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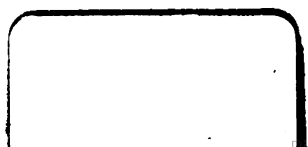
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# R E P O R T S

OF

All the Cases decided by all the Superior Courts

RELATING TO

MAGISTRATES, MUNICIPAL,

AND

PAROCHIAL LAW.

(REPRINTED FROM THE "LAW TIMES" REPORTS.)

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EDITED BY

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# REPORTS

OF

## All the Cases decided

BY THE

# SUPERIOR COURTS,

RELATING TO THE LAW ADMINISTERED BY MAGISTRATES, AND  
TO PAROCHIAL AND MUNICIPAL LAW.

COMMENCING HILARY TERM 1862.

[Q. B.]

FINCH v. BLUNDELL.

[Q. B.]

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMSON, T. W. SAUNDERS, and C. J. B.  
HERULET, Esqrs., Barristers-at-Law.

Saturday, Jan. 25.

FINCH v. BLUNDELL.

*Beerhouse—Sunday—Opening house during prohibited hours—Evidence—Conviction.*

*Upon an information against a beerhouse-keeper under the 11 & 12 Vict. c. 49, s. 1, for opening his house for the sale of beer before half-past twelve on a Sunday, it was proved by a witness that he went to the house on a Sunday at thirty-five minutes after eleven o'clock in the forenoon and found the door closed, and having knocked he was admitted; that he saw the deft. in the house and went into the front parlour and found two persons there, who were lodgers; that he then went into the back parlour, in which there was a great deal of tobacco smoke and the tables in the room were wet; that he went from there immediately into the yard of the house, in which there are two privies, forming part of the premises; that the door of one of the privies was open and the door of the other privy was shut; that it was endeavoured to be closed against him, but he forced it open, and found two persons in the privy, both of whom were men of the town, living close by; that one of these men had a pot in his hand which had beer in it with fresh froth on it, and that this man tried to make away with the pot and prevent its being seen, by putting it down the seat of the privy: Held, sufficient evidence to support a conviction.*

This was a case stated under the 20 & 21 Vict. c. 43, upon a conviction by justices at petty sessions at Maidstone of William Finch, for an offence under the 11 & 12 Vict. c. 49, s. 1.

The case stated that the said William Finch, of the said borough, beerhouse-keeper, on the 24th March, at the parish of Maidstone, in the said borough, being then and there a beerhouse-keeper, and duly licensed to sell beer, ale and porter by retail, to be drunk and consumed on his house and premises there situate, and the said day being Sunday, did open his said house for the sale of beer and other fermented liquors before half-past twelve o'clock in the afternoon, to wit, at thirty-five minutes past

eleven o'clock in the forenoon, otherwise than as refreshment for travellers, contrary to the form of the statute in such case made and provided; and it was thereupon proved before us to our satisfaction that the deft. was a beerseller in the Boxley-road, Maidstone, in the said borough, and that the informant John Blundell went to the house of the deft. on the day named in the information, at thirty-five minutes after eleven o'clock in the forenoon; that he found the front door closed, and knocked at it and was admitted; that he saw the deft. in the house, and went into the front parlour and found two persons there who were lodgers; that he then went into the back parlour, in which there was a great deal of tobacco smoke and the tables in the room were wet; that he went from there immediately into the yard of the deft.'s house, in which there are two privies, forming part of the deft.'s premises; that the door of one of the privies was open and the door of the other privy was shut; that it was endeavoured to close the door against Blundell, but he forced it open, and found two persons in the privy, both of whom were Maidstone men, living close by; that one of these men had a pot in his hand which had beer in it, with fresh froth on the beer, and that this man tried to make away with the pot and to prevent its being seen by putting it down the seat of the privy; and that after this Blundell saw the deft. and told him he should summon him for having his house open. In cross-examination on behalf of the deft., Blundell was asked if he saw the man go in or out of the house, and he replied that he did not; also if the deft.'s side door was closed, and he stated that it was. No evidence was offered by the deft.; but it was contended on his behalf that the evidence was insufficient to justify a conviction, inasmuch as there was no proof of the sale of beer having taken place; and that therefore the deft. could not be convicted of having his house open for the sale of beer. We, however, thought that, inasmuch as, according to law, the house ought not to have been either open for the sale of beer, nor to have had any beer sold in it at any time after eleven o'clock on the previous Saturday night; that two men who were proved to reside in the neighbourhood were found concealed in a privy forming part of the deft.'s premises; that one of them had a pot with fresh beer

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in it in his hand, which he was trying to make away with; and that no explanation of these circumstances was given by the deft. when Blundell was at the house, and told deft. that he should summon him for the offence of having his house open; and that these facts were not denied before us; and that no evidence was offered by the deft. in explanation of these facts, were, in our judgment, sufficient proof of the offence charged against the deft., and we therefore convicted him of the said offence, and ordered him to pay a penalty of 5*l.*, he having been before convicted of offences against the same Act of Parliament. The deft. being dissatisfied with the said conviction and determination as erroneous in point of law, has, under the provisions of the 20 & 21 Vict. c. 43 duly applied to us in writing to state and sign a case setting forth the facts and grounds of such conviction and determination for the opinion of her Majesty's Court of Queen's Bench thereon, and which we now do accordingly. The question in such case being whether, upon the facts stated, there was any evidence upon which we were justified in convicting the deft. of the offence of having kept open his house for the sale of beer at the time mentioned.

*F. Russell* appeared in support of the conviction; but *Keane* was called upon for the app., and he submitted that there was no evidence to support the conviction of the app. having opened his house for the sale of beer during the prohibited hours.

The COURT were of opinion that there was ample evidence to support the conviction. *Conviction affirmed.*

Saturday, Feb. 15.

WILLIAMS v. ADAMS.

*Highway—Placing rubbish on—Neglect to remove after notice—Title to land—Jurisdiction.*

*On the hearing of an information charging A. with having placed rubbish on the highway, it was proved that the road in question led to A.'s house and to three other houses, and to the parish church; that it terminated there, and was not a thoroughfare, and that the land on each side of the road belonged to A. A. contended that the road was not a highway; and that, as he claimed it subject only to private rights of way, the justices had no jurisdiction, and ought not to decide that question:*

*Held, that the title to land did not arise, and that the justices had jurisdiction.*

This was a case stated by three justices of the peace for the county of Hereford, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose as herein-after stated.

At a petty sessions holden at Hereford, on the 24th Aug. 1861, an information and complaint was preferred by Thomas Adams, the surveyor of the highways in the parish of Marden, in the county of Hereford, hereinafter called "the respondent," against John Price Williams, hereinafter called "the appellant," under sect. 73 of the Act 5 & 6 Will. 4 c. 50, charging that the app., "having placed a quantity of scrapings, stones and rubbish on a certain highway in the said parish of Marden, had neglected to remove the same after notice had been given to him by the resp.;" was heard and determined by us, the said parties respectively, being then present, and, upon such hearing, we ordered the said resp. to clear the said highway, by removing the said scrapings, stone and rubbish, to sell and dispose of the same, and to apply the proceeds arising therefrom towards the repair of the highway within the aforesaid parish of Marden.

Upon the hearing of the said information and complaint it was proved on the part of the resp., and not denied by the app., that certain deposits were placed by him on the road in question, and it was also proved on

the part of the resp. that the deposit made by the app. amounted to a nuisance.

It was also proved on the part of the resp. that the road on which the deposit was placed led to the houses of the app., of the vicar of the parish, and of two other persons, and to the parish church, but that it terminated there, and was not a thoroughfare, and that the land on each side of the said road belonged to the app.

It was contended by the app. that the road not being a thoroughfare was not a highway, and that although, on the authority of the case of *Bateman v. Bluck*, 21 L. J. 206, Q.B., it might be a highway without being a thoroughfare, the app. contended that as he denied the road to be a highway, and therefore claimed it subject only to private rights of way, the justices ought not to try and decide that question, but ought to leave the parties aggrieved to their remedy by indictment, when it might be decided by a jury; and he protested against the jurisdiction of the justices to proceed in the matter. They decided that they had jurisdiction to try the question whether the road was a highway or not.

The resp. argued that, as the road was a "churchway" it was necessarily a highway, as the 5th section of the Act 5 & 6 Will. 4, c. 50, provides that the word "highways" in that Act should be held to mean, amongst other things, "churchways;" but the justices held that the fact that the road was a "churchway" was not of itself sufficient to show that it was a "highway," but that other facts must be proved.

It was then proved on behalf of the resp. that the road had, with one exception, always been repaired by the parish, that no gates or other obstruction had ever been placed on it, and it was not shown that any person, whether a parishioner or not, had ever been interrupted in the use of it. This evidence was carried back for at least fifty years. The exception as to repair referred to was that of a former owner and occupier of the house now owned and occupied by the app., who had, upon his taking up his residence there on the occasion of his marriage, macadamised this road at considerable cost as a boon to the parish, and to improve the road to his own residence, the other roads in the said parish not being macadamised. It was contended by the app. that the parishioners had repaired the road, not for the use of all her Majesty's subjects, but because they had a right of way over it to the parish church.

The justices were of opinion that there was sufficient evidence before them to show a dedication of the road to the public, and they therefore held it to be a highway.

It was stated by the witnesses for the app., that the deposit complained of consisted wholly of the refuse arising in the course of some building carried on by him on the premises adjoining the road, and of building materials, and that it was necessary to use the road temporarily for such deposit. The witnesses for the resp., however, stated that there were some coal ashes mixed with it.

The app. then contended that, as the occupier of the adjoining premises, he had a right to use the road (even if a highway) to a reasonable extent for the purpose of depositing thereon his building materials and refuse, and that as the act complained of by the surveyor was not therefore illegal in its commencement, but if illegal at all only made so because it was an excessive user of a legal right, it was not a case in which the justices ought to act summarily.

The justices were of opinion that the user of the road by the app., if legal in its nature, was excessive, and as they could find no authority for the argument in this respect, they decided against him.

The questions of law for the opinion of this court were:—

1. Whether, under the circumstances, the justices had jurisdiction to try the question whether the road was a highway or not?

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REG. V. THE INHABITANTS OF ST. GEORGE'S, MIDDLESEX.

[Q. B.]

2. Whether there was sufficient evidence before them to justify them in law in finding the road to be a highway?

3. Whether the deposit made by the app. was of such a nature as to be a legal act in its inception, and such a one as they ought not to adjudicate upon summarily, in case it had become illegal in consequence of excessive user?

If either the first or second question is answered in the negative, or if the third question is answered in the affirmative, their order was to be quashed; but if otherwise it was to be confirmed.

The app.'s points of argument were:—

1. That the 73rd section of the 5 & 6 Will 4, c. 50 (the General Highway Act), does not, where there is a *bond fide* dispute on the question of highway or no highway, give the justices jurisdiction to determine that question, and consequently that in such a case they have no jurisdiction to proceed on the above section.

2. That there was no evidence that the road was a public highway.

3. That, under the circumstances stated in the case, the offence charged had not been committed.

The resp.'s points of argument were:—

1. That the justices had jurisdiction to inquire whether the road in question was a highway.

2. That the road in question was a highway, and that the evidence before the justices was sufficient in law to warrant them in so finding.

3. That the app. had no right to use the road in the manner stated in the case.

4. That the justices had jurisdiction, under the circumstances stated in the case, to make the order complained of.

*Matthews*, for the resp., in support of the order of conviction, referred to *Thompson v. Ingham*, 19 L. J. 189, Q. B.; 5 & 6 Will 4, c. 50, s. 73. (He was stopped by the court.)

*Gray* (*McMahon* with him) was called on contra.—This is a proceeding against the app.; he is the party summoned, and it comes within the rule as to the right of justices to try questions relating to the title to land: (*Reg. v. Cridland and others*, 27 L. J. 28, M. C.) The case finds that the land on both sides of this road belongs to the app. and that it was a private road leading to two or three houses and the church, through which the app. says there is no right to pass. [*WIGHTMAN, J.*—I don't see that this is trying a question of title. *CROMPTON, J.*—I don't see how the question of the soil being the app.'s or not makes any difference in the question before the justices. *WIGHTMAN, J.*—It is not found that the land was the app.'s land; the case says simply that the way is a private way and not a public one, and therefore you say the justices have no jurisdiction.] In his judgment in *Reg. v. Cridland and others*, *J.* says: "Apart from the particular words of sec. 30 of stat. 1 & 2 Will. 4, c. 32, where a *bond fide* claim (to land) as in this case, is laid before magistrates, their jurisdiction ceases." This is a question between the public represented by the surveyor of highways and the owner of the land, to try whether the land in question is subject as a highway, and it would be to break in upon the rule to hold that the justices had jurisdiction to enter into that question.

*Matthews*.—The app. did not claim the land as his own; he only said it was not a highway, and claimed a subject to a right to pass over it; that was the form of the objection. It was conceded that the land on each side was his, and the title was not in question, and the order would not be evidence in a question of title to the land. The question of highway must be tried to give jurisdiction of justices; if it is not a highway they have no jurisdiction: (*Bateman v. Bluck*, *Young v. McPherson*, 1 H. of L. Cas.)

*WIGHTMAN, J.*—It appears to me that this conviction ought to be affirmed, because it seems to me that

the question of title to land did not arise. The land on both sides this road belonged to the app., and there was a right to pass along the road; but it was not, he contended, a highway; that was the question before the justices, and that was the first thing they had to decide. This is distinguishable from the cases relied on by Mr. Gray, and the title to land, as usually understood, does not come in question.

*CROMPTON, J.*—I am of the same opinion. I was struck by the way in which Mr. Gray put the case. The law is clear that justices on summary conviction are not to decide questions of title to land; that is a general rule, and does not depend on any Act of Parliament. But here the justices had to decide highway or not highway; they are not to decide between A. B. and C. D., but whether this road was a highway or not. Looking at the Act of Parliament, that was the first thing they had to do; for if it was not a highway they had no jurisdiction, but if it is they have, subject to the objection of Mr. Gray, that they must not decide questions of title. They are the proper tribunal appointed by the statute, and if that were not so there would be special provisions to show that their jurisdiction is taken away. It is very clear that they are to decide highway or not highway; they are not to define a boundary, or give any decision founded on title. The app. merely says, "you have no evidence that this is a high road." *Judgment affirmed.*

#### REG. V. THE INHABITANTS OF ST. GEORGE'S, MIDDLESEX.

*Poor-law—Removal—Sickness*—9 & 10 Vict. c. 66, s. 4.

The 4th section of 9 & 10 Vict. c. 66, providing for the non-removal of sick persons, applies to personal sickness and gives personal exemption to sick persons only. A husband, wife and children were legally settled in the parish of St. Mary, Whitechapel; in July 1858 they came to reside in the parish of St. George; in April 1859 the husband left his family on account of sickness, and went to a hospital, which he left in the May following, and returned to St. George; it was found that during his residence in the hospital he intended to return home. While he was in the hospital his wife applied for and obtained relief from the parish of St. George, and on his return home he applied for and received relief from the last-named parish up to 21st June 1859. In the following August he again left his home on account of sickness, the family in the meantime having been supported by the wife's industry and by pledging their goods, which they continued to do till Sept. 1859, when the wife, solely in consequence of her husband's illness, applied for and obtained relief from St. George's parish, which she continued to receive till 10th Nov. 1859, when an order of removal of herself and children was made. The husband subsequently returned to his family, and resided with them in St. George's parish till June 1860, when he died:

*Held*, that the order of removal dated 10th Nov. 1859, for the removal of the wife and children from the parish of St. George to the parish of St. Mary, Whitechapel, as the place of their legal settlement, was a good order.

This was an appeal against an order of removal made by two justices of the peace acting for the county of Middlesex, dated 10th Nov. 1859, for the removal of Sarah Hesketh and her two lawful children from the parish of St. George, Middlesex, to the parish of St. Mary, Whitechapel, as the place of their last legal settlement, on the hearing of which the court of quarter sessions quashed the said order of removal, subject to the opinion of this court on the following

CASE.

In the order of removal above mentioned, dated 10th Nov. 1859, Sarah Hesketh was described as the



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wife of William Heaketh, absent from her and out of the said parish of St. George, and at the time of making such order the paupers named therein, and also the husband, William Heaketh, were legally settled in the said parish of St. Mary, Whitechapel.

In July 1858 Sarah Heaketh, the pauper, first came with her husband and children to reside in the said parish of St. George.

On the 14th April 1859 the pauper's husband, in consequence of his sickness, left his wife, the pauper and children, in the said parish of St. George, and went into St. Thomas's Hospital, which is situate in the parish of St. Olave, Southwark, in the county of Surrey, and remained there as a patient until the 5th May following, when he left the said hospital and returned home to his wife and family in the said parish of St. George, and that during all the time of his residence in the said hospital he intended to return home to the said parish.

Before the husband left the said hospital, viz., on the 16th April 1859, the pauper Sarah Heaketh alone, in the absence of her husband, applied for and obtained relief for herself and children from the said parish of St. George, which was continued until May 14th, 1859.

On the 23rd May 1859 the husband of the pauper applied for and received relief from the said parish of St. George, which was continued until the 21st June 1859, on which last-mentioned day he voluntarily ceased to receive relief for himself or his family.

On the 31st Aug. 1859, the pauper's husband, in consequence of his sickness, which was consumption, again left his wife and family in the said parish of St. George, and became an inmate of Guy's Hospital, which is situate in the said parish of St. Olave, Southwark, and remained there as a patient until several months after the making of the said order of removal.

On the 10th Sept. 1859 the pauper alone, in the absence of her husband, but solely in consequence of the illness of her husband, applied for and obtained relief for herself and children from the said parish of St. George, and continued in receipt of such relief until the 10th Nov. 1859, when the said order for the removal of the pauper and her children was made. The pauper's husband, subsequently to the making of the said order, left the hospital and returned to his said wife and family in the parish of St. George, and resided with them till the 14th June 1860, when he died.

From the time the pauper's husband ceased to receive relief from the said parish of St. George, viz., from the 21st June 1859 to the time he went into Guy's Hospital, on the 31st Aug. 1859, he and his wife and their children were maintained and supported partly by the wife's industry and partly by pledging and disposing of their furniture, &c., and from the last-mentioned date to the 10th of Sept. 1859, the wife maintained herself and children in the same way, and on that day she applied for and obtained relief from the parish of St. George as above mentioned.

The court of quarter session was of opinion that the primary cause of the paupers' chargeability to the said parish of St. George was in respect of relief made necessary by the sickness of the husband.

It was contended on behalf of the said parish of St. Mary, Whitechapel, the apps., that the said order of removal ought to be quashed on the ground that the relief given to Sarah Heaketh, the pauper, was made necessary by reason of the sickness of her husband, the said W. Heaketh, and because the said order of removal did not state that the justices who made the said order were satisfied that such sickness would produce permanent disability in the said W. Heaketh, as required by the statute 9 & 10 Vict. c. 66, s. 4.

It was contended on behalf of the said parish of St. George, the resps., that as the paupers mentioned in the said order did not become chargeable in respect of

relief made necessary by the sickness of any one of them, the order was properly made, and that the statute above mentioned does not apply to a case like the present, where the person whose sickness is the cause of the chargeability of the paupers is absent from the parish obtaining the order of removal, and is not included in such order.

The quarter sessions quashed the said order of removal because the paupers became chargeable in respect of relief made necessary by the sickness of the said husband, and because such order did not state that the justices who made it were satisfied that such sickness would produce permanent disability.

The question for the opinion of the Court of Q.B. was, whether, from the facts above stated, the relief given to Sarah Heaketh, the pauper, was made necessary by sickness within the meaning of the 9 & 10 Vict. c. 66, s. 4, so as to have made it necessary that the justices who made the said order should have stated therein that they were satisfied the sickness of the husband of the pauper would produce permanent disability.

If the Court of Q.B. should answer the question in the negative, the order of sessions to be quashed, and the order of removal confirmed; but if the Court of Q.B. should answer the question in the affirmative, then the said order of sessions to be confirmed.

*Metcalfe* for the resps.—Was the relief given to the wife made necessary by the sickness of the husband within the meaning of 9 & 10 Vict. c. 66, s. 4? It is immaterial to whom the relief was given; the question is, is it necessary that the person to whom the relief is given should be sick? The 4 & 5 Will. 4, c. 76, s. 56, says relief given to the wife shall be regarded as relief given to the husband: (*Reg. v. Priors Hardwick*, 12 Q. B. 168; *Reg. v. Inhabitants of Bucknell*, 23 L. J. 129, M. C.) [CROMPTON, J.—The only point is, whether the sickness of the husband and relief to the wife is relief to the husband.] The 4th section enacts "that no warrant shall be granted for the removal of any person becoming chargeable in respect of relief made necessary by sickness or accident unless the justices granting the warrant shall state in such warrant that they are satisfied that the sickness or accident will produce permanent disability." The apps. would introduce the words "in respect of the sickness of the person mentioned in the order." But no such expression or intention is to be found in the section.

*Poland* contra.—Sickness of this nature does not render it requisite that the justices should inquire into the permanent disability. If they find that the person sought to be removed is not sick they make the order. The argument for the resps. would extend the enactment to any one who was supported by another through benevolence. The object of the Act was simply to avoid the hardship of removing from temporary sickness.

CROMPTON, J.—This case seems to come within the class of cases referred to by Mr. Poland. The removal in the section would seem to apply to personal sickness and to give personal exemption to the sick person.

WIGHTMAN, J.—That, I think, is the reasonable construction.

*Order of removal confirmed.*

ROBSON v. ANDERSON.

*Abandoning from reformatory—17 & 18 Vict. c. 86.*

—Power of justices to append to a sentence for abandoning a further sentence of detention within reformatory.

*Where a lad was found guilty of abandoning from a reformatory school, and sentenced to be imprisoned for that offence under the 4th section of 17 & 18 Vict. c. 86:*

*Held, that the justices had no authority to add to such sentence of imprisonment, an order that after the expiration thereof he should be again detained within the reformatory school.*

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REG. v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

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This was a case for the opinion of the court upon the following point:—The app. was in a reformatory under the 17 & 18 Vict. c. 86, from which he absconded, and on his being brought before the justices, they sentenced him to imprisonment under the 4th section of the Act, and that at the expiration of such imprisonment he should be detained within a reformatory school.

*J. E. Davison.*—By the absconding a first offence was created, and the justices had no such power. He referred to the several sections of the Act.

The Court was of opinion that there was no power in the justices to make the above order.

By the COURT, *Order quashed.*

*Monday, Feb. 17.*

REG. v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

*Weights and measures—Railway weighbridge—5 & 6 Will. 4, c. 63, s. 28.*

*Defn. used a machine called a weighbridge, for the purpose of weighing trucks; to compensate for any derangement of the machine, an adjusting ball was fixed, which, by being passed backwards and forwards along the thread of the screw on which it worked caused the end of the steelyard to which it was attached to be heavier or lighter, and thus produced a compensation for any variation in the weight of the platform. On the district inspector of weights and measures calling at the station in the course of his duties, he found the machine in gear, and he proceeded to test it without making use of the adjusting ball, and found it 21lbs. out of balance: Held that, under the above circumstances, the weighbridge was not "incorrect or otherwise unjust" within the meaning of the 28th section of 5 & 6 Will. 4, c. 63, and that it ought to have been properly adjusted before it was examined by the inspector.*

This was an appeal against a conviction by two justices of the county of Stafford, under the 5 & 6 Will. 4, c. 63, of the London and North-Western Railway Company, of unlawfully having in their possession on the 18th July 1860, at the Lichfield station of the said railway, a weighing machine used for the weighing of goods for conveyance on the said railway, which was, upon examination thereof duly made by the inspector of weights and measures, found to be incorrect, to wit, 21lbs. weight out of balance with the imperial standard weight, contrary to the form of the statute, &c. The appeal came on to be heard at the general quarter sessions of the peace for the county of Stafford, when the justices confirmed the conviction, subject to the opinion of the Court of Q. B. upon the following

#### CASE.

The apps. the London and North-Western Railway Company use the machine in question (called a weighbridge) for the purpose of weighing the railway trucks into or from which goods conveyed along their line of railway are laden or unladen at their station at Lichfield; machines of the same construction are employed on many railways in the kingdom. There is a steelyard, which is under cover in a small office, and the platform, which is outside, and which works in a frame and runs upon levers connected with and acting upon the steelyard. Upon this platform are rails, upon which the truck to be weighed is stopped. As these rails form part of the siding leading from the main line into the company's warehouse, all trucks going into or coming out of that warehouse must necessarily pass over the platform.

The weight of the plate of iron and rails which form the platform is 16cwt.

Being in the open air it is exposed to any atmospheric influence, and a deposit of wet or dirt renders it considerably heavier, a shower of rain causing an

increase of its weight of 11lbs. or 12lbs; it is also liable to be thrown out of poise by the waggons which pass over it from the main line to the warehouse, causing the platform to jamb on one side of the frame, and thus effecting a variation in its weight and bearing.

This weighbridge is calculated to weigh up to 16 tons; the average weight of an empty truck (being the lightest article that is weighed upon the machine) is about 3 tons; the arm of the steelyard is graduated so as to indicate variations of 4lbs.; an approximation of half a cwt. is, however, alone considered and charged for by the company on all goods weighed by this machine.

To compensate for any derangement of the machine effected by the causes above referred to, an adjusting ball is affixed to the end of the long arm of the steelyard; this ball, by being pressed backwards or forwards along the thread of the screw on which it works, causes the end to which it is attached to be heavier or lighter, and thus produces a compensation for any variation in the weight or bearing of the platform.

A copy of the following instructions was affixed in the office for the guidance of the person who had the charge of, and whose duty it was to weigh goods upon, the machine in question:—

"London and North-Western Railway.

"Weighing machines and weighbridges.

"Instructions to persons in charge.

"1. Every part of the machine is to be kept clean and free from accumulations of oil and dirt, and the registered label of the machine is to be kept upon it.

"2. The steelyard and poise are to be kept bright, so that the letters and figures may be legible.

"3. Once every month the machine is to be taken to pieces, all the knife edges and working parts cleaned and slightly oiled. This applies also to weighbridges, except as respects their being taken to pieces.

"4. First thing every morning every machine is to be accurately balanced ready for work. Special care must be taken that every machine has its own weights and no others.

"5. Every machine which has a break, lever, or other ungearing apparatus, is to be carefully kept out of gear except at the moment of weighing, that no unnecessary wear may take place.

"6. Every facility and assistance in lifting, &c., is to be given to the weighing machine makers when they visit the station to inspect or repair the machine.

"7. Complaints are to be addressed to Mr. Henry Pooley, Liverpool, and in such complaints the registered number of the defective machine is to be stated.

"W. CALKWELL, General Manager.

"Euston Station, Nov. 1859."

These instructions are printed by the company, and a copy of them is sent to every station where there is a weighing machine of this description.

At some of the stations of the company these machines are used several times in every day. At the Lichfield station the machine in question was sometimes not used for a week together, and it was rarely, if ever, used on two consecutive days. The person who had charge of the machine said that he considered to adjust it before it was used was a better plan than to adjust it every morning, as any of the causes above referred to might at any time during the day in the morning of which it had been adjusted throw it out of poise, and a fresh adjustment would be necessary, and that instead of balancing it every morning he only did so before using it, but that it had never been used without having been previously adjusted.

The resp. in this case, Maurice Richards, the inspector of weights and measures for the district in which the company's station at Lichfield is situated, visited, in the course of his duties, the machine for the purpose of inspecting it on the afternoon of the 18th July last, and found it in gear. The machine had

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not been used on the day of the inspector's visit, and upon his proceeding to test it without making any use of the adjusting ball—which he did not consider to be a part of his duty as inspector—he found that it was necessary, in order to put the machine in poise, to place weights amounting to 21lbs. on the platform. A porter passed an iron bar round the frame so as to free the platform, and an adjustment having been made by another of the company's servants by moving the adjusting ball, and the weights placed on the platform by the inspector having been removed, the machine was found to balance.

The inspector of weights and measures for the borough of Birmingham deposed that he considered a machine of that capacity which would weigh within 40lbs. to be correct.

The machine has remained, and still is, in the same state as it was at the date of the inspector's visit; and upon the adjustment which the apprs. contend for being made, it continues to weigh correctly.

The apprs. contended, that it was the duty of the inspector of weights and measures, before proceeding to examine the machine, to have taken the necessary steps for putting it in poise by having the adjusting ball removed, and so placing it in the state in which the apprs. invariably placed it before using it, and that the examination without that adjustment was not such an examination as is contemplated by the Act, so as to render the apprs. liable to a penalty under the Act, for having in their possession a machine which is incorrect or otherwise unjust within the meaning of the 28th section of the Act, 5 & 6 Will. 4, c. 63.

That their printed instructions are intended only for the guidance of their servants, and to apply *singula singulis*, and that they are amply obeyed at stations where the machine is not used every day, by its always being adjusted before use.

That in the present case there was no such variation as to cause the machine to be considered "incorrect or otherwise unjust," within the meaning of the Act.

The resp. contended that the facts above stated justified a conviction, and the order of sessions made thereon.

That it is the duty of persons possessing such a machine to keep it in such a state as that when goods are brought to be weighed, nothing should be required to correct the machine, but that it should be ready for weighing.

That the apprs. were at any rate bound by their instructions to their servants, and that it was their duty to have the machine adjusted every morning.

That the machine ought to indicate correctly (without reference to its capacity) the smallest difference of weight marked upon its graduated index.

The question for the opinion of the court was, whether upon the above facts the apprs. were liable to be convicted, under sect. 28 of the 5 & 6 Will. 4, c. 63, of the offence alleged in the conviction.

If the court should be of opinion that they were liable to be convicted, the order of sessions and the conviction are to be affirmed; if the court should be of the contrary opinion, the same are to be quashed.

*Davis (G. Browne with him)* for the resp. in support of conviction.—These machines are liable to be erroneous from a variety of causes; in the present instance, to avoid a more primitive method, a patent machine is affixed. It cannot be, because this is a scientific machine, that it should be free from the ordinary rules. It is the duty of the person using the machine to have it always ready for weighing. [CROMPTON, J.—This is a neater and more certain method than the more clumsy and primitive one; the inspector might easily, and ought to, have made himself acquainted with it.] The machine was, at the time of the inspection, in gear. [CROMPTON, J.—You can't weigh without this adjusting ball.] Yes, you can, but

not accurately. [CROMPTON, J.—The beauty of the machine is this adjusting power, and it is as necessary that it should be properly adjusted as that you should set a telescope before using it.] The Act of Parliament is evaded by the employment of machines that require adjustment.

*Hayes, Serjt. and Staveley Hill*, contra, were not called on.

WIGHTMAN, J.—This conviction cannot be supported. It does not depend on the machine itself, but on the state in which it was at the time it was examined. Then it is said that the inspector was not bound to adjust it; but the machine cannot be said to be incorrect and unjust, within the meaning of the Act, merely because it required adjustment before it was used.

CROMPTON, J.—It is stated that this machine was incorrect to the amount of 21lbs. I don't think it was incorrect at all. It requires to be set before it is used, and this adjusting apparatus is made for the purpose of giving peculiar correctness, and the whole thing cannot be called incorrect because at a particular time when it was examined it was not set. I doubt if a proper examination was made; it ought to be examined when it is in a proper state to be used. It is clear that the Legislature never intended the Act to apply to such a case as this.

*Conviction quashed—Judgment of quarter sessions reversed.*

#### REG. v. SYLVESTER.

*Licensing Act—Refusal of justices to renew licence unless the applicant would take out a licence for the sale of spirits.*

*The refusal of an applicant to take out a licence for the sale of spirits is not a sufficient legal ground for the refusal of justices to grant a renewal of a licence to keep an inn, alehouse, &c. under 9 Geo. 4, c. 61. Applications were made to justices at the general annual licensing meeting to renew certain licences to keep an inn, alehouse and victualling house under 9 Geo. 4, c. 61. Applicants for the last few years had only taken out an excise licence for the sale of ale, beer, &c., and not a licence for the sale of spirits. The justices obtained a list of all licensed persons in the borough, and resolved not to renew the licences of any person who had not during the past year taken out an excise licence to sell spirits, and they refused accordingly. The decision of the justices being upheld on appeal, subject to a case for the opinion of this court:*

*Held, that the justices had not exercised their jurisdiction, and that they were wrong in refusing to renew on the above ground.*

At the general quarter sessions of the peace for Berkshire, holden at Abingdon on the 14th Oct. 1861 Charles Townsend Sylvester and fourteen others appealed against the refusal of the justices at the general annual licensing meeting to renew each of their licences to keep an inn, alehouse and victualling-house under the statute 9 Geo. 4, c. 61. The appeals were consolidated and heard by the court of quarter sessions as one appeal, and were dismissed, subject to a case for the opinion of this court.

#### CASE.

The house occupied by each of the apprs. had been licensed as an inn, alehouse and victualling-house. Some of the houses had been so licensed for a period of fifty years and upwards, and none for a less period than twenty years. Each of the apprs. had been licensed for his house under 9 Geo. 4, c. 61, during the time he had occupied it, but for the last few years had only taken out an excise licence for the sale of ale, beer &c., and not a licence for the sale of spirits.

This usual general annual licensing meeting for the borough of Abingdon, in the county of Berks, in which

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the apps.' houses are situated, was held, according to the provisions of the said Act, on the 29th Aug. 1861. The justices obtained a list of all the licensed persons in the borough of Abingdon, including those who had not taken out an excise licence for the sale of spirits, &c., and resolved not to renew the licence of any person who had not during the past year taken out an excise licence to sell spirits. This list contained the names of the apps. and two other persons, all of whom had duly applied to the justices at such meeting for a renewal of their licences.

All the licences were renewed except those mentioned in the above list as having during the past year neglected to take out an excise licence to sell spirits.

The meeting was adjourned, and the two other persons attended that adjournment, and the justices then present renewed their licences upon their promising that they would take out an excise licence for the sale of spirits.

Each of the apps. being aggrieved by the refusal to renew his licence, duly appealed to the above general quarter sessions.

The houses and premises of six of the apps. are rated at a sufficient sum to entitle them to obtain an excise licence to sell beer under the provisions of the statute of 11 Geo. 4 & 1 Will. 4, c. 64, and they have since the hearing of the appeal obtained such licence, but the houses and premises of the remaining nine apps. are not so rated, and they are not able to obtain any such licence.

The court of quarter sessions dismissed the appeals with costs, subject to this case.

The question for the opinion of the court was, whether the justices at the annual licensing meeting acted illegally in refusing to renew the apps.' licences, on the sole ground that they declined to take an excise licence for the sale of spirits in addition to the licence for the sale of beer. If in the affirmative, then the decision of the court of quarter sessions is to be reversed and the appeals are to be allowed, and the licence of each of the apps. is to be renewed; if in the negative, then the decision of the court of quarter sessions is to be affirmed and the appeals are to stand dismissed.

*Lawrence* for the resps.—The justices thought they had a discretion under the 9 Geo. 4, c. 61, s. 1, and the question is, whether they had such discretion and exercised it. [WIGHTMAN, J.—But did they act illegally in refusing it on this sole ground? Was it a sufficient ground of objection?]

*Smyser contra* (*Griffiths* with him).—The justices did not exercise a discretion. The question is, is this a sufficient legal ground to justify them in exercising their discretion by refusing to renew. [CROMPTON, J.—Would it be sufficient for them to say, "The fact of these persons not taking out a spirit licence is in itself, in our opinion, a legal ground to authorise us in refusing this licence?"] Yes, that is what they have done here: (*R. v. Atkey*, 2 Burr. 653.) In *R. v. Justices of Walsall*, 24 L. T. Rep. 111, it was held, that when justices refused to hear an application for a licence on the ground that they had come to a general resolution not to grant any new licences, this court made absolute a rule for a *mandamus* to compel them to hear. [WIGHTMAN, J.—It does not appear that in the present case they did not hear. CROMPTON, J.—I think it is pretty clear that they made one resolution to apply to all. If we decide this in your favour, it must be quite understood that we do not interfere with the justices' jurisdiction.]

WIGHTMAN, J.—They do not seem to have exercised any jurisdiction. On the facts of the case, and the points put to us, we think the justices were wrong; the refusal to take a spirit licence was not a sufficient legal ground for the refusal of the justices to grant the apps. their licences.

*Judgment for apps.*

Nov. 7 and 11 and Feb. 22.

REG. V. THE JUDGE OF THE CONSISTORY COURT OF LONDON.

*District church-rates*—58 Geo. 3, c. 45, s. 70—

*Repairs*—Other expenses.

Sect. 70 of 58 Geo. 3, c. 45, provides that the repairs of all district churches or chapels shall be made by the districts to which they respectively belong, by rates to be raised within the districts, in like manner as in case of repairs of churches by parishes, and every district shall be deemed in law a separate and distinct parish for that purpose; and sect. 71 provides that the district shall remain subject for twenty years to be rated as part of the original parish to the repair of the original parish church, and that, after the expiration of such twenty years, the parish church shall be repaired by so much of the old parish as is left after the district has been taken from it:

*Held*, that the word "repairs" in the above sections includes expenses necessary for the due performance of the offices of the church, as well as for the repairs of the fabric.

This was a rule calling upon the Vicar-General of Lord Bishop of London and the official principal of the Consistorial and Episcopal Court of London to show cause why a prohibition should not issue to prohibit any further proceedings in that court in a suit of *Adams and another v. Beall*, for subtraction of church-rates, upon the ground that the learned judge had wrongfully construed the 70th section of the statute 58 Geo. 3, c. 45, which enacts, "That the repairs of all such district churches or chapels shall be made by the districts to which they respectively belong, by rates to be raised within the districts in like manner as in cases of repairs of churches by parishes, and every such district shall be deemed in law a separate and distinct parish for that purpose, and the repairs of all chapels made district churches shall be made by the parish in or for which the chapels shall be built." By an Order in Council, dated Feb. 8, 1855, and made under the 58 Geo. 3, c. 45, a portion of the parish of Lewisham was joined into a district parish for ecclesiastical purposes, named "The District Parish of St. Bartholomew, Sydenham," and was assigned to the consecrated church of St. Bartholomew, situate in Sydenham, in the said parish of Lewisham. Churchwardens were appointed under the Act, and on the 14th June 1860 a vestry meeting of the district parish was held for the purpose of making a church-rate. At that meeting the churchwardens produced an estimate of the probable expenditure for the repairs of the said district parish church "and for other the necessary and lawful expenses incident to their office of churchwardens for the next year," amounting to 237*l.* 1*s.* 3*d.*, and proposed a rate of 2*d.* in the pound. The resolution was opposed, but it was ultimately carried, on a poll, by a majority of 391 to 276. Proceedings were then instituted against Mr. Beall before the magistrates for the nonpayment of the rate so made, but, as he disputed the validity of the rate, the magistrates could not proceed further, and the churchwardens instituted a suit against him in the Consistory Court of London for subtraction of church-rates. The churchwardens libelled Mr. Beall, and therein set out the proceedings which had taken place; but Mr. Beall opposed the admission of the libel, upon the ground that the said rate, as appeared by the estimate, was made for other purposes than the repairs of the district church, which were the only purposes for which a rate could be made on the inhabitants of a district parish. The learned judge, however, overruled the objections, and admitted the libel to proof. The question turned upon the construction of the 70th section of 58 Geo. 3, c. 45. Coleridge, Q.C. (*Dowdswell* with him) now showed

cause against the rule.—It is contended for the deft. in the suit that the word “repairs” has reference to the fabric only, and that the provision for the payment of other matters makes this a bad rate. The latter part is a matter of detail which this court had nothing to do with, but it rests with the Ecclesiastical Court, should this court be of opinion there was any doubtful or questionable item in the rate. The former question is one of considerable importance, as it affects 3000 of these district churches. The Act upon which this question arises was passed in 1818, and has been in operation upwards of forty years, yet this question has never before been raised. There are four propositions in answer to this rule: first, that the 58 Geo. 3, c. 45, sets up the common law church-rates in district parishes; secondly, that the word “repairs,” in the 58 Geo. 4, c. 45, is to receive the same construction which that word has so long received by a series of decisions relative to church-rates; thirdly, that this rate would be a perfectly good common law church-rate for the repairs of the church, according to the well-known received legal interpretation of the word “repairs,” as applied to church-rates; and fourthly, that the Act was not at all varied by any subsequent Act. The scope of the provisions of the 58 Geo. 3, c. 45, has reference to three different forms of subdivisions of populous parishes. By that statute commissioners, after certain preliminaries had been gone through, were empowered to divide one original parish into one or more separate and distinct parishes, and they were made separate and distinct parishes in every respect, including tithes. By the 21st section the commissioners were empowered to create a district parish, but not a separate and distinct parish with reference to tithes, but in all other respects, which was the case in this instance; and the third plan was to erect district chapelries, which were separate for certain purposes, and were filled by curates nominated by the incumbents of the parishes. The 24th section had reference to boundaries and to the naming of the new district, and what were its rights and its ecclesiastical duties for all other purposes whatsoever, save and except what was specifically stated in the Act. In the 31st section was the first mention of church-rates, “save and except as to church-rates, in so far as the same are regulated by the provisions of this Act.” The 56th section enacts, “that the church-rates of the parish shall in all cases be and be deemed in law to be the security for the repayment of all money expended by the parish in providing any site or sites,” and for advances, &c., under this Act; the churchwardens are to make rates for the repayment of such expenses and advances, imposing here by special provision what could not be done by the common law—the purchase of land by the churchwardens for the building of a church. The 57th section extends to extra-parochial places, which showed that the Legislature contemplated the existence of church-rates throughout the whole of the Act. The 64th section enables the commissioners to assign out of the pew-rents such a stipend as they might think fit for the curate, the rates having nothing to do with it. We now come to the 70th and 71st sections, on which this question turns. By the 70th section the repairs of all such district churches shall be made by the districts to which they belong, by rates to be raised in the district in like manner as the repairs of the church by the parish, and every such district shall be deemed in law a separate and distinct parish for that purpose. The word “repairs” in this Act is not to be confined to a mere dictionary interpretation, but must have its legal definition as given in decisions relative to church-rates, and which embraces what is necessary for the due celebration of public worship. There is nothing in the Act to show that the Legislature intended the word to have any other construction. The 70th and 71st sections are to be read together,

and the 71st section provides “that every such district shall remain nevertheless subject for twenty years, to be accounted from the day upon which the district church or chapel shall be consecrated, to the repair of the original parish church, and be deemed part of the original parish for all purposes of such repairs, and the making and levying rates for that purpose, and from and after the expiration of such twenty years, the parish church shall be repaired by the district of the parish left as belonging to it after the other divisions of districts are made, and each district shall for ever thereafter make, raise, levy, collect and apply separate and distinct rates for repairs of the church or churches or chapels of the district as if a separate parish.” The repairs referred to in the 71st section are common law repairs, which includes certain charges, some of which are objected to in this instance, and which recent decisions allow to be made. Dr. Lushington so decided the 71st section, and the word “repairs” must be construed in the same way throughout the whole of this Act; consequently the repairs of the old parish church by the whole of the districts is to be extended to the district churches. It must be taken by implication that the Legislature intended the raising of these rates, or else these districts would lose their common law right to rate themselves. Everything incident to the office of churchwarden is included in what was necessary for the maintenance of public worship. The rate complained of is such a rate as could be made at common law for the repairs of the church, and have included in it payments to the organist, lights, &c., which the good sense of the vestry would keep within reasonable limits. [BLACKBURN, J.—To be without an organist in a large and wealthy parish in London would be considered parsimonious, whilst to have one in a poor and small rural district would be great extravagance. COCKBURN, C. J.—Yes; subject to the law these matters must be left to the feelings of the vestries. WIGHTMAN, J.—You say that if the church-rate is not applicable to lighting the church, &c., there is no other fund; but there is another, viz., the pew-rents.] The affidavit states that the whole of the pew-rents are allotted to the minister, so that in the present case there is no other fund: (*Chesterton v. Parker*, 1 Curt. E. C. 345; *Gathercole v. Way*, 1 Phill. Burn. 388 a; *Tann and Clitheroe v. Owen*, Wadd. Eccles. Dig. 108; *Smith v. Dixon*, 2 Curt. E. C. 271.)

*Collier Q. C. (Taylor with him)* in support of the rule.—This is a question requiring much consideration, and one that should be put on record with reference to the Church Building Acts, which are not a very consistent code. The Legislature, in passing these Acts, expected to be met half way by the voluntary contributions of the laity in the endowing of these districts. [COCKBURN, C. J.—Is there any trace of that in the Act?] Yes; there were many things unprovided for. Such, for instance, as the stipend of the curate, where the pew-rents were insufficient, which have to be made up by voluntary contributions; and in many of these parishes the repairs of the fabric and the incidental expenses are defrayed by voluntary contributions. [COCKBURN, C. J.—We must construe the Act as we find it.] The court has to deal only with what the Legislature has enacted in the 70th and 71st sections, and the meaning of the Legislature was that, where a parish was divided into districts, or, rather, where the district was cut off from the parish, the inhabitants of the district should be liable for the repairs only, in the strict sense of the word, for the district church, and the same with regard to the old church. Originally the church was repaired out of the tithes, and afterwards by the laity, by means of a church-rate. Formerly the repairs had reference only to the fabric, but of late years certain other matters have been included in the rate, which the Ec-

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ecclesiastical Courts had held to be illegal except with the consent of the vestry. This Act constituted a new burden, and the court is now called on by the parish authorities to import words into the Act. [COCKBURN, C. J.—You say the rate should be simply for the repairs of the fabric, and not for general purposes.] Yes. [COCKBURN, C. J.—The churchwardens are authorised to purchase a site for a church. How can they do that if they can only make a rate for the repairs of the fabric only? How are they to pay off the money?] I take it it was considered that would be done by voluntary contributions. [COCKBURN, C. J.—I think it shows that the rate was not to be limited to the amount of the actual repairs. If so, the Legislature has fallen into a great mistake.] There are provisions in the Acts for building churches by grants, pew-rents, &c. [COCKBURN, C. J.—Mr. Coleridge's argument was, that the incidental expenses for the due celebration of public worship were always defrayed out of church-rates. That the rate was levied in form for the repairs, but out of it was paid the incidental expenses, and that the Legislature intended its continuance in the passing of this Act.] In new parishes there is a fund that did not exist in old parishes out of which the incidental expenses should be paid, viz., the surplus pew-rents. [BLACKBURN, J.—Yes; but that fund was created after the passing of the Act under consideration.] Repairs mean actual repairs to the fabric only, and nothing more; but if it were held to mean more, it does not embrace more than that expressed by Dr. Lushington as the ancient subject of church-rates, and not those held to be lawful which had the consent of the vestry. [BLACKBURN, J.—Is there anything in this rate that would invalidate it if it were a church-rate under the common law?] There is a charge in it of 3*l.* for transcribing registers. [DOWDENELL.—That is in conformity with the Church Building Act. A transcript must be sent to the Registrar-General.] COCKBURN, C. J.—That is a matter of detail for the Ecclesiastical Court.]

*Cwr. adv. vult.*

Feb. 22.—WIGHTMAN, J. delivered judgment.—This was a rule calling upon the official principal of the Consistory Court of London to show cause why a writ of prohibition should not issue against his proceeding in a suit instituted by the churchwardens of the district parish of St. Bartholomew, Sydenham, against Richard Beall, for subtraction of church-rates. It appeared that the parish of Lewisham, in Kent, was, in 1855, divided into three ecclesiastical districts, under the provisions of the 21st section of the 58 Geo. 3, c. 45, and subject to the other provisions of that and the other Church Building Acts; and that one of such districts was assigned to a church called the Church of St. Bartholomew, built under the provisions of those Acts at Sydenham, and was called the district parish of St. Bartholomew, Sydenham. On the 15th June 1860 a rate was made by the churchwardens and other parishioners of the district, "for and towards the repairs of the district parish church of St. Bartholomew, Sydenham." The rate in form was "for and towards the repairs of the church," but it appeared that the rate was made, not only for the repairs of the church properly so called, but in respect of other expenses necessary for the proper performance of Divine service, such as lighting and washing, and for stationery, registers and necessary expenses of the like nature. It was hardly contended, in support of the rule, that such a rate as that in question might not have been legally made, if made at common law upon the inhabitants of an old undivided parish; but it was said that the rate in question could only be made by virtue of the powers given by the 70th section of the 58 Geo. 3, c. 45, and the other Church Building Acts, and that it must be limited

to the "repairs" of the church in the strict sense of the word "repairs," and that such expenses as lighting and washing, and providing stationery, &c., however necessary, could not be the subject of a rate, but must either be provided for out of the surplus of pew-rents, or, if that fund failed, by voluntary contributions. By the 63rd section of the 58 Geo. 3, c. 45, the Ecclesiastical Commissioners may prescribe what amount of rent may be taken for pews in the new district churches, and the produce of the rents is to form a fund, out of which provision is to be made for the spiritual person appointed to serve the church and for a clerk. The 26th and 27th sections of the 59 Geo. 3, c. 134, contain various provisions as to the application of the pew-rents of churches built under the Church Building Acts, and, if any surplus remains after certain specified objects have been fulfilled, such surplus may be applied in aid of the church-rate, if the commissioners think fit. In the present case, it does not appear that, after providing for the purposes to which the pew-rents are by the statute in the first instance to be applied, there is any surplus applicable to the defraying of such expenses as those now in question. The 3 Geo. 4, c. 72, s. 20, to which reference was made in the course of the argument, does not appear to have any material bearing upon the points in contest in this case. The great question is, as to the meaning and intention of the Legislature in the use of the term "repairs" in the 70th section of the 58 Geo. 3, c. 45. Is that word to be construed in the strict sense of repairs to the fabric of the church, or may it include expenses necessary for the proper and decent performance of Divine service, and the other offices to be performed in the church and necessarily incident thereto? In the next section of the Act, the 71st, it is provided that the district shall remain subject for twenty years to be rated as part of the original parish to the repair of the original parish church; and that after the expiration of such twenty years the parish church shall be repaired by so much of the old parish as is left after the district has been taken from it. As the word "repairs" is the only word under which a church-rate could be made in respect of the original parish church under the 71st section, the Legislature must have intended that, as far as that church was concerned, the rate made under that section might include the expenses necessary for the decent and proper administration of the services of the church, otherwise there could be no fund for that purpose applicable to the mother church after a district had been taken from it. This view of the case was taken by Dr. Lushington, Judge of the Consistory Court, in the case of *Chesterton v. Furlar*, 1 Curt. E. C. 345, 356, and which was referred to upon the argument of this case. In that case a district had been formed out of the parish of Kensington, under the 58 Geo. 3, c. 45, and while the twenty years were running a rate was made upon the whole of the original parish, including the district, not only for expenses for the repair of the fabric of the church, but for expenses which were necessary for the decent and due performance of Divine service, and payment of the rate was resisted on the ground, among others, that the district during the twenty years was only liable to contribute to a rate for the repair of the mother church in the strict sense of the word "repair," and not for the expenses necessary for and incident to the proper performance of the services of the church; but Dr. Lushington, in giving judgment, said: "I think that, according to the true construction of this clause (the 71st), the inhabitants of the district are liable to be assessed to the incidental expenses, precisely in the same manner as to the repairs of the mother church; indeed, were it otherwise, the necessary consequence would be great inconvenience and confusion." The rate in that case was set aside upon another ground, but not upon the

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objection observed upon by Dr. Lushington as above. If such a construction may reasonably be given to the provision in the 71st section, the same construction ought to be given to similar words in the 70th section; and, unless such a construction be given to the terms used in the 70th section, there is no provision for any fund for defraying the necessary expenses for the due performance of the offices of the church in a district parish, an omission which the Legislature can hardly have intended. Upon the whole, we think that, though the Legislature, in terms, taken according to their strict literal meaning, only authorises, by the 70th and 71st sections of the 58 Geo. 3, c. 45, a rate for the repair of the church, it intended to include within those terms a rate for the expenses necessary for the due performance of the offices of the church, as well as for the repairs of the fabric, and we therefore are of opinion that the rule for a prohibition should be discharged.

*Rule discharged.*

Jan. 24 and 28.

REG. v. LUNDIE.

*Bye-law—Unreasonable as to part—Severance—Amendment.*

*A local Act to provide for the better regulation of certain common pastures, empowered the pasture masters to make bye-laws for the management of the said common pastures, &c., and for the more effectually carrying the purposes of the Act into execution. One of the bye-laws made in pursuance thereof was as follows:—"If any pasture freeman entitled to stock the common pastures shall stock or depasture any entire or vicious horse on any part of the said common pastures, then and in every such case the person or persons so offending, and the owner or owners of the said stock, shall respectively forfeit and pay for every such offence the sum of 5*l.*" &c.:*

*Held, that the bye-law was divisible; that it was unreasonable and bad as imposing a penalty against the owner of such horse, but good as against the person offending.*

*Amendment under 12 & 13 Vict. c. 45, s. 7.*

In this case an application had been made for a certiorari to bring up a conviction of two justices of the borough of Beverley, made upon one of the bye-laws of the pasture masters in consequence of app. (a pasture freeman) having depastured in one of the common pastures a vicious horse, contrary to such bye-law.

By an Act of Parliament passed in the sixth year of King Will. 4, c. clxxx., intituled "An Act to provide for the better regulation of certain common pastures within the borough of Beverley, in the East Riding of the county of York," it is amongst other things provided "That on the 1st day of March in every year the several persons whose names for the time being shall be inserted on the Pasture Freemen's Roll, hereinafter directed to be made and kept by the town clerk of Beverley, shall elect from amongst their number twelve pasture masters and two auditors of accounts for the year ensuing." The Act also specially provides for the re-election of the pasture masters and auditors, and every person whose name shall be entered on the Pasture Freemen's List or Pasture Freemen's Roll (as the case may be) may vote for twelve persons being freemen of the said borough, and having their names inserted on such list or roll (as the case may be) to be the pasture masters of the said borough, and for two other persons being freemen of the said borough, and having their names in like manner inserted in such list or roll to be the auditors of the pasture accounts.

Sect. 24 provides that all acts authorised to be done by virtue of the Act may be done by the majority of the pasture masters who shall be present at any meeting held in pursuance of the Act, the whole number present not being less than five, and minutes

of the proceedings of the meetings are required to be entered in a book for the purpose, which is open to the inspection of the pasture freemen.

Sect. 32 enacts: "That it shall be lawful for the pasture masters, from time to time, to make such rules and regulations as they shall think fit for the fencing, draining and improvement of the said common pastures, and to fix the time when the same shall be broken and depastured, and when the same shall be shut up and closed, and at any time to postpone the opening or shutting thereof, and to order and direct in what manner the same shall be used and stocked;" and this section also enables the pasture masters "to enforce the rules, orders and regulations which shall, from time to time, be made."

Sect. 34 empowers "the said pasture masters, from time to time, to make such bye-laws, rules and orders as they shall think right and proper for the management of the said common pastures, and for increasing, reducing, or limiting the number of horses, cattle and sheep which may be depastured in each of such common pastures, and for determining into which of such common pastures such horses, cattle and sheep may be turned by the persons entitled to stock the same, and for fixing the amount and time and manner of paying the head-money and other moneys payable by the persons entitled to stock such pastures, or any of them, and for regulating the several horse and cattle gates, right of stray for pigs, and other rights and privileges for the time being existing in the said common pastures, and for preventing the abuse thereof;" and other matters therein specifically set forth, and for the more effectually carrying the purposes of this Act into execution in all respects whatever, as they the said pasture masters should, from time to time, think proper, with power to alter such bye-laws; "and to impose, to inflict and enforce such reasonable fines and forfeitures upon all persons offending against the same, not exceeding 5*l.* for any offence, as to them shall seem meet, such fines and forfeitures to be levied and recovered as other penalties and forfeitures may by this Act be levied and recovered, which said bye-laws, rules and orders being reduced into writing, and signed by any five or more of the said pasture masters, shall be printed and published, and so many and such part thereof as shall impose any fine or penalty on any person using or employed in the said common pastures, or any of them, shall be painted on boards and affixed and continued in some conspicuous part of each of the said common pastures near the entrance thereof, which boards shall from time to time be renewed, as often as the same or any of them, or any part thereof respectively, shall be defaced, obliterated, or destroyed, and such bye-laws, rules and orders shall be binding upon and be observed by all persons, and shall be sufficient in all courts of law or equity to justify all persons who act under the same, provided that such bye-laws, rules, or orders be not repugnant to the law of that part of the United Kingdom of Great Britain and Ireland called England, or to any of the provisions in this Act contained, and all such bye-laws, rules and orders shall be subject to appeal in manner hereinafter mentioned."

By sect. 53 it is declared "that in any action or suit to be brought by or against the pasture masters for the time being, or any of the persons acting in the execution of this Act, for any cause, matter, or thing arising out of this Act, the election of the pasture masters or other officers, or persons appointed or to be appointed by the said pasture masters, under the authority of this Act, and the books and entries of the said pasture masters, shall, upon the trial of any such action or suit, stand admitted in evidence," unless the plt. or deft. give notice before pleading or issue joined that he intends to dispute the same.

By sect. 58, "in all cases in which by this Act

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any penalty or forfeiture is made recoverable by information before a justice of the peace," it shall be lawful for such justice before whom complaint is made to summon before him the party complained against and hear and determine the matter of such complaint, "and on proof of the offence to convict the offender and to adjudge him to pay the penalty or forfeiture incurred."

And by sect. 65, "all persons who may think themselves aggrieved by any order or judgment made or given in pursuance of any bye-law, rule, or order of the said pasture masters," and all persons "who may think themselves aggrieved by any order or judgment, or any determination of any justice of the peace relating to any matter or thing in this Act mentioned or contained, or for which no power of appeal is by this Act specifically given," may within four calendar months of the order and determination appeal to the general or quarter sessions on giving ten days' notice in writing of such intention, and of the ground and nature thereof, to the party against whom such complaint is intended to be made, or to the pasture masters, as the case may be, and forthwith after such notice entering into recognisance before some justice of the peace, with two or more sureties, conditioned to try such appeal.

Sect. 67 provides, that the production of a written or printed paper purporting to be the bye-laws, rules, or orders of the pasture masters, and authenticated by the signatures of any five or more of them, shall in all prosecutions for offences against the bye-laws be evidence of the existence of such bye-laws.

The present pasture masters were elected on the 1st March 1860. At a meeting held on the 12th March 1860 the pasture masters formed themselves into committees, and certain gentlemen were appointed as the committee for the management of the common pasture of Westwood and Hurn, in which common pasture the case of complaint arose.

The app. is a pasture freeman, and his name appears on the Pasture Freeman's Roll, and the several pasture masters are also pasture freemen. At a meeting duly held on the 4th April 1859, certain rules, bye-laws and orders were made by the pasture masters for the regulation and management of the common pastures, the 7th clause of which is the one which the pasture masters enforced against the app. before certain justices of the peace for the borough, and whose decision the app. now sought to reverse.

The 7th bye-law, so far as is material to the question, is, that "if any pasture freeman entitled to stock the said common pastures, shall stock or depasture any entire or vicious horse on any part of the said common pastures, then and in every such case the person or persons so offending, and the owner or owners of the said stock or cattle shall respectively forfeit and pay for every such offence the sum of 5*l.*, to be levied and recovered according to the form of the statute in that behalf."

The bye-laws were duly signed, printed and published, and were painted on boards at the time the app. infringed upon the bye-laws as alleged, and were affixed and still continue (amongst other places) at one of the main entrances into Westwood.

On the 13th June last the pasture masters received information that a certain grey horse which was depasturing in the Westwood and Hurn, was a vicious animal (being what is called a rigged horse), and that he had on the afternoon of that day fractured a mare's hind leg, and therefore they at once impounded the horse.

On the following day a notice was affixed upon the door of the Guildhall as follows:—"A meeting of the pasture masters will be held at the Guildhall on Monday, the 18th inst., at eight o'clock in the evening, for the purpose of taking into consideration as to enforcing the penalty of 5*l.* in the seventh clause of the bye-laws

on the owner of a certain horse now in the pinfold in Westwood pasture, by or order of the pasture masters.—Jas. Monkman, clerk, Beverley, 14th June 1860;" and on the same day the clerk gave notice to the app. that his horse was vicious, and that it was then impounded. A correspondence then took place, after which the horse was delivered up to the app., on condition that he should not again turn him into the pastures; but the said W. R. Lundie, notwithstanding the condition which had been made, forthwith turned the animal again into Westwood, and on the following morning one of the pasture masters observed the pony, which he at once knew as the one which had been impounded, teasing another pony. The app. having heard that the pasture masters had caught the pony, promised he would fetch him out, and instructed a man to catch the animal and remove him from the pastures.

On the 18th June the pasture masters held their meeting pursuant to the notice, when eleven of the twelve were present, and the following is a copy of the proceedings:—

"The pasture masters for Westwood and Hurn report to this meeting that on Wednesday last they had impounded a vicious grey pony depastured in the said pasture, the property of W. R. Lundie, a pasture freeman of this borough, and that the said pony was delivered up to the said W. R. Lundie on the 16th inst. The said pasture masters for Westwood and Hurn also report that the said grey pony was discovered on the 17th inst. again depasturing in the said common pastures of Westwood and Hurn, contrary to the notice given to the said W. R. Lundie. It is therefore unanimously adjudged, ordered and determined by the pasture masters that the same grey pony was a vicious animal at the time he was depasturing in the common pastures of this borough; that a penalty of 5*l.* has been incurred, and has become payable under and by virtue of an Act passed in the sixth year of the reign of his late Majesty King Will. 4, intituled 'An Act to provide for the better regulation of certain common pastures within the borough of Beverley, in the East Riding of the county of York,' and the rules and bye-laws and orders made by the pasture masters for the regulation and management of the said common pastures by virtue or in pursuance thereof: And it is hereby also unanimously adjudged, ordered and determined, that the said fine of 5*l.* shall accordingly be paid by the said W. R. Lundie to Thomas Ellery Turner, the treasurer of the said pasture masters, and that notice shall be given by the clerk to the said W. R. Lundie of this order and determination; and it is hereby also unanimously adjudged, ordered and determined that, in case the said fine shall not be paid by the said W. R. Lundie, on or before Friday, the 29th day of June inst., that an application be made by the said clerk to the justices of the peace for the purpose of obtaining a summons against the said W. R. Lundie to enforce the payment of the said fine, in pursuance of the said Act of Parliament and the bye-laws and regulations for the management of the said common pastures."

The clerk then gave the app. notice; a summons having been issued, the justices convicted the app., as above stated, and the fine was not paid.

*Field* (Gresham with him), in support of the conviction, cited *R. v. Faversham*, 8 T. R. 352; *Fisackerley v. Wiltshire*, 1 Str. 469.

*P. Thompson contra*.—First, the conviction is bad on the face of it, inasmuch as it states that the deft. was convicted of an offence against the 34th section of the Act, instead of an offence against a bye-law made under that section. Secondly, the convicting justices had no jurisdiction, inasmuch as this penalty ought to have been recovered by an order of justices under the 57th section, and not by conviction of the offender



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under the 58th. Thirdly, the bye-law is bad and illegal, inasmuch as it imposes the penalty upon the owner of the horse whoever he may be. It is also bad as not alleging a *scienter*: (*Chancy v. Payne*, 1 Q. B. 712; Com. Dig. tit. "Bye-law;" *Bennett v. Board of Health of Blackpool*, 28 L. J. 203, M. C.; *Elwood v. Bullock*, 6 Q. B. 383; *R. v. Rose*, 24 L. J. 130, M. C.; *Grant on Corporations*, 87; *Sellwood v. Mount and another*, 1 Q. B. 726; *R. v. Justices of Cheshire*, 5 B. & Ad. 439.) The Act of Parliament is unworkable; the powers necessary to enable justices to hear and determine an offence are inapplicable as against an offence against this bye-law.

*Field*.—The conviction follows the form given in the Act, sect. 66. The *scienter* is amply sufficient. Here the horse broke a mare's leg on the 13th, and was again turned out by its owner.

COCKBURN, C. J.—I am of opinion that this conviction is good. The question is, whether this bye-law is good altogether, or whether, if bad as to part, that part can be severed. I think it clear that the bye-law is divisible. Cases can be found in which such matters have been held to be indivisible, but every case must stand on its own merits. This bye-law imposes a penalty of 5*l.* on any pasture feeder who turns out a vicious horse; but it also subjects the owner to a penalty. As regards the owner it is no doubt unreasonable, but as regards the other part it is reasonable. It is then said that, if it is held good *pro tanto*, nevertheless the proceeding here is erroneous, and that the penalty should have been recovered under the 67th section; but I am of opinion that the justices had jurisdiction to make this conviction under the 58th section. As to technical objections, we have power to amend under 12 & 13 Vict. c. 45, s. 7, and will do so when requisite.

CROMPTON, J.—I am of the same opinion. This bye-law is divisible. The offences are distinct; one is good and the other bad, and I think it may be severed. It does not come within the principle laid down in Com. Dig., which refers to one offence; by the use of the word "respectively," it seems to me to be divided, and to be applicable to each respectively. That is a useful and valuable word, and we cannot suppose it was used without intent.

MELLOR, J. concurred. *Conviction affirmed.*  
*Hargrove and Fowler*, attorneys for resp.

Friday, Feb. 14.

CROASDILL (app.) v. RATCLIFFE (resp.)

*Highway Act—Obstruction of way—Allowing rain-water to run across way from eaves of buildings.*

*C. was the occupier of a stable, and also the owner but not the occupier of some cottages, and the dripping of the rain-water from the eaves of the stables and cottages obstructed the free passage of the adjacent public footways by flowing upon and over them, and caused public inconvenience to the passengers. C. had frequent notices of the obstruction caused, but did nothing to remove it:*

*Held, that C. was not guilty of wilfully obstructing the free passage of the highway within the meaning of sect. 72 of 5 & 6 Will. 4, c. 50.*

Case stated by Justices under the 20 & 21 Vict. c. 43.

At a petty session for the city and borough of Canterbury, on the 21st Jan. 1861, an information, preferred by Edward Ratcliffe, as the surveyor of highways within the parish of Holy Cross, Westgate, without the walls of the city of Canterbury (the resp.), against Elizabeth Clarissa Croasdill, of the said parish (app.), under the 72nd section of the Highway Act, 5 & 6 Will. 4, c. 50, for that on the 17th Dec. 1860, at the parish aforesaid, within the said city and borough, she, the said app., did unlawfully and wilfully obstruct the free passage of certain highways there situate,

called Water-lane and Westgate-grove, by then and there causing certain water to run, drip and flow into, upon, over and across the said public highways from certain houses, stables, buildings and premises adjacent to the said highways, in the several occupations of the said app. and her several and respective tenants, thereby causing public inconvenience to and interrupting and hindering the free passage of such highways and of her Majesty's subjects passing thereon, contrary to the said statute 5 & 6 Will. 4, c. 50, was heard and determined by us the said justices. Upon such hearing the app. was duly convicted before us the said justices of the said offence, and we adjudged her for her said offence to pay the sum of 5*£.*, to be paid and applied according to law, and also to pay to the said E. Ratcliffe, as such surveyor as aforesaid, the sum of 8*£.* 6*d.* for his costs.

It was proved on the part of the resp. and found as a fact, that the app. had had frequent notice of the obstruction complained of in the said information, and that the said highways so situate in Water-lane and Westgate-grove were public highways, to wit footways, and had been used generally as such for a long period of years, and that the rain-water dripping from the eaves of the app.'s stable in Westgate-grove, and also from the eaves of the cottages of which she was and is the owner, but not the occupier, in Water-lane, obstructed the free passage of such highways by flowing into, upon, over and across such highways, thereby causing public inconvenience, not only to such highways, but also interrupting, impeding, annoying and hindering the free passage of such highways, and of her Majesty's subjects passing on foot thereon, and who have a claim and right so to pass thereon. It was also proved that the whole of the highway called West-grove up to the wall of the app.'s stables was and is repaired by and at the expense of the said parish of Holy Cross, Westgate, by the surveyor the said Edward Ratcliffe, the resp.; and that although the parish did not repair the footpath or raised way in Water-lane in front of the aforesaid cottages of the app., still it was nevertheless a public highway, and had been used as a public highway for a long period of years; and that the rain-water so dripping and flowing into, over and upon and across the said highways was an obstruction within the meaning of the 5 & 6 Will. 4, c. 50, s. 72, which enacts (among other things) that if any person shall in any way wilfully obstruct the free passage of such highways he shall forfeit not exceeding 40*£.*

It was admitted by the app. that Westgate-grove was repaired by the parish up to the wall of the app.'s stables, and also that she was occupier of the said stable in Westgate-grove, and the owner of cottages in Water-lane, which were in the occupation of her tenants, and also that the dripping from the respective eaves was and is an inconvenience to the public, but not an obstruction within the meaning of the said Act.

It was contended, on the part of the app., as follows:—That the app. had an easement and prescribed right to the drips in question in Water-lane, inasmuch as the water dripped upon her own premises, to wit, the path or raised way, although the public had a right to walk thereon, and that app. having such easement and prescriptive right the justices had no jurisdiction. That there was no evidence to show the raised way used as a footpath, abutting to app.'s cottages in Water-lane, was a public highway, as it had never been repaired by the parish, although there had been a common user by the public as a footpath. That rain-water dripping from eaves was no obstruction, and that, to constitute an obstruction, it was necessary to show that something was put, placed, or laid on, over, or across the highway, so as to prevent passengers from passing thereon, or to hinder or delay them in their lawful use thereof. That the app. is

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not liable in respect of the dripping from the eaves in Water-lane, because, although the owner, she was not in possession of the premises there, and that the same were, as admitted, in the possession and occupation of other persons, being her tenants.

It was contended, on the part of the resp., that the footways in question were public highways within the meaning of the Act 5 & 6 Will. 4, c. 50. Sect. 5 of that Act interprets "highways" to be understood to mean (*inter alia*) footways, causeways, churchways and pavements; and also that the drips from the eaves in question were an obstruction, inasmuch as the said footways at times were thereby flooded, and the passage thereon on foot rendered very inconvenient, more especially Westgate-grove, as the inhabitants were deprived of their nearest public way in going and returning from the church of their said parish, and compelled to take a more circuitous and less convenient route, whereas at a trivial expense the app. could obviate and abate the necessity for further complaint by erecting and maintaining a gutter along the eaves of such stables and cottages respectively, as the neighbours had done; and also that, as it was admitted by the app. that Westgate-grove was repaired up to the walls of her stables by the parish, no question could arise as to its not being a highway, and being such highway the public had at all times the right of passing thereon uninterrupted, whether from the water dripping from such eaves and flowing upon such highway, or from any other obstruction whatsoever. That the drips from the eaves in question are obstructions within the meaning of the 5 & 6 Will. 4, c. 50, s. 72, inasmuch as the words therein are, "if any person shall in any way wilfully obstruct the free passage of any such highways;" therefore the obstruction complained of causes hindrance, interruption and impediment, which are synonymous terms with obstruction; and if it were to be construed as insisted on by the app., that something must be put, placed, or laid on the highway to constitute obstruction, then her Majesty's subjects would only at times have the free passage of such highway, and at other times be compelled to use the carriage-way in Water-lane instead of the footway, and thereby not only subject themselves to great inconvenience, but endanger their lives from the traffic of carts, carriages, and other vehicles passing along and as such carriage-way abutting to such footway in Water-lane aforesaid, and which was never contemplated when they were and are entitled to the right of passing on such footway.

Wa. the said justices, being of opinion that the evidence given before us proved to our satisfaction that on the day mentioned in the information the footways in question were public highways, and had been so used for the said period of years, and that the app. suffered and permitted the rain-water which then fell upon the stables in Westgate-grove and upon the cottages in Water-lane, to drip from the eaves and roofs of the said stables and cottages respectively into, upon, over and across the said footways respectively, brought the case within the operation of the 5 & 6 Will. 4, c. 50, s. 72, by reason not only that the free passage of both the said highways was, and also that her Majesty's subjects passing on foot thereon were obstructed, impeded, hindered, annoyed and interrupted in the free use and enjoyment of such highways as aforesaid, and that such obstruction so occasioned existed not only on the day named in the said information, but on very many other occasions prior to the date of the said information, gave our determination against the app. in the manner before stated, for although the app. merely claimed a prescriptive right to drip from the eaves of her cottages in Water-lane, still no such right was applicable to the drip from the eaves from her stable in Westgate-grove, but, on the contrary, it was clearly proved and admitted by the app. to be a public high-

way, and repaired by the parish up to the wall of the app.'s stable in Westgate-grove aforesaid.

The questions for the opinion of the Court were:

1. Whether the said justices had jurisdiction to hear and determine the said information.

2. Whether the footways in question were highways within the meaning of the statute 5 & 6 Will. 4, c. 50.

3. If such highways were public highways, whether the said justices were right in arriving at the conclusion that the hindrance, impediment and annoyance complained of was a wilful obstruction within the meaning of the Highway Act, and gave power to convict the app. under the 72nd section of such Highway Act, 5 & 6 Will. 4, c. 50.

If the Court should be of opinion that the conviction was legally made, then it is to be affirmed; but if otherwise, then it is to be quashed.

*Barrow* in support of the conviction.—The Highway Act, 5 & 6 Will. 4, c. 50, s. 72, among other things enacts, "that every person who shall suffer any filth, dirt, lime, or other offensive matter or thing whatsoever, to run or flow into or upon any highway from any house, building, erection, lands, or premises adjacent thereto, or shall in any way wilfully obstruct the free passage of any such 'highway,' shall for each offence forfeit and pay any sum not exceeding 40s.," &c. The suffering so much rain-water to flow from the eaves of a building as to impede the free passage of a public footway is an offence within the words "or other offensive thing" in the above section.

*Day*, contra, was not called upon.

*WIGHTMAN, J.*—On the face of the proceedings the app. does not appear to have done anything that brings her within the enactment.

*CHROMPTON, J.*—The section applies to cases of persons who are guilty of negligence in suffering and permitting filth, &c., to run on to the highway; but then the provision is confined to things of that sort, and does not extend to suffering rain-water to flow on to the highway. And the other parts of the section show that the obstruction must be wilfully caused. That is not this case. — Conviction quashed.

Saturday, Feb. 22.

(Before WIGHTMAN and CHROMPTON, JJ.)

GALLIARD (app.) v. LAXTON (resp.)

*Police constable—Arresting a person—Possession of warrant—Assault—Rescue.*

*A warrant was issued by a justice of the county of C., directed to the constable of the township of N., and generally to all her Majesty's officers of the peace in and for the said county, commanding them, or some of them, forthwith to apprehend W. G., and convey him before two justices of C. to answer for not obeying a bastardy order for payment of money. The warrant was delivered to the superintendent of police, and had subsequently been in the possession of D., one of the police constables. Afterwards D. and S., police constables, while on duty in uniform, arrested W. G. under the warrant, but they had it not in their possession at the time of the arrest, it being at the station-house. W. G. was rescued by several persons, who assaulted the constables D. and S. Whereupon informations for the rescue and assault were laid against the parties by the constables; and at the hearing before justices the complaint as to the rescue was withdrawn, and that for the assault proceeded with, and the parties were convicted:*

*Held, that the conviction was bad, as the arrest by the constables was illegal, they not having the warrant in their possession at the time:*

*Held also, that the withdrawal of the information as to the rescue was no bar to proceeding with the complaint as to the assault.*

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[Q. B.]

Case stated for the opinion of this court upon a summary conviction by Justices.

On the 3rd July last two informations were laid before the Rev. Thomas Brooke, a magistrate of the county of Chester, against Charles Galliard, of Monks Coppenhall, in the county of Chester.

The information No. 1 was as follows:—

"County of Chester, to wit.—The information and complaint of Charles Laxton, of the township of Nantwich, in the said county of Chester, superintendent of police, taken and made upon oath, this third day of July, in the year of our Lord one thousand eight hundred and sixty-one, before me, the undersigned Thomas Brooke, clerk, one of her Majesty's justices of the peace in and for the said county, at the township of Wistaston, in the said county of Chester, who saith that he hath just cause to believe and suspect, and doth believe and suspect, that Charles Galliard, John Galliard, Louisa Galliard and Margaret wife of Charles Galliard, of the township of Monks Coppenhall, in the said county, on the first July in the year aforesaid, at the township of Monks Coppenhall aforesaid, whilst one William Galliard was in the lawful custody of one Henry Dyson, a constable, under and by virtue of a warrant under the hand and seal of T. Brooke, clerk, one of her Majesty's justices of the peace in and for the said county, for arrears in bastardy, unlawfully, forcibly and feloniously did rescue the said W. Galliard out of the custody of the said Henry Dyson, and him the said W. Galliard did put at large to go whithersoever he would, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity, and thereupon this informant prayeth that the said Charles Galliard, John Galliard, Louisa Galliard and Margaret Galliard may be apprehended for their said offence and dealt with according to law.

"Sworn, &c." (Signed) "CHARLES LAXTON."

Information No. 2. was as follows:—

"County of Chester to wit.—Be it remembered that on the 3rd of July, A.D. 1861, at Wistaston, in the said county of Chester, Charles Laxton, of Nantwich, in the said county of Chester, superintendent of police, personally cometh before me, Thomas Brooke, clerk, the undersigned, one of her Majesty's justices of the peace in and for the said county of Chester, and, upon his oath, informeth me, that, from information received, Charles Galliard, John Galliard, Louisa Galliard, and Margaret, the wife of Charles Galliard, of the township of Monks Coppenhall, in the said county of Chester, within the space of three calendar months last past, to wit, on the 1st of July 1861, at the township of Monks Coppenhall, in the said county of Chester, unlawfully did assault Henry Dyson and John Sharman, of Monks Coppenhall, police constables, contrary to the form of the statute in such case made and provided, wherefore the said Charles Laxton prayeth the consideration of me the said justice, in the premises, and that the said C. Galliard, J. Galliard, L. Galliard and M. Galliard may be apprehended and brought to appear before me, and answer the premises and make their defence thereto.

"Taken and sworn before me, THOMAS BROOKE.

"(Signed) CHARLES LAXTON."

Upon both of which informations warrants were issued and the defts. were brought up before the undersigned magistrates on the 5th July 1861, at a petty sessions held at Nantwich, when the complainant withdrew the information No. 1, but proceeded with the information No. 2, when it was proved by evidence that a warrant for arresting W. Galliard, the deft.'s brother, was issued on the 8th Sept. 1860, and was as follows:—

"County of Chester, to wit.—To the constable of the township of Nantwich, in the county of Chester, and all her Majesty's officers of the peace in and for the said county whom these may concern. Whereas

information and complaint have been made upon oath before me, T. Brooke, clerk, one of her Majesty's justices of the peace for the county of Chester, the 8th Sept. 1860, by Eliza Lowe, of the township of Nantwich, in the county of Chester, single woman, that by an order made under the authority of the statute passed in the 8th year of the reign of her present Majesty, intituled "An Act for the further amendment of the laws relating to the poor in England," at the petty sessions holden in and for the division of the hundred of Nantwich, in the county of Chester, on the 7th Aug. 1860, by her Majesty's justices of the peace in and for the said county, acting in and for the said division then and there assembled, William Galliard, of the township of Monks Coppenhall, in the county of Chester, puddler, was adjudged to be the putative father of a bastard child, then lately born of her body, and that in and by the said order it was ordered that the said William Galliard should pay to her the said Eliza Lowe, so long as she should live and should be of sound mind, and should not be in any gaol or prison, or under sentence of transportation, or to such person who might be appointed to have the custody of such bastard child, under the provisions of the said statute, the sum of 1s. 6d. per week, until such child should attain the age of thirteen years, or should die, or she the said mother should marry, and the sum of 5s. for the midwife, and the sum of 2l. 4s. for the costs incurred in the obtaining such order, and that the said W. Galliard hath had due notice of the said order, and that the said bastard child is now living under the age of thirteen years, and that she the said mother hath not been married since the said order was made, and that the payments directed to be made by the said order have not been made according thereto by the said W. Galliard, and that there is now in arrear for the same the sum of 19s. 6d., being the amount of arrears for thirteen weeks' payments and 5s. for the midwife, and the sum of 2l. 4s. for the costs incurred in obtaining such order. These are therefore, in her Majesty's name, to command you the said constable or other officers of the peace, or some or one of you, forthwith to apprehend the said W. Galliard and convey him before two of her Majesty's justices of the peace in and for the said county of Chester, to answer the premises, and to be dealt with according to law.—Given under my hand and seal, at Nantwich, in the county of Chester, this 8th day of Sept. 1860.

"(Signed) "THOS. BROOKE." (L. s.)

This warrant was given to the superintendent of police, and by him given to the police at Monks Coppenhall, and it had been in the possession of police constable Dyson.

On the night of the 1st July 1861, the constables Dyson and Sharman being on duty in their uniforms as constables in Monks Coppenhall, arrested deft.'s brother W. Galliard under the warrant dated the 8th Sept. 1860, but they had not the warrant in their possession at the time, it being then at the station-house in Monks Coppenhall, in the possession of their superior officer Inspector Wilson.

After complainant's witnesses had been examined, the attorneys for the deft. took the following objections:—

1. That the arrest was illegal, the warrant of the 8th Sept. 1860, not being in possession of the police constables when the arrest took place.

2. That the complainant having withdrawn the charge of rescue, he could not proceed with that for the assault, as the lesser offence merged in the greater one, and that the withdrawal amounted to an acquittal on the principle of *autrefois acquit*, and that he could not be re-tried for the same offence.

We were satisfied that the assault had been committed and that the objections were not tenable, and we convicted the deft. in 5s. including costs,

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and in default to be committed to Chester for two months.

The def't's solicitors applied for a case on the two points of law, under the 20 & 21 Vict. c. 43, and we agreed to grant the same, and submit for the opinion of the Court of Q. B.:

First, whether the warrant of the 8th Sept. 1860, having been issued in the form above set forth, and being in the hands of the police, an inferior officer of the same force, not having the warrant in his legal possession at the time of the arrest, was legally justified in arresting W. Galliard.

Secondly, whether the information No. 1, being withdrawn amounted to such an acquittal and trial, that the def't. could not be tried on the information No. 2.

Dated at Nantwich the 14th Aug. 1861.

THOMAS BROOKE.

WILBRAHAM TOLLEMACHE.

*Fol. 14.—Gibbons for the app.*—The conviction is bad, as the arrest was illegal, the police constables not having the warrant of Sept. 8, 1860, in their possession at the time of the arrest. In *Lambard's Ironarcha*, 97, edit. 1802, it is said: "There is another thing also whereof I thought meet to admonish our justice of the peace in this place. Many of them do use to give out their precepts to attach persons suspected of felony, to the end to have them brought before them, which thing is neither newly devised by them, nor done without colour, for they have such a precedent in the old book of justices of the peace (fol. 41). And there is no doubt but that, if a felony be done, every man may arrest whomsoever he suspecteth of it. . . . But for all that, the whole court (14 Hen. 8 pl. 18) condemneth such precepts, because, if the bailiff which served the warrant have suspicion of the party, he may of himself without the warrant arrest him; and if he have not, then is the warrant of the justice of the peace no warrant to arrest him unless he be indicted before." So in *Dalton on the Office of Sheriff*, 110: "A sworn and known officer, if he will not show his warrant to the party, as he needs not, yet upon the trust the officer ought to declare the contents of the warrant." In *Robins v. Hender*, 3 Dowl. 543, the marginal note is, "Semble, that, in order to constitute an arrest, the warrant must be produced." And in *James v. Stokes*, 4 Dowl. 125, the court refused to discharge the def't. out of custody, he having been arrested by a person not having the warrant in his possession, on the ground that the application was made too late. In *Reg. v. Whalley*, 7 C. & P. 245, it was held, that, "if commissioners of bankruptcy issue a warrant to apprehend a bankrupt, and direct the warrant, 'To J. A. and W. S., our messengers and their assistants, &c.,' this warrant does not justify the apprehension of the bankrupt by any one who is not in the presence, actual or constructive, of J. A. or W. S., and therefore B., who was the assistant of W. S. in his business of a sheriff's officer, is not justified in apprehending the bankrupt in the absence of W. S. and J. A., although B. has the warrant in his possession; and it was held also that if B., in attempting to take the bankrupt be struck down by the bankrupt with a stone, and in a struggle which ensued have a part of his nose bitten off by the bankrupt, this, in case death had ensued to B., would have been a case of manslaughter only." The *Countess of Rutland's* case, 6 Q. Bep. 53, was also cited.

These appeared in support of the conviction.

*Cur. adv. vult.*

*MR. JUSTICE WRIGHTMAN, J.*—This case was argued before my brother Crompton and myself at the sittings started term. The first question proposed to us is of no great importance, inasmuch as it may arise in any case an illegal arrest may be carried to the point of wounding, or killing an officer. It appears

that a warrant had been issued by a magistrate of the county of Chester, directed to the constable of the township of Nantwich, and all her Majesty's officers of the peace in and for the said county, commanding them, or some or one of them, forthwith to apprehend William Galliard, and convey him before two justices of the county of Chester, to answer for the not obeying a bastardy order for payment of money. This warrant is stated to have been given to the superintendent of police, and by him to have been given to the police at Monks Coppenhall, in the county of Chester, of which place William Galliard is stated in the warrant to be; and it had subsequently been in the possession of Dyson, one of the police constables who arrested William Galliard, but he had it not with him at the time when he made the arrest, it being then at the station-house at Monks Coppenhall, and in the actual possession of the superintendent of police there. Upon the 1st July last Dyson, who was the public constable, arrested William Galliard under the warrant, but did not produce it, nor was he asked to produce it, and the question is, whether, to make the arrest legal, there must at the time have been a warrant which was ready to be produced if necessary, though the warrant is not addressed to any officer by name, but to the constable of Nantwich and all the officers of the peace in and for the county generally? This general form of direction seems to be warranted by the 5 Geo. 4, c. 18, s. 6, and Dyson and the other policeman under him come within the description of the persons to whom the warrant is addressed. It is not stated what words were used by the officers at the time they made the arrest, but as they do not seem to have been impressed with any conviction that they were to inform William Galliard of the nature of the charge, it may be presumed they did tell him they only arrested him under the warrant, and not what the charge was. As they were obviously police constables, we think they were not bound, in the first instance, to produce the warrant at the time they made the arrest; but as this was not a charge of felony, but rather in the nature of a civil proceeding, the warrant ought to have been produced if required, and the arrest without such production would not be legal. The production of the warrant was not however required before at the time when the arrest was made, notwithstanding the resistance of the app. and his brother, nor indeed at any time, and as the warrant was in existence at the station, where, no doubt, it could readily have been procured, it may be said there was no reason for its being in the hands or the pocket of one of the officers, and there was no disadvantage to the person arrested by reason of its being there. That, no doubt, may be so under the circumstances which are referred to in the case; but suppose it had happened that, after the arrest had been effected, in spite of the resistance made, and before the app.'s brother had been taken to the station where the warrant was, the app. had requested the officer to produce it, which, not having it, he could not do, how would the case have stood then? We have already expressed our opinion that, if requested, the officer was bound to produce the warrant, and if he did keep it in his custody after such request, the non-compliance would not be legal, and it could hardly be contended that the arrest itself would be legal, and that the detention under the circumstances adverted to would be legal. On this view of the case it appears to us that the officers were bound to have the warrant ready to be produced if required; if they had it not, the arrest would not be legal. If an action had been brought against the officers for making the arrest, and they had pleaded a plea of justification under the warrant, they must, according to the precedents, have pleaded it was delivered to them to be executed; and though it is not stated in the precedents they should have actual possession at the time of the arrest, it is to be presumed, from the

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allegation of delivery to them, that they continued to hold it. *MacKalley's* case, 9 Coke, 69a, is distinguishable on the ground suggested by East in his treatise on Pleas of the Crown, vol. i. p. 318. See also in 1st Hale's Pleas of the Crown, 458. We are unable to find any case in which the precise point raised for our discussion has been decided. We are therefore of opinion that the officers making the arrest ought to have had the warrant with them, ready to be produced in case it should be required, and not having it they were not justified in making the arrest. As to the second point, we are clearly of opinion that the withdrawal of the information as to the rescue afforded no valid ground of objection to the proceeding under the information for the assault. Therefore the conviction will be quashed. *Conviction quashed.*(a)

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYD, Esqrs.,  
Barristers-at-Law.

Nov. 15 and Jan. 11.

REGISTRATION APPEALS.

COOK (app.) v. HUMBER (resp.)

WILSON (app.) v. ROBERTS (resp.)

*Election law—Borough vote—Qualification—Occupation of part of house—Distinction between occupation as tenant and occupation as lodger—2 Will. 4, c. 45, s. 27.*

*The app. claimed to vote in respect of the occupation of part of a house, that is to say, certain rooms on the ground-floor having doors into the house-passage, or hall, the same being shut off from the street by an outer door, kept closed day and night, also certain rooms on the upper floor, approached by a staircase used exclusively by him. There is no communication between the rooms so occupied by the app., and the rooms on the other side of the passage. The rest of the house is occupied by the app.'s landlord, who is owner in fee of the house, and resides on the premises. The app. has a lock and key to each of his rooms, and both he and his landlord have keys of the street door, and they are jointly rated :*

*Held, that the qualification failed, because the subject of occupation was not a house, but only part of a house, without actual severance from the rest of the house.*

*Qualification under the Reform Act is compounded of four heads, "tenement," "value," "occupation" and "estate."*

*Part of a house used for residence, and not for commerce, was not intended by the Legislature to qualify under the word "house," nor under any of the words in the statute which follow relating to qualification.*

*The cases upon the subject of qualification as lodger or tenant reviewed.*

#### CASE.

Borough of Bridgwater, to wit.—In this case James Cook, the younger, of Chandos-street, in the borough of Bridgwater, is the appellant, and John Humber, of High-street, is the respondent.

At a court held before the revising barrister, duly appointed to revise the list of voters for members of

Parliament to serve for the said borough, the respondent duly objected to the name of the appellant being retained on such list.

The name of the appellant appeared on such list thus:—

Christian and Surnames at full length.	Place of Abode.	Nature of Qualification.	Street, lane, or other place in the parish, &c.
Cook, James, the younger.	Bridgwater.	Houses in Succession.	Hamp and Chandos-street.

The following facts were proved before me:—

During the first portion of the twelvemonth next previous to the last day of July 1861, the app. occupied as tenant a house at Hamp in the said borough, of sufficient value, and during the remainder of the twelvemonth he resided in a house in Chandos-street, in the said borough, one side of which last-mentioned house he rented at a rent exceeding 10l. a-year. The rooms on the ground-floor of this house which were rented by the app. have doors into the house-passage (or hall), which is shut off from the street by an outer door, kept closed during night and day. The rooms on the upper floor, rented by him, are approached by a staircase, used exclusively by him; and there is no communication between such rooms and the rooms on the other side of the passage. The rest of the house is occupied by the app.'s landlord, who is the owner in fee of the whole house, and who resides on the premises, together with his family. The app. has a lock and key to each of his rooms, and both he and his landlord have keys of the street-door, and they are rated jointly. There was no demise in writing to the app., the letting being verbal.

I expunged the name of the app. from the list, and held that the facts proved did not show that he occupied as tenant, so as to give him a right of voting under 2 Will. 4, c. 45, s. 27.

If the court thinks otherwise, then the name of the app. is to be re-inserted in the list of voters.

(Signed) J. S. Revising Barrister.

*Kinglake, Serjt., for the app.*—The cases which bear upon this matter show that the decision of the revising barrister was wrong. It may be admitted that where rooms forming part of a house are let, and the landlord occupies part of the house and has control of the whole, the occupation by the person to whom such rooms are let is an occupation as lodger, and not as tenant within the meaning of the Reform Act. But, if the rooms are distinct and separate—that is to say, there being a severance of them from the rest of the house—then the occupation is as tenant within the Act, and the renter of them entitled to the franchise. In the cases which will be cited on the other side it will be seen the landlord retained the control: here he did not, for the app. has a lock and key to each of his rooms, and has a key as well as the landlord to the outer door: (*Scores v. Huggett*, 7 M. & G. 95.) This case establishes that a house may be divided into different floors, and an occupier having a key of the outer door is a tenant within the meaning of the Act, if the landlord does not reside: (*Pitts v. Smedley*, 7 M. & G. 85; *Wassey v. Perkins* (*Hill's case*), 7 M. & G. 151; *Toms v. Luckett*, 5 C. B. 23; *Downing v. Luckett*, 5 C. B. 40; *Monk v. Dykes*, 4 M. & W. 567.) The claimant's rooms were as distinct from those occupied by the landlord as if they formed part of a separate house.

*Kingdon for the resp.*—If the cases of *Pitts v. Smedley* and *Toms v. Luckett* are to be supported, this appeal must be dismissed, for it is impossible to distinguish this case from them. There was no more severance of the rooms in the case before the court than in the cases last referred to. The principle applicable

(a) In *Hale v. Rache*, 8 T. R. 187, Lord Kenyon, C.J., said: "If it be established as law by the cases cited, that it is not necessary to show the warrant to the party arrested, who demands to see it, I will not shake those authorities; but I cannot forbear observing that, if it be so established, it is a most dangerous doctrine; because it may affect the party criminally in case of any resistance, and if homicide ensue, the legality of the warrant enters materially into the merits of the question. I do not think that a person is to take it for granted that another, who says he has a warrant against him without producing it, speaks the truth. It is very important that in all cases where an arrest is made by virtue of a warrant, the warrant (if demanded, at least) should be produced."

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in such cases is laid down by Wilde, C.J., who, in *Toms v. Luckett*, says, "A man may have a right to the exclusive possession of apartments in a house, and yet another may have such a degree of dominion over the whole as to denote such possession of the character of a tenancy under the Reform Act." The fact of the residence of the landlord upon the premises is the casual distinction which the judges have drawn. Here the landlord did reside on the premises, and the app. therefore is not entitled to vote: (*Fudger v. Lewis*, Ch. temp. Hardwicke, 307, cited in *Wansley v. Perkins*.)

*English in reply.*

The Court took the argument in another case, *Toms v. Roberts*, and intimated that they would give judgment in both cases at the same time.

*Civ. adv. vult.*

ELLIS, C. J.—The app. claimed to be qualified by means of occupying part of a house as stated in the case; that is, one room on the ground-floor and two more there on one side of the house, the landlord also occupying one room upon the ground-floor, and one more on the other side, with a staircase between them, but with one outer door to the house, which was common to both, of which door each had a key. The app. relied on the cases of *Scorres v. Huggett* (*ubi supra*), and *Toms v. Luckett* (*ubi supra*), in support of his contention. The resp. contended that, upon these facts, the app. was not qualified, and he relied on *Pitts v. Beasley* (*ubi supra*), and *Wansley v. Perkins*, *Hill's case* (*ubi supra*), in support of his contention. In these four cases the subject of occupation was, in substance, the same, namely, part of a house let for lodgings, but the occupation itself was made the subject of description. In two of them the lodger was held to be qualified because his occupation was as tenant; in the other two the lodger was held not to be qualified because the occupation was as lodger. In the present case we are of opinion that the resp. is entitled to succeed, and we rest our judgment, not upon the kind of occupation described in the statement of the case, but upon the subject of occupation. We consider that the qualification fails because the subject of occupation was not a house, but only a part of a house, without any actual severance from the rest of the house. In support of this judgment we propose to refer to the statute upon the construction of which the case depends, and then to consider the four cases cited and the point for decision in each, and then the distinction between occupation as tenant and occupation as lodger, which does not appear to us to be well founded. We will afterwards give our reasons for thinking that part of a house used for residence was not intended by the Legislature to qualify under the word "house," or under any of the words which follow relating to qualification. According to our construction of the statute, qualification is compounded of four heads: "tenement," "value," "occupation," and "estate." There must be for tenement a house, warehouse, counting-house, shop, or other building analogous thereto; there must be for value annually 10*l.*; there must be occupation, that is actual exercise of the rights of the owner of the house and possession during the requisite time; and there must be an estate in the tenant either in fee or lease. If these four distinct requirements are combined in the claimant he is qualified, but if either is not. Now, though they must exist in combination in order to qualify, still, in inquiring into the existence of them in combination, each element must be separately ascertained. First, is the claimant "tenant;" secondly, is he "occupier;" and thirdly, is the tenement sufficient in "value;" and fourthly, in "estate?" In the cases above cited, the question is made to turn upon the nature of the occupation. In *Pitts v. Beasley*, Pitts was the occupier and tenant of the second and third floors, and had no key to the outer

door. The revising barrister's question for the opinion of the court was whether Pitts had such an exclusive occupation of the floor as to qualify. Tindal, C. J. says: "The question is, whether the claimant occupied as owner or tenant." It does not turn so much upon the description of the premises as on the nature of the occupation; and because he had not the key of the outer door, the landlord residing on the premises, he does not occupy as tenant. In *Wansley v. Perkins*, *Hill's case* (*ubi supra*), Hill was occupier as tenant of the second floor. The landlord resided on the premises, and they each had a key of the outer door. The revising barrister referred the question on the sufficiency of the qualification. The judgment was, that the claimant was a lodger, because the landlord remained in possession of the rest of the house. In *Scorres v. Huggett* Scorres was tenant, and occupied two rooms on the second floor; the whole house was let in separate lodgings, and each lodger had a key. The landlord did not reside. The revising barrister referred the question whether the occupation of such two rooms was sufficient to qualify. The claim in the list had been for "apartments." The court held, that the question turned on the sufficiency of the description, and decided for the qualification, because the claimant had a key of the outer door. The court merely considered the barrister confined the question to the occupation, and excluded all question of tenancy. In our view, that decision does not conflict with the present judgment. In *Toms v. Luckett*, Toms was tenant or occupier of the first floor of the house, the landlord occupied the shop and parlour, but did not sleep there, and the house was let out in lodgings, and each lodger had a key to the outer door; the revising barrister referred the question whether the occupation as tenant was sufficient to qualify, as the landlord did not sleep on the premises, and had no right to close the outer door. The judgment is, that the occupation was sufficient, the exclusive control of the outer door not being sufficient, and the occupation of part by the landlord not having the effect to disqualify, which his sleeping on the premises might have had. Three of the judges add that part of a house is a sufficient tenement, being comprised under the words of the statute "other building." As to that, by referring to the question of the revising barrister, it seems the point was not before the court, and it should be noted that Williams, J. doubted the correctness of his brethren on both points, but did not formally dissent from the judgment. In these four cases it seems to us, if the revising barrister had referred to the court the true question arising on the statement of facts, it would have turned entirely on the sufficiency of the tenement, the tenancy, occupation and value being clear. It seems to us a lodger is a tenant if the premises are let to him, and it was so decided in *Newman v. Anderton*, 2 Bos. & P. (N. R.) 226. There, in replevia, the avowry was for rent of ready furnished lodgings, let at 13*s.* per week to the plt., and held by him of the deft. as tenant thereof. The letting was proved to be made, and thereupon there was judgment on the avowry for the deft. If the occupier of the premises is the tenant, and if he occupies them as tenant, and if the occupier is tenant of a sufficient tenement, as far as concerns the sufficiency of the occupation it seems to us immaterial to inquire whether he has the key of the outer door or not, because cases may be put where he would as tenant or occupier be qualified although the key should be withheld; for though it is one house in a sense, being under one roof, and divided by the structure into several flats constituting several houses, in another sense it has one outer door to the street, of which the porter has the key and the sole control for the security of the tenants. Each flat is a sufficient tenement, and the qualification is gained, though the tenant have no key to the outer

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door; and it is the same though the porter resides in one of the flats and is owner of all the rooms under the roof. Again, if the occupier is tenant, it seems to us immaterial to inquire whether he has an uncontrolled access to the house. If, for instance, a house is let to A., without any access, except over the yard of B., and B. neither gives nor refuses leave, A. passing over the yard by the sufferance of B., the mere liability to interruption to the access would not prevent him being qualified. And again, it seems immaterial to inquire whether the tenant of a house has exclusive possession, that is, if exclusive possession means exemption from servitude, or rights of entry reserved to the landlord: such servitudes and rights of entry affect the value of the tenement, and not the sufficiency in kind. Therefore, we think the true question in the cases cited, and in the present case, turns on the nature of the tenement occupied. Is it such a property as the Legislature intended to make a qualification? Now, the statute requires some permanent occupation and some independent interest in the property in the claimant, to prevent the illegal creation of a vote, as the ownership of the tenement indicates. In other words, the requirements are, at least, a tenancy exclusive of some occupation of less independence, such as the occupation of a servant for a service; for example, a porter at a lodge, a gardener at a lodging, and also such as that of a surgeon for an hospital or a room therein (*Dobson v. Jones*, 5 M. & G.); also the occupation of premises for the objects of charity, occupying under permission of the trustees of the charity: (see *Heartley v. Banks*, 5 C. B.; and *Davis v. Waddington*, 7 M. & G. 37.) These and other cases of occupation show the value of the tenement is excluded by the requirement that the occupier must be, at least, a tenant; but, if he is a tenant, he occupies as tenant, and this part of the qualification is complete; and it is immaterial as to that under what denomination of tenant he is classed—that of lodger, farmer, or lessee. As to the kind of tenement that qualifies, the statute has mentioned two kinds of buildings, namely, those used for residential and those used for commercial purposes—a “house” for residence, and a counting-house, warehouse or shop, or other analogous building, for commerce. Where the claim is the occupation of a house, we consider that the Legislature did not intend to create part of a house used for residence and not for commerce a tenement sufficient to qualify. Part of a house cannot be truly said to be a house. The word “house” is used in two senses. In *Luckett v. Bright*, 2 C. B., 193, a part of a house in one sense, in another becomes a whole house by reason of the actual severance. Neither do we consider the Legislature under the term “other building” meant to include part of a house as a residence, for the qualification of a householder was frequently a qualification before the Reform Act, and in respect of that it was always held that a lodger was not qualified as a householder. In *Fludger v. Lambe*, Cas. temp. Lord Hardwicke (*ubi supra*), the claimant was qualified to vote in that he was a householder and sole occupier of the house. One objection of the pl.’s was, he had let part of the house in lodgings, and so was not sole occupier, and Lord Hardwicke ruled to the contrary. He says a lodger was never considered by any one as the occupier of a house; it is not the common understanding of the word; neither as to any part he occupied can he be said to be the occupier of the house. Since the Reform Act the same opinion has been held in the decisions, holding that the occupation as lodger did not qualify. The common meaning of “lodging” is part of a house used for residence. If the Legislature had intended to make lodgers qualified, it would not have been left to obscure conjecture on words or their meaning. In *Wright v. The Mayor of Stockport* a second-floor room overlooking a space was held

to qualify, because each separate room was, by reason of actual severance with a separate outer door, an entire building in one sense, though part of an entire building or factory in another sense. Then assuming this to be the correct construction of the statute, the question then was, whether the rooms occupied by the app. were a house. We think they were correctly decided by the revising barrister not to be a house within the meaning of the statute, because they formed part of a house when let, and there was no actual severance of the app.’s part from the other part. Then the authorities relied on of *Scores v. Huggett*, and *Toms v. Luckett*, have been cited to show that part of a house may be a house without actual severance, by reason of some conventional arrangement in respect of the keys of the outer door, or the prescription of the landlord; and the authorities are uniform to show that, by the act of severance, part of a house may become changed into a house, and without such change was effected it would not be so. In *Kitchen on Courts*, c. 9, it was said, if one who inheriteth a house, lets a certain part from that in which he dwells, and severeth it from the other part, and maketh several doors to the high street, it is now as two houses; otherwise it is as but one, with one door to the street. In *Monk v. Dykes* (*ubi supra*) Parke, B. says that the doctrine of Lord Coke, that a chamber may be *domus mansus* in law, refers to a house divided into several chambers, with separate outer doors, and that neither in law nor common sense can a man be said to be in possession of a dwelling-house if he has a mere chamber; and that principle is adopted and was laid down in Cro. Ch. 473. In *Reaz v. Great and Little Usworth*, in 5 A. & E. 261, the question was, whether each floor, though part of a house in one sense, was in law a separate and distinct dwelling-house. It appeared that each floor had a separate staircase from the outside, and a separate door, and on account of its actual severance the floor was decided to be a separate and distinct dwelling-house, and the house was a floor. In *Toms v. Luckett* the claimant occupied the upper part of the house and a kitchen, having a distinct and separate entrance thereto, and the landlord occupied the ground-floor. The claim on the list was for part of a house. The judgment is, that the claimant was qualified because part of a house in one sense may be so completely separated from the residue as to constitute a house in another sense. The description of the part of the house might be true according to the common understanding of the term, and yet may be sufficient to denote a house in another sense. In this judgment the qualification was made to him on the actual severance. The law relating to burglary, where the protection of human bodies during the hours of sleep is referred to, and a distinction is made for that purpose, which has no analogy for qualification, the general rule is, part of a house in the common understanding of the word does not become a house in law unless there be actual severance. In Leech’s Crown Cases, 90, *Rogers’s* case, Lord Coke’s opinion is quoted thus: “If the occupiers of several rooms keep the keys and inhabit them separately, if they enter into the house at one outer door with the owner, these rooms cannot be said to be the dwelling-houses of the inhabitants, but the indictment ought to be for breaking the house of the owner. If the owner does not reside on the premises, the crime for feloniously breaking into the sleeping abodes of the lodgers in the night is precisely the same as if the landlord slept there.” In that case it is held the abode of the lodger may be called *domus mansus* in law. This exceptional rule depending on the reason above assigned, is no ground whatever for holding a lodging to be a house within the meaning of the statute; and yet these exceptional cases were pressed upon the court in *Toms*

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v. *Luchett* as authorities for holding that a lodging was a house if the owner did not sleep upon the premises. For these reasons, and upon these authorities, we think the qualification fails in respect of the subject of occupation. The decision will be affirmed.

*Judgment for resp.*

WILSON (app.) v. ROBERTS (resp.)

*Borough vote—Qualification—Offices—Part of house—Actual severance—2 Will. 4, c. 45, s. 27.*

The facts are sufficiently stated in the judgment.

*Overruled (Fawcett with him) referred to Bright v. The Mayor of Stockport, 5 M. & G. 33.*

*Underscored, for the resp., offered no remarks.*

*Cur. adv. vult.*

*JAN. 11.*—ERLE, C. J. now delivered judgment.—In this case the claimant occupied the first floor, being part of a house which had not become by actual severance an entire house in any sense. We consider the qualification fails, because the tenement, the subject of occupation, was not sufficient. It is not stated to be a "shop," "warehouse," or "counting-house." It was not a house, because it was only part of a house; it was not a building of a nature analogous to other buildings, because it was only part of a building, without any actual severance. We have explained our reasons and have referred to the authorities on which we relied in the case of *Capt v. Hamber*. This being our opinion upon the nature of the tenement occupied, it is immaterial to consider how the occupation of the claimant was affected by an independent access to the first floor, or by his absence at night from the premises. The decision is affirmed.

*Judgment for the resp.*

*Friday, Feb. 7.*

BLADES v. HIGGS AND ANOTHER.

*Animals fera natura—Right of property in after killed.*

The plt. brought a number of rabbits which had been taken and killed on A.'s land by poachers, whereupon A.'s servants (the defts.) took them forcibly away from him. In an action for such wrongful conversion, the real question at issue being as to whom the rabbits belonged,

Held, according to the authority of *Lord Lonsdale v. Eigg*, that the property in the rabbits was in A.

*Declaration.*—For that the defts. converted to their own use, or wrongfully deprived the plt. of the use and possession of the plt.'s goods, that is to say, rabbits and dead rabbits.

2. And for a second count, the plt. sues for that the defts. assaulted and beat and pushed about the plt., and took from the plt. the plt.'s goods, that is to say, rabbits and dead rabbits.

*Plea:*—1. Not guilty. 2. And for a second plea the defts. as to all but assaulting, beating and pushing the plt., say that the said goods were not any of them the plt.'s, as alleged. 3. And for a third plea the defts. as to the assaulting, beating and pushing the plt., say that the plt. at the said time when, &c., had wrongfully in his possession certain dead rabbits of and belonging to the Marquis of Exeter, and the said rabbits were then in the possession of the plt. without the leave and licence and against the will of the said marquis, and the plt. was about wrongfully and unlawfully to take and carry away the said rabbits, and convert the same to his own use, whereupon the defts., as the servants of the said marquis, and by his command, requested the plt. to refrain from carrying away and converting the said rabbits, and to quit possession thereof to the defts., as such servants, which the plt. refused to do, and thereupon the defts.,

as the servants of the said Marquis of Exeter, and by his command, gently laid their hands upon the plt., and took the said rabbits from him, using no more force than necessary, which are the alleged trespasses.

*Replication*, issue joined on all the defts.' pleas. And for a second replication to the defts.' third plea, the plt. says that the said third plea is bad in substance.

Upon the argument of this demurrer the court held that the plea was good.

The cause was tried at Leicester before Willes, J., when a verdict was found for the plt. The action was brought by a fishmonger and licensed dealer in game at Stamford, against two servants of the Marquis of Exeter, to recover damages for taking out of his possession ninety rabbits. The facts appeared to be as follows:—On a certain night some persons entered upon the land of Lord Exeter, and took and destroyed ninety rabbits, which they packed in bags directed to the plt., and carried early in the morning to the Ketton railway-station, where they left them to be conveyed to the Midland Railway station, at Stamford. The defts. having heard that the rabbits were to be at the Stamford station, went there, and after having seen the contents of the bags which were now in the possession of the plt., examined, took them forcibly away from him, for which the present action was brought, and the real question at issue was, as to whose property the rabbits were.

A rule nisi having been obtained on a former day, calling on the plt. to show cause why the verdict found for him should not be set aside, and a new trial had, on the ground that the judge misdirected the jury, in telling them that the facts relied upon by the defts., if taken as proved, did not constitute evidence that the rights to the possession of the rabbits was in the Marquis of Exeter,

*Hayes*, Serjt. (*Beasley* with him) now showed cause, and referred to *Sutton v. Moody*, 1 Ld. Raym. 251; and *Lord Lonsdale v. Rigg*, 26 L.J. 196, Ex. Ch., and contended that the latter case was not in point, as the question as to whom the game belonged was not argued.

*Macaulay*, Q. C. (*Field* with him), in support of the rule, were not called on.

WILLIAMS, J.—We are all of opinion that we are bound by that authority. The Court of Ex. Ch. considered this precise point, and decided against the argument you are now making. It is true that in the Court of Ex. Ch. this point was not argued, but that is because nobody treated it as one that was disputable. If you wish now to dispute it, you may have leave to appeal.

WILLES, J.—I am of the same opinion. It is impossible to get over the case of *Lonsdale v. Rigg*. It will be well, when this case is further considered, if it should ever be so, to compare the dictum of Lord Holt, in *Sutton v. Moody*, with the passage in the Institutes of Justinian, where it is laid down that wild animals, "simul atque ab aliquo capta fuerint, jure gentium illius esse incipiunt; quod enim ante nullius est, id naturali ratione occupanti conceditur. Nec interest, feras bestias et volucres, utrum in suo fundo quisque capiat, aut in alieno." (a) The same rule has been adopted in all countries professedly governed by the Roman civil law. Whether any distinction can be made where the wild animal is driven off the land of one person on to that of another, I am not prepared to say.

BYLES and KEATING, JJ., concurred.

*Rule absolute.*

Attorneys for plt., *Wright and Bonner*, for Law, of Stamford.



## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and  
G. J. B. HERTLETT, Esqrs., Barristers-at-Law.

Friday, Feb. 14.

TAYLOR (app.) v. STANSFIELD (resp.).

*Highways—Surveyors' accounts—Disallowance of payments for bygone debts.*

*The surveyors of highways accounts for 1856 showed a balance due to them of 211l. 14s. 10½d., and their accounts for 1857 showed a balance due to them of 205l. 5s. 1½d. For the next three years ending March 1860 new surveyors were appointed, and the balance of 205l. 5s. 1½d. was omitted in the accounts for those three years and undischarged. The surveyors for the year commencing March 1860 paid that balance out of moneys received by them, and entered such payment in their accounts:*

*Held, that they were not justified in doing so, and that the justices were right in disallowing that payment in their accounts.*

Case stated under the 20 & 21 Vict. c. 43.

At a special sessions of the peace for the highways within the division of Agbrigg, in the West Riding of Yorkshire, holden at Wakefield on the 1st April 1861, and thence by adjournment on the 15th of the same month, pursuant to 5 & 6 Will. 4, c. 50, the app. the two surveyors of the highways of the township of Flockton, in the said division, for the year then last past, laid their accounts of moneys received and disbursed by them as such surveyors as aforesaid before us, the undersigned justices of the peace of the said riding, acting within the said division, then and there present. The resps., who are inhabitants contributing to the highway rates of the said township, thereupon made complaint to us against the said accounts, and the application of the moneys so received by the app. as surveyors as aforesaid. And we heard the complaint, as required by law, and examined the app. on oath, and ordered that the sum of 205l. 5s. 1½d., one of the items of disbursement included in the accounts, should be disallowed, and we caused a memorandum to be made upon the face of the accounts, and the app. being dissatisfied with our determination, we hereby state and sign the following case:—

For the year ending the 25th March 1856 the app. Joseph Taylor and one David Goldthorpe, the duly elected surveyors of highways, laid their accounts on 14th April 1856 as—

Moneys received .....	£535	6	2
Moneys disbursed for repairs .....	747	1	0½

Leaving due ..... 211 14 10½

The same surveyors were reappointed the following year, and on the 13th April 1857 they brought forward the preceding year's balance of 211l. 14s. 10½d. The account stood thus:—

Received from rates .....	£394	7	9
Payments for repairs (including old balance of 211l. 14s. 10½d.) ...	599	12	9½

Leaving due ..... 205 5 1½

For three years, ending 25th March 1860, new surveyors were appointed, and the balance of 205l. 5s. 1½d. remained undischarged and outstanding and not noticed in the accounts of those three years. The app. being elected surveyors for the year commencing 25th March 1860, discharged the debt of 205l. 5s. 1½d. out of the moneys received by them. Their accounts showed:

Received from rates .....	£391	9	1
Payments for repairs (including old balance of 205l. 5s. 1½d.) .....	371	9	1

These accounts were laid before us, the justices, on

the 15th April 1861, and were verified on oath, but the sum of 205l. 5s. 1½d. was disallowed, subject to one of the Supreme Courts being of opinion that the payment of the said sum was a legal payment in the year ending 25th March 1861.

It was argued before us on behalf of the complainants (the new resps.), that it was not legal for the said surveyors of the year ending 25th March 1861, to discharge out of moneys coming to their hands by virtue of their office in that year any debt or balance overpaid in respect of the year ending 25th March 1857, and therefore that we ought to disallow the disbursement of the said sum of 205l. 5s. 1½d., so entered in the accounts for the year ending 25th March 1861. It was argued on behalf of the app. that this was a legal disbursement, the balances ending at the close of the years ending respectively 25th March 1856 and 25th March 1857, having been duly found owing to the then outgoing surveyors and certified by the justices as above mentioned, and not been discharged as they might have been by their successors, and the same having been incurred for the purposes of repairing and keeping in repair the highways of the said township.

We, however, being of opinion that the disbursement of the said sum by the app. as aforesaid, was not a legal disbursement in the year ending 25th March 1861, gave our determination against the app. in the manner before stated.

The question of law arising on the above statement, therefore, is whether or not it was lawful for the app. to discharge as before mentioned the said sum of 205l. 5s. 1½d., the balance overpaid as aforesaid, in respect of the year ending 25th March 1857, out of the moneys received by them in the year of office ending 25th March 1861.

The opinion of the Court of Q.B. is asked upon the said question of law, whether or not we were right in our determination as aforesaid, and as to what should be further done or ordered in the premises.

JOHN BARRY.

T. FOLJAMES.

*West for the resps.*—This case was granted upon the authority of *Townsend v. Reed*, 30 L. J. 223, M. C. The magistrates felt it impossible to make this allowance, the amount having been in arrear so long, and not having appeared in the accounts of the three years preceding 1860. In *Weddington v. The Guardians of the City of London Union*, 28 L. J. 113, M. C., it was held that a retrospective poor-rate for the payment of past debts could not be made. See also *Durrant v. Boys*, 6 T. R. 580, per Lord Kenyon, C.J.; 5 & 6 Will. 4, c. 50, s. 44. The ratayers now may be totally different persons.

*Mails for the app.*—The amount was purposely kept out of the accounts during the three years after 1857 by the new surveyors, and the app. ought not to suffer on that account. [CROMPTON, J.—You must show us that the magistrates were bound to allow the payment.]

WIGHTMAN, J.—The magistrates were not wrong in disallowing this payment. From 1857 to 1861 this debt was never entered in the surveyors' accounts at all, and it is too much to say that the present inhabitants of the different parishes are liable to pay this, of which they may have had no idea at all.

CROMPTON, J. concurred.

Order confirmed.

Wednesday, Feb. 13.

REG. v. THE INHABITANTS OF CHIDDINGTONSTONE.

*Poor-law audit—Pauper lunatic—Common fund—*

*Opening accounts—Arrears—Certiorari.*

*A. B., a pauper lunatic, was in 1864 sent to the county lunatic asylum at the charge of the parish of C., from which parish she was then irremovable, and C. continued to pay for her maintenance up to the*

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present time. In April 1858 two justices made an order, which was not signed till April 1860, ordering the payment of the expenses of the pauper's examination and the accumulated amount of maintenance, &c., from 1854 out of the common fund. The county district auditor, in auditing the accounts for the half-year ending Michaelmas 1860, disallowed the sum charged against the parish of C. for the maintenance of the pauper for the half-year ending Michaelmas 1860, but he allowed all the preceding charges.

The auditor calling upon the auditor to show cause why his certificate should not be varied, the court refused to interfere, and discharged the rule.

A writ of certiorari had been obtained on behalf of the ratepayers of the parish of Chiddingtonstone, in the county of Kent, calling upon George Matthews Arnold, the auditor of the West Kent audit district, to show cause why the allowance made by him on the 17th Dec. last in the accounts of the Sevenoaks Union for the half-year ending Michaelmas-day 1860, should not be varied by adding the parish of Chiddingtonstone with the sum of 150*l.* 18*s.* 4*d.* and debiting the common fund of the said union with the same sum.

The following is a copy of the auditor's certificate:—  
“I hereby certify that in the accounts for the half-year ending Michaelmas-day 1860, contained in the general parochial ledgers of and belonging to the board of guardians of the Sevenoaks Union, I have disallowed the sum of 11*l.* 17*s.* 8*d.*, charged therein, against the parish of Chiddingtonstone for and in respect of the maintenance of Jane Medhurst, a lunatic, and I have transferred the said charge of 11*l.* 17*s.* 8*d.* to the debit of the common fund account entered in the said general ledger, and, subject to the said disallowance, I have allowed the said account in all other respects. My reasons for the above are as follow: that Jane Medhurst, a pauper lunatic, was, in 1854, sent to the Kent County Lunatic Asylum, at the charge of the parish of Chiddingtonstone, from which parish she was then removable from length of residence, her settlement being elsewhere.

“Her maintenance continued to be charged by the lunatic asylum to the said parish and the guardians of the union, who paid the same, also charged such payments in like manner to the said parish in their half-yearly accounts from that period up to the present time.

“The steward of the said asylum refused an application to transfer the charge for the maintenance of the lunatic to the guardians of the union in respect of their common fund without an order of justices under the Lunatic Asylum Act 1858.

“Two justices on the 28th April 1858 made an order which was prepared for signature (but not actually signed till two years later) ordering the payment of 3*l.* the expenses of pauper's examination, and 100*l.* 6*s.* 8*d.* the accumulated amount of her maintenance at the asylum from the 10th March 1854 (when lunatic was sent to the asylum) to this date to be paid out of the common fund and this order was considered to be authorized by sect. 102 of the said Act; the order was similarly provided for the payment of the future maintenance. The total amount of maintenance for the period of the pauper being sent to the asylum up to the end of the Lady-day half-year 1860 is 150*l.* 18*s.* 4*d.*

“The further cost of maintenance for the half-year ending Michaelmas 1860 included in the accounts now under audit by me is the said sum of 11*l.* 17*s.* 8*d.*

“The overseers of the parish of Chiddingtonstone, as ratepayers of that parish and otherwise, requested me, by their solicitor, to disallow the accumulated charge of 150*l.* 18*s.*, as entered in the union ledgers against this said parish, and, in lieu thereof, to charge the whole of such sum against the common fund of the union.

“The clerk to the guardians, while admitting that the parish of Chiddingtonstone was equitably entitled to relief, contended that sect. 102 of the said Act was controlled by sect. 97, and that the justices could order the payment of the cost of twelve previous calendar months' maintenance only.

“Having heard what was alleged on both sides, I have made the certificate of disallowance and allowance as above; and my reasons for so much of the same as relates to said disallowance is, that under the said order of justices, of the 28th day of April 1858, the maintenance of the said lunatic for the half-year ending Michaelmas 1860 ought to have been charged against the common fund of the said union, and not against the said parish; and for the said allowance, that I have, by law, no power, as auditor, to reopen the accounts of the said half-year previous to the accounts of the half-year, to wit, the half-year ending Michaelmas 1860, now under my examination, the said accounts of the said previous half-years having been long since by me examined, audited and closed, and my functions of auditor in regard thereto having become terminated and discharged.

“Witness my hand, this 7th day of Dec. 1860.

“(Signed) GEO. M. ARNOLD,

“Auditor of the West Kent audit district, which comprises the said union and parish.”

F. Russell showed cause.—The certificate of the auditor respecting the allowance and disallowance is legal and valid. The duty of the auditor at the time of making the certificate was confined to auditing the accounts for the half-year immediately preceding Michaelmas 1860, and he had then no power to examine into the propriety of charges made in the accounts of previous half-years, long ago audited and acquiesced in by the parties affected. The parish officers and ratepayers of the parish of Chiddingtonstone had full knowledge, or at least means of knowing, during all the previous half-years in which the said lunatic was charged, that she was charged to the debit of the account of the said parish of Chiddingtonstone by the guardians of the Sevenoaks Union, in the accounts of the said union; and it was the duty of the overseers and ratepayers of the said parish to object at the audit of each half-yearly account in respect of the said union, to any improper charge made against them in each account, and as through inaction and negligence they had failed to object to the charges in respect of this lunatic in previous half-years, the auditor was justified in exercising his discretion by refusing to open accounts previously audited, even if he had the power to do so. The justices had no power by law to make an order ordering the guardians of the Sevenoaks Union to pay any sum to the churchwardens and overseers of the poor of the said parish of Chiddingtonstone in respect of this lunatic. The order of justices, purporting to be made in April 1858, but in reality made in April 1860, is wholly invalid and void, and even if not so, it can have no retrospective effect.

Barrow contra.—By 16 & 17 Vict. c. 97, s. 102, the cost of the examination and removal of Jane Medhurst to the Kent Lunatic Asylum, and of maintaining her there, ought to have been charged to the common fund of the Sevenoaks Union; at any rate the cost of her maintenance since May 1858 ought to have been so charged and borne. The reasons given by the auditor in his certificate of allowance for refusing to transfer the said costs to the common fund of the union, are insufficient and inapplicable to the facts of the case. [CROMPTON, J.—Can you lie by for ten years, and then charge the common fund?] We did not know of the five years' residence. [WIGHTMAN, J.—That was unfortunate; still it was for you to find out the chargeability; see how it would affect other people.] Knowles v. Trafford and another, 26 L. J. 57, M. O. [CROMPTON, J.—You ask us to order him, against him.

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own judgment, to allow all the arrears.] There is nothing in the Acts to make the audit final.

WIGHTMAN, J.—It would be opening the whole account. Why did you not call on him at the time?

By the COURT:

*Rule discharged.*

SMITH (app.) v. VAUX (resp.)

*Alcouse—Opening house for the sale of beer—Sunday—Evidence—11 & 12 Vict. c. 49.*

*At twenty minutes before one o'clock a.m. on Sunday morning the outer entrance door of an alcouse was wide open, the bar, tap-room and parlour were likewise open, and in them were several men and women, some of whom were residents in the parish, a man and three women had a pint cup three-fourths full of beer before them, and the landlady was collecting the drinking cans. There was no evidence as to the actual selling of beer after twelve o'clock on Saturday night:*

*Held, that there was some evidence to justify a conviction for keeping the house open for the sale of beer before half-past twelve, p.m., on Sunday.*

This was a case stated under 20 & 21 Vict. c. 43.

At a petty sessions of the peace, holden at Nottingham, on the 8th Dec. 1860, before two of the justices of the peace for the said county, Charles Smith, the above-named app. was charged for that he the said Charles Smith, on Sunday, 25th Nov. last, at the parish of Arnold, in the said county, being a licensed victualler, did open his house for the sale of beer before half-past twelve o'clock in the afternoon, otherwise than as refreshment for travellers, contrary to the statute 11 & 12 Vict. c. 49. And the said deft. being then present, accompanied by his attorney, the said charge was duly heard, and upon such hearing the justices convicted the said deft. of the said offence, and adjudged him to pay a penalty and costs. And the said deft. thereupon, pursuant to the provisions of the statute 20 & 21 Vict. c. 43, gave notice and required the said justices to state and sign a case, &c.

CASE.

Upon the hearing it was proved in support of the information that the deft. was a licensed victualler at Arnold; that at twenty minutes before one o'clock on the morning of Sunday, the 25th Nov.—that is, before half-past twelve o'clock in the afternoon of that day—a police-officer, who was called as a witness, went to the house of the deft. and found the outer entrance door wide open, and there was free entrance for all comers from the street; that witness went direct into the bar and found that open; that witness also went into the tap-room and found that open; that witness also went into the parlour and found that open; that in the bar, and also in the tap-room, and also in the parlour, witness found several men and women, some of whom were unknown to him, and others of them witness knew to be residents in the parish of Arnold, in which the house is situated; that witness saw in the bar one man and three women with a pint cup about three-parts full of beer on a table before them; that witness saw several men in the tap-room and saw the wife of the deft. collecting drinking vessels called cans, used for drinking beer, from the table in the tap-room, but witness did not see whether there was any liquor in such cans; that witness called the attention of the deft., who was in the tap-room, to the hour as shown by the clock, and the deft. used some abusive language in reply, but offered no explanation, and made no statement to account for the house being open at that hour.

At the hearing it was not alleged on behalf of the deft. that any of the persons in the bar, or in the tap-room, or in the parlour, were travellers, nor was any evidence tendered or given on behalf of the deft.; but it was contended for the deft. that the evidence in

support of the information did not show that the house was open for the sale of beer, and that the justices were not at liberty to draw inferences, but that an actual sale of beer on Sunday morning ought to have been proved in order to justify a conviction. Upon the facts proved as above stated, the justices found that the deft.'s house was open for the sale of beer before half-past twelve o'clock in the afternoon of the said Sunday, and convicted the deft. accordingly.

The judgment of the court is requested as to whether the said justices were right in point of law in their determination.

Boden, Q.C., for the respa., in support of the conviction, contended that the conviction was right. There was sufficient evidence to warrant a finding that the house was open for the sale of beer within the prohibited hours. There was no necessity to prove any actual sale of the liquor at that time, provided the circumstances warranted such an inference.

Hoyes, Serjt., for the app., contra, was called on.—He contended that the leaving the house open for the departure of the guests was not sufficient evidence to justify the inference, and there was no proof of any sale of beer or any attempt to do so on Sunday morning. The charge was for opening the house on Sunday morning for the sale of beer, but the house had not been closed on the preceding Saturday night; there was no evidence of serving any one; the house was merely open to allow the guests to depart. [CROMPTON, J.—The house and doors being open was evidence for the justices, though perhaps the collecting the cans looked a good deal like the last act of the night.]

Boden, Q.C. in reply.

WIGHTMAN, J.—I can't say that there is not some evidence. I don't know that I should have come to the same conclusion; but unless we see clearly there is no evidence we should not interfere.

CROMPTON, J.—I own I think the justices were right in their finding. Certainly on these facts there is some evidence to justify it. *Conviction affirmed.*

Friday, Feb. 14.

PARKER v. GREEN.

*Public-house—Permitting persons of bad character to assemble therein—Licences—Witness—9 Geo. 4, c. 61—14 & 15 Vict. c. 99.*

*Twenty-four prostitutes and fifty men remained at the bar of a public-house for an hour or more. The women were disorderly, and some of them swearing. At a later hour the same evening, fifty prostitutes and sixty men were there; some of the prostitutes being the same as were there at the earlier part of the evening. Several of the same prostitutes were proved to have been in the same house on other evenings. The deft. was present on these occasions:*

*Held, that this was sufficient evidence of knowingly permitting and suffering persons of notoriously bad character to assemble and meet together in the house, contrary to the Excise licence granted under 9 Geo. 4, c. 61:*

*Held, also, that an information for such offence was a criminal proceeding, and that the deft. was not admissible as a witness upon the hearing of it.*

Case stated under the 20 & 21 Vict. c. 43.

At a petty sessions holden at the Guildhall, Plymouth, on the 16th May 1861, an information preferred by Thomas Green, an inspector of police for the said borough (the resp.) against John Parker (the app.), under the 31st section of 9 Geo. 4, c. 61, charging that the said J. Parker, on the 13th May 1861, at the borough aforesaid, being a person duly licensed to sell excisable liquors by retail, in his house and premises there situate, did unlawfully and knowingly permit and suffer divers persons of notoriously bad character to meet and assemble together in his said house and

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premises, against the tenor of his licence and contrary to the form of the statute, came on for hearing before us, the undersigned, being two justices, &c., and upon such hearing the app. was duly convicted, and we adjudged him guilty as of a first offence against the provisions of the said Act, 9 Geo. 4, c. 61, relative to the maintenance of good order and rule, and to forfeit and pay the sum of 5*l.* and 16*s.* for costs, and in default of payment and sufficient distress we adjudged the said app. to be imprisoned in the goal of Plymouth aforesaid for one calendar month, unless the said several sums, and all costs and charges of the said distress should be sooner paid. And the app. being dissatisfied, &c., we do hereby sign and state the following

## CASE.

At the general annual licensing meeting for the said borough of Plymouth, held on the 15th Sept. 1860, a licence was granted to the app. to authorise and empower him to keep an inn, alehouse, or victualling house at the sign of the Queen's Hotel, situate in George-street, in the said borough of Plymouth, which is one of the most public thoroughfares in the said borough, and by the said licence (which is in the form prescribed by the said Act 9 Geo. 4, c. 61) it is provided, amongst other things, that the app. do not knowingly permit or suffer persons of notoriously bad character to assemble and meet together therein, which licence was to continue in force from the 10th Oct. then next until the 10th Oct. then next following.

Three police constables of the said borough of Plymouth were then examined, and the following is the whole of the evidence adduced before the said justices, on the hearing and determination of the said information on behalf of the resp.

John Julian having been duly sworn, stated as follows:—I am one of the police officers of this borough. I know the deft.; he is a licensed victualler and keeps the Queen's Hotel in George-street in this borough; he has kept it upwards of eight or nine months. On the 13th inst. I visited his house with Daw and Elson about ten at night. I went into the bar through the door nearest to Mr. Willmott's. We all three went in the same way together. I found twenty-four prostitutes and fifty men in the bar. The prostitutes were very disorderly, some of them swearing, and one of them had been drinking, and was very much excited. I was acquainted with the faces of the women. I have seen them walking the streets with different men at different hours of the night, and I also knew they lived at brothels. We remained in the bar five or ten minutes and then left as before stated. We left Elson outside the door, and Daw and myself went away. Elson was standing between the two front doors to the bar. The gentlemen go in at the lower door, and the women at the front. Daw and myself remained away about an hour, and then returned to the Queen's hotel. I saw Elson standing just where we had left him. We had some conversation with Elson and then went into the bar again. I then counted thirty prostitutes, fourteen of whom were there on my first visit at ten o'clock, and sixty men. The women and men were mixed together, laughing, talking and drinking; I saw no eating. They were rather closely packed together, and there was rather more than less than ninety persons. We remained in the room from five to ten minutes, and we all three left. Elson remained outside between deft.'s two doors as before; Daw and myself left and returned at 11.45. We saw Elson just where we had left him. We did not go into the bar, but remained outside with Elson till twelve o'clock, and at that time and within fifteen minutes before, I saw sixteen of the women come out, whom I saw in the bar at eleven o'clock. There is a large counter round the bar. They stood outside the counter; there are no chairs or seats in

the bar outside the counter. The deft. was in the bar on each of my visits. On the Saturday night previous and on other occasions within these last two months I had seen these women in the same bar in the deft.'s presence.

Two other policemen corroborated the above evidence.

The attorney for the app., after tendering the app. as a witness, and his evidence being rejected, addressed the bench on his behalf, and in the course of his address took the following objections:—

1. That there was no evidence upon which we, the justices, could convict the app. of having knowingly permitted or suffered persons of notoriously bad characters to assemble and meet together in the said house.

2. That prostitutes were not persons of notoriously bad character within the meaning of the licence granted to the app.

3. That there was no evidence that they assembled or met or were there for any other purpose than for refreshment.

4. That evidence of what took place at the app.'s house on any other previous occasions was improperly received and ought to have been rejected.

Having heard and considered the said case, we are of opinion and find that the app. keeps the said dwelling-house under the licence before stated. We also find that on the night in question, viz. 18th May 1861, fourteen prostitutes did meet and assemble together in the app.'s house, together with a number of men. We also find that the app. knew the women were prostitutes, and that he knowingly permitted and suffered them to assemble and meet together in his house. We further find that the prostitutes remained in the app.'s house longer than was necessary for taking refreshment, and that they assembled and met there for the purposes connected with their vocations as prostitutes. And we are of opinion and find that they are persons of notoriously bad character within the meaning of the app.'s licence. We received the evidence that the same prostitutes, or some of them, who met at the app.'s house on the 13th May had been seen in his house on previous occasions, on the ground that it tended to prove the app.'s guilty knowledge of the bad character of the persons there on the night in question.

We unanimously gave judgment against the app. as before stated. And hereupon we request the judgment of the Court of Q. B. whether our determination upon the facts and grounds previously stated, is or is not erroneous in point of law, or what further should be done in the premises.

W. LUSCOMB, Mayor.

DAVID DEARY.

*Welsby* in support of the conviction.—The app. was licensed to keep an ale and victualling-house, under 9 Geo. 4 c. 61, and the licence empowered him to sell by retail excisable liquors and to permit the same to be drunk or consumed on his premises, "provided that he (among other things) do not knowingly permit or suffer persons of notoriously bad character to assemble and meet together therein." Sect. 21 imposes penalties on persons convicted of "any offence against the tenor of the licence." Under this section the app. was fined 5*l.* for permitting persons of notoriously bad character to meet and assemble in his house. In support of the information it was proved that, on one occasion, at ten p.m., twenty-four prostitutes and fifty men were in the bar, the women very disorderly and swearing; and at eleven p.m. the same night there were thirty prostitutes and sixty men, and they remained there some time, much longer than necessary for the purpose of taking refreshment. [CROMPTON, J.—In *Reg. v. Oddy*, 2 Den. C. C., 5 Cox C. C. 210, it was held, that, upon a charge of feloniously receiving stolen goods, the possession of other stolen goods not connected with the immediate charge is not

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admissible as evidence of guilty knowledge. So here it is no more than evidence of bad character that the app. had been guilty of a similar offence a few days before.] No: this case goes further; it was proved that the same prostitutes, or some of them, were present on both occasions. As to the second point, the app. was rightly excluded from being a witness. This was decided in *Cutell v. Ineson*, 27 L. J. 167, M. C., where it was held that the deft. was not an admissible witness on an information for unlawfully using engines for the purpose of taking game, under 1 & 2 Will. 4, c. 32 s. 23.

*Lopes* for the app.—Prostitutes are not persons of notoriously bad character within the meaning of the licence. The provision was pointed at thieves and persons of criminally bad character. In *Greig v. Bendino*, 27 L. J. 204, M. C., this court held that a magistrate was not bound to convict a person of keeping a disorderly house on evidence that twenty prostitutes and a number of men were in the house together for some time after he had been warned, and knew that the women were prostitutes. [WIGHTMAN, J.—The enactment is not to be held to be a denial of provisions or refreshment to persons of that class, but to prevent them assembling together.] A meeting and assembling together implies a common design; here there was no evidence of anything of the kind. As to the second point: the app. ought to have been admitted as a witness under the 14 & 15 Vict. c. 99. This information was not a criminal proceeding. The offence was only a breach of a condition in the licence; it was not made an offence by direct enactment. In bastardy and fiscal cases the deft. is admissible: (*The Attorney-General v. Radloff*, 10 Ex.; *Legg v. Pardo*, 9 C. B., N. S., 298.)

WIGHTMAN, J.—I am of opinion that the conviction ought to be affirmed. The evidence before the magistrates was, in my judgment, sufficient to make out the case. The only point on which there could be any doubt is the last one. This appears to me to be a criminal proceeding within the 14 & 15 Vict. c. 99. On sect. 31 of 9 Geo. 4, c. 61, it seems clearly a criminal offence. It says: "Any person licensed under this Act who shall be convicted of any offence against the tenor of the licence to him granted shall be adjudged to be guilty of a first offence against the provisions of this Act relative to the maintenance of good order and rule," and for that the punishment is a fine; and in a later part of the same section it is enacted that "if proof shall be adduced to the satisfaction of the justices that such person so charged is guilty of the offence with which he is so charged, such person shall be adjudged to be guilty of a third offence against the provisions of this Act, and to pay a fine." It seems to me clearly to be a criminal offence, and I therefore think the public-house keeper was properly excluded from being a witness.

CROMPTON, J.—I am of the same opinion. As to the admissibility of the evidence of what took place on a former occasion at the app.'s house, I had some doubt, but Mr. Walsby removed that doubt. I think there was some slight evidence of knowledge that the women were prostitutes, and of notorious bad character. As to the other point, I am clearly of opinion that the magistrates were right in refusing to admit the app. as a witness. I do not mean to say that punishment is necessary to make it a criminal proceeding. This was a criminal, and not a civil proceeding. Bastardy has been treated as a civil proceeding, and so when a remedy has been given to the party aggrieved. This, however, is an offence against public order. In *The Attorney-General v. Radloff*, it was an information at the suit of the Crown for excise penalties. In the present case the convicted person is to be punished for the sake of the public, according to the magnitude of the offence. *Conviction affirmed.*

Saturday, Feb. 15.

PETHERICK (app.) v. SARGENT (resp.)  
*Beerhouse—Keeping open—Selling beer—Evidence—Gift of beer.*

A. B. went to a beerhouse; the door was shut; the landlady said she could not draw, it was past the hour, but she said she would give A. B. a drop of beer, which she did. She refused money, but said, "You may send me some greens," which was done: Held, that there was no evidence to justify a conviction for selling beer after the hours prescribed by the Act for closing.

This was a case stated under 20 & 21 Vict. c. 43.

At a petty sessions holden at the Stanhope Arms Inn, in Holworthy, in and for the division of Holworthy, in the county of Devon, on Thursday, 18th April 1861, an information, preferred by John Sargent, hereinafter called the resp., against Arthur Petherick, hereinafter called the app., under sect. 15 of the 3 & 4 Vict. c. 61, charging for that he, the said Arthur Petherick, on the 27th March 1861, at the parish of Holworthy aforesaid, being then a beerhouse keeper, and duly licensed to sell beer, ale and porter by retail, to be drunk on the premises there situate, under the provisions of the statute in that case made and provided, did keep his house open and did sell to one Judah Hookin a certain quantity of beer, to wit, one pint, after the hour of ten o'clock at night, to wit, at fifteen minutes after eleven of the night of the same day, the said parish of Holworthy and the said house and premises not being within the bills of mortality, nor within any city, cinque port, town corporate, parish, or place, the population of which, according to the last parliamentary census, exceeds 2500 persons, and not being within one mile, measured as directed by the statute in such case made and provided, from any polling place used at the last election for any town having the like population and returning a member or members to serve in Parliament, contrary to the statute in such case made and provided, was heard, and the justices, after sundry adjournments, did adjourn the said information for further hearing until Thursday, the 20th June 1861. The said information was heard and determined by the justices, the said parties respectively being then present, and upon such hearing the app. was convicted of the said offence, being the second offence within two calendar months, as was duly proved, and he was adjudged to forfeit and pay the sum of 5*l.* for his said offence, and 1*5s.* for his costs, and if the said several sums were not paid within seven days the same to be levied by distress and sale of the goods and chattels of the said app. And whereas the said app. being dissatisfied with such determination upon the hearing of the said information as being erroneous in point of law, applied to the justices to state and sign a case setting forth the facts and grounds of their said determination as aforesaid for the opinion of this court, &c.

CASE.

Upon the hearing of the said information, on the 18th April 1861, the following evidence was taken:—

William Hill deposed that he was a policeman stationed at Holworthy. On the 27th March he was on duty about eleven o'clock at night; he received information that a woman had gone into Petherick's, the Market-house Inn, with a jug; he went and stood at the inn door, and saw a woman come out; he asked her what she had, and took up the corner of her shawl, and said, "What have you there?" She allowed him to taste what she had in the jug; it was beer. He saw her come out of the inn, but did not ask her where she got it, or who served her. In cross-examination he said, "She did not say who gave it; she said it was very hard she could not buy a drop of beer without being stopped."

Judah Hookin deposed that she was at the Lady-day market. After returning from market she went

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to Petherick's, the Market-house Inn, for some beer. When she came the door was shut; she went in, and did not think it was so late as it was. She asked for a pint of beer, and put down 2d. Mrs. Petherick said she could not draw it, it was past the hour; but said she would give me a drop of beer; she would not have the 2d. Mrs. Petherick said, "You may send me in some greens." Witness gave her the greens which paid for the beer, and stated that if she had not had the beer on the Wednesday she should not have brought the greens on Friday. The value of the greens was 1d., or a little more. Witness merely picked them for Mrs. Petherick, because she gave her the beer. Gave the greens to Mrs. Petherick's daughter, and told her "her mother would know what it meant."

John Hockin was called by the app.—He swore that he was waiting for his mother. He heard the clock strike ten shortly after his mother came home from market; it was not half-past ten when his mother came home with the beer.

The questions for the opinion of the court were whether, on the facts stated, the conviction was right or wrong.

The 15th section of the 3 & 4 Vict. c. 61, prohibiting—

Firstly, having or keeping the house open for the sale of beer or cider within the prohibited hours.

Secondly, selling or retailing beer within the prohibited hours.

Thirdly, suffering beer or cider to be drunk or consumed in or at such house within the said prohibited hours.

If the court should be of opinion that the said conviction was legally and properly made, and the app. was liable as aforesaid, then the said conviction to stand; but if the court should be of opinion otherwise, then the said information is to be dismissed.

Taylor, for the app., contended that there was no selling or keeping open the house; both these offences were distinctly negated by the facts set forth in the evidence. The door was shut, and what occurred was no selling.

WRIGHTMAN, J.—The evidence here did not justify the conviction. Whether or not it was a gift, no fraud was intended, and there was nothing which amounted to a selling.

CROMPTON, J. concurred. *Conviction quashed.*

Feb. 15, 17 and 22.

BRAY (app.) v. SOMERS (resp.)

*Churchwarden—Continuing in office till successor is sworn—Signing jury-lists—Responsibility.*

*A churchwarden continues in office till his successor has made the statutory declaration accepting office.*

*App. was, in the years 1857, 1858 and 1859, duly elected churchwarden, and subscribed the statutory declaration. In 1860 another person liable to serve was duly elected, but did not subscribe the declaration, and did not perform the duties, and on each election taking place app. refused to sign the jury-lists and to continue to act in the office of churchwarden:*

*Held, that he was bound to sign such list, and to act until his successor was duly sworn.*

This was a case under 20 & 21 Vict. c. 43. An information was preferred by James Somers, the high constable of the hundred of Lesnewth, against William Bray, for that he the said W. Bray had, as churchwarden of the parish of Trenegeles, neglected to sign the list of jurors for the said parish for the present year 1861, and after hearing the parties and the evidence adduced by them, the justices adjudged that the said W. Bray should be fined the sum of 5*l*. And the said W. Bray, alleging that he is dissatisfied with the said determination, as being erroneous in

point of law, did apply to the said justices to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of the Court of Q. B.

#### CASE.

The deft. having on 30th Sept. 1861 appeared upon summons before the justices to answer to the said information, it was thereupon proved on the part of the said complainant, that the said W. Bray was in the year 1857 duly elected churchwarden for the parish of Trenegeles, and subscribed the statutory declaration for performing the duties of the said office. That in the year 1858, and again in the year 1859, he was similarly elected, and on each of the two last-mentioned occasions, again subscribed the declaration accepting office. That in the year 1860 Mr. Richard Chapman, a person liable to serve the office of churchwarden for Trenegeles, was duly elected a churchwarden of that parish, but did not subscribe a declaration for performing his duties as churchwarden, and that he had not in fact performed such duties. That except as aforesaid, no person has since Easter 1859 been elected into and accepted the office of churchwarden for Trenegeles. That the said W. Bray has not done any official act since the expiration of the year 1859–60, and has at all times subsequently refused to do any act as churchwarden, contending that he was not bound to fill the office of churchwarden longer than during the one year for which he was last elected; whereupon the justices (knowing the great importance of the jury-lists to the due administration of justice, and that such lists could not be received and certified by the justices as true lists of all such persons within the respective parishes of the division of Lesnewth as were by law liable to serve on juries, unless such lists were attested and subscribed by those officers who are required by the statute of 6 Geo. 4, c. 50, to attest and subscribe the same) did adjudge and determine that the said W. Bray was still a churchwarden for the said parish, and was bound to act as such until his successor should be appointed and duly qualified by subscribing the proper declaration, and that he ought to have signed the said jury-list.

If the court should be of opinion that the said W. Bray was bound to sign the said jury-lists according to 6 Geo. 4, c. 50, s. 45, then the information should be confirmed; but if the court should be of a contrary opinion, then the said information to be quashed.

J. Walter Smith for the resp., in support of the conviction.—The question is, whether the app. was bound to act under the circumstances stated. The outgoing churchwarden continued in office until his successor was sworn; this is the rule of all annual offices: (18th Canon, 5 & 6 Will. 4, c. 62, s. 9; *Foot v. Prowse*, 1 Str. 625.) No doubt it is a hardship, but if the outgoing churchwarden is not still the churchwarden, the consequence is that there is no churchwarden. The new churchwarden is not *de jure* in the office till he is sworn, though perhaps for some purpose he may do certain acts before he is sworn. [WRIGHTMAN, J.—It seems monstrous to hold a man liable to serve for any length of time because another man refuses. If Chapman could be compelled to act, he ought to be.] (*Anon.* 1 Vent. 247; *Ilex v. Whitechurch*, 7 B. & C. 573; *Re v. Marsh*, 5 A. & E. 468; *Garrington v. Holy Trinity*, Bur. Set. Cas. 30, 240.)

Collier, Q.C. for the app.—The moment the new churchwarden is elected he is in the office, and the taking of the oath is not a condition precedent; he is in as soon as he is elected, and may then perform his functions; otherwise the consequence would be that a man may be saddled with the office for life, for the inhabitants may choose a successor who will never qualify. [CROMPTON, J.—Has he not a right to put the law in force, and make them elect a proper person?] The ecclesiastical courts will compel a man to

be sworn. The rule as to a tithing-man seems to show that the office lasts only till a successor is elected: (*Rez v. Inhabitants of Corfe Mullen*, 1 B. & Ad. 211; *Woodcock v. Gibson*, 4 B. & C. 462; Gibson's Codex. canon 89, p. 215.) The statute of Hen. 8 overrides the canon, and a breach only renders him liable to the censure of the ecclesiastical court: (Rogers' Ecclesiastical Law.)

*J. Walter Smith* in reply.—The case in Ventris is referred to in the case of 1 B. & Ad., and not spoken of as an authority: (*R. v. Marsh*, 5 A. & E. 468; 5 & 6 Will. 4, c. 62, s. 9; 1 Cur. 447.)

*Cur. adv. vult.*

**Feb. 22.**—WIGHTMAN, J.—This case was argued before my brother Crompton and myself. The case of the app., in being obliged to continue in the office of churchwarden, because the successor duly elected and otherwise qualified refuses to be sworn or to make the statutory declaration, appears a case of so much hardship that we should have been well disposed to have given judgment in his favour if we could have done so consistently with the authorities. The question is, whether the outgoing churchwarden, whose year of office had expired, may be considered as continuing in office until a successor is not only elected, but is sworn, or has made the statutory declaration. The 118th Canon says, the office of churchwarden and sidesman shall be reputed to continue until the new churchwarden who shall succeed be sworn. The necessity for swearing a churchwarden in order to enable him to act *de jure* is recognised by several authorities in the courts of law as well as in the Ecclesiastical Courts. In the Anon. case reported in Ventris 267, it is said that a churchwarden may act before he is sworn; but that is the only case which we are aware of to the same effect, and this authority upon the point is greatly weakened by the observation of Lord Denman in *Rez v. Marsh*, 5 A. & E. 476. In the case of *Foot v. Prowse*, 1 Strange, 625, King, C. J. compared the case of aldermen, where they are annually elected, to the case of constables and other annual officers, who are good officers after their year is out, and until another is elected and sworn. In the case of *Rez v. The Inhabitants of Whitchurch*, 7 B. & C. 573, it was held by the court, in favour of the ancient certificates purporting to be made by the churchwardens and overseers, that the court would presume that the churchwarden was sworn before the certificates were made, apparently considering the taking of the oath not necessary to make him churchwarden *de jure*. And we may observe, further, that by the 54 Geo. 3, c. 107, s. 1, it is enacted that indentures for binding poor apprentices, executed by persons acting for churchwardens of a township, hamlet, or chapelry, shall be deemed as good as if the same had been executed by a person actually sworn to the office of churchwarden for the township, hamlet, or chapelry, provided always that such person shall be duly sworn into the office of churchwarden of the parish wherein the township, hamlet, or chapelry binding such poor apprentice is contained, or into the office of churchwarden of such township or chapelry separately. In this enactment, the Legislature appears to have considered that it was a necessary qualification for the churchwarden to enable him to do the act specified, that he should be sworn either as churchwarden of the parish, or of the township, or the chapelry. It is not necessary to decide in this case whether, if Chapman had acted in the office of churchwarden, his acts might have been valid, as being those of a churchwarden *de facto*; but he never acted in any way, or took on himself the office, and, not having been sworn, or made the statutory declaration, it would appear, therefore, of necessity, he cannot be considered as acting *de jure*. It would seem to follow Bray may be considered to be in the office, as no

successor has been sworn, or done any act which would make him churchwarden *de facto*. We think we cannot relieve the app., and that, in point of strict law, he is bound to sign the jury-list. The conviction will be affirmed without costs.

*Conviction affirmed without costs.*

## ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

**Feb. 21 and March 21.**

HORNBY AND OTHERS v. THE BURIAL BOARD OF THE EXTRA-PAROCIAL PLACE OF TOXTETH-PARK.

*The Burial Acts 1852 and 1853—The 15 & 16 Vict. c. 85, ss. 11 to 37 and s. 52—The 16 & 17 Vict. c. 134, ss. 5 and 7—The 14 Geo. 3, c. 94, s. 29—The 55 Geo. 3, c. lxx., ss. 15 and 16—The incumbents of Walton-on-the-Hill, in the county of Lancaster, of St. James's Church, of St. Michael's Church, and of St. John the Baptist's Church, in Toxteth-park—The Toxteth-park new cemetery—Right to fees for burials therein.*

*Neither are the incumbents of Walton-on-the-Hill, in the county of Lancaster and of St. James's Church, of St. Michael's Church and of St. John the Baptist's Church in Toxteth-park, near Liverpool, nor is or are any one or more of them, under the provisions of the above-mentioned Acts of Parliament, the incumbent or incumbents of Toxteth-park; or entitled as such to the fees paid for burials in the new cemetery there.*

This suit was instituted by the Rev. Thomas Hornby, vicar of the parish of Walton-on-the-Hill, in the county of Lancaster; the Rev. Lewis Frederick Thomas, incumbent of St. James's Church, Toxteth-park, near Liverpool; the Rev. William Clementson, incumbent of St. Michael's Church, Toxteth-park, aforesaid; and the Rev. James Hassell, incumbent of St. John the Baptist's Church, Toxteth-park, aforesaid. The bill prayed a declaration that the p'ts. were entitled by themselves or their curates, or such duly qualified persons as the p'ts. might authorise to perform the duties, to exercise all rights and authorities for the performance of religious service in the consecrated portion of the said Toxteth-park Cemetery, over the remains of the parishioners of the said parish of Walton-on-the-Hill, or of inhabitants of the said district of Toxteth-park, who were or should be buried in such consecrated ground; and that the p'ts. were entitled to receive the same fees in respect of such burials as last aforesaid, as they had previously enjoyed and received in respect of burials in the said cemeteries, of or attached to the said churches of the three last-named p'ts. The bill also prayed an account of the fees received by the defts. for such burials as aforesaid, being fees to which the p'ts. or some or one of them were or was entitled; an account of like fees and dues and perquisites for the erection of monuments or tablets, &c.; for an injunction, a declaration of the p'ts.' rights with reference to the defts.' cemetery under the Burial Acts in the bill mentioned, and for a receiver.

By the 18th paragraph of the bill the p'ts. stated that, for the purpose of avoiding any questions amongst themselves, they had mutually agreed with each other, that all fees, dues and perquisites to which they or any of them were or was or should be entitled in respect of burials in the said Toxteth-park Cemetery, should be divided between themselves while they respectively held their respective incumbencies in certain specified proportions; and also that they or any of them, or any duly qualified clergyman, nominated in writing by any of them, might perform the burial service in such cemetery, either by original right or as a

proper substitute, pursuant to the provisions of the 15 & 16 Vict. c. 85.

The facts of the case, so far as a detailed statement of them is material to this report, will sufficiently appear from the judgment of the M. R., *infra*. The following, amongst the other sections of the above-mentioned Acts of Parliament, were cited in the arguments, and specially read and commented upon by the M. R.:

The 15 & 16 Vict. c. 85, s. 32, by which it is enacted—"that from and after the consecration as aforesaid of any burial-ground provided under this Act (except any portion thereof intended not to be so consecrated), or where all or any part of such burial-ground by reason of the same having been already consecrated shall not require to be consecrated, then from and after such time as the bishop of the diocese shall appoint, such burial-ground shall be deemed the burial-ground of the parish for which the same is provided; and where the same is provided for two or more parishes, such burial-ground shall be in law as if such parishes were one parish, and as if such burial-ground were the burial-ground of such one parish; and every incumbent or minister of the parish, or of each of the parishes (as the case may be), for which such burial-ground is provided, shall by himself and his curate, or such duly qualified persons as such incumbent or minister may authorise, perform the duties and have the same rights and authorities for the performance of religious service in the burial in such burial-ground, or in the consecrated portion thereof, of the remains of parishioners or inhabitants of the parish of which he is such incumbent or minister, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received, and the clerk and sexton of such parish, or of each of such parishes shall (when necessary) perform and exercise the same duties and functions in respect of the burial of the remains of parishioners or inhabitants of the parish of which he is clerk or sexton in such burial-ground, or the consecrated portion thereof, and shall be entitled to receive the same fees on such burials as he has previously performed and exercised and received as if such burial-ground were the burial-ground of the respective parishes of such incumbent or minister, clerk and sexton respectively, and the parishioners and inhabitants of such parish, or of each of such parishes, shall have the same rights of sepulture in such burial-ground as they respectively would have had in the burial-ground or burial-grounds in and for their respective parish, subject, nevertheless, to the provisions herein contained."

The 35th section of the same Act, by which it is enacted—"that where at the time of the discontinuance of interment in any burial-ground the fees in respect of burials therein are divided between the incumbent of the parish and the incumbent of any district parish or other ecclesiastical district, each incumbent shall have the same proportion of the fees in the burial-ground to be provided under this Act as he was entitled to in respect of interments in the old burial-ground."

And the 52nd section of the same Act, by which it is enacted—"that, in this Act the following words and expressions shall have the several meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction; that is to say—*Parish* shall mean every place having separate overseers of the poor, and separately maintaining its own poor: *Ratepayers* shall mean the persons for the time being assessed to and paying rates for the relief of the poor of the parish: *Incumbent and minister* shall, in respect of any fee made payable to an incumbent or minister under this Act, mean the clergyman who would have been entitled to the fee had the body been buried in the churchyard or burial-ground of the parish

from which it came, or in the burial-ground of the ecclesiastical district, in case such district has a burial-ground at the passing of this Act; and if any difference shall arise between two or more persons severally claiming to be the incumbent or minister under this provision, such difference shall be determined by the bishop of the diocese: *Churchwardens* shall mean also chapelwardens, or other persons discharging the duties of churchwardens: *Overseers* shall mean also any persons authorised and required to make and collect, or cause to be collected, the rate for the relief of the poor of the parish, and acting instead of overseers of the poor, &c., &c.: *Clerk* shall mean the clerk appointed pursuant to this Act by any burial board appointed under this Act."

And the 14 Geo. 3, c. 94—being "an Act for establishing a new church or chapel, erecting at Toxteth-park, in the parish of Walton, near Liverpool, in the County Palatine of Lancaster"—by sect. 29 of which it is enacted—"that there shall be paid to and into the hands of the minister of the said new intended church or chapel for the time being, for the performance of the several offices of minister, clerk and sexton there, double the fees, dues and perquisites which are usually and of right ought to be paid for every marriage, churching, burial and opening the ground for graves in the churchyard or cemetery at the parish church of Walton aforesaid; and that the minister of the said new intended church or chapel shall, from time to time, collect and receive all such double fees, dues and perquisites, and account for and pay, by two equal payments in every year, on every 24th day of June and 25th day of Dec., one moiety or half part thereof to and into the hands of the vicar of the said parish of Walton for the time being, or his agent in that behalf, to be divided amongst himself and the clerk and sexton of the said parish church of Walton, within ten days after such vicar or his agent shall have received the same, in such shares and proportions as the fees payable at the said parish church of Walton are and of right ought to be divided; and that the remaining moiety or half part thereof shall, on the said half-yearly days, be divided between the minister, clerk and sexton of the said new intended church or chapel, in such shares and proportions, as fees of the like nature and for the like services usually are and of right ought to be divided amongst the vicar, clerk and sexton of the said parish church of Walton, the first of which payments to the said vicar of the parish of Walton aforesaid, or his agent, for the use of himself and the clerk and sexton of the said parish church, and the first of which divisions to the clerk and sexton of the said new intended church or chapel, shall begin and be made at and upon such of the said half-yearly days as shall first happen after the consecration of the said intended church or chapel; and in case of nonpayment thereof, at any time or times within thirty days after either of the said half-yearly days, one equal moiety of such fees, dues and perquisites shall and may be sued for and recovered, from the minister of the said intended church or chapel for the time being, from time to time, by, and in the name of the vicar of the parish of Walton-on-the-Hill, in the county of Lancaster, by action for moneys had and received for his use."

*Selwyn*, Q.C. and *Jessel* appeared for the plts., and

The *Solicitor-General*, *Robinson* and *Baylis* (of the common law bar), for the defts.

*Selwyn*, Q.C. in reply.

Besides the sections of the Acts above particularly stated and set forth, the following were also cited in the arguments:—The 15 & 16 Vict. c. 85, ss. 11 to 37; the 16 & 17 Vict. c. 134, ss. 5 and 7; the 14 Geo. 3, c. 94, ss. 1 to 28; and the 55 Geo. c. lxx. ss. 15 and 16.



ROLLS.]

HORNBY AND OTHERS V. THE BURIAL BOARD OF TOXTETH-PARK.

[ROLLS.]

The MASTER of the ROLLS said:—This suit is instituted by the vicar of Walton-on-the-Hill, and by three incumbents of churches, situated in Toxteth-park, against the burial board of Toxteth-park, created under the Acts of Parliament relating to the burial of the dead. The bill prays a declaration that the plts. are alone entitled to perform the burial service in the consecrated portions of the Toxteth-park Cemetery, and to receive the fees for so doing. It seeks an account of such fees against the defts., and also an injunction to restrain them from interfering with the plts. in the performance of these religious observances. The Toxteth-park Cemetery was consecrated on the 17th June 1856. When this took place, the bishop of the diocese, in order, as it seems, to avoid all disputes as to fees, fixed a high scale of fees for the performance of the religious service on the burial of the dead, and recommended an amicable arrangement by which the duty of officiating at the funerals was to be performed in rotation by the clergymen having churches or chapels in Toxteth-park, and the fees divided between them. This arrangement, it appears, though not sanctioned by a vestry meeting, was acted upon for three years until the month of Nov. 1859. Unfortunately, this arrangement, not having the force of law, bound no one. Some changes took place also in the incumbencies in question. On looking into the Burial Act, it appeared to the plts. that the incumbent of Toxteth-park was entitled to receive the burial fees. Each of the plts. seems to have claimed to fill that character; and thereupon, being unable to decide that question, but in order to exclude all other persons, and assuming that Toxteth-park must have such an incumbent, and that at all events one or more of them must be such incumbent or incumbents, the plts., as they state in the 18th paragraph of their bill, for the purpose of avoiding any questions amongst themselves, have mutually agreed with each other that all fees, dues and perquisites to which they or any of them are or is or shall be entitled in respect of burials in the Toxteth-park Cemetery shall be divided between themselves, while they respectively hold their respective incumbencies, in certain specified proportions. Unfortunately, this agreement, if acquiesced in, would bind no one but themselves in their character of incumbents; and upon any vacancy occurring, the whole question would probably be mooted afresh. Neither does this arrangement between the plts. dispense with the necessity which this suit imposes on the court of determining which, if any of them, is or are entitled to the fees for burials performed in the consecrated portion of Toxteth-park Cemetery; not in order to prevent a future repetition of this suit whenever a change shall take place in the incumbency of any one of the churches or in the parish of Walton-on-the-Hill itself, but both because, without examining the claims of each, the court cannot say that either collectively or individually they sustain the character they assumed, and also because the defts. insist on having the rights of the plts. *inter se* ascertained for the purpose of having it determined whether the modern relaxation in the rules of pleading in equity enables various persons, each claiming a right against the other, to come into equity to enforce that right against the defts.; without any further determination of the question than that, if the defts. be not entitled, the right belongs to one or other of the plts. I have thought it therefore necessary for me to go into the whole question, and to state, as accurately as I can, my opinion upon the various questions raised in this suit, and which of the parties (if any) to it is or are entitled to the fees in question; and if so, in what proportions. The first question raised is, whether the district of Toxteth-park is or is not extra-parochial. It is contended, on the part of the plts., that Toxteth-park has always formed a portion of the parish of

Walton-on-the-Hill, of which the first plt. is the vicar. If it be not a portion of that parish, whatever right the other plts. may have to be termed incumbents of Toxteth-park and to take the fees received for burials in the cemetery, the vicar of Walton-on-the-Hill can have none. The evidence on this subject is not satisfactory. On behalf of the plts. the testimony of old witnesses is produced to the effect that Toxteth-park was always considered as part of the parish of Walton-on-the-Hill. A terrier of 1778 is produced, in which Toxteth-park is entered as part of the lands of Walton-on-the-Hill; the record of an action brought in the Exchequer, in the 40 Eliz., *Appynwall v. Mollyneux*, is produced, in which it appears to have been tried whether Toxteth-park was part of the parish of Walton-on-the-Hill, or, as asserted by the defts., part of the parish of Lancaster, in which, however, nothing final was determined; and various other documents and Acts of Parliament are produced in which Toxteth-park is styled part of the parish of Walton-on-the-Hill. On the other hand, a document is produced dated in 1707, in which Toxteth-park is treated as extra-parochial; and in 1835 an action was brought respecting church-rates, in which a jury found that Toxteth-park was extra-parochial, and a prohibition was founded on that verdict, which was not, at the time, questioned by any proceedings in banco, and which has since been acquiesced in and acted upon by the vicar of Walton-on-the-Hill, by refusing to allow the inhabitants of Toxteth-park to be married in the church or buried in the burial-ground of Walton-on-the-Hill, as of right, and as belonging to that parish. In particular, the first plt. on the record has always acted on this assumption during the whole period of his incumbency. If I were compelled to deal with this question on the present evidence, I should be disposed to give greater weight to the finding of the jury in a case where this point was expressly the issue to be tried by them, and where it is to be supposed that both parties to the action brought forward all the evidence that could be found to bear on the subject, than to the detached portions of evidence of a contrary tendency brought before me, and all which must, it is to be assumed, have been duly considered by the jury. But, in truth, apart from such verdict I should not think the evidence conclusive on either side, and I do not think that I ought to find the plts. entitled by the verdict in an action in which, at least, the three last were not represented. If therefore, upon the consideration of the rest of the case, I should be of opinion that the right to receive the burial fees in the cemetery of Toxteth-park depends on the question whether Toxteth-park itself be or be not extra-parochial, I should direct an issue to try that question before a jury, or summon a jury before myself for that purpose. I abstain, therefore, from any further comment on the evidence adduced on that part of the case, and proceed to consider the question of the right to receive these burial fees on the assumption that Toxteth-park forms a portion of the parish of Walton-on-the-Hill. If on this assumption the plts. are not entitled to receive these fees, any further investigation of that question would be superfluous. If, on the other hand, the right of the plts. or any of them to receive the fees should rest on this assumption alone, then it will be necessary to submit the fact of the extra-parochiality of Toxteth-park to a further examination before a jury.—I proceed, therefore, to examine the claims of the plts. to the fees, taking them *seriatim*. The fees for burials in cemeteries authorised as Toxteth-park is, under the public Burial Acts, are payable and receivable according to the mode regulated by these Acts; except so far as they are affected by local Acts relating to the place where the burials occur. Independently of the provisions by statutes, such fees are not payable or receivable. Consequently it is with reference to these alone

[ROLLS.]

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[ROLLS.]

that the claims put forth by the plts. must be considered. Properly, they must be considered under two aspects : first, what right each plt. may have under the general Acts relating to the burial of the dead which affect the whole kingdom ; secondly, what right each may have under the provisions of local Acts of the Legislature which may affect the question ; and, in considering the latter branch of the case, it will be proper to inquire what bearing the provisions of the public Acts have on the right created by the local Act in each case. I will begin with the case of the first plt. on the record, and consider what his right to receive the fees on burials are—first, as regards the general Acts, and next as regards the local Acts which apply to Toxteth-park. The public Acts of Parliament which regulate the burial of the dead are three. The first is the Act of 15 & 16 Vict. c. 85, commonly known as the Metropolitan Burial Act. This statute extends only to the metropolis, which expression is defined in the 53rd section of the Act. The second Act is that of the 16 & 17 Vict. c. 134, which, by sect. 7, extends the provisions of the first statute, with certain exceptions proper only to the metropolis, to the whole of England and Wales. The third Act is the 20 & 21 Vict. c. 81, entitled "An Act to amend the Burial Acts," the provisions of which have no bearing on the questions I have to decide. They depend upon the first two Acts, and principally upon the provisions of the first, which are by the second extended to places in England beyond the metropolis. The first ten sections are not material for the present purpose. The 11th section enacts how the burial board of the parish is to be created, and how its members are to be elected. The 12th provides how its vacancies are to be supplied. The next six sections provide how the business of the burial board is to be conducted. The 19th section provides for the payment of the expenses of the board. The 20th and 21st sections give the board power to raise money. The 22nd provides for the application of the moneys to be raised and of the incomes to arise from the burial-ground. The 23rd enacts that parishes may unite for the purpose of providing a burial-ground for the common use of such parishes, and regulates the mode of doing so, and constitute one burial board for the parishes united for that purpose. The 24th makes the burial board a body corporate. The 25th directs the burial board to provide a burial-ground for the parish or parishes, for which they are appointed to act. The next six sections confer powers on the burial board for the purposes therein specified, viz., the laying out of burial-grounds, the contracting for works and the like. The next six sections, viz., from 32 to 37, relate to the income to be derived from fees for burial and for the sale of exclusive rights of burial vaults and the erection of monuments. Of these the 32nd is the clause which specially relates to this subject, and has been the subject of much comment on both sides in the argument before me. The clause is in these words : [His Honour read the clause as above stated and continued.] The first question which arises in ascertaining the effect of this clause is the meaning to be attached to the word "parish." The second is the meaning of the word "incumbent." The word parish is defined in the 52nd section of the Act to mean every place having separate overseers of the poor, and separately maintaining its own poor. It is admitted that Toxteth-park is a place having separate overseers of the poor, and that it separately maintains its own poor ; and that it is not in that respect mixed up with any other place, or with the rest of the parish of Walton-on-the-Hill. It follows, therefore, although according to ancient boundaries Toxteth-park is and always has been a portion of the parish of Walton-on-the-Hill, still that, within the meaning of this Act, Toxteth-park is to be regarded as a distinct and separate parish, and that if it had been thought convenient to have one

common burial-ground for the whole of the parish of Walton-on-the-Hill, including in that designation the district of Toxteth-park, it would, under the 23rd section of the Burial Act, have been necessary to provide the burial-ground for Walton-on-the-Hill and for Toxteth as for two distinct parishes, and a joint burial board must have been formed, which, under the 24th section of the Act, would have been incorporated by the name of the "Burial Board for the parishes of Walton-on-the-Hill and Toxteth-park, in the county of Lancaster ;" and under the 29th section arrangements would have had to have been made between the vicar of Walton on the one hand and the incumbent of Toxteth-park, assuming such to exist, on the other, for the purposes mentioned in that section. I then turn again to the 52nd section of the Act for the purpose of ascertaining the meaning given by that Act to the term "incumbent." It is this : [His Honour read that section as above stated, and continued.] Taking these two definitions together, I am of opinion that the vicar of Walton cannot in that character claim these fees in respect of the burial of persons dying within Toxteth-park, because in this respect, as I have already observed, it is for the purposes of this Act a distinct parish from Walton. For the same reason, I am therefore of opinion that the first plt. on the record, who is such vicar, cannot, upon the facts established before me, be considered to be the incumbent of Toxteth-park, within the meaning of this Act, and for the purposes of it. He clearly is not so *de facto* ; for, since his induction into the vicarage of Walton, he has treated Toxteth-park as a place apart from his vicarage. He has not buried or married the inhabitants thereof as being dwellers within his parish. If he be the incumbent *de jure*, still the clause only provides that the incumbent of the parish shall have the same rights for the performance of religious service in the burial of the remains of the inhabitants, and shall be entitled to receive the same fees in respect of such burials, as those which he has previously enjoyed and received. Independently of the local Act, to which I shall presently refer, and which I shall consider in conjunction with this clause, the vicar of Walton has hitherto enjoyed no rights or authorities for the performance of religious service in the burials of the remains of the inhabitants of Toxteth-park, or received any fees in respect of such burials. I am of opinion, therefore, that, regarding the question solely on the construction of the public Acts, the plt. Mr. Hornby is not the incumbent of Toxteth-park within the meaning of the word as used in that 32nd section, or in that character entitled to receive the fees in question. The 35th section, however, is relied upon in his behalf ; it is in these words : [His Honour read the section as above stated, and continued.] In my opinion this section cannot assist his case, unless he were the incumbent of Toxteth-park, which in my opinion he is not, for the reasons I have already stated. There is nothing in the two other public Acts which affects this question, which rests solely on the construction of the sections of the 15 & 16 Vict. to which I have referred. It is true that this Act does not deprive the vicar of Walton of any rights which he previously had, and which he might have enforced or maintained in any court of law ; but I am of opinion, for the reasons I have already stated, that for the purposes of a cemetery established under the authority of this Act, it does not by itself give to or confer upon him any right to receive fees for the performance of the burial service in the consecrated portion of the cemetery of Toxteth-park. Whether it has any such effect by relation to any provisions contained in any local Act under which the vicar now receives burial fees, I shall notice immediately, when I am considering the provisions of the local Acts of Parliament relating to this district.—The next plt. on the record is the

incumbent of St. James's Church, which is situate within the district of Toxteth-park. This is established under an Act of the 14 Geo. 3, c. 94, entitled "An Act for establishing a new church or chapel erecting at Toxteth-park, in the parish of Walton, near Liverpool, in the county palatine of Lancaster." It recites the wants of the inhabitants for increased and improved church accommodation; it allots a piece of ground whereon a church or chapel was then erecting, and for a churchyard or cemetery, in the close called the new field or Toxteth-park, for the purpose of completing the new intended church. It appoints commissioners, enacts that the pews shall be marked, and the rents fixed thereon, at not less than 140*l.* per annum, and not to exceed 180*l.* per annum. It enacts that the seats shall be sold by auction, and the purchase-money applied in repaying the subscribers. It provides for the recovery of the rents of the seats, and also for the appointment of churchwardens, whose qualifications must be that of being a proprietor of a seat in the church, and the electors are to be the other proprietors. The minister, on the occasion of a vacancy, is to be elected by the proprietors of seats; it provides for the duties of the minister and his stipend out of the pew-rents, and provides for the mode of recovering it; and also the salaries of the clerk and sexton. The statute goes on to enact, in these words, "that no corpse shall be buried within the said new intended church or chapel, but only in the said new intended churchyard or cemetery thereunto belonging, which churchyard or cemetery is hereby vested in the churchwardens or persons acting as or in the nature of churchwardens, for the time being, who are hereby authorised and empowered to sell, dispose of and convey burial places in the churchyard or cemetery to any person or persons or their respective heirs willing to become purchasers thereof." The clause then goes on to provide for the application of the moneys so to be derived. The next clause saves all the rights of the rector and vicar of Walton. The next clause refers to the fees, and is in these words: [His Honour read the clause as above stated, and continued.] The question is, what right this Act gives to the incumbent of St. James's and to the vicar of Walton with reference to the fees for burials in the cemetery of Toxteth-park? The first observation which occurs is, that no district is expressly defined as belonging to this church or chapel; the pews and the right of sepulture are to be sold indiscriminately to all who think fit to buy, whether residing in Toxteth-park or out of it. It is not a burial-ground attached to Toxteth-park, or indeed to any defined place. It cannot be treated as the burial-ground of Toxteth-park, for it is not one in which any inhabitant of Toxteth-park has any right of being buried. From its establishment up to Sept. 1844 this church or chapel with its cemetery, except that both are situated within the district of Toxteth-park, had no more connection with Toxteth-park than with any other place that lies so near to it as the furthest extremity of Toxteth-park. It is true that on the 3rd Sept. 1844 the Queen, by order in council, under the provisions of the Church Building Acts, assigned a district to the consecrated chapel of St. James, at Toxteth-park, not, however, making it co-extensive with Toxteth-park, and leaving the burial-ground just as it was before; that is, leaving it a private cemetery in which any one might purchase the right of interment, and the profits to be derived from which were to be applied in decorating the church. Is it clear, I think, from these facts that the incumbent of this church cannot claim to be the incumbent of Toxteth-park. At the utmost he is only incumbent of a portion of Toxteth-park, set apart for ecclesiastical purposes. Many large parishes have been divided into ecclesiastical districts and incumbents given to each of those districts, but none of the incumbents,

either separately or jointly, were or could be considered as the incumbent of that parish. Is the plt. then an incumbent of an ecclesiastical district within the terms of the definition of the word "incumbents," in the 52nd section, and as such entitled as of right to the fees in question, or to any portion of them? To sustain this he must establish that he (the clergyman) would have been entitled to the fees had the body been buried in the churchyard or burial-ground of the parish from which it came. In my opinion that means such burial-ground attached to the parish or to the ecclesiastical district of which he is incumbent, as the inhabitant of that district would have a right to be interred in. It does not mean that any speculation or conjecture is to be formed whether, if no cemetery had existed in Toxteth-park, the deceased person would have bought a right of interment in the burial-ground attached to any other church. But the burial-ground of St. James's is not, and never was, the burial-ground of Toxteth-park. The next words in the clause which relate to the burial-ground of the ecclesiastical district, in case such district has a burial-ground at the passing of this Act, do not in my opinion assist his contention. St. James's, treating it as an ecclesiastical district, had no burial-ground at the passing of this Act, and has not now any burial-ground in the sense intended by this clause, if I construe it correctly. There is a burial-ground attached to the church of St. James's, but it is one in which the right of interment can only be obtained by purchase. It is in no sense the burial-ground of the ecclesiastical district defined in 1844, in which the inhabitants dying within that district have any right to be buried. If it be contended that the incumbent of St. James's ought, under the equitable construction of this clause, to be considered entitled to be kept unaffected with regard to the fees in respect of burials of remains of inhabitants of Toxteth-park which he previously received, if his cemetery had been closed, then the answer is, that the formation of the burial-ground at Toxteth-park leaves him and the burial-grounds established by the local Act exactly in the same situation as they were in before; for by the 5th section of the second Act, the 16 & 17 Vict. c. 134, it is provided that the Act "shall not extend to authorise the discontinuance of burials, or to prevent the burial of the body of any person in any cemetery established under authority of any Act of Parliament;" neither therefore on the ground that the incumbent of the church of St. James's is the incumbent of Toxteth-park, nor on the ground that the cemetery in which he is entitled to perform the service has been discontinued, or the right of burial there altered, can the incumbent of St. James's insist on the right to receive the fees paid for the performance of the burial service in the Toxteth cemetery.—The same observations apply to the vicar of Walton, so far as his interest in or connection with the church of St. James is concerned. He has a right to half the burial fees received by the incumbent of St. James's for the performance of the burial service in this burial-ground. This right can in no respect improve his position as incumbent of Walton, or make him an incumbent of Toxteth-park, and as the burial-ground is left unaffected by the Act under which the cemetery in Toxteth-park is created, he is not entitled to require to be paid the fees received for burial there. It may be, no doubt, that the burials in the cemetery erected under the Act of 14 Geo. 3 may be diminished by the establishment of the new cemetery in Toxteth-park; but this, in the absence of specific enactments, gives the persons interested in the cemetery so injuriously affected no equity to have the loss occasioned to them by the establishment of a neighbouring cemetery made good to them (even if it were established, which here it is not). If such an equity existed, it would apply equally to those persons who are interested in the application of

[ROLLS.]

HORNBY AND OTHERS v. THE BURIAL BOARD OF TOXTETH-PARK.

[ROLLS.]

the moneys paid for the right of interment there. But, in my opinion, the public Burial Acts do not apply to such cases. I am of opinion, therefore, that the second plt. on this record is not entitled to maintain this suit.

—The next plt. on the record is the incumbent of the church of St. Michael in Toxteth-park. This church was established by a local Act of 55 Geo. 3 (1815), c. 70; it is entitled "An Act for establishing a church or chapel in Toxteth-park in the parish of Walton-on-the-Hill in the county of Lancaster." It recites that John Cragg had lately bought and set apart a piece of ground in Toxteth-park for the site of a church, together with a cemetery to the same, and had conveyed it to trustees and built a church on it. It vests the property in the trustees and enacts that the church and cemetery shall be set apart for ever for the service of Almighty God according to the Liturgy and usages of the Church of England, and called the Church of St. Michael, Toxteth. The seats are vested in trustees; 100 free seats are set apart for the use of the poor, the rest are to be sold by Mr. Cragg, who is to receive the rents of them to reimburse himself his expenses in building and sustaining the church. The appointment of the minister is the private patronage of the patron of Walton. There are double fees appointed for the funeral service, one half of which is to be paid to the vicar of Walton. The 15th and 16th sections relate to the burial within the cemetery. The 15th provides that the burial places shall be vested in trustees, who are authorised to sell such places of burial for places of burial to any person willing to become the purchaser thereof; and the Act provides for the application of the money to arise from this source. The 16th section provides that one-fourth of the cemetery shall be reserved for the burial of poor who die in Toxteth-park within the circuit of one mile from the church. Except for this 16th section, the church of St. Michael would not in substance differ from the church of St. James; beyond this, that it has not hitherto been erected into an ecclesiastical district by any order in council, as has been the case with the church of St. James. It is, therefore, except as to one-fourth, a private burial-ground, the profits of which belong to private individuals, which is in no degree interfered with or discontinued by reason of the establishment of the cemetery in Toxteth-park, and to which the observations I have already made relative to the cemetery of St. James equally apply. These are not, in my opinion, affected by the right of the poor to be buried there, which is confined to those who die within a mile of the church. This is not co-extensive with Toxteth-park, nor is St. Michael's an ecclesiastical district, so that in no sense can it be considered as either a church or cemetery for the entire district of Toxteth-park, or for an ecclesiastical division of it. It is, in truth, a mere private enterprise to afford church accommodation to persons residing in the neighbourhood, whether inhabitants of Toxteth-park or not; and seeking to obtain some remuneration for so doing, from the sale of pews and church sittings and places of burial indiscriminately, to all who may wish to obtain them.

—The last plt. on the record is the incumbent of St. John the Baptist's Church, in Toxteth-park. This district was created by an order in council of the 23rd Sept. 1837, under the authority of the Church Building Acts, which enable the Ecclesiastical Commissioners to divide any parish into two or more districts for ecclesiastical purposes; the district is accordingly defined by the order in council as a portion of Toxteth-park, and the district is named "the district of St. John the Baptist, Toxteth-park." The church itself was erected by the Ecclesiastical Commissioners to afford seats to 1800 persons, of which seats 800 are free. This church has no burial-ground attached to it, the grant of the land (by Lord Sefton) having provided, as a condition, against the exercise of any such right; and

accordingly the order in council gives no such right. In truth, however, except that this church was erected by the Ecclesiastical Commissioners, and except that private burial-grounds are attached to St. James and St. Michael, there is no distinction between any of these churches, or the rights of the incumbents of them, so far as regards the question before me. They are all in the nature of chapels of ease to the parish of Walton. Assuming that parish to include the township of Toxteth-park, they confer no rights on the incumbents beyond those specified in the provisions contained in the instruments creating them.—I have now gone through the case of each of the four plts. I have stated the reasons which have led me to the conclusion that no one of them separately is of right entitled to any of the fees received for the performance of the religious service over the remains of persons dying within Toxteth-park, and interred in that cemetery. It remains to be considered whether by any combination of all, or some of them, that right can be sustained. The observations I have made in considering the case of each show that in my opinion no union of them can confer that right upon them. If the incumbent of St. James could claim the fees in respect of the burials of persons dying within the district attached to that church, and if the incumbent of St. John the Baptist could do the same with respect to the ecclesiastical district so named, then, though not entitled to receive any fees in the character of incumbent of Toxteth-park, they might have been entitled under the provisions contained in the 52nd section, under the definition of "the incumbent," and the amount to be received by them must, in case of disagreement, have then been settled by the bishop of the diocese; but such is not the case. If the plts. could make out any case individually, it would, in my opinion, only amount to such a case as is last mentioned, where the interposition of the bishop, but not that of this court, is required; but, even to that extent, the case before me fails. It is one which the Act does not touch, and possibly it is one which it was not intended by the Legislature that it should touch. As I am of opinion that the case of the plts., taken distributively and collectively, fails, it has become unnecessary for me to decide the question raised by the defts., which I noticed at the opening of these observations, and on which I made no remarks; because I thought it desirable that I should decide this case on the merits, rather than on any question of pleading, however important that question might be.

—It may be convenient that I should recapitulate shortly the view I take of this case. The fact of the parochiality, or extra-parochiality, of Toxteth-park is immaterial for the present purpose. The statute makes that district a parish, and a parish distinct from the parish of Walton. Previously to and at the time of the establishment of this cemetery, although there were several persons who were incumbents of churches within the district of Toxteth-park, there was no one person or combination of persons, who filled the character of the incumbent of Toxteth park, as defined by the Act. The incumbents of the churches within Toxteth-park, even if they were entitled to be treated as incumbents of ecclesiastical divisions of Toxteth-park, have no burial-grounds attached to such divisions, in any one of which it can be said that the remains of persons dying within Toxteth-park would have been buried, if it had not been for the existence of the Toxteth-park cemetery; and without this being established the incumbents of such churches can have no claim to participate as of right in the fees received for the performance of the religious service on the interment of bodies in Toxteth-park cemetery. I regret much the disturbance of the arrangement sanctioned by the bishop; but I have no power to compel any return to it. All that belongs to me is to consider the case made by the plts. I have done

so, and I am of opinion that they are not individually or collectively entitled to the relief they ask, and I must therefore order this bill to be dismissed.

### EXCHEQUER CHAMBER.

Reported by C. J. B. HERTLET, Esq., Barrister-at-Law.

#### APPEAL FROM THE QUEEN'S BENCH.

May 9 and June 13, 1861, and Feb. 1, 1862.

(Before POLLOCK, C.B., WILLIAMS, J., BRAMWELL, B., WILLES, BYLES and KEATING, J.J.)

#### ARCHER v. JAMES AND OTHERS.

*Truck Act*—1 & 2 Will. 4, c. 37—*Deductions from wages.*

*Deductions or stoppages were made from the wages of an artificer in the hosiery trade in respect of frame rent, machine rent, standing of frames and machines, winding the material, fines for irregular attendance, gas for lighting the factory and fire in waiting-room, amounting to about 8s. 9d. per week fixed charges.*

*Held, per Pollock, C.B., Bramwell, B. and Byles, J. (affirming the decision of the court below), that such deductions or stoppages were not illegal under the Truck Act.*

*Per Williams, Willes, and Keating, J.J., that they were.*

This was an appeal by the plt. (under the provisions of the C. L. P. A. 1854), against the decision of the Court of Q. B., refusing to grant a rule to the plt., calling upon the defts. to show cause why the nonsuit in this action should not be set aside, and a verdict entered for the plt. for the amount of all, or some of the items, in the defts.' set off, upon a point reserved at the trial.

The following is a statement of the case:—

This action was brought against the defts., who are manufacturers of hosiery goods at Nottingham, by the plt., who was an artificer in their employ before the action was brought. The declaration was for money payable by the defts. to the plt. for wages due, and of right payable from the defts. to the plt. for his work and labour, as an artificer, workman and labourer, in and about the making, knitting and preparing of woollen, worsted, yarn and cotton manufactures, by him done and performed as the hired artificer, workman, labourer and servant of the defts.: and for work and labour of the plt., in and about the manufacturing trades and occupations of making, knitting and preparing of woollen, worsted, yarn and cotton manufactures, by him done and performed for the defts. at their request; and on an account stated.

The defts. pleaded never indebted, and payment; and also a set-off for money payable by the plt. to the defts. for the plt.'s use, by the defts.' permission, of certain frames and machines, goods and chattels of the defts., and standing room for the same; and for the hire of chattels and effects, by the defts. let to hire, to the plt.; and for work done by the defts. for the plt. at his request; and for money paid by the defts. for the plt. at his request, and for money found to be due from the plt. to the defts. on accounts stated between them.

Upon these pleas issue was joined and taken.

The following is a copy of the particulars of the defts.' set-off:—

	£	s.	d.
1. Frame rent, at 1s. 9d. per week ...	14	10	5
2. Machine rent, at 4d. ....	2	13	4
3. Standing, at 3d. ....	2	0	0
4. Winding, at 1s. ....	8	0	0
5. Fines ....	1	5	1
6. Gas, at 4d. ....	1	9	11
7. Fire in waiting-room ....	0	11	3

Total £30 10 4

The plt.'s claim, which extended over a period of

four years, as stated below, was proved at the trial, to the amount of 30l. 10s. 4d., and the defts.' set-off, to the same amount, consisting of the items before mentioned, was also proved; and, at the conclusion of the evidences on both sides, upon the authority of the case of *Chawner v. Cummings*, 8 Q. B., plt. was nonsuited, with leave to move as above mentioned.

It appeared that the plt. had, from Sept. 20, 1855, until April 25, 1857, and again from June 6 in the latter year until June 4, 1859, been a framework knitter, employed in a branch of the hosiery manufacture, by the defts., who carry on their business as manufacturers of hosiery, in their own premises, at Nottingham. The plt. and other artificers worked for the defts., in the frames and machines belonging to the defts., in the said factory.

The plt.'s work consisted in making heels of stockings, with material of the defts., the plt. merely finding labour; and he was paid for his work weekly, upon the basis of 7d. per dozen heels, made by him during the week, subject to certain fixed charges, made by the defts., which are mentioned in the particulars of the set-off; and are hereafter more particularly set out and explained.

At the weekly settlements, the amount of the plt.'s work was first ascertained; then the amount of charges was deducted, and the balance paid to the plt. in cash, to which he had never made any objection.

The following are the particulars of the charges so deducted and mentioned in the defts.' set-off:—

1. A frame-rent, or sum of 1s. 9d. per week, for the use of the frames furnished by the defts. (in their own factory), and there employed by the plt. in performing his work.

2. A machine rent, or sum of 4d. per week, for the use of a machine furnished by the defts. (in their own factory) by which stockings are narrowed much quicker than formerly, and there also employed by the plt. in performing his work.

3. 3d. per week, as a remuneration to the defts., for the use, by the plt., of their factory, wherein to perform the work for them; and for the standing room of the frames and machinery therein, which the plt. worked.

4. A sum of 1s. per week for winding the yarn, which would be a necessary operation for each workman, before the yarn could be used for the purpose of manufacture; but which winding had been performed before the yarn came upon the defts.' premises.

5. Fines imposed for irregular attendance at the factory, at the rate of 4½d. a quarter of a day, for the time of absence.

6. For gas supplied by the defts. for the purpose of lighting their said factory, instead of the men lighting it themselves.

7. For firing supplied by the defts. for the purpose of heating their said factory, instead of the men heating it themselves.

The amount of work performed by the plt., during the time he was in the defts.' employ, varied from time to time, according to the state of trade, the plt. being sometimes employed for a greater, and sometimes for a smaller number of hours in the day, but the charges (with the exception of the fines) were fixed and uniform; and were made whatever the amount of earnings.

The plt. was by the weekly settlements, during the time he was so in the defts.' employment, paid the whole amount due to him, as such artificer as aforesaid, less the charges and deductions aforesaid, and for which alone, accruing during the whole service the present action is brought.

Previously to the case of *Chawner v. Cummings*, 8 Q. B. 311, it had been the established and unvarying usage in the hosiery manufactures in the counties of Nottingham, Derby and Leicester, for a century past,

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for the employer to let the frames at a rent to the person with whom he contracted, for the manufacture of his materials into goods, and to deduct the amount of frame rent from the gross price agreed for working up the materials into goods, upon settling with the workman for the same. The frames were kept in repair by the owners of them, at frequent expense. The number of frames belonging to the manufacturers, and for which therefore weekly rent had been for many years charged, was very great; and such rent was deducted from the gross earnings of the workmen, on settling with them for their wages, and it was admitted that the other deductions made by the defts. in this case were made according to the then usage of the trade, except as mentioned in the next paragraph; and that such usage was known to the plt., and that he was during the whole period aforesaid dealt with accordingly.

This work, however, has recently been introduced into factories; and in consequence the system of payment in such factories is not as yet uniform; some employers deducting charges, while others make a corresponding diminution in the rate of payments, so as to make the nominal sum net instead of gross. For example, in such case 5d. per dozen is paid for heeling, instead of 7d., as paid by the defts. The sum for which this action is brought is the total amount of the said charges or deductions which accrued, during the period of the plt.'s employment by the defts. as aforesaid. The plt. disputes the legality of these charges and deductions under the statute 1 & 2 Will. 4, c. 37; and contends that he is entitled to recover the full amount of his wages, or earnings, at the rate of 7d. per dozen; the defts. contend that the said sum of 7d. per dozen was not the wages payable to the plt. until the usual charges had been paid out of the same.

There was no written contract between the parties.

The jury found that all the deductions were according to the usage of the trade; and it was agreed that, but for the Truck Act, the accounts had all been agreed and settled between the parties, and a nonsuit was accordingly entered.

Plt. then moved the court below to set aside the nonsuit and enter a verdict for the plt. for the amount of all or some of the items in the set-off, which rule the court below refused to grant.

Notice of appeal against the decision of the Court of Q. B. in refusing the said rule was duly given by the plt.; according to the C. L. P. A. 1854.

The question for the decision of the Court of Appeal is, whether, under the circumstances, the plt. was entitled to recover in this action the said sum of 30l. 10s. 4d., or any part thereof. If the court shall be of opinion in the affirmative, then the verdict is to be entered for the plt. for that amount, or for such part thereof as the court shall direct, with costs of suit; otherwise the nonsuit is to stand.

Hayes, Serjt. (*Manley Smith* with him) for the app. the plt. below.—The question to be here considered is the construction of the Truck Act, 1 & 2 Will. 4, c. 37, and the case of *Chawner v. Cummings*. The 4 Ed. 4, c. 1, was repealed by the 1 & 2 Will. 4, c. 36, and then the Truck Act laid down the law on the subject as at present existing. It is no new doctrine for the Legislature to interfere with contracts between certain parties. There are classes which require protection beyond that usually given to the public, amongst these may be named infants and married women. The most common case of "truck" that arises is the delivering of goods to the employed instead of money, but in this case the general nature of the deduction is for the hire of goods. Nottingham, Derby and Leicester are the principal places where the hosiery trade is carried on, and they are all much affected by this practice of making stoppages or charges to be deducted from the

weekly wages of the workmen; these men are paid by piece-work, not by weekly ascertained wages; they receive credit for the amount earned, the stoppages are entered on the debit side, and the balance paid over to them. *Chawner v. Cummings* was the case of a middleman being employed, and there there was the middleman's profit; here, all the profit goes to the master. The machines, &c. are the property of the deft. the master, and are standing on his premises; and moreover three of the charges here made were not made in that case, viz. the "standing-room," the "gas," and the "fire in the waiting-room," besides which here there are fines imposed. [BRAMWELL, B.—The master says, "If the machine stands idle which I have appropriated to you, I am the loser by your not working."] Then gas and fire are clearly within the Act. Suppose, instead, the deft. had supplied candles and coals. [POLLOCK, C. B.—Suppose a master said, "I will give you so much a week, but if you live in a cottage of mine I will give you so much less."] That would not be within the Truck Act. [POLLOCK, C. B.—Then here he says, "I will give you so much, and deduct a part for the rent of the machine."] That clearly comes within the Act. The statute says the wages are to be paid to the artificer in the coin of the realm. Then, what are his wages? [WILLIAMS, J.—You say, if the master gives 10s. a week and a pot of beer and a loaf, that is good; but if he gives 15s. and deducts 5s. for goods supplied, that is bad.] The grievance here complained of is patent. It is found that the amount of work varied from time to time, but the charges were fixed and uniform; therefore the less the man has to receive the larger the percentage deducted. In the present case it was brought to 70 per cent., and evidence was given of a case in which a man had a larger amount of deductions than the amount he had earned. The man is charged the same if he is on half work as if he were on full work, and that without any fault of his; it amounts to an act of insane injustice. [WILLIAMS, J.—We have only to look to the Act of Parliament; before we might construe the contract according to its legal effect, by now we are governed entirely by the Act.] The introduction of stoppages is recent, and some masters still pay wages net; if the master chooses so to hire his men, he brings himself within the Act. In construing the Act, justice as between man and man must not be thrown aside, but must be used to throw light on the intention of the Legislature. The result of the working of this system is found to be, that if an employer has one hundred machines it is to his advantage to employ one hundred men at half time rather than to employ fifty men at whole time; it therefore increases the number of men in the trade and leads to great distress, so that the master makes deductions to nearly 100 per cent. and the parish keep the workmen. The preamble of the Act recites that it is necessary to prohibit the payment in certain trades of wages in goods, or otherwise than in the current coin of the realm. The first section enacts: "That in all contracts hereafter to be made for the hiring of any artificer, in any of the trades hereinafter enumerated, or for the performance by any artificer of any labour, in any of the said trades, the wages of such artificer shall be made payable in the current coin of this realm only, and not otherwise; and that if in any such contract the whole or any part of such wages shall be made payable in any manner other than in the current coin aforesaid, such contract shall be and is hereby declared illegal, null and void." Then the 19th section specifies the trades to which the Act shall apply. The 3rd section enacts, "That the entire amount of the wages earned by, or payable to any artificer, in any of the trades hereinafter enumerated, in respect of any labour by him done in any such trade, shall be actually paid to

such artificer in the current coin of this realm, and not otherwise; and every payment made to any such artificer by his employer, or of in respect of any such wages, by the delivering to him of goods, or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared illegal, null and void." The 4th section enacts, "That every artificer in any of the trades hereinafter enumerated, shall be entitled to recover from his employer in any such trade, in the manner by law provided for the recovery of servants' wages, or by any other lawful ways and means, the whole or so much of the wages earned by such artificer in such trade, as shall not have been actually paid to him by such his employer in the current coin of this realm." The 5th section declares that in any action for wages no set-off shall be allowed for goods supplied by the employer. The 23rd section enacts, "That nothing herein contained shall extend, or be construed to extend, to prevent any employer of any artificer, or agent of any such employer, from supplying, or contracting to supply, to any such artificer any medicine or medical attendance, or any fuel, or any materials, tools or implements to be by such artificer employed in his trade or occupation, if such artificer be employed in mining, or any hay, corn, or other provender to be consumed by any horse or other beast of burden employed by any such artificer in his trade and occupation; nor from demising to any artificer, workman, or labourer employed in any of the trades or occupations enumerated in this Act, the whole or any part of any tenement at any rent to be thereon reserved; nor from supplying or contracting to supply to any such artificer any victuals dressed or prepared under the roof of any such employer, and there consumed by such artificer; nor from making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect of any such rent; or for or in respect of any such medicine, or medical attendance; or for or in respect of such fuel, material, tools, implements, hay, corn, or provender, or of any such victuals, dressed and prepared under the roof of any such employer; or for or in respect of any money advanced to such artificer for any such purpose as aforesaid: provided always, that such stoppage or deduction shall not exceed the real and true value of such fuel, materials, tools, implements, hay, corn, and provender, and shall not be in any case made from the wages of such artificer, unless the agreement or contract for such stoppage or deduction shall be in writing and signed by such artificer." And the 25th section enacts, "that in the meaning and for the purposes of this Act, all workmen, labourers, and other persons in any manner engaged in the performance of any work, employment, or operation, of what nature soever, in or about the several trades and occupations aforesaid, shall be and be deemed 'artificers,' and that within the meaning and for the purposes aforesaid, all masters, bailiffs, foremen, managers, clerks, and other persons engaged in the hiring, employment, or superintendence of the labour of any such artificers shall be and be deemed to be 'employers,' and that within the meaning and for the purposes of this Act, any money or other thing had or contracted to be paid, delivered, or given as a recompense, reward, or remuneration, for any labour done or to be done, whether within a certain time or to a certain amount, or for a time or an amount uncertain, shall be deemed and taken to be the wages of such labour; and that within the meaning and for the purposes aforesaid, any agreement, understanding, device, contrivance, collusion, or arrangement whatsoever on the subject of wages, whether written or oral, whether direct or indirect, to which the employer and artificer are parties, or are assenting, or by which they are mutually bound to each other, or whereby either of them

shall have endeavoured to impose an obligation on the other of them, shall be and be deemed a 'contract.'" Those are the sections of the Act applicable to this case. What are wages if these are not? If it were agreed that the frame should become the property of the workman at the expiration of a given time—that would be the purchase of goods, the amount charged to be payable by instalments—is there any difference if the man hires? In the judgment of Lord Denman, C.J., in the case of *Chawmer v. Cummings*, the court seems to have attached an importance to the usage of trade to which it is in no way entitled. The observations there made as to the "winding" are not applicable; that operation is not performed on the premises, but before the yarn arrives there, and it would be equally sensible to charge a proportion of the sum for shearing the sheep. [BRAMWELL, B.—I cannot see the absurdity. Suppose I say, "I will give you 10s. a-week, minus 1s.;" or, in other words, "I will give you 9s."] The same sum is charged whether little or much is wound; therefore what might be reasonable for a large quantity becomes a scandalous imposition for a small one. The ground of the judgment in *Chawmer v. Cummings* seems to be that a frame was not a tenement, and that there had been no demise; but even if that case can be supported, there are other charges made here not included in that case; but it is contended that the whole and every part of these deductions are illegal.

*Macaulay, Q.C. (Morescother with him) for the resp. the deft. below. (a)*—This particular trade is principally carried on in those counties which have been named; there are some 30,000 or 40,000 frames employed in it, and there is no abuse committed or hardship imposed such as was intended to be remedied by the Truck Act. This is only a mode of computing the wages. It has been asked, What are the wages? 7d. per dozen is not the wages, but the basis for calculating them. [WILLES, J.—Why not say you will pay 4d., and pay it? POLLOCK, C.B.—It is desirable a man should know what he earns, he then knows what he has to spend; here it seems he pays for the machine whether he works or not. Now, if he had regular wages, he would be under any circumstances, when he worked, entitled to pay, and would not be chargeable for rent when he did not work. WILLES, J.—I can't see why the master should not give net wages, and so avoid all dispute and imputation of unfairness.] These are not deductions—nothing was payable to the plt. but the balance, which was paid in coin.

*June 14.—Macaulay, Q.C. continued his argument.*—There are different methods of carrying on the business of hosier. The object of the deduction is to have a fixed nominal price in the trade; the price per dozen paid to the men may vary, but the price for the rent of the frames never. When a man comes to ask for work the deductions for shop charges are agreed upon, and to succeed in this action the plt. must prove that 7d. per dozen was the sum agreed to be paid; but, in fact, the shop charges were a part of the consideration to be paid to the plt.; the plt., in fact, found nothing but his labour, at wages to be paid on the basis of 7d. per dozen. The set-off is not composed of deductions to be made out of the agreed value; there is nothing in the Act to control the manner of ascertaining the value of labour. A uniform rate of pay is essential. [WILLES, J.—Again, I say, why do they not give a net sum? I find no answer to that.]

*Hayes, Serjt. in reply.*—The deft. began by paying such wages, and afterwards introduced this system of deductions. It is said that the wages are larger than if they were net; no doubt they are, but the rent continues whether the work continues or not. Then it is said that this arrangement is to the men's advan-



[EX. CH.]

ARCHER v. JAMES AND OTHERS.

[EX. CH.]

tag. A stocking-machine is in value from 3*l.* to 5*l.*; compare this with the rent demanded. [BRAMWELL, B.—Suppose the plt. should have judgment, and, afterwards, A. and B. meet, and they say, Well, so much is to be paid, and so much is to be deducted, the result will be, say, 5*s.* 6*d.* per dozen, would that be all right?] Certainly, that would be net wages. [BRAMWELL, B.—What is the difference between saying, “I will pay you 5*s.* 6*d.*, or 7*d.* less 1*s.* 4*d.*?”] There is a great difference; it is paying with a thing of uncertain value. [POLLOCK, C.B.—I cannot read the 2nd and the 25th sections without thinking that this contract is a violation of the Act. To call this rent seems nonsense; it would be as reasonable to call the sum paid for the hire of a horse for a day, rent.] It has been shown that the deductions have exceeded the amount of the wages; then, if there be 7*d.* coming to the master at the end of the week, can that be called computing wages? Is it not rather a cross-demand, amounting to payment? *Bowers v. Lovelock*, 25 L. J. 371, Q. B., was a case in which there were deductions of a somewhat similar nature made, and it was not suggested that those deductions did not fall within the Act. The result of this practice with respect to letting frames is, that there are more frames than are wanted, and more men are encouraged to enter the trade than can subsist by the work.

Cur. adv. vult.

Feb. 1.—KEATING, J.—In this case the plt., an artificer in the hosiery trade at Nottingham, sued the defts., his employers, to recover an amount of wages alleged to be due, and in answer to the claim the defts. pleaded never indebted, payment and a set-off, consisting of certain charges against the plt. for the rent of frame and machines, and other charges of a similar character, which had been deducted by the defts. on the weekly settlement of accounts, and which, if such deductions were legal, would furnish an answer to the plt.'s claim. The plt. worked without any agreement in writing at the manufactory of the defts. in making heels of stockings at 7*d.* per dozen, subject to a deduction of certain fixed charges which were made every week from the amount of his work, taken at 7*d.* per dozen, and the balance only was paid to him in cash. These charges were, first, frame rent for the use of the frame with which he worked, at 1*s.* 9*d.* per week; secondly, machine rent at 4*d.* per week; thirdly, for the standing of the frames and machinery in the defts.' manufactory at 3*d.* per week; fourthly, winding the material with which he worked, at 1*s.* per week; fifthly, fines for irregular attendance, at 4*s.* 6*d.* a quarter of a day for time of absence; sixthly, gas for the lighting defts.' factory at 4*d.* per week; seventhly, fire in waiting-room: amounting in all to about 3*s.* 9*d.* fixed charges, the fines varying according to circumstances, whilst, however, the charges to the amount of 3*s.* 9*d.* per week were fixed, and the amount of work performed varied according to the number of hours during which his masters required his services. It was contended by the plt. that these deductions were illegal, as being within the prohibitions contained in the statute 1 & 2 Will. 4, c. 37 (commonly called the Truck Act), and I am of opinion he is right. In passing the statute referred to, the Legislature seems to have considered the artificer as requiring special protection in his dealings with his employers, and to have thought it right, therefore, to make the contracts between these parties one of the exceptions to the general rule that persons should be allowed to make their own contracts in their own way. The particular evil intended to be remedied (and which, notwithstanding former enactments, still prevailed) was the truck system of payment by masters of their men's wages wholly, or in part, with goods—a system manifestly to the disadvantage of the workmen, who was practically forced to take the goods at his master's valuation. In order to obviate this, the

statute, reciting that “It is necessary to prohibit the payment, in certain trades, of wages in goods, or otherwise than in the current coin, was passed:” [His Lordship read the several sections of the statute applicable to this case and continued.] The statute, therefore, seems most distinctly to provide that the whole of the wages of the artificer's labour shall be paid to him in current coin and not otherwise, without any deduction or stoppage except in the cases and under the condition referred to in sects. 23 and 24, and except he freely consents (under sect. 8) to the substitution of banknotes for such current coin. These enactments are made still more stringent by the addition of penal clauses, and what shall be deemed and taken to be “wages” of labour is declared by sect. 25 to be “any money or other thing had, or contracted to be paid, delivered, or given as a recompense, reward, or remuneration for any labour done, or to be done, whether within a certain time, or to a certain amount, or for a time or an amount uncertain.” The question, therefore, in the present case seems shortly to be this—was any other thing “than money had” by the workman, and given by the master, “as a recompense, reward, or remuneration for any labour done” by the former for the latter? In other words, were the benefits represented by 3*s.* 9*d.*, viz., the use of the frame and machines, fire, light, &c. given by the defts. to the plt. in exchange for and as part of the earnings of his labour or not? That they were, in fact, given by the master to the workman, and “had” by the workman from the master, is as unquestionable as that they are not current coin, and were not given for nothing. For what, then, were they given, except for the labour of the workman? Clearly, as it seems to me, for nothing else; the workman had nothing else to give for them but his labour, and gave nothing else. I am therefore unable to perceive how it can be successfully contended that the plt. was not paid his wages as above defined “otherwise than in money.” That he was not paid 7*d.* per dozen in money for the stocking heels was admitted; but it was said that 7*d.* a dozen did not represent his wages, but that his wages were 7*d.* a dozen, minus a proportionate part of the 3*s.* 9*d.*, and that he was therefore paid his wages in money; but this appears to me another way of saying either that the benefits represented by the 3*s.* 9*d.* were not given at all, or that if given to him it was not in exchange for his labour. If goods had been supplied by the master to the workman to the amount of 3*s.* 9*d.* instead of the use of tools to the same amount and deducted from the 7*d.* per dozen, the artificer would not have been more or less paid “otherwise than in current coin” in the one case than in the other? Or if the workman had contracted with a third person to supply him with things supplied by the master, the stocking heels would have clearly represented the value of 7*d.* a dozen, and he would have been paid that amount in money; how then can the stocking heels represent less labour or more according as the workman hires the implements for making them from one person or from another? It is quite true that if 3*s.* 9*d.* be a fair price for the hire of the frames, machine, &c., the result to the workman would be the same, whether he hired them from his master or from a stranger, just as if he the master supplied him at a fair price with goods which, if not purchased from his master, he must have bought from a stranger. Yet that is precisely what the statute forbids. Suppose the workman to make for his master only 6½ dozen stocking heels, that being about the amount which would repay the 3*s.* 9*d.* at 7*d.* per dozen, what does the master pay for them? Does he pay 7*d.* a dozen, 3*s.* 9*d.*, or does he get them for nothing? There seems to me to be no medium. But the workman makes another 6½ dozen; for them he gets precisely 3*s.* 9*d.*; will the last 3*s.* 9*d.* be wages and the first



not? or is there any other difference except that the last is paid for in current coin, and the first otherwise "than in current coin." It seems to me there is none. The defts., therefore, have paid the plt. in exchange for his labour otherwise than in money, and such is declared by the Act to be illegal; whether rightly or wrongly, it is not our province to inquire—it is sufficient if it be declared clearly and distinctly. The Legislature has thought the payment of wages by masters to their workmen of a particular class, wholly or in part in goods, or otherwise than in money, to be liable to abuse and therefore undesirable, and the present case furnishes a flagrant example of the precise evil intended to be remedied by the statute, viz., the giving by masters to their workmen in exchange for their labour, wholly or in part, things of uncertain value, instead of money, the value of which is certain. Here, by the contract, whilst the workman is forced to take that which is of uncertain value in exchange for his labour, and to take it from the master alone, the latter reserves to himself the power of determining how much wages, if any, the workman shall earn beyond the precise sum necessary to reimburse himself for the outlay of his capital, in building, lighting and heating his own manufactory and providing the necessary implements for use therein. A more complete instance of that from which it appears to have been the intention of the Legislature to shield the artificer it seems to me difficult to imagine. But, it is said, the case of *Chawner v. Cummings*, 8 Q. B., 311, has already sanctioned this species of contract and decided it not to be a violation of the statute; and undoubtedly (without for the present referring to the additional number of items of deduction we find in the present case, probably resulting from that decision) it does appear to be an authority to the extent stated; but I apprehend that, sitting in a court of error, we are bound to look at the case before us unfettered by the authority which it is the object of the present proceeding to review; and humbly conceiving that decision not to construe the statute correctly, I have been unable to convince myself that, sitting here, I ought to adhere to it. The judgment of the court in that case seems to have proceeded upon the ground that the earlier sections of the statute do not prohibit any deductions whatever. "It is to be observed (says the judgment, p. 323), that payment otherwise than in money as above prohibited, deductions, or charges, are nowhere mentioned or alluded to before the 23rd section, hereafter to be considered. Then, are these deductions in the nature of payment at all? It seems to us to be the mode of calculating the amount of wages, and nothing more." Now if it be true that the prohibitory part of the statute does not contemplate stoppages or deductions, it is extremely difficult to see why the Legislature should have enacted the 23rd and 24th sections at all; why, if it did not prohibit any stoppages, it should yet legalise some? But surely it is scarcely correct to say that the earlier sections do not mention or allude to stoppages or deductions when the 3rd section expressly refers to, and, in effect, incorporates the exceptions afterwards found in the 23rd and 24th, the words being: "And every payment made to any such artificer by his employer of, or in respect of any such wages, by the delivery to him of goods, or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared illegal, null and void." And it would have been strange indeed if it were otherwise, for the truck system, against which the statute was confessedly levelled, was itself a system of stoppage or deduction. Deduct so much for supplies, and pay the balance in cash, constituted the evil the statute was passed to remedy; nor is it easy to conceive how there could be a part payment in goods, or otherwise than in the

current coin, without a stoppage or deduction. That the deductions legalised by sections 23 and 24 are exceptions upon sects. 2, 3 and 4, and not exclusively upon sects. 5 and 6, appears to me to be clear, inasmuch as the prohibitions contained in the latter sections are confined to the set-off and sale of "goods, wares and merchandise" only, whereas the deductions legalised by sects. 23 and 24 extend to "rent and medical attendance," and the costs of educating the artificer's children. I quite agree that what is called "frame rent" in this case is not "rent" within the meaning of sect. 23, but that a deduction in respect of such, if it were "rent," could be made without a contract in writing, which was also laid down in the judgment in *Chawner v. Cummings*, appears to me not to be in accordance with the clear words of the statute. The only case cited in the argument before us, as having been decided upon this subject since *Chawner v. Cummings*, was that of *Bowers v. Lovekin*, 6 E. & B. 584. There it was conceded that the deductions were illegal, although some of them were not clearly within the 23rd section; but that case being one of deductions from the wages of a miner where there was no contract in writing, the question involved in the present case was not discussed, the only contest being whether the collier in that case was an artificer within the Act. But although not perhaps an authority upon the point now in question, the case strongly illustrates the anomaly consequent upon the judgment in *Chawner v. Cummings*, namely, that while stoppages within the 23rd section are illegal if not made in pursuance of a written contract signed by the workman, all other stoppages are legal without any such formality. The price of implements supplied to a miner, to be used in his trade, can only be deducted when that price represents their true value, and the contract is in writing; but it would appear from that judgment that the price of the use of implements supplied to a stocking-knitter, to be used in his trade, as well as gaslight, fires, &c., &c., may be deducted without either of those conditions being complied with. It is true the learned counsel for the defts. did not put the case of his clients altogether upon the ground taken in the judgment in *Chawner v. Cummings*. He relied not so much upon the argument that if these charges were stoppages or deductions they were legal, not being in the nature of payments, as that they were not really deductions from wages at all; in other words, that the defence to the action was under the general issue, rather than under the plea of set-off. But surely it cannot be contended in any view that the stoppage in respect of fines can be made available otherwise than as set-off, and if that be so, by what reasonable construction of the contract can the deduction for fines be placed upon a different footing from the other deductions? It appears to me that the contract is clearly one for stoppage or deduction from wages, a contrivance (to use the words of the 25th section of the Act) by means of which the master makes the interest of part of his capital a first charge upon the labour of his workman, instead of obtaining it from the consumer in the price of the article when sold, as in the case of a net cash payment of wages; and this, together with the additional control which the master obtains by such an arrangement over the earnings of the workman, may probably furnish the answer to a question put during the argument, namely, if 2d. per dozen fairly represents the value of the deductions (and the case does not find otherwise), why do not the defts. pay 5d. per dozen net like other masters? Our attention has been called to the consequences that may result from our decision in favour of the plt. in this case; if such were to follow upon our judgment, it would be a matter rather for the consideration of the Legislature than for a court of law; and it seems to me safer to construe

the statute without reference to the inconvenience resulting from our upholding or refusing to sanction a contract like the present. In my opinion the *plt.* is, in point of law, entitled to the judgment of the court. His Lordship said that Williams and Willes, J.J. concurred with him in this opinion.

BYLES, J.—In this case the master manufacturer employed the artificer to make stocking-heels at 7d. per dozen. The artificer was to find the labour, and to work on the master's own premises, using the master's frame. The settlements were weekly. The amount due for the artificer's work was first ascertained, then from the sum coming to the artificer was deducted, first, 1s. 9d. per week for the use of the frame; second, 4d. per week for the use of another machine; third, 3d. per week for the use of the factory; fourth, 1s. per week for winding the yarn; fifth, fines at the rate of 4½d. per quarter of a day for absence; sixth, a charge for gas; seventh, a deduction for firing. The artificer was sometimes employed, and sometimes not, but the charges, with the exception of the fines, were fixed and uniform, and made against him, whatever the amount of his earnings; so that the fixed charges might equal or exceed the amount to be received by the artificer for making stocking-heels: when he came for his wages he might have to pay instead of receive. It was alleged by the artificer that such a contract, and all settlement of account under it, are made void and illegal by the provisions of the Truck Act, 1 & 2 Will. 4, c. 37. Whether they are so invalidated or not is the question before us. An inquiry into the policy of the Act for the purpose of forming or expressing our opinion whether that policy be right or wrong is no part of our duty, but such an inquiry for the purpose of rightly interpreting the Act, and giving full effect to the true intention of the Legislature, is legitimate and material. The old Truck enactments are very numerous, and date from the year 1464, 4 Edw. 4. They were applied first to one branch of manufacture, and then in succession to others as experience and the progress of manufactures dictated, till they embraced the whole, or nearly the whole, of the manufactures of England. They established the obligation, and produced, or at least fortified, the custom of uniformly paying the whole wages of artificers in the current coin of the realm. They were finally collected and consolidated into one Act by the statute now under consideration, 1 & 2 Will. 4, c. 37. They were in truth part of a system of legislation regulating the relation of master and workman, this part of it being in favour of the workman, who is an individual deemed weaker than his master, and therefore liable to oppression. On the other hand existed regulations in favour of the master and against the workmen collectively, who in the aggregate, and acting in combination, were deemed stronger than their masters, and likely to oppress not only their own employers, but individuals of their own body. These were the laws against combinations and strikes. The laws against combinations have been swept away, except in certain aggravated cases—with what success it is no part of our business to inquire—but the Truck Act still remains, and while it remains must be honestly interpreted and carried out according to its true meaning and spirit. Indeed, the Truck Act, when passed, was a practical deduction from a principle still more general, providing, more or less, all systems of law, founded on experience; that is to say, that where two classes of persons are dealing together, and one class is, generally speaking, weaker than the other and liable to oppression either from natural or accidental causes, the law should, as far as possible, redress the inequality by protecting the weak against the strong. On this principle rests the protection thrown round infants and persons of unsound or weak mind, the protection afforded even by the common law to the victims of

fraud, and by the Court of Ch. at this day to heirs, expectants and sellers of reversions, against catching and unconscionable bargains, though entered into without fraud and by persons of full age. No doubt all such legislation or judicial interposition is, in many cases, ineffectual. But, as Lord Hardwicke observed, in *Chesterfield v. Jansen*, 2 Ves. 125, "I cannot hold that to be vain and wild which the law of all countries and all wise legislation have endeavoured at, as far as possible; happy if they could, in some degree, prevent it. *Est aliquid prodire tenus.*" To which it may be added that the efficacy of such provisions must not be estimated by the abuses actually remedied, so much as by the abuses prevented by the knowledge that such is the law. So viewed, the Truck Act must have been deemed by the Legislature which passed it a highly remedial statute, and is, therefore now, as I admit, notwithstanding the penal clauses to be construed liberally, so as to advance the supposed remedy and suppress the supposed mischief. The motive for these observations has been that it may not be supposed that the conclusion at which I have arrived was reached without due consideration of the policy of the Truck Act, or prompted by any prejudice against it. Our decision must, as it appears to me, mainly depend on the meaning of the word "wages," as used in the Act. The interpretation clause, sect. 25, defines the word "wages" as any money or other thing had, or contracted to be paid, or given as a recompense for any labour, whether within a certain time, or to a certain amount, or for a time or an amount uncertain. Any remuneration, therefore, for the labour of the artificer, whether by the day or by the piece, is wages; whatever is contracted to be paid for his personal labour is wages; and what is more than that is not wages. The price of 7d. per dozen, in the case before the court, is not merely wages so defined, but wages *plus* an addition for the work done by the stocking-frame. Now, inasmuch as the frame does not belong to the artificer, he is obliged to hire a frame; and, in the case under consideration, instead of hiring the frame of a stranger, the artificer hires it of his employer, at a fixed rent per week. The hire of the frame is paid by the employer to the artificer as part of the 7d. per dozen, according to the quantity of work done, and therefore is a fluctuating sum, but the rent of the frame is paid by the artificer to his employer according to his time, and therefore is a sum certain. Suppose the rent of the frame due to the employer and the compensation for the work of the frame due to the artificer were calculated on the same principle, at the same rate, and therefore amounted to the same sum; for example, suppose the rent of the frame due to the master to be 2d. per dozen, and the charge by the artificer for the work done by the frame to be also 2d. per dozen, then the deduction being exactly equal to the addition, it would clearly appear, I conceive, that the 2d. per dozen deducted for the use of the frame did not come out of wages. But in the case under consideration, as the rent is calculated by time, and the compensation for the use of the frame by the piece, occasionally the hire of the frame paid by the artificer may be more than the compensation for the use of the frame received by the artificer. And the excess in such a contingency is a loss to the artificer exactly as it would have been if he had hired the frame from a stranger. But then, on the other hand, occasionally the compensation for the labour is more than the rent of the frame, and the excess in that event is a profit to the artificer, just as if the artificer had hired the frame of a stranger. When the bargain is a fair one, these contingencies are calculated to balance one another. There seems to me therefore nothing in such a bargain unnecessarily contrary to the Act of Parliament. It is objected that sect. 23, which is a declara-

tory enactment, shows that wages are not to be paid or satisfied by a set-off for such things as fuel, materials, tools, implements, hay, corn, provender, for a house and rent, which deductions, so far as sect. 23 is explanatory and prohibitory, are mentioned as examples of what has already been made illegal by the earlier sections of the Act, and that so far as the proviso in that section is enabling, that proviso does not apply except in certain cases—signed contracts, that is—of which the case under consideration is not one. I admit the difficulty which arises on this 23rd section. I do not think it is answered by saying merely that the balance of what is due after stipulated deductions, are wages. For, if the word “wages” were to be understood as the net amount payable after subtracting stipulated deductions, nearly the whole Act would be frustrated. It would amount to no more than this, that the balance, after stipulated deductions of any sort, shall be paid in coin. But I think it may be a satisfactory answer to the arguments founded on the 23rd section, that deductions are admissible if they really come not out of the wages properly so called, but (as in this case they do come) out of previous additions to those wages. It is then objected that this arrangement is a transparent artifice—I do not say to evade (for that, if practicable, may be lawful), but—indirectly to infringe the statute. It may be remarked, however, that the practice does not appear to be a new one, and probably originated in cases where, before the establishment of great factories, the artificer worked in his own dwelling, and in such a case a fixed periodical rent for the frame was the only security possessed by the employer against loss to himself by his frame being improperly employed by the artificer to do other people's work. Besides, I think that enough does not appear on the case to enable us to draw the conclusion that this arrangement is a mere artifice to contract to pay, or to pay wages otherwise than in the current coin of the realm: (ss. 1 and 3.) The observation already made as to the deductions for the rent of the frame appears to me applicable to the deductions for the other machine, for the use of the factory, for the winding, for the gas and for the firing. In all these cases, as in the case of the frame, there is first an addition to the wages measured by the piece, and a subsequent deduction generally measured by time. With respect to the fines, the case is different. The statute is very obscure on the question whether a set-off be allowable; sect. 23 seems to imply that a set-off is not in general to be allowed. On the other hand, a set-off is not prohibited in terms except in the single case of a set-off for goods received on account of wages: (sect. 5.) Looking at the limited character of that prohibition, and considering that this deduction may perhaps be treated as a condition in the original contract making a portion of the wages to depend on a contingency, I feel great difficulty in saying that it is prohibited. In *Chawner v. Cummings*, a fixed deduction of one penny in the shilling was held to be lawful, and to be but a mode of calculating wages. It must be admitted, however, that the statute is very difficult to construe, and is ambiguous not only on this question of fine, but also on the other question. Yet, considering that the statute has already received in *Chawner v. Cummings* a judicial interpretation sixteen years ago, which interpretation has been acted on ever since, and that thousands of contracts and settlements of accounts have taken place on the faith of that interpretation; that if these settlements are disturbed an infinite multitude of actions will be brought and many fines become payable by persons who have trusted the authorised expounder of the statute, I think this is a case in which the maxim *stare decisis* ought to apply even in a court of error; and therefore that the judgment below ought to be affirmed.

BRAMWELL, B.—In this case we have to ascertain

the meaning of an Act of Parliament. If the words were plain it would be irrelevant to inquire as to the object or policy of the Legislature; our duty would be simply to declare what we found enacted. But there is a doubt as to the meaning of the language, in order to solve which it is proper to inquire into the probable object and policy of the statute. It may be compendiously stated to have been to provide for payment of wages in money. For this purpose it prohibits agreements for paying wages otherwise, and prohibits so paying them when a money payment has been agreed for. To insure obedience it enables the artificer to repudiate a contract and payment contrary to its provisions, and, however fairly he may have been dealt with, to enforce payment in such case over again. It is obvious that such a provision is open to two most important objections. First, it interferes with that freedom of contract and conduct which is universally recognised as of the greatest benefit; secondly, it enables an artificer, who may have requested and received payment otherwise than in money, and who may have benefited thereby and been most justly and kindly treated, to commit a great dishonesty by enforcing payment again. But great as these objections are, the Legislature has thought that a preponderating benefit was to be got by encountering them. And it may be, that the ignorance, improvidence, or poverty of the working classes, as they are called—that is, those who work for wages—is such as to require the protection the statute has provided for them. But, in order to see to what that protection extends, it is necessary to see what are the mischiefs to be guarded against, the mischiefs of what is called the truck system. They seem to me three—the first two being in principle the same. First, an employer of labour may engage a man to work for him with a promise of apparently fair wages, part or all in goods, and then cheat him by giving him inferior goods or goods overcharged. Secondly, he may engage him with a promise of fair wages, and then cheat him in the payment by insisting on his taking goods inferior or overcharged as before. Thirdly, he may supply the man with goods beyond his wages, get him into his debt, and then have an injurious control over him. These are the mischiefs of a truck system. It is vain to say that the master could cheat in cases where money wages were agreed for by withholding money agreed to be paid, and that the law would redress the one wrong as readily as the other. The answer is, that such a cheat is too barefaced and would certainly be successfully resisted, while more or less of inferiority in the quality or value of goods might be endured, and, if contested, would give rise to more doubtful injuries. Whether these mischiefs are worth the remedy, or whether the remedy is the best, is not the question. If it were, I for one should desire an opportunity for ascertaining what the results of a truck system had been before I ventured to differ from those who had considered the matter and devised the enactment, and from the high authorities who have held that legislation against such system is perfectly “just and equitable.” I refer to “Smith's Wealth of Nations,” book I. c. 10. But I believe the object of the statute was that which I have mentioned, and certainly, considering the objections to it, it ought not to be interpreted loosely, more especially as it makes an infringement of its provisions a crime. I now turn to those provisions. The 1st section provides that contracts for wages (in the trades enumerated) shall be made payable in current coin. The 2nd section prohibits engagements as to where or with whom wages should be expended. The 3rd section is that wages shall be paid in coin. The 4th section gives the artificer power to recover whatever has not been paid in coin. The 5th prohibits a set-off. The 6th a cross-action. The other sections may be called auxiliary, with certain exceptions, which I shall have to notice.

EX. CH.]

ARCHER v. JAMES AND OTHERS.

[EX. CH.]

The facts in this case are, that the defts. are hosiery manufacturers, having a factory in which are stocking-frames, and which of course is warmed and lighted by them. They find the materials, and the artificer, a framework knitter, makes the article. In this case the plt. made stocking heels, using these machines in their factory. The sum to be paid him was ascertained thus:—A sum was arrived at by putting 7d. a dozen for all the heels he had made in a week, and from that sum was deducted 3s. 9d. about, and what are called fines—4½d. a quarter of a day when the artificer does not attend. The way this 3s. 9d. is made up is, that so much is put down for the use of the machines of the defts., so much for the room in which they are, so much because the yarn has been wound, without which it cannot be worked, so much for light and fire. I have mentioned how this 3s. 9d. is arrived at, but to my mind it is wholly immaterial. The parties arrive at that figure by a particular process, and each agrees to it for particular (and probably the same) reasons satisfactory to himself; but they might arrive at it for different reasons, or for no reason, and simply fix it at an arbitrary sum. It may be as well to remark, however, that the origin and reason of it is this—that formerly the artificer was paid 7d. per dozen heels, but he then found—either as his own or by hiring—the machines, worked them in his own house, for which of course he paid, with his own fire and lights, at his own cost. I believe the charge for the winding has some similar origin. Of course fines are necessary, or not unreasonable, to prevent loss by the machines not being used. The origin of this apparently inconvenient arrangement is probably that the master and artificer could not agree on the sum to be paid net per dozen, while they could agree on what was a fair equivalent for the workman having the machines, room, fire, light, &c. found for him, instead of finding it himself. Some masters and men, however, agree at 5d. per dozen net. The only other matter to observe is, that the 3s. 9d. is fixed per week, while the quantity of work done by the artificer may vary according to his industry or health, or other causes, and also according to the quantity of work the master may think fit to give him. Now, it is obvious to my mind that this is not within any of the mischiefs I have specified. The artificer does not agree to take goods in payment of wages, nor having agreed for money is made to take goods, nor can he get into debt to his master by spending more than his wages. I suppose, indeed, he would be liable if he did not make as many heels as at 7d. a dozen came to 3s. 9d., but that is not by spending more than he earns, but by not earning. If the case is within the statute, within which provision is it? Not that in the 1st section. It says: "In all contracts the wages shall be made payable in coin only, and if payable in any manner other than in coin shall be void." Can it be said that, whatever is to be paid here is not to be paid in coin? Can it be said anything is payable in another manner? Is this 3s. 9d. a payment, or any one of its items? Impossible. Then the case certainly is not within sect. 2. Then is it within sect. 3? That says, "the entire amount of wages earned by or payable to any artificer, &c., shall be actually paid in current coin." Has the artificer earned any more wages—are any more payable to him than the sum arrived at, after allowing the 3s. 9d. and fines? I say clearly not. The question reduces itself to this, What are his wages? The 7d. a dozen, or 7d. a dozen less 3s. 9d.? To my mind clearly the latter. Can it be said his wages are 2d. a dozen more than the man who is being paid the 5d. without any deduction? Can it be supposed that, if there were no Truck Acts and no statute of set-off, he could recover 7d. a dozen? I ask, as I asked on the argument, suppose they fixed 3s. 9d. arbitrarily, without

giving a reason for it, is that within this statute? If I agree with a man that he shall work for me at certain rates, first allowing in my favour 5s., is that an agreement to pay him a sum, and part of it in that 5s.? Further, sect. 5 prohibits a set-off in an action to recover wages, "by reason of any goods, wares, or merchandise had or received by the plt. as or on account of his wages, or in reward for his labour, or in respect of any goods, wares, or merchandise sold, delivered, or supplied to such artificer at any shop or warehouse of the employer." Obviously this means goods, the property in which has been transferred to the artificer. It is impossible to say in this case that goods have been "sold, delivered, or supplied at any shop or warehouse" to the plt. within the meaning of that section. The same remark applies to the next section. Sect. 8 is necessary in consequence of sect. 3; but it is said sect. 23 shows that this case is within the statute. First, this statute, which makes the doing of what it prohibits a misdemeanor (sect. 9) ought not to be extended by implication. But it seems to me that this section shows the present case is not within the statute. It enacts that it shall not prevent the employer supplying the artificer with medicine or fuel, or materials, tools, or implements, to be by such artificer employed in his trade, if such artificer be employed in mining. Now, such a case would have been within the letter, but not within the spirit, of the statute; therefore it was excepted by this section. The miner requires tools and lights. The best for both master and artificer is that the latter should be at the expense of them—it ensures an economical use of them by him. If the master sold him those tools, as is also convenient, it would be within the letter of the Act. His wages are fixed at a certain amount. To earn them he must, indeed, buy tools, but he acquires the property in them; may sell them if he likes; may use them when much worn, or throw them aside when little worn; their goodness and condition he alone is interested in. It is true he cannot earn his wages without them, neither can he without his clothes and his food; but they are not any more than those articles a fixed sum which is here to be taken into account in estimating his wages. He is at the risk of them, and their cost to him will vary according to his care and prudence, like the cost of his clothes and food. They are, therefore, within the words of the Act, but, not being within the mischief to be prevented by it, are excepted from its provisions. But, suppose the miner and master agreed, it would be better that the latter should find the materials and tools at his own risk; and suppose they could not agree what piece wages should be paid, but that they could agree that one week with another a fair sum for candles and tools was one shilling more when the miner was diligent, less when he was not; and suppose, therefore, they agreed to continue the old piece-work prices, but start with 1s. against the miner—that is the present case—would it be within the Act? I say no. If it would, it certainly would not be within sect. 23, as no materials or tools would have been supplied to the miner, which means that the property has passed. The "medicine supplied" does not mean lent, or given to be returned; neither is that the meaning of the word as to the tools. The same reason applies to the provision as to pay, &c. An agreement to pay wages by allowing the occupation of a tenement at so much rent would be within the letter of sect. 1, but not within its spirit, and is therefore excepted; so of the rest of that section. But sect. 25 is referred to, which defines wages for the purposes of the Act to be "any money or other thing had or contracted to be paid, delivered, or given as a recompense, reward, or remuneration for any labour done or to be done;" and it is asked were the benefits represented by 3s. 9d.—viz., the use of the frame and machine, fire, light, &c.—given by the

defts. to the plt. in exchange for and as part of the earnings of his labour or not; and it is contended they were given by the master to the workman, and had by the workman from the master; that they were not given for nothing, and so were given for the labour, the workman having nothing else to give, and giving nothing else. If I am right in my opinion, though I may not be able to detect it, a fallacy lurks in this argument. I think I can show what that fallacy is, but before doing so I think I can demonstrate it is there. Suppose two men work for the same employer in the same factory, having equally the use of a frame, machine, fire, light, &c. One, A., works on the terms on which the plt. worked; the other, B., on the terms of being paid 5*d.* per dozen. Suppose each makes 22½ dozen heels in a week, each will be paid 9*s.* 4½*d.* for his work at the end of it. Now, has the employer given the use of the frame, machine, fire, light, &c. to A. more than he has given it to B., so as to be within the Truck Act? Impossible; for if so, every master who found any tool or machine or room for his workman would be within that Act. I believe carpenters always find their own tools, which are expensive in the first instance, and require renewals and sharpening. Suppose a master employed a carpenter who found his own tools at 5*s.* a day, and another whom he supplied with tools at 4*s.* 6*d.* a day. Would either, and if so which, be within the Truck Act? I don't know how the fact is, but suppose a journeyman tailor, who worked away from his master's workshop, got greater wages than one who worked at it, on account of his not occupying room, &c., would that be within the Act? It cannot be. I say, then, some fallacy lurks in this argument. What it is I will attempt to point out. Pure wages are the price of labour alone—simply labour. As soon as a tool is used capital is used, and if the tools are the labourer's he is a capitalist, and part of what he receives the profit of his capital: (Ricardo's Principles of Political Economy, c. 1, sect. 3.) This may be made plain, I think. If I employ a man to thrash my wheat at so much a quarter, and he thrashed it with a flail, what he received would be called "wages," the value of the use of the flail being inappreciable in the sum he charges. But if he used a thrashing-machine and steam-engine, what he received would not be called "wages," but the hire of the machine and engines with men to attend and work them. Now, let me not be misunderstood. I do not say that what the man with the flail receives, nor what the carpenter with his tools receives, nor what the working hosiery who finds the frames and machines, fire, light, &c. receives, are not properly called "wages," and wages within the Truck Act. They are. The labour is the principal thing, and the flail, the tools, "the frame and machine, fire, light," &c., so subordinate and ancillary that the total price is properly called "wages." On the other hand, the tool or machine may be so much the principal thing, and the labour so subordinate and ancillary, that "wages" would be an incorrect term to use to describe the total price. Nor am I proposing to draw any line where "wages" would cease to be the right word; but only to show that there is a case where the machine or tool is the principal ingredient, that the payment is principally on account of it, and therefore where the use of the machine or tool is of appreciable value, part of the payment to the labourer must be in respect of it; so that where the working man finds his own "frame, machine, fire, light," &c., part of his "wages" is in reality a compensation for the use of them. When he does not find them, he is in no sense paid for them. The man who works at 5*d.* a dozen is not, neither is the man who works at 7*d.* a dozen, with a fixed deduction of 3*s.* 9*d.* for the use of the room, and "machine, fire, light," &c. They are not "given" to him, I submit, any more than the tailor's shop is to

the journeyman; any more than the tools in the case I have supposed are given to the carpenter; nor any more than a ship is given to sailors who receive wages; nor are they to my mind in any sense the remuneration, recompense, or reward of his labour. They are things furnished to him to labour with. This reasoning also seems to me to answer the argument, "that if the workman had" contracted with a third person to supply him with the things supplied by the master, the stocking heels would have clearly represented a value of 7*d.* a dozen. So they would, and so they do when they are made by the man who makes at 5*d.* a dozen with no fixed deduction of 3*s.* 9*d.*, because they represent the value of the labour and the value of the use of the tools; and therefore the question, "can the stocking heels represent less labour only or more, according as the workman hires the implements for making them from one person or another?" may be safely answered, no; nor do they represent less compensation for the use of the "frame and machine, fire, light, &c.," in the one case than the other. Again, it is said, suppose the workman makes for his master only 6½ dozen heels in a week, what does the master pay for them—7*d.* a dozen; or does he get them for nothing? I say neither. And if he makes another 6½ dozen and gets precisely 3*s.* 9*d.*, will the last 3*s.* 9*d.* be wages and the first not? Or is there any other difference except that the last is paid for in current coin, and the other "otherwise than in current coin?" I say there is no first or last 3*s.* 9*d.* Why cannot the man who works at 5*d.* a dozen say the same thing, that "I make 22½ dozen a week, my master supplies me with frame and machine, fire, light, &c.; does he do so for nothing, or do I pay for them? Not for nothing; therefore I pay for them, but if so I pay for them in labour, and labour only. How much? Why their value, 3*s.* 9*d.* a week." That is to say, "I make 6½ dozen a week, really in payment for the frame and machine, fire and light, &c.; or I am paid for them by the supply of the frame and machine, fire and light, &c. I therefore am only paid in money for the residue 16 dozen, and I receive 9*s.* 4½*d.* I receive for the last 16 dozen I make 7*d.* a dozen, and my case therefore is the same as the plt.'s, and within the Truck Act." Again, could the deft. in this case, in calculating the cost of the stocking heels, say that the first 6½ dozen had cost him nothing for labour, but only the use of the frame and machine, fire, light, &c., and the last 16 dozen had cost him only labour, and nothing for his frame and machine, fire, light, &c.? That cannot be. Take the case of two carpenters. One, A., finds his tools, and is paid 3*s.* a-day; the other, B., has them found by the master, and is paid 2*s.* 6*d.* a-day. At the end of the week A. is paid 18*s.*; B. is paid 15*s.* Has B. worked one day for nothing, or been paid for it by the use of the tools? I say neither. If not, would it make any difference that they were paid piece-work instead of day-work, and at the end of the week received as before, 18*s.* and 15*s.* respectively? Again I say, no. If not, would it make any difference that B. was to be paid piece-work at the same rate as A., with a fixed deduction of 3*s.* a-week because the tools were furnished him? I cannot think it would—but this is the case. In truth, the contract in its entirety between the parties must be looked at. The whole of the agreement of the master is the consideration for the whole of the agreement of the workman. The master is content to find the frame and machine, fire, light, &c., and let 7*d.* a dozen be taken as the price, if the workman is content to start with a fixed deduction of 3*s.* 9*d.* The workman is content to start with that fixed deduction if the master will find the frame and machine, fire, light, &c., and let 7*d.* a dozen be taken as the price. And in

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truth neither the first  $6\frac{1}{2}$  dozen is paid for by the use of the frame and machine, fire and light, &c., any more than the second, or any other  $6\frac{1}{2}$  dozen. It might equally well be said by the plt. when he makes 22 $\frac{1}{2}$  dozen a week—that is 3 $\frac{1}{2}$  dozen daily—and receives at the end of the week 13s. 1 $\frac{1}{2}$ d., less 3s. 9d., “I have earned a sixth of 13s. 1 $\frac{1}{2}$ d., that is 2s. 2 $\frac{1}{2}$ d. each day, but I have been paid only 1s. 6 $\frac{1}{2}$ d. a day, which, at the rate of 7d. a dozen, shows I have been paid in money for about 2 $\frac{1}{2}$  dozen only, at 7d. a dozen; therefore I have made my first 1 $\frac{1}{2}$  dozen heels daily for nothing, unless paid by the use of the frames and machine, fire, light, &c.,” or to go further and say, “I work twelve hours a day, therefore I am paid nothing for the first heel and an eighth in each hour, unless by the use of the frame and machine, fire, light, &c.” In truth, no one part of his work is paid in a way different to any other. If he makes 6 $\frac{1}{2}$  dozen only in the week, and so at the end receives nothing, I say the master does not pay 7d. a dozen for them, nor does he get them for nothing. He has given to the workman the right to charge 7d. per dozen for all he makes beyond, and it might be as well said that the workman had the frame and machine, fire and light, &c., given to him for nothing as to all the heels made after the first 6 $\frac{1}{2}$  dozen. If the workman does not avail himself of the right by making more, he has not the less had it. Suppose by great skill and diligence he made 30 dozen a week, is he not better off than the man paid at 5d. a dozen? Why? By having used the right. It is true that the quantity of work to be given is at the option of the master, but it is not contended that if the master contracted to give as much as the workman could do, the case would not be within the Act, but is because he does not so contract. That makes no difference in this question. I think this answers the arguments I have referred to; but I protest against their being taken to be well founded because I cannot answer them, and I call attention to arguments in favour of the debt. which have received no answer; viz., that whatever can be argued of this case could equally be said of the man who works at 5d. a dozen, and that though the 3s. 9d. is arrived at in a particular way, the reason in the mind of the master and workmen may be entirely different, and there is no difference in principle between his case and one where 3s. 9d. had been fixed arbitrarily and without reference to any basis of calculation, save that 7d. per dozen, less 3s. 9d., was a fair price. I am therefore of opinion that this case is neither within the spirit nor letter of the Act, and that there are collateral guides in the statute to the same conclusion. Independently of that, there is the case of *Chawner v. Cummings*, decided now more than fifteen years ago. Since that decision the practice described in that case has been adopted in the three great counties of the trade, though not uniformly. In *Dalby v. The East India Assurance Company*, 15 C. B. 365, the court says, speaking of a case cited, “Though we are quite satisfied it was founded on a mistaken analogy and wrong, we should hesitate to overrule it, though sitting in a court of error, if it had been constantly approved and followed and not questioned, though many opportunities had been offered to question it.” They proceed to say it has not been acted on, but disregarded, and they overrule it. Apply these remarks to this case. The court was satisfied the decision was wrong, yet they would hesitate to overrule it if acted upon. Can this court be satisfied *Chawner v. Cummings* is wrong? As to being acted upon, it has been so to an extent that makes the consequences of reversing it frightful to contemplate. The litigation will be enormous. The temptation to fraudulent claims by artificers who have no real cause of complaint against their masters, but who can bring their cases within the present, will be irresistible and

most mischievous, and persons who have acted with perfect honesty and fairness, trusting to that decision, will find themselves, by its reversal, turned to criminals, subject to indictment (sect. 9), and liable to the oppression and extortion consequent thereon. If ever there was a case in which it was better to persist in a wrong construction of a statute (if this has been wrongly construed, which I deny), this is the case. For these reasons I think the judgment should be affirmed. I am not, that I am aware of, influenced by any prejudice against the policy of the statute, nor by any love of the character of a truck master. I think every right-minded man would wish the artificer to have his wages in the way they are most useful to him, viz. in coin, to do freely with them as he pleases; and though it may sometimes be beneficial that the master should keep a shop at which the artificer can be supplied, every reflecting person will see that it is so liable to abuse that it may be better no one should be permitted to do it. Nor have I any prejudice in favour of the practice stated in this case. I think that the 3s. 9d. being fixed, though the work given to the artificer varies at the pleasure of the master, is very objectionable. I do not suppose, with my brother Hayes, there is any contrivance by which the wages of a particular trade can be permanently depressed below their natural price, but such an arrangement gives a power to harass and oppress and practically defraud, is mischievous in itself, and is such that, I think, no well-disposed person would desire to possess.

POLLOCK, C.B.—This action is brought under the 1 & 2 Will. 4, c. 37, to recover wages alleged to be unpaid in coin, and to have been stopped or deducted by reason of a claim of the employer against the workman for room, light, heat, and the use of the implement or machine by means of which the labour of the workman was performed; and it is brought avowedly to question in this court of error the decision of the Q. B. in the case of *Chawner v. Cummings*, 8 Q. B. 311. If that case was well decided, the plt. cannot maintain the present action. The question turns entirely on the true construction of the statute referred to. There is a very old rule in the construction of statutes, that a remedial law shall be construed liberally, but a penal law strictly; and occasions sometimes arise where this rule is applicable, and may govern the construction; but whether a statute be remedial or penal, it is the duty of the court to ascertain its true construction according to the language used, and with reference to the subject about which it is used, and to give effect to that which they discover to be the plain meaning of the Legislature. The present statute is a very remarkable one: it is extremely stringent and prohibitory—it interferes with the common law rights of masters and servants in making their contracts, and it is in some respects penal; it renders null any payment, however honest, and any set-off, however just and correct, if contrary to the statute. Its general policy and object are not avowed and declared by the Legislature—it is a collection of enactments to which we are bound to give effect; but which we cannot extend, under the notion of acting in the spirit of the statute; and the question is, does the statute in any of the enactments apply to the present case? There is nothing in the case before us to throw any doubt on the *bona fides* of the contract between the employer and the artificer. We must assume that this is not an arrangement to evade or defeat the statute, but is the honest agreement between the parties; and with that assumption—which I think we are bound to make—what are the wages of the plt.? Certainly not the entire sum claimed, for that includes matter which is not furnished by him, but by the master. Is, then, the agreement anything more than a detail of the manner in which the wages shall be calculated and ascertained; or is the use of the machine a mode of payment, and the deduction of that

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from the assumed price of the articles to be considered as a stoppage of the wages? It appears to me, from the case I am now about to put, that result follows so clearly, that I do not think it necessary to go into any lengthened detailed argument beyond that. Suppose the marketable value of the article produced were made the basis of the calculation, and there were deducted from that first the material of which it was composed, then the other matter mentioned in this case, and the balance remaining were taken to be the wages due; could it be said that the workman was entitled to recover the full marketable value of the article as wages, because the value was made the basis of the calculation, and that the value of the material was a deduction from his wages prohibited by the statute? I should say very clearly no; and I cannot in principle distinguish the case before us from the case I have here supposed, and the deduction of the value of the material from the market value of the article is so obviously a matter of plain justice before you assign anything as the wages of the workman, that I cannot conceive any one acquainted with the subject entertaining any doubt about it, and the benefit the workman derives from the use of the machine, and the deduction made in consequence, appears to me to stand upon precisely the same footing. I think, therefore, that the case of *Clawson v. Cummings* was rightly decided, and the judgment of the Q. B. must be affirmed. The court being equally divided, the judgment of the court below will be affirmed.

Attorney for the plt., *Jeremiah Briggs*, 5, High Pavement, Nottingham.

Attorney for the def., *Ashwell*, Middle Pavement, Nottingham.

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. MAUNDER, and C. J. B. HENTLEY, Esqrs., Barristers-at-Law.

*Thursday, Feb. 13.*

BEERLING (app.) v. TERRY (resp.)  
*Turnpike Act—Local Act—Amount of toll—Breadth of fellies of wheels—Construction.*

Case, stated by justices of the peace for the county of Kent, for the opinion of the Court of Q. B., under the provisions of the 20 & 21 Vict. c. 43:—

On the 17th Jan. 1861 John Beerling appeared before two justices of the peace for the county of Kent, on a summons issued on the information of George Terry, for that he the said John Beerling, on the 4th Dec. 1860, at the parish of Eastry, being then and there the collector of the tolls at a certain toll-house, toll-gate, or turnpike, called or known by the name of Statenboro'-gate, then standing and being upon the turnpike-road leading from Dover, through Walder-share to Sandwich, in the said county, did then and there demand and take of the said G. Terry a greater toll than authorised by law, and contrary to the statutes in such case made and provided.

It was shown to us that by a local Act, 41 Geo. 3, c. xi., passed for altering, widening and repairing the said road leading from Dover to Sandwich through the parish of Waldershare, the trustees are authorised to take at such turnpike-gate—"For every horse, mare, gelding, or mule, drawing any coach, chariot, phaeton, calash, curricule, vis-à-vis chaise, diligence, caravan, chair, hearse, litter, waggon, wain, cart, or other carriage, the sum of 3d."

That in a succeeding section (sect. 17) in such Act, there is the following proviso:—"That when any carriage having the sole or bottom of the fellies of the wheels of the breadth of six inches or more, and drawn by not more than four horses or other beasts of draught, or when any carriage having the sole or bottom of the fellies of the wheels of the breadth of nine inches or more (provided that such fellies respectively and the

tires thereon shall be so flat as not to deviate more than one inch from a flat or level surface) shall pass through any of the said turnpikes, no more shall be demanded or taken than one half only of the tolls herein-before made payable for or in respect of the horses or other beasts of draught drawing such like carriages respectively not having wheels of the respective breadths aforesaid."

It was admitted that the complainant had passed through the toll-gate in question with a light waggon, drawn by one horse, such waggon having the fellies of the wheels of less breadth than 4½ inches at the bottom or soles thereof, and that the collector demanded and took for such horse a toll of 4½d., the same being in accordance with the table of tolls set up at such gate by the authority of the trustees of such road.

We were attended by the clerk to the trustees of the said road on behalf of the collector, and he called our attention to the 7th section of the General Turnpike Act, 3 Geo. 4, c. 126, which enacts, "that from and after the 1st Jan. 1823, the trustees or commissioners appointed by virtue or under the authority of any Act or Acts of Parliament made or to be made, for making or maintaining any turnpike-road, shall, and they are hereby required to demand and take, or cause to be demanded and taken, for every waggon, wain, cart, or other such carriage having the fellies of the wheels thereof of less breadth than 4½ inches at the bottom or soles thereof, or for the horse or horses, or cattle drawing the same, one half more than the tolls which are or shall be payable for any carriages of the same description, having the wheels thereof of the breadth of 6 inches, and for every waggon, wain, cart, or other such carriage having the fellies of the wheels thereof of the breadth of 4½ inches, and less than 6 inches at the bottom or soles thereof, or for the horse or horses, or other cattle drawing the same, one-fourth more than the tolls or duties which are or shall be payable on any carriage of the like description, having the wheels thereof of the breadth of 6 inches, by any Act or Acts of Parliament now in force, or hereafter to be passed for making or maintaining any turnpike-road, before any such waggon, wain, cart, or other carriage respectively shall be permitted to pass through any turnpike-gate or gates, bar or bars, where toll shall be payable by virtue of any such Acts."

Our attention was also called to the Act amending the last-mentioned Act, 4 Geo. 4, c. 95, sects. 5 and 6. And also to the repealed General Turnpike Act, 13 Geo. 3, c. 84, s. 23, which enacts, "that the trustees appointed by virtue or under the authority of any Act of Parliament made for repairing or amending turnpike-roads, or such person or persons as are authorised by them, shall and may and are hereby required to demand and take for every waggon, wain, cart, or carriage having the fellies of the wheels thereof of less breadth or gauge than 6 inches from side to side at the least at the bottom or sole thereof, and for the horses or beasts of draught drawing the same, one-half more than the tolls or duties which are or shall be payable for the same respectively; and for every waggon, wain, cart, or carriage having the fellies of the wheels thereof of less breadth or gauge than 6 inches from side to side at the least at the bottom or sole thereof, and for the horses or beasts of draught drawing the same, from and after the 29th Sept. 1776, double the toll or duties which are or shall be payable for the same respectively by any Act or Acts of Parliament made for amending or repairing turnpike-roads, before any such waggon, wain, cart, or carriage respectively shall be permitted to pass through any turnpike-gate or gates, bar or bars, where tolls shall be payable by virtue of any such Acts."

It was admitted that the trustees had previously to the passing of the Act 3-Geo. 4, c. 126, taken and



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collected on the road the additional tolls granted by the said Act of 13 Geo. 3, c. 84.

It was contended on behalf of the complainant that since the passing of the 3 Geo. 4, c. 126, the trustees are authorised to take in respect of carriages with wheels having the felloes of less breadth than  $4\frac{1}{2}$  inches, one-half more than the toll in respect of carriages having wheels of 6 inches breadth; that such toll was by the proviso in the local Act reduced from 3d. to  $1\frac{1}{2}$ d. per horse, and that the sum which the collector was authorised to take in respect of complainant's horse was  $2\frac{1}{2}$ d., being the  $1\frac{1}{2}$ d. and one-half more than the  $1\frac{1}{2}$ d. pursuant to the general Act of 3 Geo. 4, c. 126, s. 7; and that the collector, having taken a larger sum, had rendered himself liable to conviction.

It was contended on behalf of the app. that the local Act 41 Geo. 3, gave a general toll of 3d. for every horse drawing any coach, &c., as therein enumerated; that the proviso in the last-mentioned Act applied to any carriage with wheels having felloes of the breadth of 6 inches or more, drawn by not more than four horses, and to any carriage with wheels having felloes of the breadth of 9 inches or more, not deviating more than 1 inch from a flat or level surface, without limit as to the number of horses; that the 7th section 3 Geo. 4, c. 126, introduced a new graduated scale applicable to any waggon, wain, cart, or other such carriage, and regulated the toll according to the breadth of the wheels under  $4\frac{1}{2}$  inches and 6 inches respectively, without reference to the number of horses drawing the same, whereas the proviso in the local Act was not a general scale but a particular one regulated by the number of horses of draught, and was therefore overruled by the general Act; that the general Act of 3 Geo. 4, c. 126, operated upon the toll of 3d. given by the local Act unaffected by the proviso therein; that even if the proviso in the local Act did apply to the present case, the words "six inches or more" must be construed with reference to the provisions of the general Act and the imposition of a toll to mean an excess of six inches; that according to the complainant's construction of the statutes it would be impossible to frame a table of tolls for the road, inasmuch as the additional toll imposed by the 7th section of 3 Geo. 4, c. 126, on wheels  $4\frac{1}{2}$  inches and under 6 inches in breadth would, by such construction, amount to  $1\frac{1}{2}$ d. and a fraction of a farthing; and that the intent of the Legislature in passing the 13 Geo. 3, c. 84, s. 23, and 3 Geo. 4, c. 126, s. 7, was to increase the tolls payable under local Acts, whilst the effect of the construction sought for by the complainant would be to diminish the tolls imposed by the local Act in question, which the Legislature could not have intended.

We were of opinion that the toll taken in respect of complainant's horse was greater than authorised by law. One of us considered that if the waggon in question had had wheels with felloes of 6 inches breadth, the toll should have been the sum of  $1\frac{1}{2}$ d. only, under the local Act, and that the collector was authorised to take one half more in addition, viz.  $\frac{1}{2}$ d., making together  $2\frac{1}{2}$ d., and the other of us considered that the toll taken by the collector should have been the 3d. toll mentioned in the local Act.

We convicted him in a penalty of 2s. 6d. and costs 14s.

Wherefore he applied to us to state and sign a case setting forth the facts and the grounds of our determination for the opinion of the Court of Q. B.

*Practice* in support of the conviction.—The app. contends that the Acts impose three times the amount of toll on narrow wheels that is imposed on broad wheels; but that is not so, it only imposes twice that amount. The usual method of imposing tolls was to

put the original toll on the broad wheels and to increase the toll if the wheel was narrow; but the special Act in question reverses the usual order of things and places the original toll upon narrow wheels and diminishes it if the wheels are broad.

*Denman*, Q. C. (F. M. White with him), contra, contended that the course of legislation and the usual principles of construction showed that the app. was entitled to the judgment of the court. He cited *Pickford v. Davis*, 1 Bing. N. C. 141.

*WIGHTMAN*, J.—I think the breadth of the wheel is the essential point for the lowering of the toll, and that therefore 3d. is the sum chargeable.

*CROMPTON*, J.—I am of the same opinion. The contention is ingenious, but it is clear, on looking at the Acts, that the true meaning is that tolls should be double the amount on narrow wheels to what they are on broad—the justices, therefore, were right.

*Judgment for resp.*

Nov. 13 and Feb. 22.

REG. v. THE INHABITANTS OF LEOMINSTER.

*Poor-law—Order of removal—Transmission of notice of chargeability by post—Delivery by letter-carrier on Sunday.*

*The transmission of notice of chargeability and order of removal by the post, where by the ordinary course of such post the documents reach the hands of the parish officers of the parish to which the removal is intended to be made on the Sunday, is not void by the operation of the 29 Car. 2, c. 7.*

*The parish officers of S. having obtained an order of removal of a pauper to L., sent the notice of chargeability and copy order of removal, &c., by post to the parish officers of D. on Saturday the 25th Aug. These documents were, in accordance with the usual course of the post, delivered by a letter-carrier employed by the post-office to the parish officer of L., to whom they were addressed, on Sunday the 26th Aug.:*

*Held, a good service.*

This was a special case stated by the Staffordshire Sessions, upon an appeal against an order of removal of certain paupers from the parish of Sedegeley, in the county of Stafford, to the borough of Leominster, in the county of Hereford. The case was as follows:—

The overseers and churchwardens of the resp. parish of Sedegeley sent to the churchwardens and overseers of the app. borough of Leominster the notice of chargeability, accompanied by a copy of the order of removal, and a statement of the grounds of removal by post: (see the 4 & 5 Will. 4, c. 76, s. 79.) These documents were posted at Dudley, on Saturday, 25th Aug. 1860. According to the usual and regular course of the post between Dudley and Leominster letters posted at Dudley on Saturday arrive at Leominster and are delivered to the persons to whom they are addressed on the Sunday. The documents above mentioned were, in accordance with the usual course of the post, delivered by a letter-carrier employed by the post-office to the parish officers of Leominster to whom they were addressed, on Sunday the 26th Aug. On the 12th Sept. the said parish officers applied for, and on the 15th Sept. obtained, a copy of the depositions upon which the order of removal was made, and notice of appeal for the Michaelmas sessions and grounds of appeal were in due time given and served on the resp. parish. The grounds of appeal admitted the birth-settlement of the pauper's husband Edward Scarlett, and of his father, to be in the app. parish, as stated in the grounds of removal, and alleged, amongst other matters, that the service of the order of removal was not in accordance with the provisions of the statutes in such case made and provided, and set up a derivative settlement of the said Edward Scarlett, the pauper's husband, in the parish of Wellington, in the



county of Hereford, in right of his grandfather. At the hearing, objection was taken by the apps. that the service upon the Sunday of the notice of chargeability, order of removal, and grounds of removal, under the circumstances above stated, was altogether void under the 29 Car. 2, c. 7. On behalf of the resps., it was contended that the delivery of the documents by the servant of the post-office on Sunday was not a service within the meaning of the 29 Car. 2, c. 7, the sending by post on the Saturday being in accordance with the statute 4 Will. 4, c. 76, and it appearing that the documents would have been in sufficient time if delivered on the following Monday, and, moreover, that if the court of quarter sessions should hold the objection valid, then they should be entitled to ask that the appeal be dismissed. The chairman stated that the justices then constituting the court were equally divided in opinion upon the said objection, and that consequently the hearing of the appeal upon the merits must proceed. The apps. offered no evidence, and the witnesses for the apps. were called upon their subpoena, but they were not in attendance and did not appear, and thereupon the court confirmed the order of removal with costs, and afterwards granted the present case. The question for the opinion of the court is, whether the service of the notice of chargeability, order of removal and grounds of removal, under the above circumstances, was void. If the court should be of opinion that such service was void, then the order of quarter sessions is to be set aside, and an order made dismissing the appeal or quashing the order of removal, not upon the merits, or such other order as this court shall direct. But if the court should be of a contrary opinion, then the order of quarter sessions to be confirmed.

Nov. 13.—*Davis* appeared for the resps., and

*H. Matthews and Staveley Hill* for the apps.

The following cases and statutes were cited:—*Reg. v. Inhabitants of Slawstone*, 21 L. J. 145, M. C.; *Doe v. Roe*, 5 B. & C. 764; *Colwill v. Lewis*, 2 C. B. 60; *The Inhabitants of Asprell v. The Justices of Lancashire*, 16 Jur. 1067; *Taylor v. Phillips*, 3 East, 155; *Rawlings v. The Overseers of West Derby*, 2 C. B. 72; 15 L. J. 70, C. P.; *Reg. v. Justices of Middlesex*, 17 L. J. 111, M. C.; *M'Ilkham v. Smith*, 8 T. R. 86; *Roberts v. Monkhouse*, 8 East, 548; *Hughes v. Budd*, 8 Dowl. P. C. 315; *Ex parte Eggington*, 23 L. J. 41, M. C. 41; *Reg. v. The Recorder of Richmond*, 27 L. J. 197, M. C.; *Ell. Bl. & Ell.* 253; *Reg. v. Justices of Kent*, 18 J. P. 327; *Reg. v. Recorder of Shrewsbury*, 22 L. J. 98, M. C.; 4 & 5 Will. 4, c. 76, s. 79; 29 Car. 2, c. 7; 14 & 15 Vict. c. 105, s. 10. *Curr. adv. vult.*

Feb. 22.—WIGHTMAN, J.—The question for our decision in this case is, whether the transmission of a notice of chargeability and copy of an order of removal by the post under the 79th section of the 4 & 5 Will. 4, c. 76, where by the ordinary course of post the document reached the hands of the officers of the parish to which the removal was about to be made on the Sunday, is void by the operation of the 29 Car. 2, c. 7. We are of opinion that it is not. Admitting that the delivery of such documents in the ordinary manner would be a service of the order of removal within the meaning of the latter statute, we are of opinion that the transmission by post is not such service. If the transmission by post had been service, or equivalent to service, the provisions of the 79th section of the 4 & 5 Will. 4, c. 76, and the 14 & 15 Vict. c. 105, s. 10, would have been wholly unnecessary, and the effect of these statutory enactments is to substitute for service something which clearly would not be service within the meaning of the term as used in the 29 Car. 2, c. 7. It appears to us that it would be to put a forced construction on the latter statute to bring within its operation something which, at the time of its enactment, had not been within its terms, and

which, properly speaking, is not even by implication brought within the letter. The statutes to which we are referred do not say that the sending by post shall be service; they permit transmission by the post in lieu of service; nor is it clear that the evil or inconvenience contemplated by the 29 Car. 2, c. 7, exists in such a case. There is no desecration of the Sabbath by the employment of an agent for the special purpose of serving process; no disturbance of the privacy of the party to be served; or, necessarily, any distraction of his mind from matters of higher consideration. Our construction of the Act is put on a much higher consideration. If the letter be delivered at all on the Sunday, which must depend on the postal regulations of the district or parish, it would be delivered by the letter-carrier in the course of his ordinary round. It is optional with the overseer whether he will open the letter, or reserve its perusal to the following day; and, as the Legislature, in passing the modern statutes, enacting the transmission of these notices by post, was, of course, perfectly familiar with the existing practice of the post-office in respect of the delivery of letters on Sunday, we cannot but think that, if it was intended to make the service of such notices void if they should happen to reach the officers of a distant parish on a Sunday, some provision to that effect would have been added. We were forcibly struck with the inconvenience that might arise from holding the objection to be fatal. Notices of this kind are often to be sent between distant parishes where the course of the post upon which the precise time of delivery may depend may be wholly unknown to the parish officer transmitting the notice. The existence or non-existence of a cross post may make a letter which is calculated to reach its destination on Saturday or Monday, arrive a day sooner rather than later; and as these objections are generally taken not to uphold the sanctity of the Sabbath, but to defeat justice, such might be the effect, even where there may have been a total absence of all intention to violate the Act of Charles II. It appears to us, therefore, that the right course is to treat the case as not falling within the provisions of the latter statute, while at the same time, conformably with the decision in the case of *Asprell v. The Justices of Lancashire*, we should treat the notice when received on a Sunday as operating, so far as time is concerned, on the ensuing day.

Order confirmed.

Thursday, Jan. 30.

REG. V. THE JUSTICES OF LIVERPOOL.

Rate—Limit as to amount—Levy.

By a local Act, a town council were empowered to make, once a year, or oftener, one or more rates, provided that the amount to be levied should not in any one year exceed 1d. in the pound upon the rateable value of the property. The council made a rate, and directed the overseers of L. to levy 4767l., but the overseers said that they could not levy that sum without charging more than 1d. in the pound upon the productive rateable property; upon which the council applied to justices to issue a distress-warrant to levy the 4767l. upon the goods of the overseers, but the justices declined to do so:

Held, that the justices were right in so declining.

*Mellish*, on behalf of the Corporation of Liverpool, applied for a rule calling upon certain justices of the borough of Liverpool, and also upon the overseers of the parish of Liverpool, to show cause why the justices should not issue their warrant to levy the sum of 4767l. 4s. 3d., the amount of a library and museum rate, by distress and sale of the goods of the overseers. The rate in question was made under a local and personal Act, the 15 Vict. c. iii. ("An Act for establishing a public library,

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*Ex parte* THE MATLOCK BATH DISTRICT—BIGGS v. MITCHELL.

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museum and gallery of Arts at Liverpool, &c.") Sect. 18 enacts, "That it shall be lawful for the council once in every year, or oftener if they shall think necessary, to make one or more rate or rates, to be called 'the library and museum rate,' for the purpose of defraying all or any of the expenses incidental to or necessary for carrying into effect the objects of the Act, &c. Provided that the amount to be levied for all or any of the purposes aforesaid shall not in any one year exceed 1*d.* in the pound upon the rateable value of the property within the borough liable to such rate; and every such rate shall be levied as a separate rate, and be levied and recovered in like manner as a borough rate is or may by law be levied and recovered." The point in issue depends upon what meaning is to be given to the limit of 1*d.* in the pound upon the rateable property within the borough. The course adopted was this: the corporation required the overseers to return the rateable value of the property within the parish, and they made a return which showed that the portion of the assessment which they would be bound to levy would be 4767*l.* 3*s.* 4*d.*, at the rate of 981-1000ths of a penny in the pound. In answer to the precept of the corporation to levy that sum, the overseers said that it was impossible to levy the whole of that amount in consequence of some premises being empty, and of the insolvency, &c., of some of the ratepayers. It was now urged in support of the rule that, although the council could not make a rate beyond 1*d.* in the pound upon the rateable property within the borough, yet that the overseers, if they found it necessary, in consequence of empty houses, insolvent ratepayers, or from other causes, and that they could not provide the sum assessed without levying something beyond the 1*d.* rate upon ratepayers who could pay, they might do so.

COCKBURN, C. J.—I think that there should be no rule in this case. By the Act the occupier of each house is to be assessed to a rate not exceeding 1*d.* in the pound on the rateable value of his property; and it is not because some houses are unfruitful that others are to pay for them. The intention of the Act was that each occupier should be liable to pay a rate not exceeding 1*d.* in the pound.

CROMPTON, J.—The meaning was to limit the rate to 1*d.* in the pound upon each house. The council must take care not to make an assessment that will require a taxation of more than 1*d.* in the pound upon each house.

The rest of the Court concurring, *Rule refused.*

Monday, April 28.

*Ex parte* THE MATLOCK BATH DISTRICT.

Local Government Act 1858—21 & 22 Vict. c. 98—Adoption by place having no known or defined boundary—Adoption by greater place.

A district having no defined boundary, but being a portion of a parish, petitioned the Secretary of State under the 16th section of the 21 & 22 Vict. c. 98, and the necessary inquiries were made, notice given and the order as to the boundaries made by the Secretary of State under the above-named section, and a summoning officer appointed. Subsequently the parish resolved to adopt the Act, and thereupon the Secretary of State declined to proceed to advertise in the London Gazette the boundaries of the district:

Held, that he was right so to do, and this court refused to grant a mandamus to compel him.

Lush, Q. C. moved for a rule calling on the Secretary of State for the Home Department to show cause why a mandamus should not issue commanding him to cause an advertisement to be inserted in the London Gazette, pursuant to the provisions of the Local Government Act 1858, 21 & 22 Vict. c. 98. The Matlock Bath District is a portion of the parish of Matlock having no defined boundary. A petition was adopted

and presented, the necessary inquiry made and notice given, and the order was made by the Secretary of State; the boundaries were settled, and a summoning officer appointed to carry out the Act, pursuant to sect. 16. The parish of Matlock having resolved to adopt the Act, a doubt arose under the 14th section of the Act, and the Secretary of State was uncertain whether he ought to proceed any further. It was now contended that this district was now a place having a known and defined boundary, and that it might adopt the Act accordingly. Sects. 12, 14, 16, 18, 19 and 20 were particularly referred to. [BLACKBURN, J.—The words at the end of the 14th section are against you. The Secretary of State may say, if he pleases, that the smaller place shall be excluded from the limits of the greater, but he has refused to do so. The 16th section is also adverse to your application. CROMPTON, J.—It is a mere location of the sections. If the 14th had come after the 16th there could have been no doubt about it.]

COCKBURN, C. J.—I am of opinion there should be no rule. The terms of the 14th section are: "In cases where any place, hereby authorised to adopt this Act, includes within its limits any less place which, if it were not so included, would of itself be authorised to adopt this Act, such less place shall not be entitled to adopt this Act, unless the greater place within the limits of which it is included has refused to adopt the same, or unless it has been determined by one of her Majesty's principal Secretaries of State, in manner hereinafter mentioned, that such place ought, as respects the adoption of this Act, to be excluded from the limits of such greater place." The district making the application would not be in a position to adopt the Act without the permission of the Secretary of State. In the first place, the adoption of the Act can only be by a place of known bounds. Then comes the provisions of the 16th section, referring to the adoption of the Act by places not having a known or defined boundary, and it is said that that section supersedes sect. 14; but I do not think it does; the difficulty only arises from the somewhat inartistic arrangement of the clauses; but in truth there is no real difficulty when they are read together.

CROMPTON, J.—I am of the same opinion. [His Lordship referred to sect. 12, *et seq.*] If sect. 14 had been after sect. 16, there could be no possible doubt; the provisions of sect. 16 are only for the purpose of ascertaining if the place in question is fit to be put in the category of places with known and defined boundaries. I think the construction is clear, and that there should be no rule.

BLACKBURN and MELLOR, JJ. concurred.

*Rule refused.*

Saturday, April 26.

BIGGS (app.) v. MITCHELL (resp.).

Gunpowder—Having or keeping more than 50lbs. at any one time—Conviction—12 Geo. 3, c. 61, s. 11. By the 12 Geo. 3, c. 61, s. 11, no person shall have or keep at any one time more than 50lbs. of gunpowder in any house, &c., within the cities of London or Westminster, or within three miles of either of them, or within any city or borough, or market-town of Great Britain, or one mile of the same: Held, that this does not apply to a temporary deposit in a warehouse, with a view to being sent on.

This was a case, stated under the 20 & 21 Vict. c. 43, for the opinion of this court upon a conviction by the Lord Mayor of London, under sect. 11 of the 12 Geo. 3, c. 61, for keeping, at one time, more than 50lbs. weight of gunpowder in a certain warehouse, not being a dealer in gunpowder.

The case stated that, upon the hearing of the information, it was proved, on the part of the resp., that on the day named, about two o'clock in the afternoon, he, with another inspector of the city police, seized,

under a search-warrant, granted by me, six packages of gunpowder, weighing together 300lbs. weight, which they then found on the premises of the app., who is a carrier and licensed carman, in a sort of warehouse, where goods of every description are and were then kept, for the purpose of being afterwards removed by country carriers to their several destinations. These packages of gunpowder, which were not covered over with tarpaulin, had been sent a few hours before from different persons to be forwarded by carriers to different places. The app. was aware of the nature of the contents of these packages, and it was proved to my satisfaction that they were placed in the warehouse as a temporary halting place in the course of their transit, and that they would have been sent away from the app.'s premises in about two hours from the time they were so found by the inspector of police, and that he, the app., had entered them in the book which he, as carrier, kept of the goods received and sent out.

It was contended, on the part of the app., that the Act of Parliament was intended by the Legislature to apply only to persons having or keeping in their possession a quantity of gunpowder beyond what was prescribed and allowed, and not to gunpowder *in transitu*, which that in question was; that the app. merely kept a *dépôt* for goods *in transitu*, as was proved to my satisfaction, and that if he was to be held to have committed an infraction of the law by having there for a short interval of time a quantity of gunpowder with other goods on their way to different destinations, there was not a railway company in the kingdom which did not contravene the statute at one or other of the stations almost daily; that the words "have or keep at any one time," in the 12 Geo. 3, c. 61, s. 11, contemplated a man "keeping" for an indefinite period a prohibited quantity of gunpowder, and could not apply to the app. who had the packages in question in his warehouse, not for any unreasonable time, but only for an interval consistent with the exigencies of the trade, and necessary for their several conveyances to their final destination. I, however, being of opinion that the Legislature intended by the Act of 12 Geo. 3, c. 61, particularly when considered in connection with the 18th and 21st sections, which impose penalties on persons engaged in the conveyance of gunpowder who shall not properly cover packages of gunpowder when being conveyed, or who shall not use all due diligence in the loading or unloading of it, that gunpowder shall only be removed in carriages constructed or used expressly for the purpose, and with no other commodities, or promiscuously as the packages in question were then sent and deposited, and that therefore the app. had brought himself within the operation of sect. 11 of the 12 Geo. 3, c. 61, and I therefore gave my determination against the app. in the manner before stated. The question of law arising on the above statement for the opinion of this court, therefore, is, whether the app. did "have or keep" at one time the said excessive quantity of gunpowder within the intent and meaning of the 12 Geo. 3, c. 61? If the court should be of opinion that he did not so have or keep the same, then the information is to be dismissed; but if the court should be of opinion otherwise, the conviction is to stand.

By sect. 11 of 12 Geo. 3, c. 61, it is enacted, "That no person or persons shall have or keep at any one time, being a dealer or dealers in gunpowder, more than 200lbs. of gunpowder, and not being such, more than 50lbs. of gunpowder, in any house, mill, magazine, storehouse, warehouse, shop, cellar, yard, wharf, or other building or place occupied by the same person or persons (all buildings and places adjoining to each other, and occupied together being to be deemed one house or place within this Act), or on any river or other water (except

in carriages loading or unloading, or passing on the land, or in ships, boats, or vessels loading or unloading or passing on any river or other water, or detained there by any tide or bad weather), within the following limits; that is to say, within the cities of London or Westminster, or within three miles of either of them, or within any city, borough, or market town of Great Britain, or one mile of the same . . . on pain of forfeiting all the gunpowder beyond the quantity hereby allowed to be kept, and the barrels in which such gunpowder shall be, and also 2s. for every pound of gunpowder beyond such allowed quantity."

Hannen now appeared in support of the conviction, and contended that it was right, for under the terms of the section it was an offence to have, for whatever purpose, more than 50lbs. of gunpowder, it being equally within the mischief of the section whether the same quantity remained on the premises, or different quantities continually renewed, the purpose being to prevent a large quantity of gunpowder being upon the premises at any one time. [CROMPTON, J.—The gunpowder, if to be sent off, must be put temporarily in some place before being sent off.] But it must not be placed in any one of the localities mentioned in the section. [CROMPTON, J.—If so, there might be this difficulty: packages of gunpowder are during the day brought to a railway-station, and, very properly, they are not sent off by passenger trains, but are put by to be sent off by themselves; according to your argument this could not be done, as the packages would amount to more than 50lbs.] The Act merely prohibits such a quantity being deposited in certain localities; the gunpowder could be taken to some other place to be put on the railway.

M. Smith, Q. C. (*Sleigh* with him) argued that the app. was not within the section, which clearly referred only to the keeping of gunpowder, as is clear from the concluding words of the section, which do not include the word "have;" and that if the construction contended for on the other side were correct there could be no halting place in London, but the gunpowder must at all hazards be sent on by the first conveyance. He referred also to the 18th section, which has the words "have or convey."

Hannen was heard in reply.

CROMPTON, J.—We must in this case look at the sections, and see if the construction that has been put upon the 11th section can be maintained. Now I must say that I do not think that this is a keeping of gunpowder within this section. The section treats the offence as that of *keeping* gunpowder, for whilst in the 11th section the words are "have or keep," so in the 18th they are "have or convey," the having in the first case having reference to keeping, and in the second case to conveying—the keeping evidently meaning storing. The statute, both by its preamble and its sections carrying out the preamble, makes the keeping and conveying distinct. It is unnecessary to decide how soon it would become "a keeping." If it were left for an unreasonable time that would be a keeping; so if there were a general receiving and warehousing until a large quantity had been collected, that would be a keeping; but a mere halt in London for the purpose of sending it on is not within the section. There is great weight in the argument of Mr. Hannen that, notwithstanding the gunpowder is only temporarily on the premises, still very great quantities may at all times be there; but that is not the question, for I think it never could have been intended that, in the case of railways, or waggons as at the time the Act passed, a quantity of powder might not be brought and put under a transit shed. I cannot say that this is a "having or keeping" within the 11th section. If the present state of the law be unsatisfactory in this particular, there must be fresh legislation upon it.

[NISI PRIUS.]

MILDRED v. WEAVER.

[NISI PRIUS.]

MELLOR, J.—I am of the same opinion, and I think that the word "have" is to be explained by the words that follow it; namely, "keep" in the 11th section and "convey" in the 18th. I am not insensible to the danger pointed out by Mr. Hannen, but I think the app. is not brought within the section.

*Conviction quashed.*

## NISI PRIUS.

### HOME CIRCUIT.

SPRING ASSIZES 1862.—*Kingston, April 3.*

(Before EARLE, C.J.)

MILDRED v. WEAVER.)

*Highway—Right of way—User.*

*A right of way may be obtained by the public by user for purposes of pleasure only.*

*Non-repair by the parish is cogent evidence against a way over private property being a highway, but it is not conclusive.*

*Proof of user by all the Queen's subjects at their free will and pleasure at all times, is strong evidence of dedication as a highway; but it is to be considered in reference to gates, repairs, permission, &c.*

*The fact of payment for the user is not conclusive against the right, but it is cogent evidence against it.*

This was an action of trespass for breaking down the plt.'s lodge-gates, and driving carts along his private road over his land and defacing the soil thereof. Deft. had pleaded a right of way, that the road was a public highway, and also a right by prescription; and, further, that the Archbishop of Canterbury and his tenants for the time being were entitled to go along the road with carts, &c., and that deft. was a tenant of the archbishop, and committed the trespasses in the exercise of those alleged rights.

*Borill, Q.C., Lush, Q.C. and Hurrell for plt.*

*Chambers, Q.C., Peterdorff, Serjt. and Clark for deft.*

The plt. was lessee of property now occupied by him as a gentleman's residence, but formerly a farm belonging to Archbishop Whitgift's Hospital, near Croydon. The deft. was a farmer, having a farm on one side of the plt.'s ground, and has lately acquired a field on the other side of it, and to which he claimed a right of access with carts over the plt.'s land by the road in question. There are two roads leading from Croydon towards the plt.'s house—Combe-lane and Crobam-lane. At the entrance of Combe-lane the gates had been put up by a former lessee of the plt.'s farm, and from these gates the road in question ran across the plt.'s land towards the deft.'s field on the other side of it. There was no dispute on the part of the plt. of the right to use this road as a footway or a bridle-way; but the deft. had claimed a right to use it with heavy carts, which, of course, cut it up. The plt. had lately, as he alleged, repaired it at an expense of 20*l.*, and the deft. and his son, in the assertion of this supposed right, had broken open the gates, which had been shut to exclude his carts, and had gone through with carts, cutting up the soil and causing damage.

*Borill*, for the plt., said he should prove by the evidence of the warden of Whitgift's Hospital, an old man eighty years of age, and by an old plan of the farm which had been in his possession, and which did not show the road upon the farm, that the road had not existed in the early part of this century, and that a lessee of the farm had made it for his own use. Persons had been allowed to pass along it on foot or with horses, but heavy carts had always been stopped and turned back, and gates had always been there. In 1838, one Wood was tenant. Permission had been asked to use the road, and in 1848,

one Church being tenant, the deft. had agreed to pay something yearly for leave to use it. It was clear therefore that there had never been any dedication to the public. The parish had never repaired the road, and it was plainly not a highway. Neither was it a way by prescription, at all events for carts and horses.

*Chambers* opened the case for the deft., and called many witnesses in support of the alleged right of way with carts and carriages to a place called Crobam Hurst.

These witnesses were cross-examined with a view to show that the user of the road had been only by light vehicles (as for parties of pleasure or the like), and had been merely permissive.

The deft. was called, and admitted the payment to the plt., but explained it as having been only as a contribution for the expense of repairs; not as a rent, or acknowledgment, for the user of the way.

The real question was this: the deft. had asserted his right to go with carts or waggons over the road referred to, and had exercised it for the purpose of carrying heavy loads of lime from the field on one side of the plt.'s farm to his farm on the other. This was a different user of the road from the mere passage on horseback, or even with lighter vehicles, and therefore it was contested. The plt. had not possessed the property for more than two years, and since he had it had desired to improve it, and with that view had hardened the road and put it in good condition. The passage of the heavy loads over it cut it up and made deep ruts in it. So long as the road was in its original state this mattered little, but now it was a matter of importance. The strongest evidence for the defts. in support of the alleged right was that of the bailiffs of former tenants (going back fifty or sixty years), which went to prove the user of the right and the absence of all obstruction. On the other hand, the counsel for the deft. admitted that of late years there had been a greater use of the road with carts and carriages than before.

*Chambers*, in summing up the case for the deft., argued that a user of a way, whether for pleasure or business, was an evidence of right, unless accompanied by obvious and ostensible evidence that it was permissive, and that even if former tenants had agreed to pay for the user, that would not affect the public right.

*Borill*, in reply, urged that if this was a highway some one would have been called from the neighbourhood to prove that it had been so regarded. If it was a highway, there would have been proof that it had been repaired by the parish. If it were a public highway, either the parish or some one else must be bound to repair it, and in either case there would have been parties not wanting to enforce its repair. But it did not appear that the repair had ever been enforced against any one. The fact was, it was nothing more than a common farm road, and to set up a legal right in this case on such evidence of mere user would be to set up a similar right over every park in the country. The mere casual user with a cart or carriage proved nothing, for it was not likely that in every instance there could be an interruption; and, unless the parties themselves were called, it could not be known whether or not they had permission. Mere evidence, therefore, that carts and carriages were seen to use the way was worth little. Some were butchers' and bakers' carts going to the house; others would be visitors; others would go by permission; and others would not be noticed. The mere resort by the public to a beautiful place did not make a highway. If it did, there would not be a beautiful place in the country which was not a highway. It was nothing to produce some persons who had not been turned back. It was not usual or possible to keep so strict a watch and guard as to exclude every one.

ERLE, C. J., in summing up, said the question was whether they were satisfied that there had been a dedication of the road to the public by the owner. If all the Queen's subjects had used the way at their free will and pleasure, and at all times, that was strong evidence of such a dedication as a highway. But the evidence of such a user was to be well weighed with reference to gates, to repairs, to permission, and the like. It was a matter of common experience that there were many farm roads which, as means of communication, were of great convenience, and which many persons used a long time before it became worth the owner's while to resort to any measures to prevent it. On the other hand, the fact of payment for the user would not be conclusive against the right, for it might be that a man was not in a position to enter into litigation to enforce his right. Still it was a strong piece of evidence against the right. The question was only as to the carriage-way. The bridle-way would be admitted, and if a gate was put up it might be opened by a horseman just as much as if there were a right of carriage-way. The strongest evidence in favour of the defts., and in support of the alleged right, was that of the bailiffs of former owners, for it would be within the province of the bailiffs to prevent trespasses, and they might have put a lock on the gate for carriages, and opened a bridle-gate. Easy-minded men, however, would not be disposed to contest every user, and it was a matter for the experience of the jury whether the evidence tended to show a farm road or a highway used by the world, and whether the user as a highway had been submitted to by the owners. Beyond all doubt there might be a user of a highway for purposes of pleasure, but the question was, whether the road had been used as a highway. It was very material that there had been no repair by the parish, although, to make it serviceable, it had been necessary to lay out money on the road. This was not conclusive, for he had known instances in his experience of indictments against parishes for not repairing highways on Salisbury Plain, on which a pickaxe had never been used before, and he had known parishes forced to repair such highways; but Croydon was a very different neighbourhood from Salisbury Plain. The non-repair therefore was not conclusive, but it was certainly very important. On the whole evidence, the jury must say whether the public had used the way at all times at their free will and pleasure. If so, they should find for the deft.; if not, for the plt.

The jury, before retiring, asked whether, if they found for the plt. against the alleged right for carriages, there would be any danger of the public losing the bridle-way.

The LORD CHIEF JUSTICE.—None whatever.

*Verdict for the plt.*

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

*Saturday, April 20.*

(Before ERLE, C.J., MARTIN and CHANNELL, BB., BLACKBURN and KEATING, JJ.)

REG. v. JOHN JENNISON.

*False pretence—Existing fact—Promise.*

*Money was obtained by the prisoner from an unmarried woman on the false representations that he was a single man, and that he would furnish a house with the money and would then marry her:*

*Held, that the false representation of an existing fact (that he was not a single man) was sufficient to support a conviction for false pretences, although the money was obtained by that representation, united with the promise to furnish a house and then marry her.*

Case reserved for the opinion of this Court by Cockburn, C.J.

John Jennison was indicted and tried before me at the last assizes for the county of Nottingham for obtaining 8*l.* of one Ann Hayes by false pretences.

The prisoner, who had a wife living, had represented himself to the prosecutrix, who was a single woman in service, as an unmarried man, and pretending that he was about to marry her, induced her to hand over to him a sum of 8*l.* out of her wages received on leaving her service, representing that he would go to Liverpool, and with the money furnish a house for them to live in, and that having done so he would return and marry her. Having obtained the money the prisoner went away and never returned.

The prosecutrix stated that she had been induced to part with her money on the faith of the representation of the prisoner that he was a single man, that he would furnish a house with the money, and would then marry her.

There was no doubt that these representations were false, and that morally the money had been obtained by false pretences. But it was contended on the part of the prisoner that, as the prosecutrix had been induced to part with the money by the joint operation of the three representations made by the prisoner, that he was unmarried, that he would furnish a house with the money, and that he would then marry her, and as only the first of these pretences had reference to a present existing fact, while the others related to things to be done in future, the indictment could not be maintained.

I reserved the point, and the prisoner having been convicted, have now to request the decision of the court upon the question. A. E. COCKBURN.

No counsel appeared to argue on either side.

ERLE, C. J.—We are of opinion that the conviction in this case was proper. The indictment was for obtaining 8*l.* from Ann Hayes by false pretences, and it was found by the jury that the woman parted with the money on the false representation by the prisoner that he was a single man, and the promise that he would lay out the money in furnishing a house for them to live in, and that he would then marry her. It is perfectly clear, that obtaining money by a false promise is not the subject of an indictment; but here there was the false pretence that the prisoner was an unmarried man, which was an essential fact in this case, and without which pretence the prisoner never would have obtained the money from the woman. Now, one false fact, by which the money is obtained, sufficiently sustains the indictment, although it may be united with false promises which would not of themselves do so. The conviction therefore was right.

The other Judges concurring,

*Conviction affirmed.*

REG. v. JAMES FITCH.

REG. v. JOHN HOWLEY.

*Forgery—Turnpike ticket—Receipt for money—*  
24 & 25 Vict. c. 98, s. 23.

*A turnpike ticket is a receipt for money, and the forging, &c., thereof is within the meaning of the*  
24 & 25 Vict. c. 98, s. 23.

Case reserved for the opinion of this Court by Wightman, J.:

At the last Kingeton assizes, two men, named James Fitch and John Howley, were severally convicted before me of uttering forged receipts for money, and the question is, whether the document which in each case was uttered by the prisoners respectively is a receipt for money within the meaning of the 24 & 25 Vict. c. 98, s. 23.

The prisoners were two of the carmen employed by the South-Western Railway Company, who every evening repay their carmen any sums they may have

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expended during the day for passing with their vans or carts through any turnpikes, and each of the prisoners produced and gave to the officer of the company whose duty it was to pay them or allow them in account any money they had expended in passing through the St. James's turnpike-gate, a false ticket, in form and colour resembling those issued at that gate, as a voucher for their having passed through the gate and paid the tolls, whereas they had not passed through that or any of the gates belonging to the trust or paid the tolls.

The document, in form, is as follows:—

19/2	"Bermondsey, Rotherhithe and Deptford Roads, St. James's-gate.	1/-
	18	

Clears Fort-place, East-lane Plough-bridge, St. James's China-hall, Rotherhithe, New-road, Gibraltar Swan-bar, and on all side bars of the trust."

And is an imitation of a turnpike-ticket given upon passing through the St. James's-gate. The figure 1s. upon the right-hand side indicates that 1s. has been paid upon passing through the turnpike-gate. If a larger or smaller sum than 1s. is paid, the sum actually paid is inserted, and the 1s. marked upon the copy set out in this case is merely introduced as a specimen of the form.

The prisoners are now undergoing the sentence which I passed at the time. Wm. WIGHTMAN.

C. Wood was instructed on behalf of the prosecution; no counsel was instructed for the prisoners.

MARTIN, B. asked what the objection raised at the trial was.

J. Thompson (*amicus curiæ*) said, he, as counsel in the case at the trial, had taken the objection that a turnpike-ticket was a mere pass entitling a person to pass with his horse and vehicle through the gates mentioned on it, and that it was not a receipt for money; but, on looking into the General Turnpike Act, 3 Geo. 4, c. 126, s. 37 (see also 4 Geo. 4, c. 95, s. 28), he found that the objection was not tenable, for turnpike trustees were bound to provide tickets denoting the payment of toll, and also specifying the gates freed by such payment, and entitling the person producing the same to pass through the gates mentioned without paying any further toll.

By the COURT, Conviction affirmed.

Saturday, Jan. 18.

(Before COCKBURN, C.J., ERLK, C.J., POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ., MARTIN, B., CROMPTON and WILLES, JJ., BRAMWELL, and CHANNELL, BB., KEATING, J., WILDE, B., and MELLOR, J.)

REG. v. EDWARD GIBBONS.

Perjury—Materiality of the matter sworn—Evidence affecting credit of principal witness.

On the hearing of the summons taken out by A. for an order of affiliation on H. of a child born in March, A. was asked in cross-examination whether she had not had carnal connection with C. in the previous September. She denied it. The justices wrongly allowed C. to be called to contradict her, and he swore that he had had connection with her in the September previous. C. was afterwards indicted and convicted for perjury in having sworn that in the September previous he had had connection with A.: Held by eleven judges (Martin, B. and Crompton, J. dissenting), that although C.'s evidence was inadmissible in point of law, yet having been admitted and being relevant to the credit of a material witness in the cause, perjury could be assigned upon it.

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Case reserved for the opinion of this court by Williams, J.

In this case the deft. was tried before me at the last assizes for the county of Sussex for perjury, in having falsely sworn that, in Sept. 1860, he had carnal knowledge of the person of Ann Bishop.

She was delivered of a bastard child on March 29, 1861. On the 28th of June following, an application made by her for an order of affiliation on one Harmer, came on to be heard before the magistrates, and she made a deposition in support of such application. She was then cross-examined on the part of Harmer as to whether she had not had connection with the deft. in the previous September. She denied it. The deft. was afterwards called as a witness on behalf of Harmer, and swore that he had had connection with her as imputed by the question put to her.

On the trial before me, at the close of the case for the prosecution, it was objected by Mr. Addison, the counsel for deft., that the evidence given by the deft. on which the perjury was assigned, was not material to the issue raised on the application for the affiliation order, inasmuch as the question put to Ann Bishop, as to having had connection with the deft., went merely to her credit, and therefore her answer ought to have been regarded as conclusive, and the evidence of the deft. in contradiction of her was inadmissible and illegal, and not material to the question raised before the magistrates.

The deft. was convicted, but I reserved the point for the consideration of this court whether the objection made on his behalf was well founded.

EDWARD VAUGHAN WILLIAMS.

The case was twice argued: first time Nov. 16, 1861, before Pollock, C.B., Wightman and Williams, JJ., Channell, B., and Keating, J., but they not being able to agree in opinion, directed a rehearing before the full court. The substance of both arguments will be found below.

Addison for the prisoner.—It is submitted that the conviction is bad. It is to be assumed that the deft. could not be the father of the child, and therefore it is contended that his evidence in contradiction of the woman, as to having had intercourse with her in the previous September, was not material to the issue, and perjury could not be assigned upon it. Any question which would have thrown a doubt on the paternity, which was the question to be decided by the justices, would have been material; but any question as to intercourse with the woman in September had nothing to do with the paternity of the child, which was born in March. The principle seems to be that the evidence on which perjury can be assigned must relate to the direct matter in controversy, or it must relate to a collateral matter which tends to corroborate the witness's evidence upon the principal matter. In the present case the alleged perjury was not calculated to influence the decision of the magistrates in any way. The 5 Eliz. c. 9, is the first statute relating to perjury, and Coke (3 Inst. c. 74) in commenting upon this statute says, that the perjury must be "in a matter material to the issue or cause in question; for if it be not material, then though it be false yet it is no perjury, because it concerneth not the point in suit, and therefore in effect it is extra-judicial." Reference was then made to *Rez. v. —*, 1 Freeman, 505; Hawk. P. C. bk. 1, c. 69, s. 8. In *Reg. v. Manton*, Palmer, 382, the point was, whether a man was insane at the time of death, and evidence that he was insane five days before his death was held immaterial. In *Custodes v. Howell Gwin*, Styles 374, it is said that "of a false oath not touching the matter in question, an indictment lies not." The cases of *Rez. v. Grieve*, 1 Ld. Raym. 258; 12 Mod. 139; *Rez. v. Muscot*, 10 Mod. 195; *Rez. v. Dunston*, Ry. & Moo. 109; *Rez. v. Nicholl*, 1 B. & Ad. 21; *Reg. v. Bartholomew*, 1 C. & K. 366, were

then cited. In *Reg. v. Murray*, 1 Fos. & Fin. 80, Martin, B., after consulting Byles, J., held that false swearing in answer to questions tending only to the discredit of the principal witness in the case, did not amount in law to perjury. In *Reg. v. Overton*, 2 Moo. C. C. 263, the question, though not material to the issue, had a tendency to corroborate the principal evidence. [POLLOCK, C. B.—The point whether a witness commits perjury ought not to depend on whether or not the question should have been shut out. In *Reg. v. Philpotts*, 5 Cox Crim. Cas. 363; 2 Den. C. C. 309, 21 L. J. 20, M. C., Lord Campbell said: "It has been said, if the judge were wrong in admitting the document in evidence, the deft. could not be convicted, making the offence of perjury to depend upon whether a judge were right or wrong in his direction on a question of law, and upon the decision of some nice point in a bill of exceptions, which might ultimately go to the House of Lords. We are of opinion as the evidence was given in a judicial proceeding with the view to the reception in evidence of a document which was material, and as that evidence was false, that all the ingredients necessary to constitute the crime of perjury are present, and that the conviction must be affirmed."] The cases of *Reg. v. Lavey*, 3 Car. & K. 26; 5 Cox Crim. Cas. 259; *Reg. v. Martin*, 6 Car. & P. 562; and *Reg. v. Robins*, 2 Moo. & Rob. 512, were then cited.

*Barrow* for the prosecution.—The conviction was right. The evidence in question was material as affecting the credit of the woman before the magistrates. It might affect the amount they would order to be paid to her. (Taylor on Evidence, s. 1295.) In *Reg. v. Grieco*, Holt, C. J. said: "It is not necessary to appear in an information for perjury to what degree the point in which the man is perjured was material to the issue; for if it be but circumstantially material it will be perjury. . . . So if a witness swears to the credit of another witness, if it be false it will be perjury if it conduces to the proof of the point in issue." The cases of *Thomas v. David*, 7 C. & P. 350, and *Reg. v. Barker*, 589, were then cited. [CHANNELL, B.—In the report of *Reg. v. Philpotts*, in 21 L. J. 20, M. C., there is a strong opinion of Maule, J. expressed in the course of the argument, that a man is guilty of perjury who swears falsely as to what might have been objected to.] The cases of *Reg. v. Meek*, 9 C. & P. 313, and *Bury v. Watkins*, 7 C. & P. 308, were then cited. As to *Reg. v. Murray* [MARTIN, B.—I do not think that case ought to be considered any authority. It was only my impression of what was material, formed hastily on circuit.] *Reg. v. Berry*, 8 Cox Crim. Cas. 121 was then cited.

*Addison* replied.

COCKBURN, C. J.—I have to deliver the opinion of all my brothers except Crompton J. and Martin, B. We are of opinion that the conviction was right and ought to be affirmed. It is quite clear that the question put to the principal witness in the case was a pertinent question, and one which she was bound to answer. It is true that the question had not reference to the main issue of paternity then before the court, but it had immediate reference to a question arising upon and subordinate to that, viz., how far she was deserving of credit. Possibly, if she had answered the question in the affirmative, it might not have affected the decision of the magistrates; but she was bound to answer, and I therefore entertain no doubt that if she had answered the question falsely she might have been indicted for perjury. I agree that, it being a question affecting her credit and relevant only on that ground, all parties ought to have been bound by the answer she gave; but the magistrates thought proper to admit the evidence of the deft. in contradiction. That was not, in point of law, admissible; but being admitted it had reference to what was a material question on the inquiry. We

have the authority of Hawkins, P.C., bk. 1, ch. 69, "that, though the evidence signify nothing to the merits of the cause and is immaterial, yet, if it has a direct tendency to corroborate the evidence concerning what is material, it is equally criminal in its own nature and equally tends to abuse the administration of justice, and there does not seem to be any reason why it should not be equally punishable." Now the evidence having been admitted, *Reg. v. Philpotts* is a direct authority for saying that perjury might be assigned upon it, inasmuch as it was a relevant question. I must say that I go along with the principle in *Reg. v. Philpotts*, and think that, although in point of strictness the evidence was open to objection, yet it does not lie in the mouth of the deft. to say that the question was not one as to which he was not bound to speak the truth. The conviction must be affirmed.

CROMPTON, J.—I am by no means satisfied that this was a right conviction. It seems to me that the prosecution must show that this was a material question in the cause. The old doctrine can hardly be impugned that the evidence upon which perjury may be assigned must be relevant to a material question in the cause. Then was this a question material, or any question at all in the cause, whether on such a day the mother of the child had this carnal intercourse with the deft.? It is clear that she could only have been asked this question as going to her credit; and that when asked the question all parties are obliged to take the answer of the witness. I agree with the Lord Chief Justice, though doubtful once, that if the witness is cross-examined as to a matter going to his credit, that is a material in the cause, and that if he gives a false answer he is indictable for perjury; but then his answer is conclusive. Now, it appears to me that it was not a material, or any question in the cause, whether the intercourse suggested by the question took place. It was to be assumed to be a fact that it did not from the answer of the woman to the question put to her. The evidence was not admissible, because the fact must be taken to have been proved by the answer of the woman. It is very different from the case where the question is a step in the cause, as in *Reg. v. Philpotts*. My doubt arises from this, that it was to be assumed from the answer of the woman how the fact was. If then it was not a material question in the cause, the question of perjury could not arise.

MARTIN, B.—The test I would apply to the case is this: Assume that all the facts were set out on the record up to the contradiction of the woman by the deft., would that contradiction have been material to the issue? I think it would not. The question to my mind is, whether in point of law it was material to the issue. The blunder of the magistrates in admitting the evidence in contradiction cannot alter that. I cannot conceive how the error of the magistrates can make that evidence material in the sense in which it should be material to support an assignment of perjury upon it. If the evidence upon which perjury may be assigned is to depend on what the justices in petty sessions may choose to admit as evidence, the greatest mischief will arise. *Conviction affirmed.*

Saturday, April 26.

REG. V. FRANCIS FRETWELL.

*Abortion—Attempt to procure—Supplying drug—Accessory.*

*The deceased woman became pregnant by the prisoner, and died from the effects of corrosive sublimate taken by her for the purpose of producing abortion. The prisoner knowingly procured it for the deceased at her instigation and under the influence of threats of self-destruction if the means of pro-*

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*dosing abortion were not supplied to her. The jury negatived the fact of the prisoner having administered it, or caused it to be taken by her: Held, that the prisoner was not guilty of murder as an accessory before the fact.*

Case reserved for the opinion of this Court by Cockburn, C. J.

Francis Fretwell was indicted and tried before me, at the last assizes for the county of Nottingham, for the wilful murder of Elizabeth Bradley. The deceased had died from the effects of corrosive sublimate taken for the purpose of producing abortion.

The poison had been procured for her by the prisoner with full knowledge of the purpose to which it was to be applied; but there was ground for believing that the prisoner in procuring the poison had acted at the instigation of the deceased and under the influence of threats by her of self-destruction if the means of producing abortion were not supplied to her.

She was a married woman living in service separately from her husband, and had become pregnant by the prisoner. She had endeavoured to purchase corrosive sublimate herself, but the druggists to whom she had applied having refused to furnish it to her, she had urged the prisoner to procure it. The prisoner was not present when the poison was taken.

The facts in question occurred in the month of July 1861, anterior to the coming into operation of the 24 & 25 Vict. c. 94.

The Jury, upon questions specially put to them by me upon the evidence, expressly negatived the fact of the prisoner having administered the poison to the deceased, or caused it to be taken by her. They found specially that the prisoner procured the poison, and delivered it to the deceased with a knowledge of the purpose to which she intended to apply it, and that he was therefore accessory before the fact to her taking poison for the purpose of procuring abortion.

Upon this finding I directed the jury to find a verdict of wilful murder against the prisoner, reserving for the consideration and decision of the Court of Criminal Appeal whether such verdict was right in point of law.

In giving such direction I acted in deference to the authority of the case of *Reg. v. Russell*, 1 Moo. C. C. 356, but it appearing to me doubtful how far the ruling of the judges in that case, that if poison be taken by a woman to produce abortion, and death ensues, the woman is *felo de se*, could be upheld; and still more so how far a man, accessory to the misdemeanor of a woman in taking poison for the purpose of producing abortion, can properly be held to be accessory to the self-murder of the woman, if contrary to the intention of the parties death should be the consequence; I have reserved these points for the consideration of the court.

A further question arises as to the admissibility of the depositions of the deceased, upon which the case against the prisoner mainly depended.

Her evidence having been taken on a charge against the prisoner of having administered, or caused to be taken, poison, in order to produce abortion, it was objected that the depositions were not admissible on the present charge as being substantially different from the case on which the evidence had been taken.

I was disposed to think, the transaction being the same, the evidence was admissible, although, in consequence of the death of the woman having supervened, the charge had assumed a different shape and character. I however reserved this question also for the consideration of the Court.

A. E. COCKBURN.

No counsel appeared to argue on either side in this case.

The following is an abstract of the case of *Rex v. Russell*, cited above:—"Russell was tried on an indictment which charged Sarah Wormsley with mur-

dering herself with arsenic, and Russell with inciting her to commit the said murder. It appeared that Wormsley, who was about four months advanced in pregnancy, but not quick with child, died from taking arsenic, which she had received from Russell, for the purpose of procuring a miscarriage, and that she knowingly took it with intent to procure a miscarriage, in the absence of Russell. It was objected that there was no evidence to prove that she was *felo de se*; that the 9 Geo. 4, c. 31, s. 13, did not apply to a woman administering poison to herself; and that, assuming her to have taken arsenic knowingly, and with intent to procure a miscarriage, she was not guilty of any offence; and, consequently, if there were no principal there could be no accessory. Secondly, that the 7 Geo. 4, c. 64, s. 9, did not apply to the case of a principal who was *felo de se*. Upon a case reserved, it was held that she was *felo de se*; that Russell was an accessory before the fact, but that he could not be tried as an accessory under the 7 Geo. 4, c. 64, s. 9, as he could not have been tried at all before that statute, which was to be considered as extending to those persons only who before the statute were triable either with or after the principal, and not to make those triable who before never could have been tried."

ERLE, C. J.—The prisoner was convicted of murder, and the question is, whether, upon the facts, he was properly convicted. The deceased, Elizabeth Bradley, was pregnant, and took a dose of sublimate for the purpose of producing abortion. The sublimate had been procured for her by the prisoner, with the full knowledge of the purpose for which it was to be applied. The prisoner in procuring the poison had acted at the instigation of the deceased, and under the influence of threats of self-destruction if the means to procure abortion were not supplied to her. Then the case sets out the motives which induced the woman to be so desirous of preventing her state being known. The jury negatived the fact of the prisoner having administered the poison to the deceased, or caused it to be taken by her; but said that he had delivered it to her with the knowledge of the purpose to which she intended to apply it, and so they were directed that he was a principal in the murder. Cockburn, C. J. reserved the case, holding the party to be guilty of murder by reason of the decision in the case of *Rex v. Russell*, 1 Moo. C. C. 356; but the facts of the present case appear to me to differ materially from the facts in that case, where the prisoner, finding the woman to be pregnant, procured arsenic for the purpose of procuring abortion, and himself administering arsenic to her, she taking it without a knowledge of what it was, but taking it for the purpose of procuring abortion, and it caused her death. The Judges held that it was a dangerous misdemeanor in her to take a drug for the purpose of procuring abortion, but a statute had recently passed to meet such a case. It had been held to be a dangerous misdemeanor to take a drug, and if in the perpetration of a dangerous misdemeanor death ensued, the party was guilty of murder for that death, and the woman had been held by a majority of the judges to have been guilty of murder, *felo de se*, and Russell was an accessory to the murder by administering the arsenic with intent to procure abortion. Now, in the present case there appears to me a very marked distinction between the conduct of the prisoner Fretwell and the conduct of the prisoner Russell. In Russell's case he administered the poison. In the present case the prisoner was unwilling that she should take the poison; it was at her instigation and under the threat of self-destruction that he procured it and supplied it to her; but it was found that he did not administer it to her or cause her to take it, and it would be consistent with the facts of the case that he hoped she would change her mind; and it might well be that the prisoner hoped and ex-



pected that she would not resort to it. There is a material distinction between the two cases. The court do not think it necessary to lay down the law whether the person taking it would be guilty of *felo de se*. I am the more fortified in this decision by looking at the late statute, 24 & 25 Vict. c. 100, which contains some important provisions, and has defined the crime both of the woman taking the poison and the party procuring it and causing her to take it. The late statute has made the party who procures the drug guilty of a misdemeanor, but made it a totally different kind of crime to the administering. In my opinion the prisoner was not guilty of murder, and the conviction must be reversed.

MARTIN, B. thought the conduct of the prisoner was too remote to make him guilty of murder.

CHANNELL, B. concurred in the judgment as given by Erle, C. J.

BLACKBURN, J. also concurred. According to the finding of the jury the prisoner did not cause the poison to be administered, and was not a party to it in such a way as to make it amount to murder.

KEATING, J. was of the same opinion.

*Conviction reversed.*

#### REG. V. WILLIAM STEPHENSON.

*Evidence—Illness of witness—Admissibility of deposition—11 & 12 Vict. c. 42, s. 17.*

*It is a question for the presiding judge to determine whether the proof of a witness being so ill as not to be able to travel, within the meaning of the 11 & 12 Vict. c. 42, s. 17, is sufficient for the purpose of admitting his deposition before the committing magistrate. Therefore, when the deposition was admitted upon evidence that the prosecutrix was daily expecting her confinement and otherwise poorly, and therefore too ill to travel, this court declined to interfere with the exercise of the discretion of the presiding judge.*

Case reserved for the opinion of this Court by the Chairman of the East Riding sessions (Yorkshire).

The prisoner was tried at the Easter quarter sessions of the North Riding of Yorkshire for obtaining money under false pretences from one Mary Smith.

The female servant and the brother of Mary Smith proved that the latter was daily expecting her confinement, and the brother stated that she was "poorly otherwise," and that she was therefore too ill to travel from her place of residence to the place of trial, a distance of about twenty-five miles.

The counsel for the prosecution then proposed to give in evidence the deposition of Mary Smith, duly taken before the committing magistrate, to which the prisoner's counsel objected, on the ground that the illness (if any) ought to have been proved by a medical man, and that the expectation of her confinement was not an illness contemplated by sect. 17 of the 11 & 12 Vict. c. 42, which authorised the deposition being given in evidence on the trial.

The Court decided on receiving the evidence tendered by the prosecution of the illness, and also upon reading in evidence the deposition of Mary Smith, taken before the committing magistrate. The prisoner was found guilty, and sentenced to two calendar months' imprisonment, with hard labour, but the execution of the sentence was respited, and the prisoner was admitted to bail to appear at the next quarter sessions of the North Riding of Yorkshire.

At the request of the prisoner's counsel, this case was granted for the opinion of the Court of Criminal Appeal on the points raised on behalf of the prisoner.

CATCART, Chairman.

No counsel appeared to argue on either side.

The following are the words of sect. 17 of the 11

& 12 Vict. c. 42:—"And be it enacted that in all cases where any person shall appear, or be brought before any justice or justices of the peace charged with any indictable offence, whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons, or have been apprehended with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to, and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same, and the justice or justices before whom any such witness shall appear to be examined as aforesaid, shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do, and if, upon the trial of the person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same."

ERLE, C. J.—The question reserved in this case is, whether the deposition of the prosecutrix, taken before the committing magistrate, was admissible in evidence at the trial in consequence of proof of her illness at the time, and whether her illness was within the meaning of the statute. The words of the statute are, "If the party shall be proved to be dead or too ill to travel." The evidence at the trial was, that the prosecutrix was daily expecting her confinement, and her brother stated that "she was poorly otherwise," and that she was therefore too ill to travel. The prisoner's counsel objected that the illness ought to have been proved by a medical man, and that the expectation of her confinement was not an illness within the meaning of the statute to admit the deposition. We do not mean to affirm such a proposition. There may be incidents in regard to parturition which will bring the case within the statute, and we consider that it is in the discretion of the presiding judge to determine whether the deposition is admissible under the circumstances, for he is responsible that the party be proved to be too ill to travel, and this court ought not to reverse his decision. We therefore think the court of quarter sessions acted rightly in admitting the deposition, and affirm the conviction.

The other Judges concurred, on the ground that it was a question for the presiding judge to determine, and that if he thought the evidence of the illness sufficient within the statute, it was for him to act upon his discretion.

*Conviction affirmed.*

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WORTHINGTON AND ANOTHER v. SUDLOW.

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## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and  
C. J. B. HEALST, Esqrs., Barristers-at-Law.

Tuesday, April 29.

WORTHINGTON AND ANOTHER v. SUDLOW (Clerk, &amp;c.)

*Contract—Public Health Act, 12 Vict. c. 63, s. 69. A local board of health, in exercise of the powers of 12 Vict. c. 63, s. 69, gave notice to the owners of premises in a private street to sewer, &c., and on their default contracted with plts. to do the work, "the work to be completed within five months, and the contractor to be paid for the work when the money is collected from the owners of the adjacent property." It turned out that the money could not be collected by reason of an insufficient notice having been given by the local board:*

*Held, that the contractor might sue the local board on an implied undertaking that the board was in a condition to collect the money, and had done, or would do, all on their part to collect it.*

This was an action brought by the plts. against the deft. as the clerk for the time being of the local board of health for the district of Moss-side, for the recovery of 2310*l.* 15*s.* 8*d.*, the balance of four several sums of 2367*l.* 2376*l.* 10*s.*, 1228*l.* and 1122*l.*, being the price of certain works specified in four contracts, the first of which is dated 10th Feb. 1858; the second, the 7th July 1858; and the third and fourth respectively the 17th Nov. 1858.

The pleadings were set out in the appendix to this case, and were to be taken as part of it, the court having all the powers of amending or adding to the pleadings that a judge at Nisi Prius would have had, the object of both parties being to have the matters really in dispute between them decided. All the said contracts were entered into between the plts. and the local board of health for the district of Moss-side, being a non-corporate district for which a local board of health has been duly constituted according to the Public Health Act 1848, and they are signed by the plts. as the contractors, and were signed by five of the members of the board, and otherwise executed in conformity with the provisions of the 85th section of the Public Health Act. The works specified in each contract are, the sewerage, levelling, paving, flagging and channelling of certain streets within the said districts, not being highways, which were not sewered, levelled, paved, flagged, or channelled to the satisfaction of the said local board, and the works were such as the said local board might execute under the 69th section of the Public Health Act upon the failure so to do of the owners or occupiers of the adjoining premises.

Each contract contains a stipulation binding the plts. to perform the works the subject of the contract within the time and in the manner therein specified under a pecuniary penalty, and also a provision stating that the contractors were to be paid for the work when the money was collected from the owners of the adjacent property.

The works the subject of each of the four contracts were duly performed by the plts. as the contractors, within the time and in the manner therein mentioned. Before entering into any of the said contracts with the plts., the local board had given to the several owners of the respective premises fronting upon the streets mentioned therein, a notice in writing, intended as a notice such as is required in that behalf by the 69th section of the Public Health Act.

The case then set out the form of notice; but it is unnecessary to do more than refer to the case of *Parkinson v. The Mayor of Blackburn*, 33 L. T. Rep. 119, which decided that the notice was bad, and that the board could not enforce payment for the work done from the owners of the premises. All the said owners

have failed to comply with the said notices, and the said local board thereupon entered into the said contracts for the purpose of executing the said works under the 69th section.

After the works under each of the four contracts had been performed by the plts. application was made by the local board in due form to each of the said owners for payment of his or her just proportion of the expenses incurred in executing the works which had been settled by the surveyor of the local board as payable by each such owner according to the frontage of his or her premises upon the streets mentioned in each of the contracts, and all the sums recovered by the local board of health in consequence of such application before the commencement of this action were duly paid by them to the plts.

Certain owners on being so applied to refused payment, and in several cases the justices before whom the owners were summoned by the board for the purpose of enforcing payment held the notices bad and refused to make any order, considering themselves bound by a decision of the court of quarter sessions, which had recently and after the date of the said contracts been given in an analogous case upon the authority of the Court of Q. B. in *Parkinson v. The Mayor of Blackburn*. In consequence the local board thought it useless to take further proceedings, and in point of fact no further proceedings were taken by the local board to enforce payment from the rest of the said owners of the respective sums assessed upon them in respect of their premises, and since the time for payment of these sums more than six calendar months elapsed before this action was commenced.

The several contracts were in the following form, *mutatis mutandis*:—

"Memorandum.—It is hereby contracted, understood, and agreed by and between the undersigned Wm. Worthington and John Worthington, for themselves, their executors, administrators, or assigns, on the one part, and the Local Board of Health for the district of Moss-side, near Manchester, in the county of Lancaster, for themselves and their successors, on the other part, as follows, viz.:—That the said W. Worthington and J. Worthington shall duly and fully perform and complete all and every the works, and provide the materials mentioned in the foregoing specification under and according to the terms and conditions, and within the time therein expressed, in consideration of the sum of 2376*l.* 10*s.* of lawful English money, to be paid to the said W. Worthington and J. Worthington, their executors, administrators, or assigns, by the said local board of health or their successors, at the times and in the manner mentioned in the said specification, and which said sum of 2376*l.* 10*s.* the said local board of health hereby promise and agree that they or their successors will pay, or cause to be paid, to the said W. Worthington and J. Worthington, their executors, administrators, or assigns, at the time and in the manner last aforesaid. That the said specification, and the plans and sections therein referred to, shall in all respects be taken and considered as composing part of this contract and agreement, and the said W. Worthington and J. Worthington shall duly observe and perform all the conditions of the said specification.

"That in the event of the said W. Worthington and J. Worthington, their executors, administrators, or assigns, failing, neglecting, or refusing to duly perform this contract and agreement, or to do, perform and complete the works and provide the materials, or any of them, mentioned in the said specification, according to the terms and conditions of such specification in every respect, and within the time limited therein; then the said W. Worthington and J. Worthington hereby expressly promise and agree that they, their executors, administrators and assigns, will pay, or cause to be paid, to the said local board of health or their

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successors the sum of 2376*l.* 10*s.* as a penalty under and according to the provisions of the Public Health Act 1848.

"Witness, the hands of the said W. and J. Worthington, and the hands of five or more members, and the seal of the said local board hereunto respectively subscribed and affixed, this 7th day of July 1858.

"WILLIAM WORTHINGTON.

"JOHN WORTHINGTON.

"SAMUEL BROOKS

"A. J. BARTON

"JAMES CRAVEN

"ANTHONY FLINT

"J. D. CREWDSON."

[L. S.]

The clause in the specification as to the time and payment was the following: "The work to be done within five calendar months of the signing the contract, and the contractor to be paid for the work when the money is collected from the owners of the adjacent property."

*Manisty (Melish and C. Hutton with him) for the plts.*—The plts. are entitled to recover. By the 12 Vict. c. 63, s. 69, the local board might pave, &c., the private streets themselves, after having given a notice to the owners of the abutting premises, and after a neglect by them to do so. Here they gave notices which turned out to be bad, and the local board could not therefore enforce payment from the owners of the sums expended. The local board had power to make these contracts, and they stipulated to pay certain sums when they collected the money; there was therefore an implied undertaking that they had the means of fulfilling the contract and of collecting the money. They have the carriage of the proceedings, and it was by their act that they were prevented from recovering the money. This action is, therefore, maintainable against the local board for representing that they were in a condition to fulfil the contract and collect the money when they were not: (*Hall v. Conder*, 2 C. B., N. S., 22; *Keys v. Harwood*, 2 C. B. 905; *Bain v. Kirk*, 18 L. J. 83, Q. B.)

*Wheeler, Serjt. (T. Jones with him).*—This action is not maintainable unless the plts. can establish that there was, by reason of these contracts having been entered into, a warranty of the validity of the notice given to the owners of the premises. The fact of these notices being held insufficient was a thing not foreseen by either party when the contracts were made, and therefore not provided for in the contracts. The result of the argument on the other side is to make this an absolute covenant to pay. To import into this contract an implication such as that suggested would be to make another contract, for there was no implied undertaking to do more than the board had done, viz., given a notice such as it was, and about which the plts. might have inquired: (*Aspdin v. Austin*, 5 Q. B. 671; *Sampson v. Easterby*, 9 B. & C. 505; *Saltoun v. Houston*, 1 Bing. 433.)

*Manisty in reply.*—This action is not against the local board personally, so as to make them personally liable; and it is premature to discuss in what mode the plts. can avail themselves of a judgment in it in their favour.

*COCKBURN, C. J.*—I am of opinion that our judgment ought to be for the plts. We are not fettered by the pleadings in this case, and if we are of opinion that on any form of declaration the plts. are entitled to recover we may give our judgment accordingly. Now I think that the plts., although not in a condition to recover by the express terms of the contract, yet on an implied undertaking on the part of the defts. are entitled to recover. No doubt it was the intention of both parties that payment should be made out of the fund to be collected from the owners of the property in the vicinity of the works. Nothing is so natural as that the defts. should have desired to limit their liability

to pay out of that fund, and that the plts. should engage to be paid out of that fund, but in such bargains there are implied undertakings which may be enforced. There must be an implied undertaking by the defts. to this extent at least, to do what it was incumbent on them to do in order to collect the fund, but of that there is no indication in the contract. That shows that in such a contract there may arise by implication some term or condition not expressed in the contract. The defts. can only contract for such works in their public capacity after they have first called upon the owners of the property to do the works, for then only arises the power to do the work themselves or to contract with others to do the works for them. Accordingly the defts. apply to the plts. to do the works which they might have done themselves in exercise of the power given to them by sect. 69. Then, is it not as if the contract had stated this *in extenso*, and as if they had said, at the same time, "Although *prima facie* we shall be liable as parties employing an agent, yet we may stipulate that you shall not call on us for payment till we have collected the money from the owners of the property?" It turns out that the local board had given an insufficient notice to the owners of the property, and it is now said that the defts. might have made inquiries as to this, but I think they were not bound to do that. It also turns out that the local board are not invested with the power of collecting the money. I therefore think that an action lies against them for having represented that they were in a position to collect the money from the owners of the property, when, in point of fact, they had not done that which gave them power to do so. Our judgment will therefore be for the plts. The Court of Ex. Ch., in *Collen v. Wright*, 27 L. J. 115, Q. B., decided in an analogous case upon the same principle.

*CROMPTON, J.*—I am of the same opinion. The most favourable way of putting the case for the defts. is the way in which my brother Wheeler put it, viz., that the plts. agreed with the defts. that they would take the chance of the moneys being collected from the owners of the property. Taking that assumption as correct, I think there arises in this case such an implied covenant or agreement as suggested by the Lord Chief Justice. The contract is, that they would pay specific sums to the plts. when the money was collected from the owners of the property. This is an act to be done by the defts. They agree to pay when they collect. Does not that assume that they are in a position to collect? They seem to be making an engagement that they are in a position to collect, when they really are not. It is just like the case I put during the argument, of a person contracting to pay such sum of money as shall be found by an arbitrator to be due, in which case, if he refuse to appoint an arbitrator, the other party may recover that sum in an action against him for not appointing an arbitrator. In this case the defts. say, almost expressly, "We will collect this money."

*BLACKBURN, J.*—I am of the same opinion. The first ground taken by Serjt. Wheeler, as I understood his argument, was that this contract was *ultra vires*, because sect. 69 required as a condition, before the local boards could do the works themselves, that they should give a notice to the owners of the property, and that, as a proper legal notice had not been given, they had no power to do the work themselves. I do not inquire at present whether giving a notice was a condition or not to the exercise of the power of the local board. In this case I think it is enough if the contractor sees that, if the local board have taken the proper steps, the local board may do the work. Then arises the question whether, on these contracts, the plts. are in a position to recover. I am not prepared to say that the parties have not made the collection of

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this money a condition precedent to the defts.' liability to pay; but if they have done so, I hold very strongly that the terms of the contract show an implied agreement that the defts. will do all on their part towards the collection of the money. I don't know that it goes so far as that they covenant that the money shall be absolutely collected; but here the payment is to be made when the money is collected, which depends on the local board taking proper steps for doing so. I therefore think that there was an implied agreement that the local board should do, or had already done, their part towards the collection of the money. On that ground I think there has been a breach of the agreement by the defts. in this case.

MILLOR, J.—I am of the same opinion. It would be extremely unreasonable to throw on the contractor the necessity of making inquiries whether proper notices have been given to all the owners of property in cases like this. It must be taken that the contract was upon the footing that the local board had done or would do all that it was requisite for giving them the necessary power. Some implication must be made before the contract can be reasonably construed. The contract limits the time for the performance of the works, and points out the fund for payment, "when and as the local board collect the money from the owners of the property." Surely that must carry with it the undertaking that they will do all that is necessary on their part in order to enable them to fulfil the contract and pay the contractor. If so, they have not done that, and the pls. are entitled to maintain an action for a breach of that undertaking.

*Judgment for the pls.*

Wednesday, April 30.

REG. v. WILLIAM WEBB HAYWARD.

*Municipal corporation—Borough quarter sessions—Clerk of the peace—In whom the power to dismiss—7 & 8 Will. 4, c. 76, ss. 103, 105.*

*In municipal boroughs under the 5 & 6 Will. 4, c. 76, which have a grant of a court of quarter sessions, though the power to appoint a clerk of the peace is vested by sect. 103 in the town council, the power to dismiss such clerk is by operation of sect. 105 vested in the recorder.*

This was a demurrer to a replication in proceedings *by quo warranto*. The *quo warranto* information called upon Mr. William Webb Hayward to show cause by what authority he exercised the office of town-clerk of Rochester. To this he pleaded he was appointed by the town council of the borough of Rochester under the provisions of the 5 & 6 Will. 4, c. 76, s. 103. To this it was replied that the said town council had dismissed him from his said office for misbehaviour, and had appointed thereto a Mr. Humphrey Wickham. To this replication there was a demurrer. By sect. 103 of the 5 & 6 Will. 4, c. 76 (Municipal Corporation Act), it is enacted that in boroughs under that statute in which a grant of a court of quarter sessions has been made, "the council of any such borough shall appoint a fit person to be clerk of the peace during his good behaviour."

By sect. 6 of the 1 Will. & M. c. 21, it is enacted that if the clerk of the peace shall misbehave himself in his office, and a complaint and charge in writing of such misbehaviour shall be exhibited against him to the justices in sessions, the said justices may on examination and due proof thereof openly in the said sessions, suspend or discharge him from the said office; and in such case the *custos rotulorum* shall appoint another able and sufficient person residing in the said county or division to be clerk of the peace."

By sect. 105 of the 5 & 6 Will. 4, c. 76, it is enacted that the recorder is to hold his court of quarter sessions once in every quarter of a year, "of

which court the recorder of such borough shall sit as the sole judge; and such court of quarter sessions of the peace shall be a court of record, and shall have cognisance of all crimes, offences and matters whatsoever cognisable by any court of quarter sessions of the peace for counties in England, and the said recorder shall have power to do all things necessary for exercising such jurisdiction, notwithstanding his being such sole judge, as fully as any such last-mentioned court: provided, nevertheless, that no recorder by virtue of his office shall have power to make or levy any county rate, or rate in the nature of a county rate, or to grant any licence or authority to any person to keep an inn, alehouse, or victualling-house, to sell excisable liquors by retail, or to exercise any of the powers herein specially vested in the council of such borough."

*Mellish, Q.C. (Macnamara with him)* appeared in support of the demurrer, and argued that, as the right to dismiss the clerk of the peace for the county is by the 1 Will. & M. c. 21, s. 6, vested in the justices at their quarter sessions; and as the 105th section of the 5 & 6 Will. 4, c. 76, gives the recorder of a borough cognisance of all matters whatsoever (with certain exceptions of which this is not one) cognisable by the quarter sessions for counties, with power to do all things necessary for exercising such jurisdiction, the power to dismiss the clerk of the peace for the borough of Rochester was with the recorder and not with the town council: (*Bac. Ab. tit. "Office" and "Officers;" Rex v. Lloyd, 2 Str. 996; Harcourt v. Fox, 1 Shew. 426.*)

*Lush, Q.C. (Prestice with him)* argued that the power to dismiss is with the body who appointed, namely, the town council: (*Reg. v. Carmarthen, 7 A. & B. 756; Reg. v. Grimshaw, 10 Q. B. 747.*)

COCKBURN, C. J.—In this case there must be judgment for the deft. I think the town council have taken upon themselves a power of removing an officer which was not vested in them. Now the Municipal Corporation Act provides that all the judicial functions of the sessions shall be performed by the recorders of the boroughs, and that all matters, with certain exceptions, cognisable by the quarter sessions of counties, are to be cognisable by the recorders. Now, as clerks of the peace hold their office during good behaviour, their misbehaviour is cognisable by the quarter sessions. Upon turning to the 1 Will. & M. c. 21, s. 6, we find that the misbehaviour of the clerk of the peace is a matter which is to be brought before the justices at their quarter sessions, to be dealt with by them. It is said by Mr. Lush that that gives only a concurrent power, and that the *custos rotulorum* who appoints has the same power. I cannot think so; for I believe that when the Legislature gave the power of removal to the justices at sessions, it intended that to be the only tribunal upon the subject. I think that the court of quarter sessions in counties had sole cognisance of the misconduct of the clerk of the peace, and as the recorder has jurisdiction over all matters cognisable by the quarter sessions, he alone has such power in boroughs. I cannot think that it was the intention of the Legislature to leave the power of dismissal to the town council, for I cannot conceive anything more inconvenient than the misconduct of a judicial officer being left to the consideration of a town council, which is necessarily, and very properly, a fluctuating and popular body. I admit that in many cases the power of removing an officer is in the party by whom he was appointed; but if the Legislature has, in a given case, as in the case of a clerk of the peace, entrusted another body with this power, it seems to me that the proviso that the recorder shall not exercise any of the powers specially vested in the town council is exceptional in this instance. I think, therefore, his jurisdiction is co-extensive with that of justices at county quarter

sessions, and that the power of dismissal is with him, and not with the town council.

CROMPTON and MELLOR, JJ. gave similar judgments. *Judgment for the deft.*

Wednesday, May 7.

REG. on the Prosecution of the BURIAL BOARD OF WALCOT, SOMERSET v. THE OVERSEERS OF WALCOT.

*Burial board—Common law parish divided into ecclesiastical districts under the 48 Geo. 3, c. 45—Power of the vestry of the common law parish to appoint a burial board for the entire common law parish—Mandamus—Return—Demurrer.*

*The fact that a common law parish has been divided, under the provisions of the 48 Geo. 3, c. 45, into district parishes for ecclesiastical purposes, does not disentitle the ratepayers of such common law parish from meeting in vestry and resolving upon having a burial-ground and nominating a burial board for such common law parish.*

*The common law parish of Walcot was in the year 1840, by an order in council, divided into three district parishes for ecclesiastical purposes, pursuant to the 48 Geo. 3, c. 45, the old burial-ground remaining common to the new districts. At a vestry of the common law parish, held pursuant to the 15 & 16 Vict. c. 85, s. 10; and 16 & 17 Vict. c. 134, s. 7, it was resolved that a burial-ground should be provided for such parish, and a burial board was then appointed:*

*Held, that the proceedings were lawful, and that the board was well constituted for the entire common law parish.*

This was a demurrer to a return to a *mandamus*.

The writ, which was directed to the above-named defts., stated, that in and for the parish of Walcot there is a burial board duly and lawfully constituted, and that the said board has incurred certain expenses in carrying the statutes relating thereto into effect, to wit, the sum of 48*l.* 9*s.* 8*d.*, which expenses are chargeable upon and to be paid out of the rates for the relief of the poor of such parish, and that a certificate under the hands and seals of certain members of such board for the above sum was duly served upon the overseers, requiring them to pay such sum to the clerk to the said board for and on behalf of such board, which sum they the said overseers had refused to pay, and commanding them to pay the same, &c.

To this the overseers returned, that the church of the said parish of Walcot, before and at the time of the division of the said parish into three distinct and separate parishes, as thereafter mentioned, had been and was a rectory, and that before the constitution of the said burial board for the said parish of Walcot, as in the said writ mentioned, and before the passing of any resolution by the vestry of the said parish that a burial-ground should be provided for the said parish of Walcot, the said parish had been and was, by an order of her Majesty in Council, duly made on the 5th March 1840, in pursuance and under the authority of an Act of Parliament, made and passed in the 55th year of the reign of his late Majesty King George the Third, intitled "An Act for building and promoting the building of additional churches in populous parishes," divided into three distinct and separate parishes, named respectively the parish of Walcot St. Swithin, the parish of St. Saviour and Trinity parish, for all ecclesiastical purposes whatever, in accordance with and in pursuance of the provisions of the said Act; and that such division had, before the constitution of the said burial board as aforesaid, and before the passing of any resolution by the vestry of the said parish that a burial-ground should be pro-

vided for the said parish as aforesaid, become complete by the resignation of the spiritual person who was the incumbent of the said parish of Walcot at the time of such division, and has so continued from thence hitherto, and that before and at the time of such division so becoming complete as aforesaid, there was in each of the divisions into which the said parish of Walcot was so divided as aforesaid respectively, a separate and distinct church or chapel duly consecrated in that behalf, and as required by law, and that after the said division had so become complete as aforesaid, and before the constitution of the said burial board as aforesaid, and before the passing of any resolution by the vestry of the said parish of Walcot that a burial-ground should be provided for the said parish as aforesaid, the said churches or chapels respectively became and were used and appropriated as the parish churches of the said three distinct and separate parishes respectively, and have so continued from thence hitherto.

To this return the prosecutors demurred.

The points of argument stated for the prosecutors were:—1. That the fact of the common law parish of Walcot having been divided into three ecclesiastical districts, under the provisions of the 58 Geo. 3, c. 45, as mentioned in the return, does not disentitle the ratepayers of the said common law parish from meeting in the vestry of such parish, and resolving that a burial-ground shall be provided for such parish. 2. That as, at the time when the said burial board was constituted, there was a common burial-ground for the said common law parish, in which the deceased parishioners of such common law parish were accustomed as of right to be buried, and which, by a lawful order, was directed to be closed, it was incumbent upon the parishioners of such parish to meet in the vestry of such parish and resolve that a burial-ground should be provided for such parish. 3. That the Burial Acts, 15 & 16 Vict. c. 85; 16 & 17 Vict. c. 134, s. 7; 18 & 19 Vict. c. 128, ss. 11, 12, 13; 20 & 21 Vict. c. 81, ss. 5, 9, and the 23 & 24 Vict. c. 61, s. 4, are framed to provide for the case of a common law parish being divided, under the provisions of the 58 Geo. 3, c. 45, into district parishes.

The points of argument for the defts. were, that the fact of the common law parish of Walcot having been divided into three ecclesiastical parishes under the provisions of the 58 Geo. 3, c. 45, as mentioned in the return, incapacitates the ratepayers of the common law parish from providing a burial-ground and forming a burial board for such common law parish under the provisions of the Burial Board Acts.

By sect. 16 of the 58 Geo. 3, c. 45 ("An Act for building and promoting the building of additional churches in populous parishes") provisions are enacted for dividing large parishes into ecclesiastical districts.

Sect. 24 enacts, that "the churches and chapels respectively assigned to such districts shall, when duly consecrated for that purpose, become and be the district parish churches of such district parishes for all purposes of ecclesiastical worship and performance of ecclesiastical duties, and as to all marriages, christenings, churchings and burials, and the registry thereof respectively within the same," &c.

Sect. 27 enacts, that "all Acts of Parliament, laws and customs relating to publishing banns of marriage, marriages, christenings, churchings and burials and the registering thereof, and all ecclesiastical fees, oblations or offerings, shall apply to such separate and distinct parishes and district parishes so made as aforesaid when they shall so become complete, separate and distinct parishes under the provisions of this Act, after the death, resignation, or other avoidance of the existing incumbent respectively in each such parish or extra-parochial place, and to the churches and chapels thereof, and to

the ecclesiastical persons having cure of souls, or serving the same, in like manner in every respect as if the same respectively had been ancient, separate and distinct parishes and parish churches by law to all intents and purposes."

By the 15 & 16 Vict. c. 85 ("An Act to amend the laws concerning the burial of the dead in the metropolis") sect. 2, power is given to her Majesty to order the discontinuance of interments in certain burial-grounds. By sect. 10, the ratepayers of any parish assembled in vestry may resolve that a burial-ground shall be provided under the Act, and thereupon they are, by sect. 11, to appoint a burial board, the expenses thereof, &c. (by sect. 19) to be charged upon and paid out of the poor-rate, power being given by sect. 20 for the board to borrow money; and, by the interpretation clause (sect. 52), the word "parish" shall mean every place having separate overseers of the poor and separately maintaining its own poor.

By the 16 & 17 Vict. c. 134, the former Act is made to extend to the whole of England and Wales.

By sect. 5 of the 20 & 21 Vict. c. 81, "the vestry, or meeting in the nature of a vestry, of any parish, new parish, township, or other district, not separately maintaining its own poor, and which has had no separate burial-ground, may appoint a burial board, and such vestry or meeting, and the burial board appointed by it, shall exercise and have all the powers which they might have exercised and had under the said Acts and this Act, if such parish, new parish, township, or district had had a separate burial-ground before the passing of the said Act of the 18th and 19th years of her Majesty. Provided always, that all the powers of any other vestry or meeting and burial board, if any, shall then cease and determine, so far as relates to such parish, new parish, township, or district as aforesaid," &c.

By sect. 4 of the 23 & 24 Vict. c. 64, it is enacted that, "where any parish or place has been divided into two or more parts or districts for all or any ecclesiastical purposes, and any one of such parts has a separate burial-ground, it shall not be lawful for the vestry, or meeting in the nature of a vestry, for such entire parish or place to appoint a burial board without the approval of one of her Majesty's principal Secretaries of State."

The vestry meeting of the common law parish of Walcot, at which it was resolved to have a burial-ground, and at which a burial board was appointed, was held on the 25th Jan. 1859.

*Kinglake*, Serjt. (*T. W. Saunders* with him) now appeared in support of the demurrer, and argued that the burial board for the entire common law parish was well formed. [COCKBURN, C. J.—It seems to me that there is one short argument which disposes of the question. When the Legislature by the first Act gave a power to close a burial-ground to which these districts resorted for the burial of their dead, it could not have been intended that such districts should have no right to bury in the new burial-ground, for they possessed no power at that time to provide a burial-ground for themselves.]

*M. Smith*, Q.C. (*Kingdon* with him), in support of the return, was called upon.—He contended that, as by the 58 Geo. 3, c. 45, the new ecclesiastical parish of St. Saviours had full and exclusive powers with reference to the burial of its own dead, it was not competent to the common law parish to form a board which should include such ecclesiastical parish. [CROMPTON, J.—That Act applies to the then existing state of things. It did not tie up the hands of the Legislature. At that time there was no necessity for the present system. COCKBURN, C.J.—That Act did not deprive your district of the right of burial in the old ground.] I should be inclined to say it did. [COCKBURN, C.J.—The burial

of the dead is in some sense a secular as well as an ecclesiastical matter. I think the words of the Act are quite sufficient to include all districts, causing them to remain united for burial purposes.] In *Reg. v. The Sudbury Burial Board*, El. Bl. & El. 264, it was held that the word "parish" is applicable also to a parish not having separate overseers nor separately maintaining its own poor. [COCKBURN, C. J.—That may be for some purposes; but still it certainly includes the original parish out of which the districts are carved. MELLOR, J.—The sanitary objects of these Acts clearly supersede the ecclesiastical ones. The expenses are to come out of the poor-rate. CROMPTON, J.—The Acts show that these burial-grounds are not for church purposes only, but for the interment of all the parishioners, whether churchmen or dissenters.] The law does not make any distinction between between the old and the new burial-grounds. If the old parish can form a board for all the districts, these districts might afterwards fall away, and then the old board would be unnecessary. [COCKBURN, C. J.—The whole scheme is founded upon the expenses coming from the poor-rate. Now these districts originally had no power over the poor-rate, and therefore they could not have had any such burial boards for themselves; and we must take it upon this return that there was a common burial-ground for all the districts. *Kinglake*, Serjt. referred to sect. 35 of the 15 & 16 Vict. c. 85. *M. Smith* referred to sect. 5 of the 20 & 21 Vict. c. 81. COCKBURN, C. J.—If the new districts will not exercise their powers under that Act by having a separate burial board, the old parish must provide for the whole. What has been done since the formation of the board is immaterial.] (*Reg. v. Wright*, 5 L. T. Rep. N.S. 345. This district is a distinct parish, and although there may have been a difficulty originally as to raising money, this would be merely a *casus omissus* of the Legislature. The old parish having included the new district, they have interfered with a parish which has a right to its own burial-ground, and the burial board was therefore badly formed.

*Kinglake*, Serjt. in reply.—The object of the Legislature was to supply a new burial-ground when the old one was stopped up. We have nothing to do with the permissive rights of the new districts. If, under the original Act, the new district had provided its own burial board, it is quite clear that it could not have raised any funds.

He was stopped by—

COCKBURN, C. J.—I am of opinion that the return is bad, and that our judgment must be for the Crown. In the first place, it is important to see how this case would have stood if the 15 & 16 Vict. c. 85, and the subsequent Acts of Parliament which applied the first Act (that was only to extend to the metropolis) to the rest of the kingdom—it is important to see how it would have stood if those Acts had alone passed the Legislature. Now, looking to the 15 & 16 Vict., I am strongly of opinion that the whole entire parish, or the vestry of the entire parish, would have had the power to establish a burial board for the purpose of maintaining the common burial-ground for the interment of the dead in the old common law parish, now divided into three ecclesiastical parishes. The 10th section of that Act of Parliament speaks of the "vestry of such parish," and empowers such vestry to appoint a burial board; and then the Act of Parliament goes on to give the burial board the necessary powers, and, amongst others, the power of acquiring and purchasing ground for the purpose of burial, and of charging the price upon the rates of the parish, to be repaid out of those rates in a given number of years. It empowers them to borrow money to meet that purpose, and it empowers them to charge the expenses year after year, as they may arise, upon the

rates of the entire parish. There is no mention in that Act or reference in that Act to sections of an entire common law parish into which it may have been divided. The Act of the 58 Geo. 3, and other Acts, come under that branch of legislation for ecclesiastical purposes. Now, in the interpretation clause of that Act of Parliament the term "parish," as used in the Act, is explained to mean "any place maintaining its own poor." The whole scheme of the Act is to throw the expense of burial upon the poor-rates of the parishes that may avail themselves of this Act of Parliament. There is no provision whatever for ecclesiastical purposes into which the common law parish may be divided under the Acts of Parliament, and inasmuch as the expenses of public burial are to be defrayed out of the poor-rates of each parish or place maintaining its own poor, it is quite plain in that Act of Parliament there could be no means whereby an ecclesiastical parish or district, as distinguished from a common law parish, could probably meet that expense. Now, I cannot suppose that the Legislature, when it gave the power to the proper authorities to stop up places heretofore used for the purpose of burial, and gave power to parishes to provide new places of burial in such cases, could have intended that ecclesiastical parishes, as distinguished from parishes in the general sense of the term, should be left without the means of meeting an exigency of so great and important a character. Then, if we find the term "parish" is by that Act of Parliament intended to mean a place maintaining its own poor—if we find the term used in the largest possible sense, and we find no provision made for the case of a section of such general parish, divided from it or carved out for ecclesiastical purposes—it is impossible to suppose that the Legislature could have intended to have meant such a case. The only way in which it appears to me consistent with common convenience and common sense is to interpret the word "parish" there so as to have the largest signification as distinguished from the parish for ecclesiastical purposes designated in the more recent Act of Parliament, and to consider the term "parish" embracing the whole of any parish divided into minor sections for ecclesiastical purposes but united for the maintenance of the poor and burial-grounds. Then, if it stood on that Act of Parliament alone, I should entertain no difficulty in coming to the conclusion that the vestry of the old united parish had done no more than, under that Act, they were entitled to do, in appointing this common burial board for common purposes throughout the whole of the parish. Then our attention is drawn to subsequent Acts of Parliament. I own they tend, in my mind, to confirm rather than throw any doubt upon the construction which I am prepared to put upon that Act. In the first place, we have the provisions of the 18 & 19 Vict. c. 128, ss. 12 & 13, to which attention has been called, which excepts from the former Act, to a certain extent, the case of "parish, township, or other district not separately supporting or maintaining its own poor, as heretofore had a separate burial-ground." Therefore, if one of these ecclesiastical parishes, which clearly does not maintain its own poor as separate from and independent of the common law parish—if one of these had a separate burial board, then these provisions would not be applicable to such a case. What does that show? Why, that, but for these provisions, such a case of such a parish or place would have been within the provisions of the 15 & 16 Vict. Then we have a subsequent Act, which has been referred to, in the 20 & 21 Vict. s. 5, which relates to a case of a parish or district not maintaining its own poor, and which has not had a separate place of burial. The former provision having had reference to a parish, district, or place, and having a separate place of burial, now the Legislature extends

the provisions of that Act to a place which has not had a separate place of burial. Then it is provided that such a parish, district, or place may avail itself of the provisions of the former Act of Parliament, constitute its own burial board and have a separate place of burial and defraying the expenses incident thereto, "to be defrayed by a rate levied for that purpose." Then followed this remarkable provision, that as soon as that shall have been done, then all the powers of "any other vestry, or meeting and burial board, if any, shall then cease and determine so far as relates to such parish, new parish, township, or district as aforesaid." Now it is unnecessary to consider that to-day, because this return does not raise the question of how far, if the parish of St. Saviour's had appointed a burial board, that would oust the vestry or the burial board of the general parish of their power, because it does not appear in this return that they had exercised the powers vested in them under the 5th section of that Act of Parliament; but it appears to me that that section is very strong indeed to show that, in the absence of any such legislation as is contained in this Act of Parliament, the 15 & 16 Vict. would necessarily have embraced the present case, because there are provisions that upon appointing the minor parish, the ecclesiastical parish not having previously had a burial ground—upon their appointing the burial board, the power of the old burial board shall cease, shows that but for this legislation for the particular case in question both powers would remain untouched and unaffected to the full extent under the former Act of Parliament. That to my mind is very strong and conclusive to show that but for that, under the 15 & 16 Vict., the old united parish—the vestry of that parish—the burial board appointed by the vestry would have had full power over such a case as the present, which is a case embraced in subsequent legislation. I entertain no doubt that under the 15 & 16 Vict. c. 85, the vestry of the entire parish had power to appoint a burial board, and that burial board, when appointed, had power to exercise all those powers and rights given to them by the 15 & 16 Vict. c. 85, and that burial board so established had jurisdiction over all the component parts of this entire parish, including these minor ecclesiastical parishes established for ecclesiastical purposes. I am of opinion, therefore, that this was a proper exercise of the power vested in the vestry and burial board by that Act of Parliament, the 15 & 16 Vict., and from anything that appears on this return, our judgment ought to be for the Crown.

CROMPTON, J.—I am of the same opinion. I think this return is a bad one. It comes to nothing more than this, that the parish had been divided for ecclesiastical purposes under the Church Building Act. Circumstances occurred which have been stated at the bar before the passing of the 23 & 24 Vict., which appear to have some material bearing on the case as to making the rate, and making the burial board after the 20 & 21 Vict. I think you ought to read this as occurring after the 20 & 21 Vict., and before the 23 & 24 Vict. Now, what is the return? It is merely that this parish had been divided into three districts for ecclesiastical purposes. Now, I think it quite clear, under the earlier Act of Parliament, the 15 & 16 Vict., that the construction is that which has been mentioned by my Lord, and relied upon by my brother Kinglake, that the bodies which were to constitute the burial boards are the vestries for secular purposes, for poor-rate purposes. That is not only pointed out by the interpretation clause in the Act; but I think is very strongly so from the whole tenor of the Act. I think it was the real policy of the framers of the original Act to make this a matter for the vestry having the regulation of the secular matters—that is poor-rates, because they have people to pay—not comprehending merely the persons who



resorted to the church, but meant it to be a matter that could not properly be called the ecclesiastical duties of the vestry for the church, but it provided a cemetery for all her Majesty's subjects, taking care not to hurt the consciences of any person by making a proper division. It is quite clear to my mind that they intended by these Acts to do no more than to make it a matter for the parochial authorities acting for the established church. That appears to be the meaning of it from the words of the Act. I think it is clear, under the 15 & 16 Vict., that they are the persons to appoint where there is a vestry for the poor-rates. It is a strong answer to that to say that there are no provisions and no mode (as put by the Lord Chief Justice early in the case, and never answered), that there is no mode by which the smaller ecclesiastical district could raise its funds. After looking at some of the Acts for comprising two or three districts for maintaining their own poor, there is no difficulty, because the Act says in such cases as that contemplated in the 18 & 19 Vict., they make their orders on the several parishes and get the rates, but under the 15 & 16 Vict. the smaller body could not possibly affect the poor-rate, and the ecclesiastical bodies, the vestry, could not affect the rates, for the poor-rates are to lay in the original parish. I take it to be quite clear that, if it stood alone on the earlier legislation, that the power is in the parish authorities, they having power over the poor-rates and maintaining their own poor, and not in the ecclesiastical district. Then we come to see whether it is brought within any of the other sections? It appears to me there has been a change in the notion of the Legislature, and in these latter Acts they wish to bring it back more within the ecclesiastical authorities, where there is any common bond or union. Then, in the 18 & 19 Vict., first where there are several parishes united together by some common ecclesiastical bond, there are provisions of that kind, and then there are other provisions, and the ones I suppose to be applicable to this case are the 12th and 13th sections. The 12th section provides for the case of a vestry of a parish or district—and I think that comprehends this place in that respect—not separately maintaining its own poor, but which has a separate burial-ground. It does not appear upon the return that it is brought within that category. I think that is out of the question. I should remark that I do not see in this Act, if they do not appoint, that the power of the vestry for the larger district for the purposes of poor-rates is taken away. Supposing that no board is appointed under the 12th section, I find no words taking away, as contended for by Mr. Smith, the power of the larger body. It is not necessary to consider that now, because it is not now on the return that there is a burial board. I have considerable doubts as to how far that would take away the power, because there are no words saying that the power of the larger body shall cease. I doubt whether that could take away necessarily the power of the general body; but, be that as it may, the return not being good under that, I come next to the 20 & 21 Vict. Now, by the 5th section of that enactment is repeated very much the commencement of the enactment of the 18 & 19 Vict., and it makes a provision for the purpose of these new districts, but not insisting on there being necessarily a burial-ground. It enacts, "the vestry or meeting in the nature of a vestry of any parish, new parish, township, or other district not separately maintaining its own poor, and which has no separate burial-ground." Now, those words are, I think, permissive for what follows in the Act? "May." In some cases "may" is used to exercise some judicial functions, but looking to what follows in the Act it appears to me to be permissive—"may appoint a burial board; and such vestry or meeting, and the burial board appointed by it, shall exercise and have all the powers which they

might have exercised." Therefore this would give that smaller ecclesiastical district power of appointing a burial board. Then I come to the doubt which was expressed on the former statute, because it seems clear to my mind, as expressed by the Lord Chief Justice, that those words show that, unless brought within the category of the latter part of the Act, the powers were not to cease. "Provided always that all the powers of any other vestry or meeting and burial board;" that is to say, where there are those words which have given those powers by the former legislation to the vestry of the large body we are now making provision for, that, and we say, if they shall exercise that option in effect, they shall appoint—"that all the powers of any other vestry, or meeting and burial board" that might be the larger body, "if any, shall then cease and determine." I should ask, when? It is clearly when they have made an appointment. It is sufficient for this case to say that they have not, according to this return, made any appointment, and the powers of the board have not ceased and determined. I think it is a very important point to consider, as the Lord Chief Justice has said, as to the right construction—that that would not destroy any of the powers they had exercised. For instance, if they had charged the parish, I should doubt extremely whether, under these words, though it is not very accurately expressed, any power that they had exercised before would remain, and remain binding. It may probably be, that if the smaller district also wished to have a board of their own they might. I do not see anything to say that they are to be relieved from any obligation that before the appointment of them in the exercise of their option may have been thrown on them. It is sufficient to say that they do not show it is to be determined. I think upon all these grounds the return is bad.

BLACKBURN, J.—I am of opinion that upon this return to the *mandamus* our judgment must be for the Crown. The original Act was for the metropolis alone; but the Legislature chose to expand the enactment to the country, and instead of making and providing a new form of statute to be applicable to the exigencies of the country, they were pleased to enact it by applying the Metropolitan Act to the rest of the country, and it was found speedily that this did not work well. Instead of reconsidering that, and making a fresh Act of Parliament, the course pursued has been to supply those defects as they were supposed to be found, by making fresh little enactments, until the effect of it has been that there are ten Acts of Parliament all existing, all to be read together, all to be reconciled to each other, when, in all probability, those who drew each one of the ten Acts had not given their minds to the provisions of the others. Therefore, great difficulty may arise in making out the construction of this enactment. In the present case I confine myself only to what arises upon the case, and in this case I do not think that there is any difficulty. The writ recites that a burial board had been made by the parish of Walcot, and *primâ facie* the parish of Walcot would be the parish in every sense that was entitled to make a burial board. The return confines itself to this. It states explicitly that the parish of Walcot was an ancient rectory, being a parish in every sense of the word; but before the time when this burial board was appointed it had been, under the 58 Geo. 3, c. 45, divided into three sub-parishes, which were parishes for all ecclesiastical purposes. It may be, that when they were divided into these three parishes for all ecclesiastical purposes, these three parishes were separate parishes in many respects, and, if the original Act of Parliament had given the power to constitute a burial board to a parish without any definition, that would raise the question whether or not the meaning of the Act was



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a parish for the lay purposes of the poor-rates, or whether it meant a parish for ecclesiastical purposes, or was confined to a parish where they were both co-extensive. But the interpretation clause puts that out of doubt, because it is there enacted that "parish" is to mean a parish separately maintaining its own poor. The original parish of Walcot, the original rectory, still remains a parish in that sense. It has separate officers for the poor, and separately maintains its own poor, and it is directly within the interpretation clause. Now comes the question whether any subsequent legislation has prevented this parish from having the power to do this? Mr. Smith has contended, looking at the different sections of the 48 Geo. 3, that a separate parish for ecclesiastical purposes was for the purpose of burial, and he pointed out a section under which a parish may have a separate burial board, which was regarded as a churchyard. I do not think that it was pointed out that it must be separate, and also may be separate for ecclesiastical purposes without having separate churchyards. Now, if the parish had required a separate burial-ground, and if the case had occurred subsequent to the 23 & 24 Vict., it seems, as at present advised, although a point may be raised, right to say that where there is a parish or place divided into districts for ecclesiastical purposes having separate burial-grounds, and therefore the burial board could not be constituted without the consent of the Secretary of State. But to raise that question the return must show, as a matter of fact, that it had a separate burial-ground, and that the burial board constituted for the entire parish had been constituted since the 23 & 24 Vict., and that the Secretary of State had not granted his sanction. Those facts are not stated at all. The return substantially says it is impossible, when once a parish has been divided for ecclesiastical purposes, that it could be a parish having power to appoint a burial board at all. As I have already pointed out, the question under this does not arise. It seems the express words of the previous Act show that is not the case. Then, under the 20 & 21 Vict., though this has not a separate burial-ground, yet, under certain circumstances, it may obtain a burial board of its own and procure a separate burial-ground; and if it has done that, it may raise a question upon the construction of the enactment as to what is the effect of saying that the powers of the vestry of the larger district shall cease? Probably questions may arise on that of some importance afterwards, but, as at present advised, I should agree with what has been thrown out by my Lord and my brother Crompton. It is unnecessary to consider that now. In order to raise that question, it would be necessary on this return to show that, in fact, the sub-districts, or one of them, had exercised the power and had made a burial board, so that the power of the larger parish had ceased. That is a matter that ought to appear upon the return. That does not appear upon the return, therefore I may take it that such a state of facts has not arisen. It does not arise now, and it is unnecessary to decide about it at all. All that is necessary to decide in order to decide this case is, that a parish having separate overseers and having overseers of its own, and separately maintaining its own poor, is a parish within the meaning of the Act, and that there is no subsequent legislation that says if they had been divided for ecclesiastical purposes, not separate parishes, that it shall cease to be such.

MELLOR, J.—I am of the same opinion.

*Judgment for the Crown, a peremptory mandamus to issue.*

REG. on the Prosecution of the BURIAL BOARD OF ST. SAVIOUR'S v. THE OVERSEERS OF WALCOT ST. SWITHIN.

*Burial board—District parish for ecclesiastical purposes—Power of, to form a burial board—48 Geo. 3, c. 45; 20 & 21 Vict. c. 81, s. 5.*

*Under the provisions of sect. 5 of the 20 & 21 Vict. c. 81, a district parish formed under the 48 Geo. 3, c. 45, for ecclesiastical purposes, may form a burial board for its own district, notwithstanding a burial board has already been formed for the entire common law parish.*

This was a demurrer to a return to a *mandamus* directed to the defendants.

The writ set out, that the parish of Walcot had been divided into three separate parishes for all ecclesiastical purposes, and that since the passing of the 20 & 21 Vict. c. 81, a burial board had been formed for the ecclesiastical parish of St. Saviour's (being one of the three districts mentioned in the last case), and that the said board had incurred certain expenses in the execution of their duties amounting to the sum of 49*l.* 5*s.* 9*d.*, which the overseers refused to pay. To this the overseers returned that on Jan. 25, 1859, and before the said burial board of St. Saviour's had been appointed, it was resolved by the vestry of Walcot (the common law parish) that a burial-ground should be provided under the Burial Acts for the common law parish, and that a burial board was therefore appointed for such parish in which the ecclesiastical parish of St. Saviour's was situate.

To this return there was a demurrer.

*Petersdorff*, Serjt. appeared in support of the demurrer, and contended that under the provisions of sect. 5 of 20 & 21 Vict. c. 81, the burial board for St. Saviour's parish was rightly formed, for that notwithstanding the common law parish had previously resolved upon having a burial board for the entire parish, it was competent to the new district parish, under the above Act, to constitute a board for their own district. He referred also to sect. 13 of the 18 & 19 Vict. c. 128.

*M. Smith*, Q.C. (*Kingdon*, with him) contended that, as a board had been formed for the entire common law parish, the district of St. Saviour's could not afterwards sever itself and form its own burial board; that a district can only appoint its own board when there is already no board for the entire common law parish: (*Viner v. The Churchwardens of Tonbridge*, 28 L. J. 251, M. C.)

*Petersdorff*, Serjt. replied.

COCKBURN, C. J.—This is a case of very great doubt, and upon which I shall come to an opinion with very great hesitation, from the difficulty with which it is surrounded. I think the best mode of dealing with the case is to adhere to the terms which we find used by the Legislature in the 5th section of 20 & 21 Vict., upon which the question turns. The question is, whether a parish or part of a common law parish existing at common law for ecclesiastical purposes, is, as distinguished from the parish out of which it has been taken under the 5th section of that Act of Parliament, entitled to establish a burial board for itself for its own separate burial-grounds, there being already a burial board established for the general larger parish of which it is a component part. Now the section in its terms gives power to such a section of the parish to establish its own burial-ground and burial board, and provides that on the parish—the minor parish—taking the necessary steps and exercising the powers given to it by that section, then all the powers of the general vestry of the parish, and all the powers of any board already constituted, shall at once cease and determine. Now if that stood alone, nothing could be plainer or more

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intelligible; but the difficulty arises in construing and giving effect to what appears to be, on the face of it, the provision in the enactment and clause of that Act of Parliament consistently with other very important provisions contained in the Acts that are to be taken as one Act with the present. The great difficulty that stands in the way of giving to that section the interpretation to which otherwise it would be entitled, is, that under the powers of the former Act the vestry for the general parish of which the parish the case of which we are now considering is a component part, would be entitled to appoint a burial board for the entire and aggregate parish, and have a burial-ground that should be common to the whole parish at large; and such burial board is entitled to borrow money for the purpose of establishing and maintaining such burial-ground, and to charge the payment of the interest and principal upon the rates of the whole aggregate parish. They are to apportion the proportion each of the component parts of the parish shall contribute to the rate in case each part of the parish pays its own poor-rates (and if it does not, there is no necessity for such apportionment as was the case in the present instance); that the overseers may levy and pay out of its poor-rate the necessary amount. If it is to be taken that after there has been such a general board established in a parish, and a common burial-ground obtained by an expenditure of this kind, and charged on the whole rates of the parish—if it is to be taken the powers of the general board are at once to cease and determine on the exercise by the district parish of the powers vested in them by the 5th section, it seems difficult to say how, there being this positive enactment by the Legislature that those powers shall cease and determine, they are to be kept alive, because to do what is necessary to make the district parish contribute its share to the common liability arises upon the charges imposed upon the rates of the parish. That difficulty is one that presents itself when we come to consider what is the proper construction to be put on the 5th section of the 20 & 21 Vict. which we have to deal with; but as that question does not practically present itself before us to-day, it will be time enough to dispose of it when it does arise. I feel great difficulty in saying that the power of the general board could be kept alive if we gave the 5th section the effect of saying, that although there should be a general board and a common burial-ground once established, nevertheless the district parish can exercise the powers given to it by the 5th section. Yet, on the other hand, when we look at the proviso that is superadded to the enactment in the same section relating to the minister's fees and with respect to burials in a common burial-ground, it seems plain that the section in question does contemplate such a case as the addition of a district burial-ground and district burial board, to be superadded in the case of a general burial board and general burial-ground; and possibly, whenever we have to deal with that question practically, it may be held (I don't say it will be) that by implication the powers of the general board, although superseded and done away with with reference to the new burial-ground in the new district, are yet kept alive with reference to the general liability that attaches to the whole rates of the parish. It is not necessary to deal with that question to-day, further than to have considered it when we come to see what is the proper construction to put on the clause. All I can say is, feeling that this is a most complicated, embroiled, and confused piece of legislation, taking all the Acts together, and that in the midst of this difficulty we have to decide one way or the other, the only course that it seems to me safe to pursue is, to adhere to the clause that we are called upon to construe, and to give a literal effect to the sense of it. In doing that, the only conclusion we can

arrive at is, that whatever may have been done by the general parish in the appointment of a general board with a view to a common burial-ground, does not supersede the powers given by the 5th section to a minor district or parish in establishing for itself its own burial-ground and burial board; and, taking that view of it (although I own I do not arrive at it without considerable difficulty and hesitation), I am of opinion that our judgment must be for the Crown.

CROMPTON, BLACKBURN and MELLOR, JJ. delivered similar judgments.

*Judgment for the Crown, a peremptory mandamus to issue.*

MANSON (app.) v. HOPE (resp.)

*Hawkers and pedlars—Going from town to town—Licence—Conviction.*

*To bring a party within the provisions of the 50 Geo. 3, c. 21 (the Hawkers Act), it is not necessary that he should go to more towns than one, and there sell goods.*

*The app. brought goods from London to Hastings, and there exposed them to sale, and sold some of them in the Music-hall, representing that they came direct from London, and were the remains of the stock of a gigantic concern of the Imperial Linen Company. Upon a conviction for selling without a hawker's licence:*

*Held, that the conviction was good.*

This was a case stated under the 20 & 21 Vict. c. 43.

On the 29th Jan. last, at the Town-hall, in Hastings, one Philip Manson appeared before us, upon an information exhibited by George Curling Hope, of Hastings, manager of the Trade Protection Society of that place, charging him, the said Philip Manson, for that he did, on Monday, the 28th Jan. then instant, at the parish of the Holy Trinity, in the borough of Hastings, being then and there a hawker, pedlar and petty chapman, and trading person, then and there travelling from town to town, then and there trade as such hawker, pedlar, petty chapman, and did then and there carry to sell and expose to sale divers goods, wares and merchandise, to wit drapery, without any licence to him before then granted in that behalf authorising him so to do, against the form of the statute in such case made and provided (*vide* 50 Geo. 3, c. 41, s. 17). The said Philip Manson appeared to answer the said information, and pleaded not guilty, and thereupon the following evidence was given. The said G. C. Hope being sworn stated as follows:—On the 28th Jan. then instant a sale of drapery was advertised to take place at the Music-hall, in the Havelock-road, in the borough of Hastings (a large room let for concerts, balls, &c.), and a bill announcing the sale was handed to him; about twelve o'clock that day he went there and found a large quantity of drapery goods for sale; the said Philip Manson was there; the said G. C. Hope purchased a tablecloth; that when the said G. C. Hope was in the saleroom he saw several other persons there buy goods and a cashier taking money. Mr. William Gleinster, superintendent of police of Hastings, also deposed that he went to the said Music-hall, about half-past three o'clock in the afternoon of the same day, and saw the said Philip Manson there, and told him that he was superintendent of police, and said to him, "My object on calling on you is to know if you are a licensed hawker." The said Philip Manson replied, "Oh no, certainly not." Witness said, "Are you aware to carry on a business of this kind you should have a hawker's licence?" The said Philip Manson replied, "No; these goods came direct from London here; they are the remains of the stock of a gigantic concern, of the Imperial Linen Company, and I am employed to sell them; I don't think I require a licence to sell them; I don't go from town to town." Witness

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told the said Philip Manson he was set in motion by the Trade Protection Society, and asked him if he had a licence, he said "No," and further added, that he was stopping at the Havelock Hotel, Hastings, and that his town residence was Wigmore-street. On these facts it was contended on behalf of the said Philip Manson, that it had not been proved that he the said Philip Manson came under the description of a hawker and pedlar by travelling from town to town or from place to place; that he the said Philip Manson had got a superfluity of goods in the warehouses, which were of a respectable character, and thinking he should get a market for them at Hastings, he hired the Music-hall, and the goods were sent direct to that place for sale, and nowhere else. Having considered the evidence and the several matters urged on behalf of the said Philip Manson, we convicted him in the penalty of 10*l*. Whereupon the attorney for the app. requested us to state a case for the opinion of the Court of Queen's Bench, whether the said evidence was sufficient in law to sustain the said conviction, and in compliance with such request we the undersigned, being the said justices, have stated and signed this case accordingly.

By sect. 6 of the 50 Geo. 3, c. 41, it is enacted that "from and after the 1st day of August there shall be raised, answered and paid to and for the use of his Majesty, his heirs and successors, the rates and duties following; that is to say, by every hawker, pedlar, petty chapman, and every other trading person and persons going from town to town, or to other men's houses, and travelling either on foot, or with horses, or otherwise, in England, Wales, or the town of Berwick-upon-Tweed, carrying to sell or exposing to sale any goods, wares, or merchandise, a duty of 4*l*. for each year," &c.

By sect. 17 it is enacted that "if any such hawker, pedlar, or petty chapman, or other trading person so travelling as aforesaid, shall, from and after the said 1st day of August, trade as aforesaid, without, or contrary to, or otherwise than, as shall be allowed by such licence, such person shall for each and every such offence forfeit the sum of 10*l*," &c.

*Barrow* now appeared in support of the conviction, and contended that the evidence justified the conviction, for that it is not necessary to constitute the offence that the party should go to more than one town: (*Attorney-General v. Tongue*, 12 Price, 51; *Attorney-General v. Woolhouse*, 12 Price, 65; 1 *Yo. & Jer.* 463; *Dean v. King*, 4 B. & Ald. 517.)

*Poland* was called upon, and he argued that it was not shown that the app. was a trader, he being merely an agent employed by persons in London. [COCKBURN, C.J.—He is equally a trader within the meaning of the Act, whether he sells his own goods or not.] He said the goods were the remains of a stock of a gigantic concern of the Imperial Linen Company, and he was employed to sell them, and that he did not go from town to town. [BLACKBURN, J.—All that is required is that there should be some evidence for the justices to act upon.] How would it be if the assignees of a bankrupt sent his stock for sale from London to Liverpool? [CROMPTON, J.—I should be inclined to think they would come within the Act.] It has been held that a single act of selling is not within the statute, and here only one thing was sold to the witness: (*R. v. Little*, 1 Burr. 609; *R. v. Buckle*, 4 East, 346.) [CROMPTON, J.—But there is evidence of a continuous sale to others.]

COCKBURN, C.J.—If this were *res integra* I should have entertained some doubt as to whether or not the app. is within the Act of Parliament; but as there are two authorities precisely in point I must hold that I am bound by them. The facts clearly bring the app. within those cases.

CROMPTON, BLACKBURN and MELLOR, JJ., concurred.

*Judgment for the resp.*

## CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, May 3.

(Before ERLE, C.J., MARTIN and CHANNELL, BB., and BLACKBURN and KEATING, JJ.)

REG. v. CHARLES SMITH.

*Forgery—Friendly society—Member—Banker's pass-book—Entries of receipt of money.*

*The prisoner was the treasurer, and also a member of an unenrolled friendly society, and it was his duty to pay moneys received into the society's bankers. The prisoner produced to the society a fictitious book, purporting to be the bank pass-book, containing entries purporting to vouch that he paid certain moneys into the bank, and that the bank acknowledged the receipt of them, which book did not truly represent the state of account. The prisoner having at various times drawn out moneys which he had appropriated for his own purpose, the jury found the prisoner guilty of presenting a false account with intent to obtain credit for having paid the moneys into the bank with a view to obtain other moneys from the society which he might fraudulently appropriate to his own use:*

*Held, that the prisoner, though a member of the society, might properly be convicted of uttering a forged receipt with intent, &c.*

Case referred for the opinion of this Court by Mellor, J.:

The prisoner was tried before me at the York assizes, for forgery of a banker's pass-book.

The indictment contained twelve counts. The abstract is annexed.

The prisoner was the treasurer of a friendly society, called the Society of the Golden Fleece. It was not enrolled and was a mere voluntary society. The society met on the first Saturday evening in every month. It was the prisoner's duty to receive the contributions of the members of the society and to advance money to the relieving officers for the sick members, and to pay in the meantime into the West Riding Union Bank the moneys which he had received at the meeting of the society in his own name for the benefit of the society.

Accordingly on the first Saturday in Nov. 1857 he received at a meeting of the society 20*l*. to pay into the bank, and on the first Saturday in December following, the prisoner, being present at a meeting of the society, said that he had paid in, and produced a book purporting to be a banker's pass-book, in order to vouch to the society that the sum of 20*l*. had been paid to the said West Riding Union Bank, and the book so produced was looked at and examined by the members of the society then present.

At subsequent meetings of the society the several sums of 40*l*., 15*l*., 40*l*. and 30*l*. were paid to him for the like purpose, and the said book, purporting to be the banker's pass-book, was produced by the prisoner and shown to the members of the society at meetings of the society, to vouch the payments of the said several sums into the bank.

The prisoner continued to be the treasurer of the society until the last day of Aug. 1861, and at that time the said book, purporting to be the said pass-book, represented the account at the banker's as follows:—

Mr. Charles Smith, Shepley, in account with the West Riding Union Banking Company:

Dr.	£ s. d.	Cr.	£ s. d.
1859, Feb. 22.	Interest up to that time .....	2	15 0
1857.		Nov. 18, Cash ...	20 0 0
1858.			
		Feb. 19, Cash ...	40 0 0
		Aug. 24, Cash ...	15 0 0
		Dec. 22, Cash ...	40 0 0
		1859.	
		Feb. 22, Cash ...	30 0 0

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REG. v. WM. MOODY.

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Upon a new treasurer being elected, an investigation took place, and it then appeared that the book which the prisoner had from time to time produced as the pass-book of the said banking company for the purpose of vouching the payments of the said several sums into the bank was fictitious, and did not truly represent the state of the account, but had been written by the prisoner's desire by a person named David Smith, who was his cousin, whereas the genuine pass-book kept between the prisoner and the banking company stated the account as follows:—

Mr. Charles Smith, Shepley, in account with the West Riding Union Banking Company:—

Dr.	Cr.
1859. £ s. d.	1857. £ s. d.
May 31, cash ... 20 0 0	Nov. 18, Cash... 20 0 0
June 30, balance 61 7 4	Dec. 31, Interest 0 2 1
	20 2 1
	1858.
	June 30, Interest 0 5 6
	20 7 7
	Dec. 23, Cash... 40 0 0
	Dec. 31, Interest 5 6
	1859. 60 13 1
	Feb 22, Cash... 20 0 0
	June 30, Interest 0 14 3
£81 7 4	£81 7 4

It further appeared that the above account truly represented all the sums which the prisoner had paid into the said bank, but that the actual balance in the bank when the new treasurer was elected was  $\text{£} 1\text{s. } 11\text{d.}$  and no more, the account having been reduced to that sum by the prisoner drawing out at various times sums of money which he had appropriated for his own purposes.

It was objected on the part of the prisoner that this was a mere voluntary association, that the prisoner was interested in the moneys, and that inasmuch as the book which he presented stated the sums which he had received, the mere misrepresentation of the true state of the account between him and the bank was no offence.

I declined to stop the case, but told the jury that if they were of opinion that the prisoner presented a false account to the members at the meeting of the society with intent thereby to obtain credit for having duly paid into the bank the various sums which he had received and to be continued in his office of treasurer, with a view to obtain other moneys from the society which he might fraudulently appropriate to his own use, to find him guilty.

The Jury found him guilty, and I postponed the judgment, and discharged the prisoner upon recognisance to appear when called upon.

I request the opinion of the Court of Criminal Appeal whether the prisoner was rightly convicted.

JOHN MELLOR.

## Indictment.

First count.—That Charles Smith, on the 5th March 1859, did forge and counterfeit a certain writing in the words and figures following:—

Mr. Charles Smith, Shepley, in account with the West Riding Union Banking Company.

Dr.	Cr.
1859. £ s. d.	1857. £ s. d.
Feb. 22, Interest up to that time 2 15 0	Nov. 18, Cash ... 20 0 0
	1858.
	Feb. 19, Cash ... 40 0 0
	Aug. 24, Cash ... 15 0 0
	Dec. 22, Cash ... 40 0 0
	1859.
	Feb. 22, Cash ... 30 0 0

with intent to defraud.

Second count.—With uttering the said forged writing with intent to defraud.

Third count.—Did forge a certain writing purporting to be the pass-book between the West Riding Union Banking Company and the said Charles Smith, with intent to defraud.

Fourth count.—Did utter a forged pass-book, with intent to defraud.

Fifth count.—Did forge a certain other writing, purporting to be the pass-book between the West Riding Union Banking Company, at Huddersfield, and the said Charles Smith, with intent to defraud.

Sixth count.—Did utter a forged pass-book between the West Riding Union Banking Company, at Huddersfield, and the said Charles Smith, with intent to defraud.

Seventh count.—Did forge a certain other writing, purporting to be a bank pass-book, with intent to defraud.

Eighth count.—Did utter a forged pass-book, with intent, &c.

Ninth count.—Did, on the 4th Sept. 1858, utter a forged bank pass-book, with intent, &c.

Tenth count.—Did, on the 1st Jan. 1859, utter a forged bank pass-book, with intent, &c.

Eleventh count.—Did, on the 5th March 1859, utter a certain forged bank pass-book, with intent, &c.

Twelfth count.—Did, on the said 5th March 1859, utter a forged receipt for money, with intent to defraud, against the statute and against the peace.

No counsel appeared to argue on either side.

ERLE, C. J.—In this case the prisoner was indicted for forging and uttering a certain writing, purporting to be a bank pass-book, with intent to defraud. There were various counts in the indictment; and the question is, whether that is the subject of forgery. The case of *Rez v. Harrison*, 1 Leach C. C. 180, is in point. In that case the judges were of opinion that an entry in a banker's pass-book was an accountable receipt, within the 7 Geo. 2, c. 22. The conviction will therefore be affirmed.

The rest of the Court concurring,

Conviction affirmed.

Saturday, May 3.

(Before ERLE, C.J., MARTIN and CHANNELL, BB., and BLACKBURN and KEATING, JJ.)

REG. v. WM. MOODY.

Forgery—Savings bank book—Entries.

The prisoner was the paid secretary of an unenrolled friendly society, of which his wife was a member.

The prisoner delivered to the society a book, on which was indorsed "Savings Bank, New-street, Huddersfield," and in which was an entry, "1855, Oct. 30, received 40l." It was proved that the entry was a forgery, and that the money had not been paid into the savings bank. The jury having found that the prisoner was guilty of knowingly uttering with intent to deceive the society, and that he had, in fact, defrauded it, it was objected for the prisoner, that being the husband of a member, he was a part owner, and could not be made criminally liable for defrauding his co-owners, and also, that the document was not the subject of forgery:

Held, that both objections were untenable, and that the conviction was right.

Case reserved for the opinion of this Court at the Yorkshire spring assizes, 1862:—

The prisoner was tried at the last assizes for the county of York, before me, one of the counsel named in the commission.

The first count of the indictment charged that the prisoner feloniously forged a certain writing, in the words and figures following:

"Savings Bank,  
"New-street, Huddersfield.

"1855, Oct. 30, received 40*l*." with intent to defraud, against the form of the statute. The second count charged the prisoner with uttering the said writing knowing it to be forged, against the form of the statute.

The third count charged the prisoner with forging an accountable receipt for money, against the form of the statute.

The fourth count charged the prisoner with uttering a forged writing, purporting to be an accountable receipt for money, knowing it to be forged, against the form of the statute.

The fifth count charged the prisoner with forging an acquittance and receipt for money, against the form of the statute.

The sixth count charged the prisoner with uttering, knowing it to be forged, a certain forged writing, purporting to be an acquittance and receipt for money, against the form of the statute and against the peace, &c.

The counsel for the prosecution in stating the case abandoned the counts for forgery.

Evidence was given that there was, before the month of Oct. 1855, and still is, at Kirkenton, in Yorkshire, a society, supported by monthly payments, for the relief of sick, and burial of deceased members, called the Society of Ancient Shepherdesses.

Of this society the wife of the prisoner was, before the month of Oct. 1855, and until recently continued to be, a member.

The prisoner was, in Sept. 1855, and from that time until Nov. 1861, the paid secretary of the society.

At a meeting of the society held in the month of Oct. 1855, he was directed by the society to pay into the Huddersfield Savings Bank, for the society, a sum of 40*l*., which was at the time given him for that purpose.

At the then next meeting of the society, which was held either one or two months after the meeting in Oct. 1855, and at which from twenty to thirty members of the society were present, the prisoner delivered to the society a book, on which was indorsed the words "Savings Bank, New-street, Huddersfield;" and on the first page of which was written, "1855, Oct. 30, received 40*l*."

When the prisoner delivered the book he said, "That is the book belonging the money."

The book was put into the society's box, and not taken out again until Oct. 1861.

The actuary of the Huddersfield Savings Bank proved that neither the indorsement nor the entry was in the handwriting of himself, or of any person employed at the bank. It was also proved that if the money had been paid into the bank on the 30th Oct. 1855, and had remained in it until the 30th Oct. 1861, interest would have been allowed thereon, amounting to more than 12*l*. 10*s*.

Prisoner continued to receive his salary from the society until 25th Nov. 1861, but did not, after receiving the 40*l*., receive any other money belonging to the society.

The fact that the 40*l*. had not been paid into the savings bank was not discovered until Nov. 1861.

The prisoner did not at any time pay any money into the savings bank to the credit of the society, but on the 6th Oct. 1860 he paid 10*l*. into the savings bank to his own credit.

The counsel for the prisoner did not deny that the indorsement and entry were forged, but he objected:—1st. That the prisoner, being at the time when he uttered the forged writing, the husband of one of the members of the society, was part owner of the money obtained, and could not be made criminally

liable for any defrauding of his co-owners, the society not being enrolled under the provisions of any Act of Parliament. 2nd. That the prisoner having received the 40*l*. before he uttered the forged writing, there was no evidence of any uttering with intent to defraud. 3rd. That the writing was not a document, the uttering of which, assuming it to have been forged, and assuming that the prisoner at the time he uttered it knew that it was forged, would support any of the counts of the indictment.

I overruled all the objections, subject to the opinion of the judges on a case.

I asked the jury:—

1. Whether the prisoner uttered the writing upon and in the book, knowing it to be forged, in order to induce the members of the society to believe that he had paid the money into the bank? If so,

2. Did he do this for the purpose of being continued in his office of secretary, and thereby obtaining further moneys? and

3. Was the society in fact defrauded by his uttering the forged writing?

The Jury answered all the questions in the affirmative, and found the prisoner guilty on the counts for uttering, and not guilty on the counts for forging.

I postponed the judgment.

The question on which I beg the opinion of the Judges is:—

Ought the prisoner to have been acquitted on the objections taken by his counsel, or any of them? If he ought, then the verdict of guilty is to be set aside, and a verdict of not guilty on the whole indictment entered, otherwise the verdict is to stand. J. MONK.

No counsel appeared to argue on either side.

ERLE, C. J.—This is substantially the same point as in the case of *Reg. v. Charles Smith* (see *supra*), and we give the same judgment. The circumstances are very analogous in this case, which was reserved by Mr. Monk. Another objection was taken, which we think untenable, viz., that the prisoner was jointly interested with the other members in the funds of the society. In this case it was a forgery that would defraud the whole of the members of the company. This conviction will, therefore, be affirmed.

MARTIN, B.—I am of the same opinion. The forgery in this case would also defraud the banker, who would be rendered liable for acting upon it. The very meaning of an entry of the receipt of money in the banker's pass-book is, that the banker has received the money so entered, and binds himself thereby to be accountable to the depositor for it. Why is not that an accountable receipt? The conviction must be affirmed.

The rest of the Court concurring,

*Conviction affirmed.*

## BAIL COURT.

Reported by T. W. SAUNDERS, Esq., Barrister-at-Law.

Friday, May 9.

(Before WIGHTMAN, J.)

ASHDOWN (app.) v. CURTIS (resp.)

*Summary conviction—Appeal under the 20 & 21 Vict. c. 43—Service of notice of appeal—When too late—Striking case out of the Crown paper.*

An app. under the 20 & 21 Vict. c. 43, must give the resp. notice of appeal with a copy of the case before transmitting the case to the court.

A case having been stated by justices under the above Act, it was delivered to the app. on Friday, the 7th Feb. On the 8th he transmitted it to the Crown-office, and on the same day he sent by post to the resp., at Hastings, a notice of appeal, and a copy of the case, which in due course were delivered to him the next day

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[BAIL.]

*Held, that such notice and copy case were given too late.*

*Seem, that if the notice and copy case be given to the resp. on the same day as the case is transmitted to the court, it will be sufficient.*

On a former day *Hanco* obtained a rule calling upon the app. to show cause why this case should not be struck out of the Crown paper, no sufficient notice of appeal having been given to the resp.

The facts were these:—On the 1st Feb. the app. was convicted by justices, whereupon he required them to state a case for the opinion of this court pursuant to the 20 & 21 Vict. c. 43. The case was accordingly stated and was delivered to the app. on Friday, the 7th Feb. On Saturday, the 8th, he transmitted it to the Crown-office; and on the same day he sent a copy of it, together with notice of appeal, in a letter to the resp., who was residing at Hastings, and who received it in due course of post on Sunday morning.

By the 20 & 21 Vict. c. 43, s. 2, it is enacted that after the hearing and determination by justices of any information or complaint either party to the proceeding may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing, within three days after the same, to the said justices, to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of one of the Superior Courts of law, "and such party, hereinafter called 'the appellant,' shall within three days after receiving such case transmit the same to the court named in his application, first giving notice in writing of such appeal with a copy of the case so stated and signed to the other party to the proceeding in which the determination was given, hereinafter called 'the respondent.'"

*Francis* appeared for the app., and argued that, as notice of appeal, together with a copy of the case, had been given to the resp. within the three days limited by the section, he had substantially complied with it, although in fact they were not actually received by the resp. until the day after the case was transmitted to the Crown-office; though he should contend that the notice should be considered as given at the time it was posted: (*Evans v. Matthews*, 26 L. J. 166, Q. B.) [WRIGHTMAN, J.—The courts do not take notice of the portion of a day, and if the notice had been received on the same day as it was transmitted to the Crown-office, I think it would have done, as we should not have inquired into at what time of the day it was given; but here it was not received until the next day, and we must look to the time when it was received.] The app. did all that he reasonably could do: (*Morgan v. Edwards* 29 L. J., 108, M. C.; *Woodhouse v. Woods*, 29 L. J. 149, M. C.) In *Chapman v. Robinson* 28 L. J. 30, M. C., which turned on the construction to be put upon the words of the 3rd section, that "the app. at the time of making such application, and before a case shall be stated and delivered to him by the justice or justices, shall in every instance enter into a recognisance," it was held that he need not enter into the recognisance at the time of the application, so that he entered into it within the three days. [WRIGHTMAN, J.—That case differs in this, that the words are, "at the time of making such application and before a case shall be stated," indicating that it is sufficient if entered into within the three days and before the case is stated.] As there is no reason why this notice should be given before transmitting the case, the clause should receive a liberal construction.

*Hanco*, for the resp., was stopped by the court.

WRIGHTMAN, J.—I think this rule must be made absolute. According to the ordinary construction of these words the notice to the resp. must be given before transmitting the case to the court. I cannot, certainly, understand the object of the word "first," but here it certainly is, and it cannot be said that this

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is merely a technical objection, since we cannot otherwise construe the Act without depriving that word of all meaning. The section says, that the app. shall within three days after receiving such case transmit the same to the court named in his application, "first giving notice in writing of such appeal"—that is to say, he must give notice before he transmits the case to the court. In the present case he has not done so, unless, indeed, putting the letter into the post amounts to giving notice. I must, however, look to the time when the notice was received, for I think that the resp. cannot be said to have had notice given to him until he has received it, which in this case was upon the Sunday, and before that, the case had been lodged at the Crown-office. I cannot say that this was what the Legislature really meant; I can only say that the language used is express upon the point, and, according to that, the notice was not given in time.

*Rule absolute without costs.*

Saturday, May 10.

(Before WRIGHTMAN, J.)

REG. V. THE JUSTICES OF CAMBRIDGESHIRE.

*Poor-law—Order of settlement of a lunatic pauper—Signature of notice of grounds of appeal.*

The 16 & 17 Vict. c. 97 (the *Pauper Lunatic Act*) provides for an appeal against an order adjudicating the settlement of a pauper lunatic, and by sect. 111 enacts, that in every case where notice of appeal against such order is given, the app. shall, with such notice, or fourteen days at least before the sessions, send to the resp. a statement in writing under his hand, "or where the app. are guardians of any union or parish, under the hands of any three or more of such guardians of the grounds of such appeal." Under the provisions of the 1 & 2 Will. 4, c. 51 (local) the poor of the city of Norwich are managed by sixty-three guardians, elected from the various parishes, who form a corporation by the name of "the governor, deputy-governor, and guardians of the poor of the city and county of Norwich and liberties of the same," and they have all the powers of churchwardens and overseers relative to the poor, and the corporation or the governor, or deputy-governor, are authorised to do and perform all acts as churchwardens and overseers:

*Held, that the 111th section of the 16 & 17 Vict. c. 97, applies to such a union, and that the notice of grounds of appeal against an order of settlement of a lunatic pauper should have been signed by three of the guardians, and that being signed by the governor only it was bad.*

Tozer, Serjt., on a former day, obtained a rule calling upon the justices of Cambridgeshire and the app. in a certain appeal, to show cause why a *certiorari* should not issue to remove into this court all orders made by the said justices at the quarter sessions held in January last, upon an appeal between the corporation of the governor, deputy-governor and guardians of the poor of the city and county of Norwich and the liberties of the same, apps., and the guardians of the Cambridge Union, resps., touching an order adjudicating the settlement and maintenance of Mary Barber, a pauper lunatic.

It appeared that, on the 11th July 1861, an order was made upon the application of the guardians of the poor of the Cambridge Union, whereby the place of settlement of one Mary Barber, a pauper lunatic, was adjudged to be in the parish of St. John, Timber-hill. This order was directed, "To the Norwich Corporation of Guardians of the Poor of the City of Norwich and County of the same City (in which the parish, township, or place of St. John, Timber-hill,

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is comprised) and to the churchwardens and overseers of the poor of the said parish, township, or place of St. John, Timber-hill, in the said city of Norwich and county of the same city." On the 2nd Oct. notice and grounds of appeal were sent signed "James Winter, Governor of the corporation of the governor, deputy-governor and guardians of the poor of the city and county of Norwich and liberties of the same."

Upon the appeal coming on for trial the resp. objected that the apps. were not entitled to be heard inasmuch as no valid notice of grounds of appeal had been given, the notice given not having been signed by three guardians as required by sect. 111 of the 16 & 17 Vict. c. 97. The sessions overruled this objection and proceeded to hear the appeal upon the merits, and ultimately quashed the order of adjudication with costs, subject however to a case.

The poor of the city of Norwich are governed by a local Act, 1 & 2 Will. 4, c. 51, which directs that sixty-three persons shall be annually elected from the parishes in the city and county of Norwich to be guardians of the poor of such city and county, and that they are to be a corporation by the name of "The Governor, Deputy-Governor and Guardians of the Poor of the City and County of Norwich and Liberties of the same," and the Act confers upon such corporation all the powers of churchwardens and overseers as far as relate to the poor, and the corporation, or the governor, or deputy-governor, are authorised to do and perform all acts as churchwardens and overseers of the poor, and may institute and defend any appeal," &c.

By the 16 & 17 Vict. c. 97 (the Pauper Lunatic Act) provisions are enacted for appealing against any order adjudicating the settlement of a lunatic pauper, and sect. 111 enacts that "in every case where notice of appeal against such order is given, the app. shall, with such notice, or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried, send, or deliver by post or otherwise to the resp. a statement in writing under their or his hands or hand, or where the apps. are the guardians of any union or parish, under the hands of any three or more of such guardians, of the grounds of such appeal," &c.

*Keane, Mills and Orridge* showed cause, and contended that the notice of grounds of appeal was well signed by the governor of the incorporation alone, for that such notice was not governed by sect. 111 of the 16 & 17 Vict. c. 97, which requires such notice to be signed by three guardians, and that the incorporation is not a union, nor are the guardians guardians within the meaning of the 132nd section (interpretation clause) of the 16 & 17 Vict. c. 97: (*Reg. v. St. George's, Hanover-square*, 18 L. J. 160, M. C.; *Reg. v. West Riding of Yorkshire*, 14 L. J. 119, M. C.)

*Tozer, Serjt. and Markby* argued that the 111th section applied to the Norwich Union. They were stopped by

*WIGHTMAN, J.*—It seems to me that the 16 & 17 Vict. c. 97 applies to this case, and that whatever was the rule under the local Act, yet that now it is necessary that the grounds of appeal should be signed by three guardians. In fact, the constitution of this union does not essentially differ from that of ordinary unions. The point of doubt was, whether this was a union within the 16 & 17 Vict. c. 97. I think that it is. It is a collection of parishes to elect guardians, and which are really united and form a union. I am certainly sorry that such an objection should prevail, but I am bound to make the rule absolute.

*Rule absolute for a certiorari.*

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HARTLEY, Esqrs., Barristers-at-Law.

Thursday, April 24.

REG. v. THE UNITED KINGDOM ELECTRIC TELEGRAPH COMPANY (LIMITED).

*Highway—Nuisance—Telegraph posts.*

*On an indictment for a nuisance in obstructing a highway by erecting telegraph posts upon it, the judge directed the jury—first, that in the case of an ordinary highway, although it may be of a varying and unequal width, running between fences one on each side, the right of passage or way, prima facie, and unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the entire of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages; secondly, that a permanent obstruction erected on a highway, placed there without lawful excuse, which renders the way less commodious to the public, is an unlawful act, and a nuisance at common law, and that if the jury believed that the defts. placed, for the purpose of profit to themselves, posts, with the object and intention of keeping them permanently there in order to make a telegraphic communication between distant places, and did permanently keep them there and the posts were of such size, dimensions and solidity as to obstruct and prevent the passage of carriages and horses, or foot passengers upon the parts of the highway where they stood, the jury ought to find the defts. guilty, and that the circumstances that the posts were not placed upon the hard or metalled part of the highway or upon a footpath artificially formed upon it, or that the jury might think that sufficient space for the public traffic remained, are immaterial circumstances as regards the legal right, and do not affect the right of the Crown to the verdict:*

*Held, that these directions were right.*

Indictment for the obstruction of a highway by the erection of telegraph posts thereon, removed into this court by certiorari, and tried at the last Aylesbury assizes before Martin, B.

The first count of the indictment charged the defts. with digging up and removing, and misplacing and digging holes in the footway on the south side of the turnpike-road from Beaconsfield to the river Colne, and erecting and placing posts with wires fastened to both sides of the posts upon the said footway, and continuing the same, and thereby obstructing and incumbering the highway.

The second count charged the defts. with obstructing and incumbering High-street in the town of Beaconsfield in a similar way.

The other counts charged similar obstructions to highways in other and different parts of the county—in the parishes of Denham, Iver, Chalfont, St. Peter's, Beaconsfield, Woodburn, and Chipping Wycombe.

The defts. pleaded not guilty.

It appeared at the trial that the telegraph posts in question were in all cases erected with the assent of the authorities who were the immediate guardians of the highway, and in some instances were erected on the highway, but in most cases upon the strips of land by the side thereof, and in some cases in spots where such adjacent strips were so broken up or covered with briars as to be practically impassable. After a good deal of evidence had been given on behalf of the prosecution, Martin, B. told the counsel that he should direct the jury as follows:—

1. In the case of an ordinary highway (although it may be of a varying and unequal width) running between fences, one on each side, the

right of passage or way *prima facie*, and unless there be evidence to the contrary, extended to the whole space between the fences, and the public are entitled to the use of the entire of it as a highway, and are not to be confined to the part which may be metalled or kept in repair for the more convenient use of carriages or foot passengers. 2. That a permanent obstruction erected on a highway, and placed there without lawful authority, which renders the way less commodious than before to the public, is an unlawful act, and a public nuisance at common law; and that if the jury believed that the defts. placed, for the purpose of profit to themselves, posts, with the object and intention of keeping them permanently there in order to make a telegraphic communication between distant places, and did permanently keep them there, and the posts were of such size, dimensions and solidity as to obstruct and prevent the passage of carriages and horses or foot passengers upon the part of the road where they stood, the jury ought to find the defts. guilty on the indictment; and that the circumstances that the posts were not placed on the hard or metalled part of the highway, or upon a footpath artificially formed upon it, or that the jury might think that sufficient space for the public traffic remained, are immaterial circumstances as regards the legal right of the Crown to the verdict.

Upon this, the defts.' counsel said that it would be useless to keep up the defence any longer, and a verdict was then taken for the Crown.

April 17.—O'Malley moved for a new trial, on the ground of misdirection; and cited *Steel v. Prickett*, 2 Stark. Rep. 463; *Reg. v. Russell*, 3 El. & B. 942; *Rez v. Tisdal*, 6 A. & E. 143; *Reg. v. Betts*, 16 Q.B. 1022; *Reg. v. Wright*, 3 B. & Ad. 681; *Rez v. Sheffield*, 2 T. R. 106.

*Cur. adv. vult.*

April 24.—CROMPTON, J.—This case was moved by Mr. O'Malley before the Lord Chief Justice, my brother Blackburn and myself. It comes before the court in rather an unusual shape. It appears that, on the evidence for the prosecution being given, or rather before the evidence for the prosecution was closed, my brother Martin stated what he should say to the jury as a direction to them; and upon that the defts.' counsel said, that if that was to be the direction to the jury, it was useless for the case to go to them, and my brother Martin very properly took the course of putting down in writing what his direction was. The case, therefore, comes before this court in the shape of a misdirection on these written propositions; and the question is, whether we can see that there was any misdirection in those propositions. The indictment was against the United Kingdom Electric Telegraph Company for putting their posts on a high road so as to obstruct the public and passengers in the use of the high road. We did not give judgment before hearing the case of *Reg. v. Train*, because we thought it was possible that something might be said in the course of that case (and nearly the same authorities were cited in both cases) that we might wish to consider. Having heard the case of *Reg. v. Train* it does not appear to us that there is anything to prevent our giving judgment in this case now. My brother Martin laid down two propositions, and all that we have to do is to examine and see whether or not we can find any ground of misdirection in that summing up. If there is a misdirection it must be taken as if the case had gone to the jury on a misdirection, but we must see distinctly that there is something wrong in what my brother Martin stated to the jury before we can interfere by way of new trial. Upon the subject of the first proposition he says, "In the case of an ordinary highway, although it may be of a varying and unequal width, running between fences on each side, the right of passage or way *prima facie*, unless there be

evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the entire of it as a highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot passengers." That seems to us to be a very proper direction. An objection was made to it in two ways by Mr. O'Malley. It was said that that would apply to cases where there is a highway open to a considerable green sward or land which may be inclosed by the lord of the manor, if connected with the waste, or by the landowner, if it belongs to the landowner, and that the direction to the jury would take in a place of that kind which is really not a part of the highway. But I own it strikes me that my brother Martin guards carefully against that. He speaks of an ordinary highway as running between fences, and he says that *prima facie* that is to be taken as a highway; and I think every one would say, as Lord Tenterden said, in *Rez v. Wright*: "I am strongly of opinion, when I see a space of fifty or sixty feet, through which a road passes between inclosures, set out by an Act of Parliament, that, unless the contrary be shown, the public are entitled to the whole of that space, although perhaps, from economy, the whole may not have been kept in repair." No doubt that is the highway according to one of the late cases, *Williams v. Wilcock*, 8 Ad. & El. 329, where the court were considering whether the right of passage over water was the same as a right of passage over land, and which the court said extends over every part of it. That really is the effect of what my brother Martin says. He says: "*Prima facie*, and unless it is explained, the public have a right to pass over the whole," and I think it must be taken in connection with what he said at the end, "and the public are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot passengers."

The proposition is confined to the case of an ordinary highway running between fences, though it may be of varying and unequal width. That is the principle of *Rez v. Wright*, which is a very strong case, and the principle is also laid down in several other cases which are referred to in *Rez v. Wright*. Taken altogether, I think it comes to this, that, *prima facie*, when you look at a highway running between fences, unless there is something to show the contrary, the public have a right to the whole, and are not confined to the metalled part of it. Mr. O'Malley was not able, when we asked whether he would confine it to the metalled part, to show any other defined line. He suggested two cases which I have referred to before, and said this might not be a part of the highway, but might be a part of the waste or part of the land of the freeholder, to which the road did not extend. If there was an acre of land before you got to the hedge itself, that would be excluded, in my mind, by what my brother Martin says, as to not being confined to the metalled road. So in the other case that Mr. O'Malley pressed us with. He said, supposing a part of this is a rock, or something of that nature on which no passenger can go, that is excluded by the circumstances my brother Martin mentions. When you consider it, that is not a part of the highway. If there is a rock standing, or if there is a house which was built before the road was dedicated to the public, it is not a part of the road. Therefore, taking this first direction, that the whole of the road between fences *prima facie* is to be taken as the road, and that you are not confined to the metalled part, that appears to us to be correct. Then, in point of fact, the first proposition seems to be little more in effect than saying, as was said in the authorities I referred to, and in several other authorities, that the public have a right of passage over the whole of the highway. The second proposition is a larger one. It is, "that a permanent obstruction erected on a highway placed



there without lawful authority, which renders the way less commodious than before to the public, is an unlawful act and a public nuisance at common law, and that, if the jury believed that the defts. placed for the purposes of profit to themselves posts with the object and intention of keeping them permanently there, in order to make a telegraphic communication between distant places, and did permanently keep them there, and the posts were of such size and dimensions and solidity as to obstruct and prevent the passage of carriages and horses or foot passengers upon the parts of the highway where they stood, the jury ought to find the defts. guilty upon the indictment, and that the circumstances that the posts were not placed upon the hard or metalled part of the highway, or upon the footpath artificially formed upon it, or that the jury might think that sufficient space for the public traffic remained, are immaterial circumstances as regards the legal right, and do not affect the right of the Crown to the verdict." Now that appears to us to be substantially a proper direction, because in effect it comes to this, whether there is a practical obstruction to the public using the highway. All the cases cited by Mr. O'Malley came to that, and it was so explained in the last case of *Reg. v. Russell*; that is what is called there a mathematical obstruction, or an obstruction that was not practical—so put, I think, by myself—there being a supposed nuisance upon the sands from children building erections upon the sands, mathematically or geologically speaking, that would be an obstruction in some possible way, as throwing a stone; but you must look to see what the practical meaning of it is. My brother Martin, I think, raised that point by saying, "So as to obstruct and prevent the passage of carriages and horses or foot passengers upon the parts of the highway where they stood, the jury ought to find the defts. guilty." In the case of *Reg. v. Russell* the jury found in effect that there was no practical nuisance—at least that was the construction that we put upon it, and the jury having found that, that was an answer to the indictment. But where it is found that there is a practical obstruction—and I understand my brother Martin's statement to be that—on a part of the highway by which the public are prevented from using it; that clearly is a nuisance according to all the definitions of nuisance. The learned Baron is also right in saying that the circumstance that the part passed over is not metalled or prepared for purposes of convenience, as has been said in several cases, really makes no difference, nor does it make any difference that sufficient space was left. According to *Rea v. Wright*, where Lord Tenterden went into it with great force, the public are entitled to all the space on the sides of the highway, as he said, for the purpose of light and air, and parties cannot withdraw any part of the highway from the general purposes of traffic with impunity. We must take it that the jury found these facts in the way put before us, that the defts. did keep up posts of such size and solidity as to obstruct and prevent the passage of horses and carriages or foot passengers upon the parts of the highway where they stood. It was put by Mr. O'Malley that the case ought to have gone to the jury, for that some of the posts appeared, by a photograph that was produced, to be on inaccessible parts of the high road. I think upon this direction, if that had been so, it would not make any difference; because, if half-a-dozen posts are on inaccessible parts of the highway, even supposing they could be lawfully put there, it would be no object to the company to have these few posts left. It was said that there were different counts, and that there was a verdict upon all those counts. I think, if any were subject to those exceptions, the defts. ought to have said they had some of those posts which would come within the exceptions referred to by my brother

Martin. They did not do that, and it would be quite useless to grant a rule as to two or three of those posts; indeed, we could not do it as it is left to us, because Mr O'Malley did not ask for a verdict upon those particular posts. We have not the power of granting a rule for a new trial, unless we see that there is something to be complained of in these two propositions. I take them as amounting to this, that, *prima facie*, the high road is not confined to the metalled part, but runs to the fences or boundaries of the high road, and that if there is a practical obstruction upon that which prevents parties using it as a highway, that is a nuisance. That is the effect of the summing up, which appears to me to be correct, and therefore I think that there should be no rule.

BLACKBURN, J.—I am of the same opinion, but I do not think it necessary to add anything to what has been said.

*Rule refused.*

*Wilson, Bristows and Carpmael*, attorneys for the prosecution.

*Richards and Walker*, attorneys for the defts.

April 24 and May 12.

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*Nuisance to highway—Street tramways—Consent of vestry—Metropolis Local Management Act 1845—Judgment as against part of the defts.—New trial. To withdraw a part of the public highway from the use of the public is a general nuisance. A street tramway is such a withdrawal and such a nuisance. An indictment charged the defts. with a nuisance by laying down an iron tramway on a common highway, and with conspiracy to commit a nuisance. It appeared at the trial that the tram was laid down by the deft. T. with the sanction of the vestry of L., in whom the management of the highways of the parish vested by the Metropolis Local Management Act 1845. The evidence for the prosecution proved that the tramway was a source of danger and inconvenience to the public using the highway in the ordinary manner. The jury then interposed, and expressed their opinion that the tramway obstructed, in a substantial degree, the ordinary use of the highway for carriages and horses, and rendered it unsafe and inconvenient in a substantial degree. The defts. proposed to give evidence to show that a great number of persons used the vehicles running on the line, whereby a large amount of expenditure was saved:*

*Held, that such persons were not the persons using the highway in the ordinary manner, and that such evidence was inadmissible; and that the vestry had no power, under the 98th section of the Metropolis Local Management Act, to grant permission to the deft. T. to lay down such tramway.*

This was an indictment for laying down a tramway on the public road between Westminster-bridge and Kennington. Train and Hathaway were the projector and contractor, and the other defts. members of the Lambeth vestry, who granted their permission to lay down the line of tramway.

The first count of the indictment charged the defts. Train and Hathaway (his surveyor) and certain members of the Lambeth vestry, with nuisance for digging holes and trenches in the public highway between Westminster-bridge and Kennington, and with removing soil, with laying down a tramway, and with laying down timber and rails. The second count charged the defts. with a conspiracy to obstruct and render dangerous the said highway, and that in pursuance of such conspiracy they did dig, entrench and cut into the said highway, and made deep holes and removed soil and laid down a tramway, and laid down timber and rails, thereby obstructing the said highway. The third count charged the defts. with a conspiracy by doing certain acts to obstruct and render

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dangerous the highway; and the fourth count charged a conspiracy without setting out the acts. Plea, not guilty.

The indictment was removed into this court by *certiorari*, and at the trial at Kingston at the last spring assizes, before Erle, J., it appeared that the nuisance complained of was a tramway for omnibuses laid down from the Surrey side of Westminster-bridge to Kennington; that it had been laid down by the defts. Train and his foreman Hathaway with the sanction of the Lambeth vestry, in whom the management of the highways of the parish was vested by the Metropolis Local Management Act 1845. Evidence was adduced on the part of the prosecution of accidents occasioned by the tramway, when the jury interposed, and expressed their perfect conviction that the tramway in question obstructed in a substantial degree the ordinary use of the highway for carriages and horses, and rendered it unsafe and inconvenient in a substantial degree. Evidence was tendered for the defence to show that a great number of persons used the omnibuses which ran on the tramway, whereby a large amount of expenditure was saved, and that this sort of conveyance was more expeditious and more comfortable than the old omnibus; but the learned judge refused to admit it, and ruled that if the act complained of was dangerous and inconvenient in a substantial degree to a part of the public having a right to use the way, it would be a nuisance, and that the evidence offered as to its convenience as to another part of the public would be no defence. A verdict was taken for the Crown as against the defts. Train and Hathaway, leave being reserved to enter the verdict for those defts. if the court should be of opinion that they were justified in what they had done under the agreement with the vestry, and that the vestry had power to authorise the laying down of the tramway under the Metropolis Local Management Act, 18 & 19 Vict. c. 120.

*Bovill, J. C. (Kaapp and C. E. Pollock with him)* moved to enter a verdict for defts. Train and Hathaway, pursuant to leave, or for a new trial, on the ground of misdirection, rejection of evidence, and that the jury disregarded the evidence proposed to be given. He referred to *R. v. Russell*, 6 B. & C. 566; *R. v. Ward*, 4 A. & E. 384, 389, 404, and contended that it was a question for the jury whether what was done was not a reasonable and convenient arrangement of the highway for the convenience of the public generally using it, and for the accommodation of traffic passing along it: (*Lord Grosvenor's* case, 2 Stark 511, 574; *R. v. Morris*, 1 B. & Ad. 441, 447; *R. v. Betts*, 16 Q. B. 1022, 1036, 1037.) Many things are done which are beyond doubt an obstruction of the highway, and an inconvenience to part of the public using it, but which are not a nuisance, because they are a benefit to the public generally. A footpath, for example, deprives people using the road of a portion of it, yet this cannot be considered a nuisance. Then, as to the consent given by the vestry, the Metropolis Local Management Act 1845, 18 & 19 Vict. c. 120, by sect. 98, enacts that it shall be lawful for every vestry, from time to time, to cause all or any of the streets within their parish to be paved or repaired when, and as often, and in such form and manner, and with such materials as such vestry think fit; under that clause the vestry had power to give their assent, this tramway being a species of pavement which they had power to adopt.

*Guth*, on behalf of the vestry, moved for a new trial.

April 24.—*CROMPTON, J.*—We have had to consult some of the judges on some other cases, and my brother Mellor has taken the opportunity of consulting Erle, C.J. on the case we have just heard, *Reg. v. Train and others*, and we find from him that there was nothing like a bargain that this should be actu-

ally reserved, and we are at perfect liberty to deal with it exactly in the way we should in any ordinary case in which the question is whether there should be a new trial or not; and therefore, unless we entertain some doubt about the matter, we ought not to raise doubts where we entertain none, and we all of us entertain a very strong opinion that this conviction was proper and right, that there is no ground for disturbing it on the part of the defts. whom Mr. Bovill represents, and that we ought to refuse the rule on these grounds. It seems clearly admitted, that this would be a nuisance unless it fell within Mr. Bovill's proposition, which I will read directly, as he stated it. He has stated it very clearly to us, and properly. It is admitted that there was strong evidence one way, and no evidence that could alter the opinion of the jury as to this being a nuisance, dangerous to the ordinary passengers on the highway, unless Mr. Bovill could bring it within the proposition which he tried to establish, trying to distinguish it between the cases that have settled the law, that you cannot, for the advantage of one part of the public, commit acts which will be a nuisance to the rights of others who have rights of passage over water, or matters of that kind. Mr. Bovill has attempted to distinguish that, and he says that, admitting that this would be, on the evidence given, a nuisance to the passers by in the ordinary way on the highway, yet he says this is such a benefit to certain persons who would use this new mode of communication that, taking it altogether, there was a question for the jury whether it could be considered as a nuisance. His proposition is this:—He says, "My contention is, it is a question for the jury whether what was done was not a reasonable and convenient arrangement of the highway for the convenience of the public generally using that highway, or for the accommodation of the traffic passing along it." He is obliged, as it struck me at the time, to confine his proposition and to take his case out of the cases that have so clearly established the law the other way. He is obliged to introduce, as part of his proposition, an arrangement of the highway for the convenience of the public generally using that highway, and for the accommodation of the public passing along it. It appears to me that, admitting his proposition to be true, he does not bring this case within that, because it appears to me this is not any arrangement for the ordinary use of the highway, such as the alteration of the footpath, and the alteration of the pavement, and matters of that kind; it is for the use of the highway generally as a highway for carriages, horses and foot passengers, and fairly it might be said raising a part of the highways for foot passengers is for the use of the highway, it is to be used by all parties. But it is a use of the highway, that is, the King's highway, and it may possibly be—I do not mean to say that it is, because you might put many cases where there might be an arrangement so much for the benefit of one party using the highway as to be destructive to parties that want to use it for another purpose; but admitting generally that his proposition might be maintainable, it appears to me that this is not making any arrangement for the use of the highway in the ordinary way of using the highway, but on the contrary it seems to me that it is practically withdrawing so much of the highway from its use as an ordinary part of the highway. Mr. Bovill says that the running of the carriages is not matter put in the indictment, but that it arises before us in this way, that laying the tram is clearly a nuisance according to the finding of the jury and the evidence. Unless he can make out that the use of the carriages brings the case within the rule—and in my opinion it does not do so—I think, so far from being an arrangement for use of the highway by traffic using it

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as a highway, it is an arrangement quite different from the ordinary use; it is, in effect, withdrawing so much, as I put it several times to Mr. Bovill, from the regular ordinary use of the highway. It seems to me idle to suppose you can use the part of the highway taken up by the tramroad. A carriage meeting one of these machines, which is confined to the tram, cannot give and take the road, and it seems to me to be withdrawing so much from the highway, to be used as a tramway, and that is the way in which all these obstructions arise, such as in the case we have just disposed of (*Reg v. The United Kingdom Telegraph Company*), and all others where you withdraw a part from the public: it is a general nuisance. Now, it seems to me, that however advantageous this may be, of necessity, as Mr. Bovill says, and no doubt it is very important to the persons interested in it, and is a very useful invention, and one which may save a deal of money, and may be useful to persons travelling with it. That may be so; but those are not persons who want to use it in the ordinary way of using a highway, and I think it falls within that class of cases of *Rex v. Langworth*, which we took a great deal of pains in considering, where some pipes were laid in the highway for a short time by a gas company, without the leave of the Act of Parliament; and when parties introduce a new mode of conveyance, which is not suitable to the old mode of a high road, they must take the almost constitutional course of getting an Act of Parliament, by which they are put under such regulations as will protect the public. The only other question is, whether there was any evidence of this being for the ordinary purpose of the high road, which ought to go to the jury. It does not appear to me that there was any evidence suggested to show it was. It was put, that it was very beneficial to persons who wanted to remove from spot A. to spot B. So would an ordinary railroad, to persons in that situation; but it does not appear to me that there is any evidence at all to bring the case within Mr. Bovill's proposition, that this was an arrangement of the highway for the convenience of the public using the highway. I think there was no evidence to go to the jury upon that, and it comes before us as on a motion for misdirection. I should be very glad if the parties were able to take the decision to a higher court. They could not have done that if we had granted the rule; but as we none of us entertain any doubt, it is not consistent with our duty that we should do so, but it is a comfort to me to suppose that if we are wrong in any way, this is not binding on the deffs., and they can contest it in another indictment, and they can put it on the record in the way of a special verdict, and so get the opinion of a court of appeal. Therefore, we think, or I think at all events, that this is clearly established to be a nuisance by the evidence and the finding of the jury in that respect, unless brought within Mr. Bovill's rule. It is not brought within Mr. Bovill's rule, but, on the contrary, there is no evidence that could have gone to the jury properly to show this was an arrangement of the highway for the benefit of the public using the highway as a highway, and therefore, I think, the rule should be refused. There was a second point he took, that they were protected under the Metropolitan Local Management Act; that this really was a mode of paving the metropolis. Really, that almost raised a smile when Mr. Bovill took it, and I do not think it requires any answer. It seems almost ludicrous to say that making a tramway of this kind was a mode of paving. Then another motion was made by Mr. Garth, and I think on one of the points, or perhaps two of the points, resolving itself into one, there should be a rule, if it is thought worth while to go on with it. I cannot help thinking it is a great pity, because Mr. Garth, if he succeeds, can have no costs, and I do not see any use in keeping up the supposed discord

in the parish, or that one party should have a triumph in having a question of corporation law decided one way or the other; but, as it is before us, we must decide it. The first point Mr. Garth makes is, that these parties are merely liable as corporators. My strong notion is, that if individual corporators concur in a resolution to put the corporate seal to a matter of this kind, that they may be, and some of them appear to be, in that predicament, and probably would be, in my opinion, personally liable, because I am supposing they actually direct the thing to be done. I fancy, if corporators were to vote to put the seal to some illegal act, such as to authorise a party to go into another party's house, that they would be individually liable. There was some discussion as to that. I referred to that case in which we held that a corporation might be liable for a libel, but it was thought by a great many persons whose opinions have very great weight that a corporation was not liable. I think myself they are liable, because they might put their corporate seal to it; but I do not see that that prevents the corporators individually being liable, because I think they would be liable as accessories to a trespass, and so principals to the trespass; and I do not see, because they are part of a corporation, that individually taking part in that order which is carried out makes them less amenable for the consequences of that. That may be a question fit to discuss. And there is a further question on that part of the case, whether these parties, all of them, did interfere in the last resolution; and it may be that those who voted, for instance, to put a supposed case—very likely a resolution was moved, that it should be taken into consideration on such a day, and those parties might not be liable; therefore I think there should be a rule to see how far these individuals are made responsible. And then there is a question of whether, it being a corporate Act, prevented their being liable individually, and whether it is brought home individually to them. That may be considered also. I think also, on the other point, perhaps, we should have hardly granted the rule; I should have doubted it very much if I had not thought it necessary to grant the rule on the point which I am coming to, because, on looking at the agreement, there may be a deal of doubt whether it is more than a permission or licence to do the act, and it might not make them liable, either as wrong-doers in trespass, or still less in a criminal point of view. I by no means say that it is not so, for the words are rather doubtful, and they do seem to authorise that measure, and that, it may be said, is impossible to be carried out without causing mischief; therefore I by no means say I am clear on that; but I think there is doubt enough on those points. Then there were other points. The third point was the mode of paving, with which we need not trouble ourselves any more, for we have all a strong opinion that there is nothing in that. My impression is a very strong one, that in the fourth point there really is nothing: that their being vestrymen will not, in the absence of some Act of Parliament which I expected would be referred to, make them liable for a misdemeanor of this kind; but, as Mr. Garth raises some doubt upon that—I do not say the subject is free from doubt, because, if anybody wanted an impossible task to perform, they might set to work to reconcile all the cases, beginning with *Sutton v. Clark*, down to the present time, which is almost impossible. I do not know that that has been extended much to cases of misdemeanor, and I think there is not much in the point; but, as Mr. Garth takes the rule on the other two points, he may have it on that. On those three points he may have the rule; but I should express an opinion that these nice points of law ought not to be brought before us by the parties concerned, more for amusement, or for wishing to have an investigation

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for a senseless triumph in the vestry, than for wishing to have any questions arising between the parties decided.

BLACKBURN, J.—I am of the same opinion. On Mr. Bovill's rule, I take it, that the facts at the trial seem to have been clear, that the tramway that was put down on this highway was proved and found by the jury to be dangerous and inconvenient to a portion of the public using the highway in the ordinary way in order to drive upon it—I think principally to those riding upon it on horseback, but still dangerous and inconvenient to a portion of those using the highway in the ordinary course; and Mr. Bovill's point was, that although it might *prima facie* be a nuisance, yet, he said, you might alter the highway so as to adapt it for the convenience of traffic on the course of the highway, and that that alteration would not necessarily be a nuisance, though in the course of alteration, or in consequence of it, you might produce some degree of inconvenience and danger to part of those who were using it. He put, as instances of it, the converting a part of the highway into a footpath for passengers, or the paving with stones; that they might be dangerous to riders, though very advantageous for the heavy traffic; and without saying this is precisely right, I think that probably, to a very considerable extent, that principle may be right, and though it would require our careful consideration to enunciate it precisely, so as to define the proper limits, certainly I think, to some extent, that principle might be right, and it might be a very proper question to be left to the jury in such a case, whether or no the alteration of the highway for the purpose of adapting it to the use of the traffic for which the highway was made, was or not done so as to be a nuisance. Then, in the present case, I think the point does not arise at all, for I take it to be clear; and I do not think, from what one can collect in the discussion, that this was a proposed alteration of the highway for any purpose of adapting it to existing traffic, but a proposal to make an alteration on the face of the highway, so as to adapt it to a new and substituted mode of carrying on traffic different from any mode that had been in previous ordinary use on the highway—a new and substituted mode of carrying the traffic; and the evidence that Mr. Bovill proposed to call, and which the jury said would be immaterial, on the judge's direction, and which, after that notice from the judge and the jury, was not given—the evidence proposed to be given was not to show what would have been a question of fact in dispute, but to show that this tramroad was not made for omnibuses of a sort previously in use, but with the intention of using a new and substituted mode of carrying the traffic, which would be highly beneficial to the public. If that was the fact, and if it were shown that the new mode of adapting the highway would be highly beneficial to the public, I do not think it would prevent the matter being a nuisance as it exists at present. I do not think a new mode of interfering with the traffic on a highway is a matter which can be left to a jury to consider on the balance of testimony. I think when that is the case the constitution of the country provides, what is almost now a court of justice, a regularly constituted court, that it must be considered before a committee of the two Houses of Parliament, whether or no, on the balance of the whole testimony, the introduction of a new mode, and interfering with the old common law rights of the parties, will be beneficial or no; and then allowing that to be done, subject to such restrictions and terms as they think fit. I think, if the alteration of the road, placing the tramway in a public highway, would be, as the *defts.* wish to contend, and for aught I know to the contrary it may be, a great benefit, that is a case to be made before committees of the Houses of Parliament, in order to obtain an Act

for the purpose; but it does not afford any justification to those who interfere with the highway, not for the purpose of adapting it to the more convenient carrying of the existing traffic, but for the purpose of adapting it to a new and substituted mode of carrying that traffic, which it is said, and perhaps truly, would be more beneficial than the other. That being so, the evidence would not, in my opinion, be properly admissible, and it was not pretended to say, this was the old mode of carrying on the traffic, but merely to show that it would be beneficial; and the direction which I take to have been given was in itself perfectly correct. Then as to the next point, in which it is contended, because the vestry have been parties to this, and the vestry have a general power to repave and repair the streets in the mode they think fit, I agree with my brother Crompton, that to say that laying tramways is a mode of repairing, is really a proposition barely to be stated to us, and requires no answer. And on the ground that Mr. Garth has put, it is quite sufficient to say, the rule  *nisi* will be granted on the grounds my brother Crompton has stated; but I think, considering how the matter stands, that there is no verdict against those *defts.*, and if they get a verdict for that, it can do them no good, neither save them expense, or procure them costs; and if they fail, as I can see no prosecutor who can get anything from them, it is for the wisdom of both sides to consider; but it seems to me far the best thing to let the rule drop, and let nothing be said on either side, or else to enter a *nolle prosequi*.

MELLOR, J.—I think, in this case, the direction proposed to be given to the jury by the Lord Chief Justice is right; and the moment it can be considered that there was no evidence offered to the jury, but it is taken as a conceded fact that this is dangerous to persons travelling in carriages and on horseback, as having the same right to use the highway as others—the moment that is conceded, there is an end of the case, because the countervailing advantage to a portion of the public, by which they economise their funds and save 10,000*l.* a-year, is not the same benefit to the public itself. The proposition of Mr. Bovill may be accurately applied to some change of the highway, that is to say, if some mode of altering the highway could be adopted so as to effect the better use of it as a highway, in the ordinary course of the use of the highway, it may be a question, some time or another, whether it is, on the whole, beneficial or not; but that is not a case like the present, where it is conceded, that to a portion of the public it is dangerous and inconvenient. It follows, then, as a matter of course, the only evidence tendered by Mr. Bovill was evidence of the countervailing benefit to those persons, who, it was said, would save as much as 10,000*l.* a-year by the change. That appears to me clearly not admissible, and I think the Chief Justice was perfectly right in rejecting the evidence; and I am of opinion, on all the grounds taken by Mr. Bovill, there ought to be no rule. With reference to the motion of Mr. Garth, I do not want to say anything more than has been said by my learned brethren.

Garth.—I am obliged to your Lordship. I am with my learned friends Mr. Lush and Mr. Serjt. Ballantine, and I must consult with them before anything is done.

CROMPTON, J.—It struck me you might get leave of the Attorney-General to enter a *nolle prosequi*.

Garth.—We need not draw the rule up yet until I have consulted my learned friends.

May 12.—*M. Chambers, Q. C. (Hawkins and Joyce with him)* moved for judgment against the *defts.* Train and Hathaway.

Bovill, Q. C. Knapp and C. E. Pollock appeared for Train and Hathaway.

Lush, Q. C. for the vestry.

The COURT said that, in the present state of the record, they could not pass judgment upon these two defts., since in the event of the vestrymen, who were also defts., obtaining a new trial, it might be that the defts. Train and Hathaway had already suffered a part of their punishment before that time arrived; at the same time, if in the interval the nuisance was continued, when the defts. were called up for judgment, the court would take that fact into consideration.

*Monday, April 28.*

**REG. V. THE JUSTICES OF THE NORTH RIDING OF YORKSHIRE.**

**Poor—Costs of suspended order—Appeal—Distress—Mandamus to justices.**

*Where there is no appeal given against an order of justices for expenses of a pauper, the justices are bound to enforce it, and in the event of their refusing, this court will grant a mandamus for a distress warrant.*

This was a rule calling on three justices for the North Riding of the county of York, and the overseers of the poor of the parish, township, or place of Oversilton, in the said riding, to show cause why the said justices, or two of them, should not issue their warrant to levy by distress and sale of the goods and chattels of the said overseers the sum of 14*l.* 14*s.*, being the amount of the charges and expenses incurred by the overseers of the poor of the township of South Otterington, in the said riding, for the maintenance of James Yarker the elder, under a suspended order of removal, dated 30th April 1860.

The order of removal referred to alleged that James Yarker the elder, Elizabeth his wife, and their two children Mary Hannah, aged three years or thereabouts, and James, aged six weeks or thereabouts, had come to inhabit in and were inhabiting in the said township of South Otterington, not having gained a legal settlement therein, nor produced any certificate acknowledging them to be settled elsewhere, and that they were actually chargeable to the said township of South Otterington, such chargeability arising from sickness of the said James Yarker the elder, and which sickness the justices were satisfied would produce in him permanent disability, and that the said paupers had not resided in the said township of South Otterington for five years next preceding the said application and complaint. And it was adjudged that the lawful settlement of the said James Yarker the elder and his said wife and children was in the said parish, township, or place of Oversilton, and the order required the said overseers of the poor of the said township of South Otterington to convey the said James Yarker the elder and his wife and children from and out of the said township of South Otterington to the said parish, township, or place of Oversilton, and to deliver them to the overseers of the poor there, and also required the said overseers of the poor of the said parish of Oversilton to receive and provide for them as inhabitants of the said parish.

The grounds of removal were: First, that the said paupers, or any of them, had not resided in the said township of South Otterington for five years next preceding the application for the aforesaid order, and that they the said paupers were poor and destitute and in the actual receipt of relief from and out of the funds raised by law for the relief of the poor in the said township of South Otterington, and were chargeable thereto, and that the last place of the lawful settlement of the said paupers was at the time of the said complaint and still was in the said township of Oversilton. Secondly, that the said J. Yarker the elder, and Elizabeth his wife, and their two children, had come to inhabit, and were inhabiting, in the said township of South Otterington, and before and at the time of the making of the said first-named order were and still

are chargeable to the said township of South Otterington, and receiving weekly relief therefrom, such relief being rendered necessary by the sickness of the said J. Yarker, which sickness will produce in him permanent disability. Thirdly, that the said J. Yarker the elder had done no act to gain a settlement, and is the lawful son of T. Yarker and Nancy his wife, who were married about thirty-four years ago at Oversilton aforesaid. Fourthly, that the said J. Yarker the elder was lawfully married about four years ago at the superintendent registrar's office at Thirsk, in the said riding, to his present wife Elizabeth, and by her he has two children lawfully begotten, the said Mary Hannah and James Yarker. Fifthly, that in or about the year 1818 or 1819, the said T. Yarker being about eighteen years of age, and in or about the year 1818 or 1819, when a bachelor and without a child or children, was lawfully hired into the township of Oversilton aforesaid by John Hoggart, at Martinmas, for a year as his servant in husbandry, and pursuant to such hiring entered upon such service with his said master in the said township of Oversilton, and served him under such hiring, and resided and slept in that township during the whole of that year from that Martinmas to the Martinmas then next following. Sixthly, that at the termination of the said hiring, he the said T. Yarker was again hired into the said township of Oversilton, by the said John Hoggart, as his servant, for another year, commencing at Martinmas, immediately on and from the termination of his first hiring, and entered upon his service pursuant thereto, and served him under such second hiring, and resided and slept in the said township of Oversilton for the whole of such other second year from Martinmas to the Martinmas following, and that he had done no subsequent act to gain a settlement elsewhere, and is now lawfully settled at Oversilton aforesaid.

The order of suspension, dated 30th April 1860, recited that J. Yarker the elder, one of the paupers within ordered to be removed, is at present unable to travel by reason of sickness and infirmity, and suspended the execution of the order of removal until it should appear that the same might be safely executed without danger.

An order to execute the order of removal, dated 23rd Sept. 1861, recited that it had been made to appear that the within-named J. Yarker the elder had died, but that the within order might now be executed with respect to Elizabeth the widow of the said J. Yarker the elder and her two children, Mary Hannah (at the time of making the said order aged three years, or thereabouts) and James (then aged six weeks, or thereabouts), and the execution of the same was therefore ordered, and recited that it had been duly proved that charges to the amount of 14*l.* 14*s.* had been necessarily incurred by the said parish of South Otterington, by the suspension of the said order of removal. The said justices did thereby order and direct the said sum of 14*l.* 14*s.* to be paid by the overseers of the parish of Oversilton to the overseers of the parish of South Otterington.

The summons, dated 4th Nov. 1861, recited an information and complaint that Wm. Hoggart, as overseer of the said township of Oversilton, had neglected and refused to pay to the overseers of the poor of the township of South Otterington the sum of 14*l.* 14*s.*, being the costs and expenses expended by them in the relief and maintenance of J. Yarker the elder and Elizabeth his wife, and their two children, under a certain suspended order of two justices for the removal of the said poor persons to the said township of Oversilton, as the place of their last legal settlement, contrary to the statute in such case made and provided.

The following is a copy of the demand:—

1860—1861.

The Overseers of the poor of Oversilton.

To the Overseers of the poor of South Otterington.

Maintenance of James Yarker for half-

year ending 1860..... 1 16 0

Coffin, &amp;c. .... 0 13 0

Maintenance of his wife and children after

his decease ..... 12 5 0

£14 14 0

At a petty sessions held on the 11th Nov. 1861, the said information was duly inquired into and heard before three of the said justices, and a warrant was applied for against the said overseers of Oversilton to levy on their goods the said sum of 14*l.* 14*s.*, but the said justices refused.

*Knapp* now showed cause.—The magistrates had nothing to do but to act on the order of the justices at petty sessions, as there was nothing bad on the face of it. The Legislature intended, by not giving an appeal below 20*l.*, that the order of the justices should be final: (9 & 10 Vict. c. 66; 11 & 12 Vict. c. 110; *Ex parte Williams*, 22 L. J. 125, M. C.) [CROMPTON, J.—There is no appeal unless expressly given by the statute. This court only interferes when there is excess of jurisdiction, or by *certiorari* when an order is bad on the face of it.]

West, contra, was not called on.

COCKBURN, C. J.—In this case the justices had only to see whether there was an order on which they could act, and it was meant that this order should be final and conclusive when the matter in question was under 20*l.* The proper course would be to apply to the magistrates who made the original order to state a case. It is the duty of the magistrates simply to see that the order is all right: they cannot go into the case.

CROMPTON, J.—I am of the same opinion. Mr. *Knapp* said it is idle to go before the magistrate and say, "I have paid the amount." That is not so; he cannot do anything contrary to what has been done before. He must act under the order of the two justices previously made. *Rule absolute, without costs.*

## COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYD, Esqrs.  
Barristers-at-Law.

Saturday, April 26.

REG. v. THE JUDGE OF THE CONSISTORY COURT.

ADAMS v. BEALL.

58 Geo. 3, c. 45, s. 70—District church-rates—

Repairs of church and other expenses.

The word "repairs" in sect. 70 of the above Act includes not only the repairs of the building, but also the expenses necessary for the due performance of the offices of the church.

In this case *Collier*, Q.C. moved for a rule calling upon the vicar-general of the Lord Bishop of London and the official principal of the Consistorial and Episcopal Court of London to show cause why a prohibition should not issue to prohibit any further proceedings in that court in a suit of *Adams* and another v. *Beall*, for subtraction of church-rates, upon the ground that the learned judge had wrongfully construed the 70th section of the statute 58 Geo. 3, a. 45, which enacts, "That the repairs of all such district churches or chapels shall be made by the districts to which they respectively belong, by rates to be raised within the districts in like manner as in cases of repairs of churches by parishes, and every such district shall be deemed in law a separate and distinct parish for that purpose, and the repairs of all chapels made distinct churches shall be made by the parish in or for which the chapels shall be built."

By an order in council dated 8th Feb. 1855, and

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made under the 58 Geo. 3, c. 45, a portion of the parish of Lewisham was formed into a district parish for ecclesiastical purposes, named "the district parish of St. Bartholomew, Sydenham," and was assigned to the consecrated church of St. Bartholomew, situate in Sydenham, in the said parish of Lewisham. Churchwardens were appointed under the Act, and on the 14th June 1860 a vestry meeting of the district parish was held for the purpose of making a church-rate. At that meeting the churchwardens produced an estimate of the probable expenditure for the repairs of the said district parish church, "and for other the necessary and lawful expenses incident to their office of churchwardens for the next year," amounting to 237*l.* 1*s.* 3*d.*, and proposed a rate of 2*d.* in the pound. The resolution was opposed, but it was ultimately carried, on a poll, by a majority of 391 to 276. Proceedings were then instituted against *Beall* before the magistrates, for the nonpayment of the rate so made, but, as he disputed the validity of the rate, the magistrates could not proceed further, and the churchwardens instituted a suit against him in the Consistory Court of London for subtraction of church-rate. The churchwardens libelled Mr. *Beall*, and therein set out the proceedings which had taken place; but Mr. *Beall* opposed the admission of the libel, upon the ground that the said rate, as appeared by the estimate, was made for other purposes than the repairs of the district church, which were the only purposes for which a rate could be made on the inhabitants of a district parish. The learned judge, however, overruled the objections, and admitted the libel to proof. The question turned upon the construction of sect. 70 of 58 Geo. 3, c. 45.

The case had been already argued in the Q. B., when the rule was discharged; and this Court said they would not interfere with that decision, and refused the rule accordingly. *Rule refused.*

Monday, April 28.

DAW v. THE METROPOLITAN BOARD OF WORKS.

Right of numbering houses in the city—11 &amp; 12

Vict. c. 163—18 &amp; 19 Vict. c. 120.

The *Metropolis Local Management Act*, 18 & 19 Vict. c. 120, includes the city, and, for the purpose of numbering houses, overrides the *City Sewers Act*; therefore, in an action against the *Metropolitan Board of Works* to recover a penalty of 40*s.* for defacing by renumbering certain houses in the city, which had been numbered under the *City Sewers Act*, it was

Held, that, by their Act, they had a right to do so, and therefore were not liable to the penalty.

This was a special case, founded on an action brought by the plt. against the defts. for the recovery of 40*s.* damages, for having defaced the numbers of the houses in Fann-street, Aldersgate.

Fann-street, Aldersgate, is within the city of London, and within the district within and over which the sole power of ordering, designing, making, enlarging, widening, deepening, raising, altering, removing, repairing, cleansing and scouring of all common sewers, drains, vaults and of paving, cleansing, lighting and improving the several streets, was, by the *City Sewers Act* 1848, declared to be vested in the mayor and commonalty and citizens of the city of London, to be executed by commissioners, to be called Commissioners of Sewers for the City of London.

The said commissioners, acting or assuming to act under the powers conferred by sect. 145 of the *City Sewers Act* 1848, have since the 1st Jan. 1856 caused the houses in the said streets to be marked and numbered in the manner which they thought most proper for distinguishing the same, and have caused the said marks and numbers to be affixed to each house and building in the said street.

The Metropolitan Board of Works, assuming to act

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under sect. 141 of the 18 & 19 Vict. c. 120 ("An Act for the better local management of the Metropolis") directed that the said houses should be marked with numbers in another manner, and that the numbers affixed by the said commissioners should be defaced and obliterated and the numbers directed by their own board should be affixed to the said houses.

The numbers fixed by the commissioners are consecutive numbers; the board directed that the houses should be distinguished by the odd numbers only being on one side of the street and the even numbers only on the other side. Acting under their said directions the said board have wilfully caused the numbers of the said commissioners so affixed by them to the said houses to be defaced and obliterated, and the substituted numbers directed by them to be marked to the said houses in the place thereof.

The questions for the opinion of the court are:—

1. Whether the Commissioners of Sewers of the city of London have now authority to number the houses and buildings in the streets in the city under sect. 145 of the City Sewers Act 1848.

2. Whether the Metropolitan Board of Works have authority, under sect. 141 of 18 & 19 Vict. c. 120, to name streets and number houses in the said city.

3. Whether the order of the said board as to numbering houses in the said city overrides the order of the said commissioners in the same matter.

If the court should be of opinion in the affirmative on the first question, and the negative on the second and third, judgment to be entered for plt. for 40s., and cost of suit. If in the affirmative on the first and second and negative on the third, the like judgment to be entered. If in the negative on the first and affirmative on the second and third, judgment to be entered for the defts. with costs.

The plt.'s points were:—1. The Commissioners of Sewers of the City of London have still authority to number the houses in the streets in the city under sect. 145 of the City Sewers Act 1848, that section not being repealed. 2. That the Metropolitan Board of Works have not authority under sect. 141 of 18 & 19 Vict. c. 120, to number houses in the said city. 3. That the orders of the board do not override the orders of the commissioners as to the numbering of houses in the city.

The defts.' points were:—That the statute 18 & 19 Vict. c. 120, s. 241, gives powers to the defts. which are inconsistent with and cannot be properly exercised if the powers given to the plt. by the 145th section of the City Sewers Act 1848 (11 & 12 Vict. c. 163, local and personal) continue in force, and therefore that the former statute impliedly repeals the latter. That even if the latter statute be not repealed, the acts charged by the declaration to have been done by the defts. were authorised by the former Act, and therefore were lawfully done.

Hannen appeared for the plt., and cited *The London and Blackwall Railway Company v. The Linehouse District Board of Works*, 26 L. J. 164, Ch.

Gray (Raymond with him) contra

ERLE, C. J.—The action in respect of which this case has been stated may be disposed of by the judgment upon the second and third questions. It appears that numbers were placed up, under the City of London Act, in Fann-street, and afterwards those numbers were effaced, and new numbers were put up under the Metropolis Local Management Act; and the action is brought for a penalty supposed to have been incurred, under the City of London Act, for effacing the numbers that had been put up under the authority of that Act. The question really is, whether the Metropolis Local Management Act controls the City of London Act where the provisions of the Metropolis Local Management Act are inconsistent with the provisions of the City of London Act? I think that where there are

two statutes giving powers to two different bodies to number streets, the exercise of those two powers concurrently would be destructive of each other. The only purpose of numbering a house is to have one number to designate it, and it is almost the same as a proper name; and if two bodies were likely to affix two different numbers to that house, the purpose of numbering houses would be destroyed. I therefore come to the conclusion that, as the two bodies have the power of numbering the houses, the two cannot co-exist, properly, together; and, therefore, the power given by the latter Act is a power that overrides that given by the former, consequently the Metropolitan Board of Works are not liable in this action. They have not made themselves liable to the penalty because in the exercise of the powers given to them they have effaced the numbers placed under the authority of the city of London Act by what numbers they chose to put up. The answer to the second question, whether the Metropolitan Board of Works had authority under sect. 141 to number the streets in the city, is in the affirmative; and, also that the order of the Metropolitan Board overrides the order of the city of London in respect of the numbering of the same houses. The question may be stated in very short terms by saying that sect. 141 of the Metropolis Local Management Act enacts, in express terms, that it shall be lawful for the Metropolitan Board of Works to number the houses in every street in the metropolis. Now, are the streets within the city of London within the metropolis? The 250th section is the interpretation clause, and the first word interpreted thereby is that "the metropolis" shall include the city of London. Now, in new naming every street in the metropolis, the definition of metropolis being that it is to include the city of London, had they a right to new number the streets in the city of London? It seems to follow from that, that we could not hold otherwise without contravening the Act of Parliament. Then sect. 242 was supposed to be inconsistent with this; and I think Mr. Gray has given the proper explanation of that section. Sect. 242 applied to parishes which were partly within the city of London and partly without the city, and so within the parishes that come under the Metropolitan Local Management Act; and it is a provision as to so much of those parishes as are within the city of London. The powers of the City of London Act in respect of sewers, as well as property vested in the city of London in relation to those parts that are within the city, shall continue, and such parts shall not be subject to be rated and assessed by the new district board belonging to the parishes without the boundary of the city. So far as the boundary is concerned, that would be a very absolute enactment; but the remaining parts (that is, the remaining parts in the city) shall be subject to the Board of Works, as other parts of the city in that sense, inasmuch as the parishes without are to be governed by vestries and district boards, and those within the boundary are to be governed by the city authorities; and the powers are to be analogous, for many purposes, to the powers given to the new representative vestries, and so, whether the parishes are partly within the city and partly within the district of the new corporation. Then as to the power of assessment, they shall not be rated and assessed by the district board, but shall be rated as to that matter to the city of London, and those parts of parishes within the boundary of the city shall be subject to the Metropolitan Board of Works just as other parts of the city are. With respect to some general authority, it seems to me the city of London is, in the terms that are expressed, without contravening the plain words of the Act, brought within the provisions of the Metropolitan Board of Works. Sect. 141 giving the Metropolitan Board power to renumber every street



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in the metropolis seems to me to bring the city of London within the provisions of that statute. Sect. 170 seems to me rather confirmatory of that. For defraying the expenses of the Act generally, it gives the Metropolitan Board of Works power to make assessments on the city of London, but the city of London are to have what is contemplated, some exercise of authority more than is consistent with Mr. Hannen's argument, which was to make sewers in the city of London; but in other respects it was commanding itself, and not subject to the command of the Metropolitan Board. The judgment which I give is confined to the second question. The third question is—are the Metropolitan Board liable to a penalty for effacing names in the city, and putting up their own numbers instead; and it asks us the question, whether the city of London have still the power under their Act. It would be extra-judicial if I were to answer that. The question goes to the length of this: where the Metropolitan Board chooses to interfere in a matter intrusted to them by their Act—a matter inconsistent with the exercise of a concurrent power by the city of London—in that case the city of London are subject to the latter authority given to the Metropolitan Board; but if the Metropolitan Board does not choose to interfere, the city of London can exercise all the powers they have in the manner conferred according to the new statutes. Whenever that question arises, it will be our duty to give a judicial decision upon it; at present it would be extra-judicial to express any opinion upon it.

WILLES, J.—I am of the same opinion upon the first question, whether the Commissioners of Sewers have any authority to number houses and buildings and streets in the city, under sect. 145 of the City Sewers Act 1848, if by that it is intended to ask the court whether they still retain an authority, although subordinate, to the paramount authority given to the Metropolitan Board by the Act for the Local Management of the Metropolis, then it is a question which does not arise upon the case, and I am only reading it therefore as in the sense of asking the court whether they have the same uncontrolled authority which they possessed under the latter statute? And I am of opinion that they have not, because it is clear to my mind that the 141st section of the Local Management Act, read with the interpretation clause of that statute, does give to the Metropolitan Board power and authority over the naming and numbering of streets in, amongst other places, the city of London; and if the Commissioners of Sewers retain any authority, it is an authority subordinate to that, and they are subject to be put out of office by the exercise of that power and authority. The first question, as I understand it, ought to be answered against the existence of any general control over the authority of the Commissioners of Sewers of the City of London, which it is necessary to answer for the purposes of this case. I abstain from stating more; they have authority, the existence or non-existence of which is not necessary to the decision of this case. With respect to the second question, whether the Metropolitan Board have authority under sect. 141 of the 18 & 19 Vict. to name streets and number houses in the city of London, I have already answered that. With respect to the question, whether the order of the board as to numbering houses in the city overrides the order of the Commissioners of Sewers, I have already answered that. In truth, Mr. Hannen has pointed to the only section to which he could refer upon the matter in favour of the existence of the power of the Commissioners of Sewers, the only section to which he could have recourse for the purpose of showing that "metropolis" in the 141st section did not mean that "the metropolis" shall exclude the city of London in the interpretation clause; and taking the two together with the 242nd section, we

have an express provision with respect to the parts of parishes which are partly within and partly without the city of London, that they shall not be taken from under the authority of the Commissioners of Sewers of the City of London. That section goes on to say, "shall be subject to the powers of the Metropolitan Board," as parishes within the city of London. We are therefore thrown back upon the question of what are the powers of the Metropolitan Board within the city of London? Amongst other things, they have power given in the 141st section over the metropolis; and the interpretation clause is that the city of London shall be included, and that is a power over the city of London. I do not conceive that you can construe the Act of Parliament in any other way. With respect to the rules of construction, of the application of which the case cited from 26 L. J. was an instance, there is no doubt that, as a rule of construction, a general enactment is not to be taken to do away with the special provisions of particular cases existing before the general Act was passed, and to such cases the rule *generalia specialibus non derogant* is applicable. You look to the general provision and treat it as applicable to all matters to which it is to apply. There is no reason to suppose that it was intended to affect other cases. That case cited is a case where the London and Blackwall Railway Company had power to make a certain building which must be taken to come within the general provision of a certain Act of Parliament at a time and in a place when and where it could not possibly be made without the consent of the board; and the second Act referred to passed altogether without reference to the special provisions of the first Act of Parliament, the first Act being a local Act, by which particular powers were given, it being a general Act of Parliament with reference to the district. There the rule which Mr. Hannen relied on was properly applied. Here you have the same objects dealt with by both Acts of Parliament, and you have powers which, if not the same, are strictly analogous to one another. Then the question therefore is, whether the word "metropolis" in the 141st section does or does not include the city of London. I have already repeated that by the interpretation clause it does. In the way in which I have been able to look at the question between these two public bodies it appears to me that the Metropolitan Board is right in the case, and that there ought to be judgment for them.

BYLES, J.—I am of the same opinion. I agree with my Lord and my brother Willes, that the first question is hypothetical, and raises an inquiry which it is not necessary for the determination of the merits of the case that we should decide, therefore I shall express no opinion upon it. But, with respect to the second question, as soon as Mr. Hannen had called our attention to the interpretation clause, which plainly says the word "metropolis" shall comprehend the city of London; and to the latter part of sect. 242, which speaks of the city of London as subject to the provisions of this Act; no doubt existed in my mind, and nothing that has occurred since has tended to alter it. Under sect. 141 the Metropolitan Board of Works have authority to number streets and houses in the way prescribed by that section. Now, with regard to the third question, whether their orders are to override the orders of the commissioners in the same matters, either the order of the commissioners must be consistent with their order, or it must be repugnant: it it be consistent with their order, of course the order of the commissioners will prevail; if it is inconsistent, then the general rule applies, that a subsequent statute prevails over the enactments of a prior one. That being so, it seems to me the defts. are entitled to the judgment of the court.

KEATING, J.—I am also of opinion that the defts.,



are entitled to our judgment, for the reasons which have been already expressed; and I do not think it necessary to add to them.

Monday, May 5.

OSBOND (app.) v. MEADOWS (resp.)

*Appeal from justices—Game—What a being upon and entering upon land in pursuit of game—1 & 2 Will. 4, c. 32, s. 30.*

*The resp. having a licence to kill game on the land of A., shot a pheasant which was on the ground in an adjoining close over which B. had the exclusive right of shooting, and then entered upon such close and picked the bird up.*

*Upon an information before the justices under sect. 30 of 1 & 2 Will. 4, c. 32, they refused to convict, relying upon the case of Reg. v. Pratt, 1 Dears. 502: Held, that they were wrong in not convicting, as the shooting and picking up were one continuous act, and sufficient to bring it within the words "being upon and entering land in pursuit of game" in sect. 30 of above-mentioned Act.*

This was an appeal from the decision of justices of the county of Northampton. The case stated that the resp., who had a licence to kill game, whilst in a close of land in the parish of Corby, occupied by one George Chapman, over which he had the right of shooting, shot a pheasant which was on the ground in an adjoining close occupied by one Thomas Underhill, over which the Earl of Cardigan (to whom the app. is gamekeeper) had the exclusive right of shooting, and that resp. afterwards went a short distance, and got over the fence out of Chapman's close into the close occupied by Thomas Underhill, and there picked up the dead pheasant.

The justices having heard the evidence, dismissed the case, upon the grounds, first, that regard being had to the decision of the Court of Q. B. in *Reg. v. Pratt*, 1 Dears. 502, the act of shooting the pheasant by resp. on the close in question, although actionable, did not constitute a trespass under sect. 30 of 1 & 2 Will. 4, c. 32, the resp. not having been in that close when he shot, but in one occupied by George Chapman, where he was not a trespasser; secondly, that we had some degree of doubt whether the subsequent entry on the close for the purpose of fetching the pheasant, which was then dead, was such a trespass in pursuit of game as is contemplated by sect. 30 of 1 & 2 Will. 4, c. 32, the doubt being as to whether it applied to dead game.

*Evans Bennett* appeared for the app., and contended that the shooting and entering was one continuous act, and therefore within the meaning of sect. 30 of the Act. He cited *Reg. v. Pratt*, 1 Dears. 502; *Loomes v. Bailey*, 30 L. J. 31, M. C.; *Rez v. Marsh*, 2 B. & C. 717; and *Mordan v. Porter*, 29 L. J. 213, M. C.

The resp. did not appear.

ERLE, C.J.—I am of opinion that our judgment should be for the app., but I refrain from giving any opinion upon the second point, as to the game being dead or alive, till some future time. As to the point taken by Mr. Bennett, that the shooting and the entering upon the plt.'s land and picking up the dead bird was one continuous act, I am of opinion that it was, and that if a man stands on his own land and shoots game on another man's land, and then goes and picks it up, that is such an entering and being upon the land in pursuit of game as to bring it within the meaning of the Act; the picking the bird up relates back to the shooting, and I think therefore that the magistrates would have been right in convicting, and therefore the case must be remitted back to them.

WILLES, J.—I am of the same opinion, namely, that the act was a continuous one, begun by the shooting and consummated by the picking up.

BYLES, J.—If it had been necessary to decide upon the point as to the game being dead and so not within the statute, there might have been some difficulty, but I am of opinion that the shooting and picking up was one continuous act, and therefore that the case comes within the statute.

KEATING, J. concurred.

*Judgment for app.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HEESTLET, Esqrs., Barristers-at-Law.

Thursday, Feb. 13.

REG. on the prosecution of the GUARDIANS OF THE ISLE OF THANET UNION (resps.) v. THE OVERSEERS OF FAVERSHAM (apps.)

*Pauper lunatic—Lunatic Asylums Act 1853—16 & 17 Vict. c. 97, s. 97—Order of settlement and maintenance.*

*The Lunatic Asylums Act 1853, s. 97, provides that it shall be lawful for any two justices of the county or borough in which any asylum, &c., in which any pauper lunatic is or has been confined is situate, to inquire into the last legal settlement of such pauper lunatic, and adjudge such settlement, and order the guardians of the union to which the parish in which such lunatic is adjudged to be settled belongs to pay to the guardians of any union or parish, or to the overseers of any parish, all expenses incurred by or on behalf of such union or parish in or about the examination of the lunatic, and the bringing him before a justice, and the conveying him to the asylum, and the costs of maintenance for the last twelve months preceding, &c.:*

*Held, per Wightman and Mellor, JJ., that it is not competent for the justices making such last-named order of maintenance to inquire into the validity of the order of admission to the asylum, and that the existence of such an order gives jurisdiction to make the order of maintenance.*

*Per Crompton, J., that the section refers only to pauper lunatics lawfully confined, and that if the order for admission were made without jurisdiction the justices would have no jurisdiction to make the order of maintenance.*

Case stated under 12 & 13 Vict. c. 45, s. 11.

This was an appeal against an order of G. C. Norton, Esq., one of the metropolitan police magistrates, dated April 13, 1860, adjudicating the settlement of Sarah Martin, a lunatic, to be in the parish of Faversham, and ordering the guardians of the Faversham Union to pay on account of the said parish certain expenses incurred in and about the examination and conveyance of the said lunatic, and also for the expenses of her maintenance.

The order recited at length an order of David Price, a justice of the peace for the borough of Margate, dated 12th July 1859, "which order is now proved before the undersigned, being a police magistrate, within whose jurisdiction the licensed house for the reception of lunatics in which one Sarah Martin, a pauper lunatic, is now confined is situate," and that it was proved upon oath that at the time of making the order by Price, Sarah Martin was chargeable to the parish of St. John the Baptist in the Isle of Thanet Union, in the county of Kent, and that by virtue of the said order Sarah Martin was conveyed on the 12th July 1850 from the said parish to the said licensed house, and was there received by the superintendent or proprietors thereof as a patient by virtue of the said order, and had been ever since and still is confined therein as a lunatic at the expense of the said parish. The order then recited a complaint by the guardians of the Isle of Thanet Union of the chargeability of the lunatic to the parish of St. John, and proceeded to adjudge Faversham to be the parish of settlement at the time of the making

Q. B.] GUARDIANS OF THE ISLE OF THANET UNION v. THE OVERSEERS OF FAVERSHAM. [Q. B.]

or the order of Price, and ordered the guardians of the Faversham Union to pay the parish of St. John the costs of the examination and conveyance of the said lunatic, and the costs of past maintenance for the twelve months next preceeding, and also ordering a certain sum weekly for the future maintenance of the lunatic in the asylum.

The order of Price was as follows:—

"I, David Price, the undersigned, having called to my assistance a surgeon, and having personally examined Sarah Martin, a pauper, and being satisfied that the said Sarah Martin is a person of unsound mind, and a proper person to be taken charge of and detained under care and treatment, there being no available accommodation in the county asylum, hereby direct you to receive the said Sarah Martin as a patient into your house. Subjoined is a statement respecting the said Sarah Martin.

"David Price, a justice of the peace for the borough of Margate, 12th July 1859.

"To J. H. Paul, Medical Superintendent of Camberwell House Asylum."

The said D. Price, upon his own knowledge, and without any notice being given to him by the relieving or other officer of the parish of St. John the Baptist, examined the lunatic at the house where she was residing, and after calling to his assistance a surgeon, made the order of the 12th July 1859. Under this order the pauper lunatic was conveyed from St. John the Baptist, Margate, to the licensed house by the relieving officer of such parish. At the time the said orders of D. Price and G. C. Norton were made, the pauper lunatic was a proper person to be confined in the Licensed house under the provisions of the 16 & 17 Vict. c. 97, s. 67; and it is admitted that such pauper lunatic was properly sent there, and that all the proceedings for sending her there were regular, with the exception hereinafter mentioned.

The settlement of the lunatic is in the parish of Faversham, and the only ground of appeal against the order is, that at the time of the making of the order by Price therein mentioned for the removal of Sarah Martin, the borough of Margate was not a borough town, or city corporate, having a quarter sessions, recorder and clerk of the peace, within the meaning of the provision of the 132nd section of the 16 & 17 Vict. c. 97, "An Act for consolidating and amending the laws of lunatic asylums in England," and consequently that Price had no jurisdiction to make the order.

At the time of the making of the order by Price the borough of Margate was a borough created by a charter of the Crown, dated 29th July 1837, under the Municipal Corporations Act, and Price had been appointed, and was at the time of the making of the order a justice of the peace of the said borough; but at the time of making the order by him no court of quarter sessions had been or was created or established for the borough, nor had any recorder or clerk of the peace for the borough been appointed, nor was there then, in fact, any recorder or clerk of the peace for the borough.

The parish of St. John the Baptist, in which the borough of Margate is wholly situate, is not part of the county of Kent, but is a non-corporate limb and ancient member and liberty of the borough, town and port of Dover, and still remains so, except so far as it is affected by the charter of incorporation above mentioned. Besides the justices appointed for the borough of Margate under the charter of incorporation, certain justices appointed under 51 Geo. 3, c. 36, and the justices of Dover, assigned to that place by virtue of the Municipal Corporations Act, have jurisdiction in Margate, under 5 & 6 Will. 4, c. 76, s. 135; 18 & 19 Vict. c. 48; and 20 & 21 Vict. c. 1. Price is only a justice for the borough of Margate, appointed under the charter incorporating that place, and is not a justice for the

borough, town and port of Dover, nor is he appointed under 51 Geo. 3, c. 36.

Dover is one of the Cinque Ports, and has a separate court of quarter sessions of the peace, recorder and clerk of the peace, and it is contended by the resps. that Margate is still within the jurisdiction of such court, by virtue of 5 & 6 Will. 4, c. 76, s. 134, and 6 & 7 Will. 4, c. 105, s. 10. It is contended on behalf of the churchwardens and overseers of Faversham that Price had no jurisdiction to make the order for the reception of the lunatic into the licensed house, and that her confinement and chargeability there being unlawful, the order of Norton, dated 13th April 1860, now appealed against, is therefore void.

It is contended on behalf of the parish of St. John the Baptist, Margate, that Price had jurisdiction to make the order, and that, whether he had or not, the order of Norton was rightly made, because at the time of making the same the pauper lunatic was confined in the licensed house, at the cost and charge of the parish of St. John the Baptist.

The question for the opinion of this court is, whether Price had jurisdiction to make the said order, dated the 12th July 1859; and, if he had not, whether the order of Norton is thereby rendered invalid.

If the court should be of opinion that the order of G. C. Norton was, under the circumstances above stated, properly made, then such order is to be confirmed, otherwise the same, or so much thereof as the court should think illegal, is to be quashed.

*Poland* for the resps.—Under 16 & 17 Vict. c. 97, s. 97, even if the order for confinement made by Mr. Price be bad, the order of maintenance of Mr. Norton is valid. So soon as the pauper lunatic is found confined, jurisdiction is given by that section; the words of the section are "is or has been confined." It is only necessary that the person should be a pauper lunatic and that he be in confinement; if those two matters appear the court will not inquire whether the proceedings were legal or not. There is no such expression as "duly confined" to be found in the section; the words are "is or has been confined," "sent for confinement." (*Reg. v. Crediton*, El. Bl. & El. 231; 27 L. J. 208, M. C.; *Reg. v. Carnarvon and Anglesea Union*, 3 New Sess. Cas. 708. [CROMPTON, J.—Those cases only go to the extent of saying that you need not show jurisdiction from the beginning.] *Reg. v. Minster*, 14 Q. B. 349.) The order would be valid if Mr. Price's order were not recited, and Mr. Norton had no power to inquire whether the proceedings were regular. If he finds a pauper lunatic confined within his jurisdiction, he has power to make an order: there can be no inconvenience or injury to the parish of settlement. Then was Mr. Price a properly constituted justice under the 67th section? It is said that "borough" means "a borough having quarter sessions, recorder and clerk of the peace" (sect. 132). Price is a justice of a borough having quarter sessions. Margate is an ancient member of Dover, and Dover is one of the Cinque Ports having quarter sessions, recorder and clerk of the peace, and its jurisdiction extends into Margate. [WIGHTMAN, J.—But Mr. Price's commission does not extend to Dover; he cannot be said to be a justice of "the borough" within the interpretation clause (sect. 132); it cannot be contended he had no jurisdiction.] (He was stopped by the Court on that point.)

*T. L. Wood*, contra, for the apps.—The true meaning of the 97th section must be, that the pauper lunatic be lawfully confined; and that section must be read in connection with sect. 67. In *R. v. Minster*, 14 Q. B. 349, Lord Campbell, in his judgment, expressly says that the confinement was not unlawful. "Confinement" means "confinement already referred to," not a casual or *de facto* confinement. All the cases referred

to are distinguishable from this. He referred to *Rez v. Rhyddlan*, 14 Q. B. 327.

*Poland* in reply.—It was no fault of the resp. parish if the pauper lunatic was not properly confined. The parish of settlement is the parish which ought to pay for her maintenance. The illegality of the confinement will not be presumed. If the lunatic were dangerous, and her discharge likely to be injurious to herself and others, she would not be discharged: (*Rez v. Pinder*, 24 L. J. 148, Q. B.)

WIGHTMAN, J.—I am of opinion that the order should be confirmed. It appears in this case that Sarah Martin was a lunatic pauper, confined in a lunatic asylum, and chargeable to the parish of St. John the Baptist, Margate. That parish having paid the expenses of her removal and maintenance, application was made to a justice within whose jurisdiction the asylum was situate, to inquire into and adjudicate on the pauper's settlement, in order to reimburse the parish of St. John the expenses it had been put to. The justice having adjudged Faversham to be the parish of settlement, the objection taken by that parish is that the authority under which the lunatic was sent to Camberwell and there confined was defective, and that, although a pauper lunatic confined in an asylum, and therefore within the terms of the 97th section, yet, as the confinement was unlawful, Price, the justice who made the order of confinement, not being a justice of the borough within the 132nd section of the Act, the order of settlement and maintenance was void. Now, it appears to me that it was for the very purpose of avoiding such questions as these that the 97th section was framed in the terms it is, for I can imagine nothing more inconvenient than questions of this nature. There is no question that the pauper was a lunatic, and ought to be removed, or that she was chargeable in the first instance on St. John's, or that Mr. Norton, the metropolitan magistrate, had the powers given to two justices; but it is said, that although it was competent for him to inquire into the settlement of a pauper lunatic confined in an asylum, he must inquire whether such lunatic was lawfully confined. It seems to me that that would lead to very awkward consequences, and I adopt the opinion expressed by Erle, J., in *Reg. v. The Carnarvon Union*, "that the jurisdiction of the justices to make an order of settlement and maintenance of a lunatic pauper commences from their finding him confined in an asylum," and "that it is very salutary to take up the inquiry there, in an appeal against an order of maintenance, and so to preclude any investigation then into the validity of the order under which he was sent there." The justice of the case would require such an order to be made, and it is sufficient if the magistrate found the pauper lunatic in a lunatic asylum without inquiring into the jurisdiction of the justice to make the order for her confinement.

CHROMPTON, J.—I cannot say that I am at all satisfied with the conclusion arrived at by my brother Wightman. It is conceded that Price had no jurisdiction; we are therefore to decide on the general proposition, whether sect. 97 relates to any other pauper lunatic than one confined by order of a justice having jurisdiction to make such order. To arrive at the meaning of the 97th section, we must contrast it with sect. 67, and it seems to me that the provisions are perfectly inapplicable to the case of a person sending another to a lunatic asylum of his own will and act, and merely because it thinks it necessary. We must take the broad proposition of an unauthorised person sending a lunatic pauper to an asylum, and the language of the Act generally is strong, to my mind, that the 97th section refers to cases where the lunatic has been brought before a proper authority and lawfully sent to confinement. The cases cited seems to me to bear that out.

MELLOR, J.—It appears to me that the proper construction of this Act is that put upon it by my brother Wightman, and I cannot help thinking that enormous inconvenience would arise from any other construction. The language of the 97th section seems to me to be intended to give jurisdiction to the justices to adjudicate on the settlement and maintenance of the lunatic pauper in the following conditions:—1. It is necessary that the person should be a lunatic pauper, and in confinement. 2. That he should have been brought from the complaining parish; and 3. That the order should be on the parish of settlement. All those conditions are complied with here. It would be inconvenient that when justices are called upon to make these orders of maintenance, they should be further called on to investigate what had previously occurred. I think, as was said in one of the cases cited, that it is salutary that the inquiry should commence on the finding a pauper lunatic in confinement in an asylum, and Erle, J. thought those were the two main facts necessary to give jurisdiction.

*Judgment for resps., confirming order.*

*April 26 and May 15.*

REG. v. THE JUSTICES OF SUSSEX, *Re AN APPEAL BETWEEN THE PARISH OFFICERS OF COLEMORE (apps.) AND THE PARISH OFFICERS OF FUNTINGTON (resps.).*

*By sect. 81 of the 4 & 5 Will. 4, c. 76, the apps. against an order of removal must, with their notice of appeal, or fourteen days at least before the first day of the sessions at which the appeal is intended to be tried, serve the grounds of their appeal upon the overseers of the resp. parish.*

*Held (Blackburn, J. dissentiente), that the grounds of appeal must be sent, at all events, fourteen days before the first day of such sessions, and that it is not sufficient to send them with the notice of appeal if such notice is not given that number of days, even in cases where, by the practice of the sessions, a less number of days' notice of appeal is required:*

*Held, also, that the apps. against an order of removal are entitled under the 11 & 12 Vict. c. 31, s. 9, to fourteen days after receiving a copy of the depositions, within which to serve their grounds of appeal, and that if at the expiration of such fourteen days there are not fourteen clear days (as provided by sect. 81 of the 4 & 5 Will. 4, c. 76) for giving such grounds of appeal before the first day of the sessions, though by the practice of the sessions there is time for giving full notice of appeal, they are not bound to try at such sessions, but it is their duty to enter and respite their appeal, which appeal the sessions are bound to receive and respite accordingly.*

*On the 1st Sept. the apps. received a copy of an order of removal, &c. On the 17th they applied for a copy of the depositions, which they received on the 19th. On the 1st Oct. they gave notice that at the next sessions they would commence, and enter their appeal (only eight days' notice of appeal being required by the practice of the sessions), but they served no grounds of appeal. On the 15th the sessions took place, and the apps. applied to enter and respite their appeal, which the sessions refused:*

*Held (Blackburn, J. dissentiente), that the sessions were bound to have received and respited the appeal.*

This was a demurrer to a return to a *mandamus* commanding the justices of Sussex to receive and hear a certain appeal between the parish officers of Colemore, apps., and the parish officers of Funtington, resps. (a) The return was as follows:—"We, John Morgan

(a) See *Reg. v. The Justices of Sussex*, vol. 1, p. 236.

Cobbett, of Edenbridge, in the county of Kent, Esquire, the Honourable John Jervis Carnegie, of Fair Oak, in the county of Sussex, and Hasler Hollest, of Lods-worth, in the said county of Sussex, Esquire, three of the keepers of her Majesty's peace, and justices of our Lady the Queen, assigned to hear and determine divers felonies, trespasses, and other misdemeanors committed within and for the county of Sussex, do hereby most humbly certify and return to our sovereign Lady the Queen, to her Majesty's writ in this behalf hereto annexed, that the order for the removal of John Sandham and his six children from the parish of Funtington, in the county of Sussex, to the parish of Colemore, in the county of Southampton, in the said writ mentioned, was made on the 18th day of August, in the year of our Lord one thousand eight hundred and sixty. That notice in writing of the said John Sandham and his said children being chargeable to the said parish of Funtington, accompanied by a copy of the said order of removal, and by a statement of the grounds of removal, including the particulars of the settlement relied on in support thereof, as required by the statutes in that case made and provided, were on the 30th day of August, in the year of our Lord 1860, sent by post by the churchwardens and overseers of the poor of the said parish of Funtington, who obtained the said order, and the churchwardens and overseers of the poor of the said parish of Colemore, to whom the said order is directed; that on the 17th day of September, in the year of our Lord 1860, the said last-mentioned churchwardens and overseers applied for, and on the 19th day of September, in the year of our Lord 1860, there was delivered to them a copy of the depositions on which the justices of the peace who made the said order did make the same. That on the first day of October, in the year of our Lord 1860, the churchwardens and overseers of the poor of the said parish of Colemore did by Edwin Albery, their attorney, give notice to the churchwardens and overseers of the poor of the said parish of Funtington, that the churchwardens and overseers of the poor of the said parish of Colemore intended, at the next general quarter sessions of the peace, to be holden in and for the said county of Sussex, to commence and enter an appeal against the said order. The general quarter sessions of the peace, in and for the eastern division of the said county of Sussex, were holden at Lewes, in the said county, on the 15th day of Oct. in the year of our Lord 1860, and in and for the western division of the said county, were holden at Chichester, in the said county, on the 18th day of Oct. in that year. The parish of Funtington is situate in the western division of the said county. The churchwardens and overseers of the poor of the parish of Colemore did not at any time on or before the day and year last aforesaid, send or deliver to the churchwardens and overseers of the poor of the parish of Funtington, or any one of them, any statement in writing or otherwise of the grounds of the said appeal in the said notice mentioned. By the custom and practice of the said sessions, eight days' notice of appeal against an order of removal, and no more, is required. The said churchwardens and overseers of the poor of the said parish of Colemore, at the said court of quarter sessions, holden at Chichester aforesaid, on the 18th day of Oct. in the year of our Lord 1860, and not on the 15th day of Oct. in that year, as in the said writ alleged, applied to have received and to enter the said appeal against the said order of removal, with a view to its being respited, and thereupon then and there applied to the said court of quarter sessions to adjourn and respite the hearing of the said appeal to the then next general quarter sessions of the peace for the said county as a matter of right, and without showing any cause or assigning any reason for such delay. The said court of quarter sessions having fully heard and considered

the said application, and all that was urged in support of and against it, decided and determined that the said appeal should not be respited, but did not further or otherwise refuse or decline to receive or enter the said appeal. That after the said 18th day of Oct. in the year of our Lord 1860, to wit, on the 25th day of Oct. 1860, the said John Sandham and his said children were removed under and by virtue of the said order from the said parish of Funtington to the said parish of Colemore, and that he afterwards, to wit, on the 10th day of Dec. in the year of our Lord 1860, died. Therefore the keepers of her Majesty's peace and justices of our Lady the Queen assigned to hear and determine divers felonies, trespasses and other misdemeanors within and for the said county of Sussex, have declined and do decline to receive and enter the appeal of the said churchwardens and overseers of the poor of the parish of Colemore aforesaid, against the order for the removal of the said John Sandham and his six children from the said parish of Funtington to the said parish of Colemore, and to hear and determine the merits of the said appeal, as commanded by her Majesty's writ to the said keeper and justices directed in this behalf, and hereto annexed."

To this return the prosecutors demurred.

The prosecutor's points of argument were:—1. That by the operation of sect. 81 of the 4 & 5 Will. 4, c. 76, which requires the apps. against an order of removal to send or deliver to the resp. a notice of their grounds of appeal fourteen days at least before the first day of the sessions at which the appeal is to be tried; and of the 11 & 12 Vict. c. 31, s. 9, which allows the apps. a period of fourteen days after they have received a copy of the depositions for giving notice of appeal, they, the said prosecutors were not bound to have given notice of their grounds of appeal so as to have been ready and in a condition to have tried their appeal at the quarter sessions of the county of Sussex, held in Oct. 1860. 2. That as the prosecutors were not so bound, the justices at the said quarter sessions were bound to have received and respited the said appeal. 3. That notwithstanding it is the practice of the said quarter sessions of Sussex to try appeals in that division of the county in which they arise, yet, by law, the prosecutors were bound to have given their notice of appeal and grounds of appeal with reference to the first day of holding the quarter sessions for the said county; namely, the 15th Oct. 1860.

The deft.'s points of argument were:—1. That, as by the custom and practice of the Sussex sessions, only eight days' notice of appeal against an order of removal are required, there was time for giving full notice of trial, and with it notice of grounds of appeal, and that the apps. ought to have come prepared to try at those sessions, and that the court of sessions were entitled to refuse to respite the appeal. 2. That it was discretionary in the court of sessions to decide whether they would respite the appeal or not, and that, having decided that they would not, the *mandamus* will not lie, and the return to it is good. 3. That the apps. were not entitled, as a matter of right, and without showing any cause or assigning any reason, to enter and have the appeal respited, and the return shows that the court of sessions had a right to decide as they did in refusing to respite the appeal.

By sect. 81 of the 4 & 5 Will. 4, c. 76, it is enacted that "the overseers or guardians of the parish appealing against any such order, or any three or more of such guardians, shall, with such notice, or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried, send or deliver to the overseers of the resp. parish a statement in writing, under their hands, of the grounds of such appeal," &c.

By sect. 9 of the 11 & 12 Vict. c. 31, it is enacted, "that no appeal shall be allowed against any order of

removal if notice of such appeal be not given as required by law, within the space of twenty-one days after the notice of chargeability and statement of the grounds of removal shall have been sent by the overseers or guardians of the removing parish to the overseers or guardians of the parish to which such order shall be directed, unless within such period of twenty-one days a copy of the depositions shall have been applied for, as aforesaid, by the last-mentioned overseers or guardians, in which case a further period of fourteen days after the sending of such copy shall be allowed for the giving of such notice of appeal, but in such case no poor person shall be removed under such order of removal until the expiration of such further period, or fourteen days."

*Manisty*, Q. C. (*T. W. Saunders* with him) appeared in support of the demurrer.

*Huddleston*, Q. C. (*Foot* with him) contra.

The following cases were cited:—*Reg. v. The Justices of Suffolk*, 4 A. & E. 319; *Reg. v. The Justices of the West Riding of York*, El. Bl. & El. 713; 27 L. J. 269, M. C.; *Reg. v. The Inhabitants of Draughton*, 8 L. J. 92, M. C.; *Reg. v. Peterborough*, 7 El. & Bl. 643; 26 L. J. 153, M. C.; *Reg. v. Skircoats*, 28 L. J. 224, M. C.; *Reg. v. The Recorder of Derby*, 20 L. J. 44, M. C.; *Reg. v. Sevenoaks*, 7 Q. B. 136, 14 L. J. 92, M. C.

*Cur. adv. vult.*

The facts and arguments sufficiently appear in the following judgments:—

*May 15.*—*MELLOR*, J. (a)—In this case a *mandamus* had been directed to the justices of Sussex to receive and enter an appeal against an order for the removal of John Sandham and his children from the parish of Funtington, in the county of Sussex, to the parish of Colemore, in the county of Southampton, and to hear and determine the merits of the said appeal. No objection was taken to the form of the writ, but the argument turned entirely on the facts stated in the return. It appeared that the order of removal was made on the 18th Aug. 1860, that notice of chargeability, accompanied by a copy of the said order, and a statement of the grounds of removal, were on the 30th Aug. sent to the parish of Funtington, and that on the 19th Sept. following a copy of the depositions upon which such order was made, having been duly applied for, was delivered to the parish officers of the said parish of Colemore; that on the 1st Oct. the parish officers of the last-named parish gave notice to the parish officers of Funtington that they intended at the next general quarter sessions for the said county of Sussex to commence and enter an appeal against the said order. The general quarter sessions for the said county commenced at Lewes, for the eastern division of such county, on the 15th Oct., and for the western division at Chichester, on the 18th of the same month. Funtington is situate in the western division. By the practice of the sessions, eight days' notice only of appeal is required. No notice of the grounds of appeal was given by the officers of the app. parish to the officers of the resp. parish before the holding of the sessions, either at Lewes or Chichester. The parish officers of the app. parish on the 18th Oct., at Chichester, applied to the sessions to enter and respite the said appeal to the next sessions, "as a matter of right, and without showing any cause for such delay." The sessions determined that the said appeal should not be respited; thereupon the question arises, whether they had authority so to determine? It was urged before us that the sessions were justified in their decision by the facts that the app. parish had been guilty of laches in not giving notice of the grounds of appeal in due time before the sessions, either "with the notice of appeal," "or four-

teen days at the least" before the first day of the sessions at Lewes, or before the 18th Oct., on which day the sessions were held at Chichester, for the western division of the county. The latter point was not much pressed, and it appears to me to be the prudent course in a matter of this kind to abide by a former decision of this court in the case of *Reg. v. The Justices of Suffolk*, 16 L. J. 36, M. C. The sessions at Chichester must have been holden by adjournment from Lewes, and in contemplation of law were a continuation of those sessions, and consequently the 15th, and not the 18th Oct., was, for the purpose of computing the fourteen days for giving notice of the grounds of appeal, the first day of the sessions." The question of laches, as it was put in the argument, is not disposed of by the determination of this point, and it becomes necessary, therefore, to consider the grounds upon which it was contended that there was such laches on the part of the apps. in this case as disentitled them to respite their appeal. It was insisted that the apps. were bound to have given notice of the grounds of their appeal fourteen days at least before the first day of the sessions, and that if by reason of their availing themselves of the twenty-one days allowed by sect. 79 of the 4 & 5 Will. c. 76 extended by the additional days given by sect. 11 of the 11 & 12 Vict. c. 31, they were too late to give such fourteen days' notice of the grounds of their appeal it was owing to their own neglect, and that it followed of course that they were not entitled to be heard in support of their appeal, and that the sessions were not bound to respite the same. Upon consideration of the statute and decisions I have come to the contrary conclusion. By the 4 & 5 Will. 4, c. 76, s. 79, it was provided that no poor person should be removed or removable until twenty-one days after a notice in writing of his being chargeable, accompanied by a copy of the order of removal, and by a copy of the examination upon which such order was made, should have been sent by the officers of the removing parish to the officers of the parish to which such order was directed, with a proviso for the case for earlier submission to the order in manner therein mentioned. It has here been in several cases decided that the object of the Legislature in giving this delay of twenty-one days in the execution of the order was to afford opportunities for the parish upon which such order was made to inquire and consider whether they had any sufficient ground of objection thereto: (*Reg. v. The Justices of Lancashire*, 4 Q. B. 913; and *Reg. v. The Justices of the West Riding*, El. Bl. & El. 713, although under the particular circumstances of that case the court discharged the rule for a *mandamus*. Lord Campbell, in delivering the judgment of the court, said: "As a rule, we think that the parties appealing are entitled to take the twenty-one days and the fourteen days mentioned in stat. 11 & 12 Vict. c. 31, s. 9, and that if at the expiration of the last of those days there is time to give effective notice of trial of the appeal at the then next sessions, such notice ought to be given, but that if there is not time to give such notice of trial the appeal ought to be entered and respited at the then next sessions following the expiration of the fourteen days; such an entry and respite would be the only step the app. can then take to show his intention to prosecute his appeal, as he will do so at the peril of being obliged to pay costs in case he omits further to prosecute it; and this is in accordance with the modern practice." The statute referred to by Lord Campbell of 11 & 12 Vict. c. 31, s. 9, substitutes a notice of ground of removal for a copy of the examinations required to be sent with the copy order by the Act of 4 & 5 Will. 4, c. 76, but entitles the officers of the parish to which an order of removal is directed to apply within the twenty-one days for a copy of such examination, and

(a) Cuckburn, C. J. was not present at the argument.

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by sect. 9 extends the period within which notice of appeal must be given to fourteen days after the sending of such copy of the examination to the officers of the parish so applying for the same. By the 4 & 5 Will. 4, c. 76, s. 81, it is enacted, that in every case where notice of appeal against an order of removal shall be given, the officers of the parish appealing against such order shall, "with such notice, or fourteen days at the least before the first day of the session at which such appeal is intended to be tried," send or deliver to the officers of the resp. parish a statement in writing under their hands of the grounds of such appeal, "and it shall not be lawful for the overseers of such app. parish to be heard in support of such appeal, unless such notice and statement shall have been so given as aforesaid." The statute 11 & 12 Vict. c. 31, s. 4, gives a legislative declaration, if any were wanting, of the object of interchanging the grounds of removal and the grounds of appeal, by reciting as follows:—"And whereas a statement of the grounds of removal and of appeal is required to be communicated, for the purpose of enabling the party receiving it to inquire into the subject of such statement, and if need be to prepare for trial." And by sect. 11 the Act of 4 & 5 Will. 4, c. 76 and that Act are to be construed as one Act. These provisions enable us to understand the true meaning of the expression, "time to give effective notice of trial," used by Lord Campbell in delivering the judgment of this court in the case of *Reg. v. The Justices of the West Riding*. Time to give an effective notice of trial of appeal must, I think, be calculated by allowing twenty-one days, with any addition arising from a copy of the examination having been applied for under 11 & 12 Vict. c. 31. If, at the expiration of that period, there be time to give the notice required by the practice of the sessions, and also to give the fourteen days' notice at least of the grounds of appeal before the first day of the next sessions, then the entry and trial of the appeal must take place at those sessions, unless adjourned under the general authority of the court; but if there be not time to give the fourteen days' notice of the grounds of appeal before the first day of such session, then no notice of trial can be effective, and the app. parish is entitled as a matter of right to enter and respite the appeal, and no question of laches can arise. Soon after the passing of the Act 4 & 5 Will. 4, c. 76, it was decided that it did not alter or affect the time prescribed by the rules of practice of the different courts of quarter sessions for giving notice of appeal: (*R. v. Justices of Suffolk*, 4 Ad. & El. 319; *R. v. Doughton*, 8 L. J. 92, M. C.) The time so required varies very considerably; accordingly it appears to me that it would frustrate to a great extent the object of the statute, in requiring the statement of the grounds of appeal to be sent or delivered to the officers of the resp. parish, if we were to hold that the words "with such notice, or fourteen days at the least before the first day of the sessions at which such appeal is intended to be tried," meant to give the varying time required for the notice of appeal by the practice of the different sessions as the equivalent alternative of fourteen "days at the least" for giving notice of the grounds of appeal. I think that the true meaning of the section is, that if the time required by the practice of the particular sessions for the notice of appeal be fourteen days at the least, or a longer period, then the statement of the grounds of appeal may be sent with such notice, as fourteen days at the least are secured to the officers of the resp. parish "to inquire into such statement, and, if need be, prepare for trial." I cannot think that it could have been intended that the grounds of appeal should precede the notice of appeal, and that the apps. in availing themselves of the time allowed by law for considering whether they would

appeal or not before sending the statement of the grounds of appeal could be guilty of laches, and it appears to me that, by adhering to this interpretation of the statutes, the mischief will be avoided which might arise, for the sessions may cease having to decide whether there had been laches or not. *R. v. Sevenoaks*, 7 Q. B. 152; and *R. v. Peterborough*, 7 Ell. & Bl. 743, relied upon by Mr. Huddleston, are not at all inconsistent with this view of the law, as they merely decide that the appeal ought to be entered at the next sessions, although it may be impracticable then to try it. In the present case, the apps. not having given notice of their grounds of appeal fourteen days at least before the first day of the sessions, could not have been heard in support of their appeal; but, as I think that they were guilty of no laches in availing themselves of the time allowed by law for consideration before taking that step, they were entitled to enter and respite as a matter of right, and that the return, therefore, is insufficient, and so our judgment ought to be for the Crown.

BLACKBURN, J.—It seems to me that our judgment in this case ought to be for the defendants. The difference of opinion in the court is, I believe, only on one point, and that a narrow one, yet on it the decision of the present case depends, and it is one which may be of practical importance in other cases. The appeal against an order of removal was originally given by stat. 13 & 14 Car. 2, c. 12 s. 2, to the parties aggrieved, and was to the justices "at their next quarter sessions." On the construction which has been put on this statute the next sessions means the first quarter sessions at the time of the grievance at which if the party aggrieved used reasonable diligence it was practicable to try the appeal. This statute is silent as to any notice of appeal, but the ordinary principles of justice and the common law required that before the appeal was determined notice should be given to the resps. to enable them to be heard. Stat. 9 Geo. 1, c. 7, s. 8, reciting that disputes and controversies had arisen on this, enacts, that in future no appeal against an order of removal shall be proceeded upon in any court of quarter sessions, "unless reasonable notice be given" by the apps. to the resps., "the reasonableness of which notice shall be determined by the justices of the peace at the quarter sessions to which the appeal is to be made, and if it shall appear to them that reasonable time of notice was not given, then they shall adjourn the appeal to the next quarter sessions, and then and there finally determine the same." It was settled, on the construction of this statute, that the justices at the sessions to which the appeal was brought had no discretion, that they must adjourn it unless reasonable notice of appeal had been given, though it were shown to their satisfaction that there had been ample time to have given reasonable notice; and further, inasmuch as if no notice of appeal at all was given, there was no reasonable notice, that the justices must, if there was no notice to adjourn, adjourn the appeal: (*R. v. Gloucestershire*, 1 Doug. 79; *R. v. Shropshire*, 7 East, 549; *R. v. Justices of London*, 9 Q. B. 41.) As, till recently, there was nothing to compel the apps. to give notice of appeal within any limited time, the effect of this construction of the Act was, that the apps. were bound to bring the appeal to the first practicable sessions; they had an option either to give reasonable notice of the appeal, and try it at the first sessions, or to omit giving reasonable notice, and so as of right to postpone the trial to the next quarter sessions: (see 3 Clitty's Stats. 654, note a.) Such was the state of the law before stat. 4 & 5 Will. 4, c. 76, s. 81. By that section, "in every case in which notice of appeal shall be given, the apps. shall, with such notice, or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried,

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send or deliver to the resps. a statement in writing under their hands of the grounds of such appeal, and it shall not be lawful for the apps. to be heard in support of such appeal, unless such notice and statement shall have been so given as aforesaid." It is on the true construction of this enactment that I differ from my brothers in the present case. It seems to me that the intention of the Legislature was to make no difference in the existing law as to notices of appeal, or the time at which the appeal should be entered or heard; but they did intend to attach a condition to the apps. being heard in support of the appeal, and that condition was that grounds of appeal should have been given either with the notice of appeal or at least fourteen days before the trial. The apps. up to the time of that Act might give a reasonable notice of appeal and try at the next sessions, and it was well known that a week's notice was usually held reasonable within the statute: (see note *a* to 3 Chitty's Stats. p. 685.) The Legislature did not, it seems to me, intend (and certainly did not use words to express an intention) to take away this power from the apps., or to enact that a reasonable notice should be fourteen days at least. What they apparently intended, and what the words used in their ordinary sense mean is, that if the apps. with such notice delivered grounds of appeal they might be heard; but it was also known that a notice of appeal might be given more than fourteen days before the first sessions, or might be given too late to try at the first sessions, so that the appeal would be entered and respited, and come on for trial three months or more after the notice of appeal, and it was probably expected that this would in future frequently be the case, as a notice of appeal was by this Act made a suspension of the power of removal, if given within twenty-one days. When, for these or any other reasons, the notice of appeal was given long before the trial, it seems to have been thought unnecessary that the grounds of appeal should be delivered with the notice, and it was provided, as an alternative condition, that the apps. might be heard if the grounds were given fourteen days at least before the first day of the sessions at which the appeal was intended to be tried—not, it is to be observed, to which the appeal was brought. I shall afterwards return to this part of this subject, as it is upon it that the difference in opinion arises; but for the present, assuming that the construction is that first stated, I proceed to point out how this becomes material in the present case. Statute 11 & 12 Vict. c. 31, s. 9, for the first time imposed a limit on the time within which notice of appeal must be given. By that enactment no appeal shall be allowed if notice of appeal be not given within the space of twenty-one days after the notice of chargeability and grounds of removal shall have been sent, unless within that time a copy of the depositions shall have been applied for, in which case a further period of fourteen days after sending of such copy shall be allowed for the giving of such notice of appeal. Sometimes this enactment is spoken of as if it gave to the apps. some additional time within which to bring their appeal; but, in truth, it limits and restricts the time, it does not enlarge it. The apps. are still bound as before to bring their appeal to the first practicable sessions after the grievance: (*Reg. v. Sevenoaks*, 7 Q. B. 136; *Reg. v. Peterborough*, 7 El. & Bl. 143; *Reg. v. West Riding*, El. Bl. & El. 713.) But formerly the apps. might always have delayed giving notice of the appeal till it was too late to try at the sessions. The enactment puts a restriction on the power to delay giving notice of appeal. I think that the effect of statute 11 & 12 Vict. c. 31, s. 9, is, that unless the notice of appeal be given within the prescribed period, the appeal shall not be allowed, but that if the notice be given within the prescribed period the law remains unaltered. The

notice may have been given earlier than it would have been if the old option to delay had remained; but I think that the appeal must be tried or respited, just as if the notice had before the Act been voluntarily given at the same date. If it be a reasonable notice for the next sessions, the appeal must be tried at those sessions as heretofore. If the notice is too late for these sessions, the appeal must, as heretofore, be entered and respited at those sessions, and tried at the next sessions. Assuming, for the present, that this is the correct view of the statutes, let us see how it applies to the present case. The supposal of the writ in this case is, that at the quarter sessions holden for the county of Sussex on the 15th Oct. last, the officers of the poor of Colemore applied to the quarter sessions to receive, enter and respite an appeal against an order of removal from Funtington to Colemore, and the sessions refused to permit the appeal to be entered and respited. Now, as the sessions are not bound to enter and respite every appeal when requested to do so, this writ is, I think, defective; for I take it that the writ ought to show on the face of it such a state of facts as makes it at least *prima facie* the legal duty of the justices to perform what they were required to do. This objection was not taken on the argument. If it had been, we should, no doubt, have permitted the prosecutors to amend by inserting in the writ supposals of those facts which appear on the return, and are admitted by the demurrer to be true, if by so doing the writ would be made good. I shall consider the case as if such amendment had been made, and what appears on the return were inserted in the writ, only recommending the prosecutors, if this case is taken into error, to consider whether it may not be necessary for them to apply for some amendment in the writ to enable them in the court of error to raise the question. What appears on the return is, that notice of appeal was, in fact, given on the 1st Oct., and that from the date at which the copy of the depositions was sent it might have been delayed till the 3rd Oct., and yet not have been too late under 11 & 12 Vict. c. 31, s. 9, and that the first day of the sessions was the 15th Oct., so that, in fact, notice of appeal was given thirteen clear days before the first day of the sessions, viz. 15th Oct., and might have been delayed till only eleven clear days before that day. It further appears that, by the custom and practice of that sessions, eight days' notice of appeal, and no more, is required. It further appears that in this case no grounds of appeal had been delivered or sent, either with the notice of appeal, or at any other time. On this the apps. claimed, as a matter right, to have the appeal entered and respited. The sessions refused to respite the appeal, but did not further refuse to enter it. The question intended to be raised is, whether this is a state of facts on which by law the sessions were bound to enter and respite the appeal? If they had a discretion at all, judgment cannot be for the Crown, even if they exercised that discretion ill. Now, from what I have already said, I think I have shown that if the notice was a reasonable notice for that sessions, the justices were not bound to respite. And before the stat. 4 & 5 Will. 4, c. 76, s. 81, this certainly would have been a reasonable notice for these sessions, whether it was given thirteen clear days or had been delayed till only eleven clear days before these sessions. But it is equally certain that if grounds of appeal had been sent with the notice of appeal they would not have been delivered "fourteen days at least" before that sessions; and if the effect of this was to make the trial at those sessions impossible, it seems to me that it would follow that the notice was not reasonable, and the appeal, therefore, should have been adjourned. But if by delivering grounds of appeal with the notice the apps. could have tried, I do not think that they can better their position by neglecting to do so. The words of the



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statute are, if the app. shall "with such notice" (of appeal) "or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried," which, as I have already pointed out, seems to me, in plain language, to give an alternative. I can see no sufficient reason why, in construing this enactment, we should expunge the first part of the alternative, and read it as if it had been enacted simply that the overseers should fourteen days at least before the first day of the sessions deliver the notices of appeal. If this had been the enactment of the Legislature the effect would have been that, whereas an app. might before that Act have gone to trial at the first sessions, if he gave a reasonable notice (that is, in general an eight days' notice), he could not after the statute do so unless he had given grounds of appeal at least fourteen days before the sessions. This would practically be to say that a reasonable notice should in future be a notice of fourteen clear days; for the cases in which grounds of appeal are delivered before the notice must always be so exceptional that they cannot be supposed to have been in the contemplation of the Legislature. *In ea quæ fre-quentius accident preveniant jura.* If there were any obvious injustice or obscurity produced by giving effect to the language of the Legislature in its ordinary sense, we might perhaps (though it would be a strong measure) construe the statute as if the words "with such notice or" had been introduced by mistake, and were to have no effect whatever; but considering that the delays in trying appeals were already a crying grievance, we should not strain the language of the Legislature when the effect of so doing would be to interpose a further difficulty in the way of a speedy trial, which I am convinced was not the object of the Legislature. For these reasons, it seems to me that the true construction of the statute is that which I have already expressed. But this is by no means decisive as to the judgment I should give, for I agree that where there is a decision on a point, a judge (not sitting in a court of error) ought to act upon that decision, even if he thinks it a mistaken one. But if there is not a decision on the point, but merely an expression of opinion, not being part of the *ratio decidendi*, or, as it is generally called, a *dictum*, it is, I think, the duty of a judge when he is forming his opinion, to give this *dictum* its just weight, but to deliver his judgment according to the opinion which he himself forms, though it is different from that expressed in the *dictum*. I think also that there are cases in which a mistaken notion of the law has (no matter why) been so generally accepted, and has been so acted upon, as to render it probable that business has been regulated and the position of parties altered in consequence; and in such cases we may hold that the general acceptance of the mistake has made that law which was originally error. *Communis error facit jus.* But then, I think, that before we set upon this principle, we ought to see it clearly made out that the error has been commonly accepted, and that the nature of the case is such that parties are likely to have acted upon the mistake, and so altered their rights and position. I proceed to inquire whether, on that principle, I am called upon to put a construction on the 4 & 5 Will. 4, c. 76, s. 81, different from that which I think the statute itself bears. On the argument before us two cases were referred to. These were, *R. v. The Justices of Suffolk*, 4 A. & E. 319; and *R. v. Draughton*, 8 L. J. 92, M. C., 2 Per. & D. I have not myself been able to discover any other authority bearing on the question; certainly no other was referred to on the argument. It becomes, therefore, important to see what these cases amount to. In *R. v. Suffolk*, 4 A. & E. 319, notice of appeal to the quarter sessions of Ipswich, and with it grounds of appeal were delivered to the resps. on the 9th Oct.

The appeal ought to have been to the quarter sessions of Suffolk. On the 13th Oct. the appa. corrected their mistake, and delivered a notice of appeal to the quarter sessions of Suffolk. The quarter sessions of Suffolk refused to enter the appeal and hear an application to have it resited, on the ground of the illness of a material witness, because they thought the notice of appeal defective and informal; and on this, a rule *nisi* for a *mandamus* to enter continuances and hear the appeal was obtained. The objection urged in showing cause was, that the amended notice of appeal was too late, being given less than fourteen clear days before the sessions. All the court held that the time for the giving of the notice was not altered by the statute, and so far the case is consistent with, or rather is in favour of the view I now support. The judges further held, that the grounds might be sent before the notice of appeal, and that these grounds were good enough and sent in time. There was here a mistake of fact, for it appears that the grounds were sent only thirteen days before the sessions, and that may, perhaps, show that the case was not carefully considered. It does not, however, touch the present case. Lord Denman expressly says, that the enactment was not intended to interfere with the time of giving notice of appeal. "If that had been intended," says he, "it would have been expressed;" and Williams, J. says, "There was a timely notice of trying the appeal. The practice as to that stands as it did before the Act of Parliament." Coleridge, J. says: "Then as to the effect of sect. 81, we are called upon to make a general alteration of practice at sessions upon a mere implication. The section enacts that a statement of the grounds of appeal shall be sent with the notice, or fourteen days at least before the first day of the sessions, and therefore it is contended that the notice must be given fourteen days before the sessions. But the statute itself does not prescribe that or any time. I asked, when this proposition was stated, what time do you say is now fixed for notice of appeal against orders of removal throughout the county? and no answer was given. The meaning of the clause is, that where the practice of sessions requires more than fourteen days' notice of appeal, the statement of grounds of appeal may be delivered with the notice, or within not less than fourteen days of the sessions, but that at all events it must be delivered fourteen days before the sessions." This latter part of his judgment is what the prosecutors in the present case rely upon. Nothing of the sort was said by any of the other judges, and on the facts no question arose as to the effect of giving grounds of appeal with a notice of appeal less than fourteen days at least before the sessions. It was, therefore, a *dictum* of one judge only; still, if it had related to any question depending on the general sessions law, I should have deferred very much to any *dictum* of Coleridge, J., as he was peculiarly conversant with that branch of the law. But what he said was with reference to the construction of what was then a new statute brought before the court for the first time, and I do not attach the same weight to a hasty expression of his opinion on the construction of the Act upon a point not then before him, more especially as it seems to have escaped his notice that it was inconsistent with his previous reasoning, as, if the *dictum* was well founded, the statute, by implication, did make a great alteration in the practice of all sessions in which the notice of appeal required was less than fourteen clear days, that is a majority of the sessions in England. *Reg. v. Draughton* is not reported in Adolphus & Ellis. It is reported in 8 L. J., M. C., and in Perry & Davison. In neither report does it appear what the state of facts was on which the court had to decide. But I have obtained the case from the Record-office, and I find



the facts to be these:—The apps. gave a notice of trial of an appeal previously entered and respited. On the same paper, and as part of it, the apps. gave their grounds of appeal. This appears by the notice of appeal returned with the *certiorari* and now in the Record-office. On the trial of the appeal the apps. being called upon to prove their notice of appeal, proved the service on the 19th March 1838. It was thereupon objected that such notice was not in time, for that it was not given fourteen days at least before the first day of sessions which were held on the 2nd April 1838. The sessions decided in favour of the apps., subject to a case in which the only question was whether such notice was given in time, pursuant to 4 & 5 Will. 4, c. 76, s. 81? No question was in terms asked as to whether, supposing the notice right, the grounds of appeal ought not to have been delivered at least fourteen days before the sessions; whatever might be the case as to the notice, the reason probably was that the quarter sessions thought, as I do, that if the notice itself was good the words of the statute were express that the grounds might be given with the notice. The Court of Q. B. affirmed the order of sessions. The terms in which the point was reserved and the question asked, prevent the decision from being fairly citable, as confirming the propriety of what was done by the quarter sessions in hearing the apps., though the grounds of appeal had not been delivered fourteen days at least before the sessions, for it is not impossible that the court might have thought the decision of the quarter sessions wrong, and yet have held that from the way in which the case was reserved their decision must be affirmed; but the facts show very decidedly that no point arose before the court on which they could decide that the grounds of appeal were not given in time. If any expression of such an opinion were used, it must have been without perceiving that in effect they were saying that the decision which they affirmed ought not to have been come to. I think I am justified in treating any such expression as being merely a repetition of Coleridge, J.'s doctrine, made without consideration, and not adding much weight to it as an authority, and certainly not binding as a decision. I have not myself been able to find any other case in which this point was alluded to, nor has any such been cited in the argument, nor, I believe, has any such authority been found by either of my brothers. I have not myself found any grounds for believing that the opinion thrown out in these two cases has been in practice commonly adopted. As far as the text-books are received, I find in Archbold's Poor Law the rule is laid down in the way contended for by the prosecutors, and *Reg. v. Draughton* is cited as the authority, but in Steer's Parish Law the rule is laid down in the terms of the statute. I do not know why we are to suppose that one expresses the general opinion more than the other. The result I come to is, that, I think that, as the law stands, the apps. may, if they please, delay their notice to the extreme limit left by stat. 11 & 12 Vict. c. 31, but that if the notice be then a reasonable notice for the next sessions, according to the practice of the sessions, though that be less than fourteen clear days before the sessions, the appeal must be tried at those sessions (subject to the power of the sessions to postpone the trial for cause), and that the apps. cannot gain to themselves a right to adjourn the trial by omitting to deliver the grounds of appeal in time for that sessions, which they may effectively do by delivering them with the notice. But if the apps. can delay the notice, it is too late for the next sessions; the old law remains unaltered; they may do so, and then, however unreasonable their delay may have been, the sessions must adjourn the appeal. In the present case the apps. have not, and could not have delayed their notice of appeal till it was too late

to try at those sessions, and therefore, in my opinion, the sessions were not bound to adjourn the appeal. I therefore think judgment should be for the *defts.*

CROMPTON, J.—It appears from the dates and facts stated upon this record, which my learned brothers have referred to, that the apps. at the expiration of the period of twenty-one days, extended by the application for the copy of the depositions, were in time according to the practice of the sessions to give their notice of appeal, which they accordingly did give, but were not in time to give fourteen days' notice of grounds of appeal. And they therefore applied to the sessions to enter and respite, which the sessions refused to allow; and if the apps. were entitled to have their appeal entered and respited, the sessions ought to be commanded to enter continuances and hear the appeal. Upon the argument before us the point most relied upon by the counsel for the *defts.* was, that the apps. had been guilty of laches, and might, if they pleased, have applied for and got the depositions earlier, and at all events might have given their grounds of appeal without taking the whole of the twenty-one days extended by applying for the depositions. Another point was taken, but not much relied on apparently by the *defts.*' counsel, that, as the stat. 4 & 5 Will. 4 says "That the notice of the grounds of appeal shall be sent with the notice of appeal, or fourteen days at least before the first day of the sessions at which the appeal is intended to be tried, the apps. were in time to give the notice of their grounds of appeal with the notice of appeal, and if given with the notice of appeal it need not be given fourteen days before the first day of the sessions, and therefore that the apps. were in time to give effective notice of the grounds of appeal so as to enable them to try. With regard to this point, which is, I believe, the only matter as to which my brother Blackburn differs from us, I am of opinion that we ought to hold that the grounds of appeal must be given fourteen days at least before the first day of the sessions. Whether such notice be given with the notice of appeal or separately, I think that we are bound, in this court at all events, to follow the construction which was put upon the enactment in question immediately on the Act passing (*contemporaneo expositione*), and expressly confirmed by the court in one or more other decisions, and after those decisions, as far as I can find, never doubted by the court in any of the cases up to the present time, and which construction has been treated in books of practice as regulating, and has in point of fact regulated, as I believe, the practice of sessions. I think that disturbing such decisions and practice is peculiarly mischievous in cases of sessions practice. In *Reg. v. The Justices of Shropshire*, 8 Ad. & Ell. 173, which the court felt themselves bound by a single prior decision or a single question against the opinions of all the judges, each of whom, if the point had been a new one, would have put a different construction on the Act in question from that which they felt themselves bound to adopt, I cannot help thinking that the construction of the court really carried out the intention of the Legislature, and that if a different construction had been put by the court upon the enactment in question it would in all probability have been remedied by the Legislature in subsequent Acts on the subject-matter. I cannot agree with my brother Blackburn that it is a sufficient reason for now disturbing the law on the subject that the words admit of another construction, even if we thought that we should have adopted such other construction if it had been *res nova*; neither do I think it a sufficient reason for our holding ourselves not bound by the decisions of our predecessors, that on examining the papers in the cases it may appear that the court may have mistaken the facts, and that if they had taken another view of the facts the question might not have arisen. It became necessary for this court immediately after

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the passing of the 4 & 5 Will. 4 c. 76, to put a construction upon the provisions of the 81st section. The statement of the grounds of appeal was obviously required, as is, indeed, expressly recited in the 11 & 12 Vict. c. 4, s. 31, "for the purpose of enabling the party receiving the same to inquire into the subject of such statement and to prepare for trial." The grounds are in the indices of pleadings, and it would *prima facie* seem that the Legislature would probably fix one general rule for the time which should be given for such inquiry and preparation throughout the country. The time for giving notice of appeal having been different at different sessions; it seems to have been thought that the effect of the enactment was to make the notice of sessions throughout the country the same; and this view was presented to the court in the case of *Reg. v. The Justices of Suffolk*, 4 Ad. & Ell. 319, which occurred the year after the passing of the Act. It was there argued that, as the clause required fourteen days at the least, and as the notice might be given with the notice of appeal, the notice of appeal must be a fourteen days' notice. The court, however, clearly assuming that the notice of grounds of removal must be a fourteen days' notice, say that it is distinct from the notice of appeal, and may be given with it, if the notice of appeal is given, as it may be, before the fourteen days; and Coleridge, J., expressly says: "The meaning of the clause is that when the practice of sessions requires more than fourteen days' notice of appeal, the statement of grounds of appeal may be delivered with the notice, or within not less than fourteen days of the sessions; at all events, it must be delivered at least fourteen days before the sessions." This was not a mere *obiter dictum*, but was the very *ratio decidendi*. The decision was that, though the provisions as to the fourteen days at the least is a general rule, as to the grounds of appeal, it does not affect the notice of appeal, which is distinct and left untouched by the statute. The notices being distinct, it was not necessary to hold that the general rule as to the fourteen days was to apply to the notices of appeal. Coleridge, J., a very great authority as to the common law, has expressly construed the statute in a case where it was necessary to construe it. I think the construction carried out the intention of the statute, as it seems very unlikely that the Legislature would have intended that the time allowed to the party for inquiry and preparation should be different, and fluctuate with the time allowed by the practice of the sessions at different places. Though the time for giving notice of appeal is untouched by the statute, and still regulated by the practice at the particular sessions, the twenty-one days and the fourteen days mentioned in the 4 & 5 Will. 4, and the prolonged period of fourteen days in the 11 & 12 Vict., all seem to me to be general regulations for the appeal, in the words of Erle, J., in *Reg. v. Portsmouth*, 7 E. & B. 650, to take different steps at different times. The words of the enactment in relation are not perhaps well chosen, but I do not think that it is so violent a construction as my brother Blackburn appears to suppose, to construe them as meaning that the notice may be given with the notice of appeal, or at some other time (which it commonly means), but that in either case it must be fourteen days at least before the first day of the session. It has been suggested that the *dictum* in *Reg. v. The Justices of Suffolk* was the mere *dictum* of Coleridge, J.; but we find in the next case, *Reg. v. Draughton*, 8 L. J., M. C., 2 Q. B. 21 Per. & Dav. 224, which occurred four years after *Reg. v. Suffolk*, that the full court of Q. B., consisting of Lord Denman and Littledale, Patteson and Williams, J.J., were expressly asked to reconsider the case of *Reg. v. The Justices of Suffolk*, and

that the court had again to put a construction on the clause in question, and Lord Denman, with the concurrence of the other judges, states, as the judgment of the court, as reported in the *Law Journal*, that the Act leaves the time for appeal as it was before, but should the notice (that is the notice of appeal) not be delivered fourteen days before the sessions, the grounds, at least, must have been. There is no occasion for our overruling *Reg. v. The Justices of Suffolk*. This is a distinct decision on the construction of the words in question. In the report in *Perry & Davison*, Lord Denman's judgment is thus given: "The implication contended for is not necessary." That is, the implication, that as the notice of grounds of appeal must be fourteen days, the notice of appeal must also be so. He proceeds to give the reason of the decisions, and says: "Notice of appeal may, by the practice of some places, be required more than fourteen days before the sessions, in which case the grounds of appeal may be sent with the notice in other cases; where so long a notice is not required, the alternative is provided, that the grounds of appeal be sent to the resp. fourteen days before the sessions. There is no provision as to the time of notice itself." Littledale, Patteson and Williams, J.J., concurring. In *Reg. v. The Justices of Lancashire*, 4 Q. B. 912, decided, two years after *Reg. v. Draughton*, Lord Denman says: "If they appeal they must, by sect. 81, give fourteen days' notice of the grounds of appeal. In later cases, where the question has been as to whether the apps., not having had time to give the fourteen days' notice of grounds of appeal, although they had had time to give notice of appeal, and where it has been decided that the party was still obliged to give his notice of appeal, and was then to enter and respite as not having had time to give effective notice of grounds of removal, I do not find that the court has ever expressed a doubt with regard to the correctness of the decisions as to the fourteen days being required to be given. I think that this state of the authorities fully justifies the statements of the practice in this respect as laid down in the last edition of Archbold's Poor Law, p. 761, where the practice is laid down as follows: "These times are given that the parish served may have an opportunity to consider whether they will appeal or not. They have then to consider whether a sufficient time remains to them to give that notice of appeal (eight, ten, or fourteen days, &c.) required by the practice of the particular sessions to which the appeal is to be, and also to serve notice of grounds of appeal, which latter must be served fourteen days at least before the first day of the sessions. If they have time to serve their notice and grounds after the twenty-one and fourteen days above mentioned, they must enter and try their appeal at the next sessions; if they have not time for them or either of them, they must enter and respite their appeal at the sessions, and try it at the next following sessions." This is quite consistent with the rule of practice as has been done by Lord Campbell, in the recent case of *Reg. v. The Justices of the West Riding*, to which I shall have hereafter to refer. I cannot help thinking, therefore, that the counsel for the resp. was right in not laying much stress upon this point, as I think he must have been aware of the practice in this respect. Notwithstanding the respect I always entertain for my brother Blackburn's opinion, which alone has induced me to go into a matter of this kind at such length, I think that, sitting here, we ought to adhere to the practice as settled by our predecessors, and that if such practice is to be unsettled it should be done only by those who have authority to correct the judgments of this court. Upon the other and main point made by Mr. Huddleston, I felt at one period very considerable doubt. He argued that, as by recent

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cases the practical time for appealing was to have reference to the order of removal, and that as the party, if he had had a reasonable time for giving notice of appeal, was held guilty of laches in not entering his appeal, the app. in the present case might have given their notice of grounds of removal in time, and were therefore not entitled to respite. On examining the cases in question, however, I quite agree with my brother Mellor, and I am not aware that on this part of the case there is any difference of opinion in the court in thinking that there are no laches in the party taking the whole of the twenty-one days and fourteen days, and not giving notice of grounds of removal before. He is to have time to make out his case and state his pleadings, and though, for the reasons given in the recent cases, it is held that the practicability of the sessions for the purpose of the appeal being entered is to be looked at with reference to the order of removal, yet the question of the practicability of trial is to be looked at with reference to the time at the expiration of the twenty-one and fourteen days, and it is clearly assumed in all these cases (*Reg. v. Sevenoaks*, *Reg. v. Peterborough* and *Reg. v. West Riding of Yorkshire*) that the party need not give his notice of grounds of removal until after the expiration of the limited time, and that though he is bound in such a case as the present to enter his appeal, he is not bound, nor can he be indeed with reference to the other party, to try his appeal. The cases, taken together, clearly establish that if the time for giving notice of appeal is practicable, the app., by taking the whole time, does not relieve himself from entering his appeal, but must enter it, and if there has not been time to give notice of grounds of appeal at the end of his limited time, he must still enter and respite. The object and effect of these decisions is very beneficial. By compelling the app. to enter his appeal, they prevent the great mischief of the resp. being led to suppose that the appeal is abandoned, but at the same time they expressly take care that the app. shall have his whole time to give his notice of grounds of removal. The result of these cases is stated by Lord Campbell in the recent case of *Reg. v. The Justices of West Riding of Yorkshire*, Ell. Bl. & Ell. 718, in a way that seems to me decisive of this question. He says, in delivering the considered judgment of the court in that case: "As a rule, we think that the parties appealing are entitled to take the twenty-one days and the fourteen days mentioned in stat. 11 & 12 Vict. c. 31, s. 9, and that if at the expiration of the last of those days there is time to give effective notice of trial of the appeal at the then next sessions, such notice ought to be given; but that if there is not time to give such notice of trial, the appeal ought to be entered and respited at the then next sessions following the expiration of the fourteen days. Such an entry and respite will be the only step the app. can then take to show his intention to prosecute his appeal, as he will do so at the peril of being obliged to pay costs in case he omits further to prosecute it. And this is in accordance with the modern practice. In the present case we think that the determination of the sessions was right, and that the rule for a *mandamus* should be discharged." In the case now before us, the apps. appear to me to have followed the exact practice as laid down by this court, and determined, I believe, most correctly by them, to be in accordance with modern practice. They were bound, according to these decisions, to enter their appeal. They were not bound to try, and could not, after taking the time given by the Legislature, force the respa. to try, and their only other course was to enter and respite, which they applied to do, in conformity with the exact course pointed out by this court, and the sessions were, I think, bound to allow them to enter and respite, and were wrong in refusing to do so. Another point was made which

clearly does not however appear to me to arise upon the record as at present framed. It was said that there was time at the expiration of the extended time to give notice of grounds of appeal for the adjourned sessions in that division of the county where the appeal was intended to be tried. If we were at liberty to go into that question, doubts might well be entertained whether the notice for such adjourned sessions might not be sufficient. This, however, was decided to the contrary in the case of *Reg. v. The Justices of Surrey*, 1 M. & L., which ought, I think, to be considered as conclusive upon us in a matter of this kind, and I should not have mentioned this point except for the note in the case of *Reg. v. The Justices of Lancashire*, 4 Q. B. 913, from which it might be supposed that the question was in some respect open, so that it might possibly be thought worthy of consideration if the case goes further, and the matter can be made to appear upon the record. I should add that I agree with what my brothers have said as to our deciding this matter without reference to the form of the writ of *mandamus*. No objection having been made in this respect, I think that we should decide the matter on the points taken before us. If any such objection to the form of the writ had been taken, we should have allowed the writ to be amended. It may possibly be thought, especially since the Act allowing a writ of error in the case of a return to a *mandamus*, and pleadings thereupon, that it is not sufficient generally to order the justices to do the act required, but that the writ should show a clear legal right. This seems certainly to be the case as to many writs of *mandamus*, where the supposal of the writ ought to show matters clearly sufficient to warrant its issuing. There may be doubt how far the writ may be in so general a form as the present, even in cases where the court are exercising their peculiar jurisdiction of controlling the exercise of the functions of inferior tribunals, and where they have been said to have a jurisdiction of a visitatorial character (per Lord Ellenborough, in *Reg. v. Justices of Wiltshire*, 10 East, 405), and where they may be supposed to have satisfied themselves *prima facie*, in the exercise of such jurisdiction, that the writ ought to issue. No doubt the writ may be very general, and if *prima facie* sufficient, the general and correct rule is, that the return must state conclusively matter which shows why the justices do not obey it; but in the present case it would seem more proper to have alleged the facts and dates that give the alleged right. If the matter goes further than this court, we think that the parties should respectively have leave to make such amendments as raise the real points argued before us. My brother Mellor concurring with me in thinking that the prosecutors are right as to the matter brought before us, we give our

*Judgment for the Crown.*

Wednesday, June 4.

REG. v. THE NEWPORT DOCK COMPANY.

*Local Government Act 1848—General district rate—Docks—Scale of rating.*

*By 21 & 22 Vict. c. 98, s. 55 (the Local Government Act 1858), the occupier of any land covered with water is to be assessed to the general district rate "in the proportion of one-fourth part only of such net annual value thereof."*

*Held, that a dock comes within the above provision.*

This was a special case, stated under the provisions of 12 & 13 Vict. c. 45, s. 11. The case stated that the respa. are the local board of health for the district of the borough of Newport, in the county of Monmouth, to which borough the provisions of the Public Health Act 1848, and of the Local Government Act 1858, have been duly applied. The Newport Dock Company's docks, railway and works are situate and being within the district of the said local board of

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health, and the dock company are the owners and occupiers thereof. On the 7th May 1861 the resps. made a general district rate upon all the rateable property in their district. This rate was duly published, and the printed form herunto annexed marked with the letter A is, so far as is necessary for the purposes of this case, a copy of the assessment thus made. No question arises in regard to the rates upon the property in such printed form A, described as No. 2821, No. 2822, No. 2823, the matter in dispute depending upon the property comprised under the No. 2824 "Docks," "12,800*l.*," "5000*l.*," "333*l.* 6*s.* 8*d.*" The next preceding poor-rate for the parish of St. Woolos, in which parish the property of the apps. is situate, and upon which rate the above-mentioned general district rate was founded, was made and duly published on the 28th Sept. 1860, and the printed form herunto annexed, marked with the letter B, is a copy of this rate so far as affects the question raised by the case. Notice of appeal to the next general quarter sessions for the county of Monmouth against the above general district rate has been duly given to and served by the apps. on the resps., and the grounds of such appeal are the several grounds embodied in this case, and are as follows:—1. That the said rate is not assessed upon the full net annual value of the several properties, hereditaments and premises in such rate stated and comprised as ascertained by the rate for the relief of the poor made next before the making of such general district rate. 2. That the Newport Dock Company is not in such rate assessed in respect of their docks and railways in the proportion of one-fourth only of such net annual value thereof, as provided by the exceptions, regulations and conditions contained in sect. 55 of the Local Government Act 1858. 3. That the Newport Dock Company is in such rate assessed unequally and unfairly as compared with the other owners and occupiers of property, hereditaments and premises in and by such rate rated, and especially as compared with the Monmouthshire Railway and Canal Company, and the South Wales Railway Company. By the Local Government Act 1858, 21 & 22 Vict. c. 98, s. 55, it is enacted as follows:—"The general district rate shall be made and levied upon the occupier of all such kinds of property as by the laws in force for the time being are or may be assessable to any rate for the relief of the poor, and shall be assessed upon the full net annual value of such property ascertained by the rate, if any, for the relief of the poor made next before the making of the assessments under this Act, subject however to the following exceptions, regulations and additions," and amongst these exceptions is as follows:—"The owner of any tithes or of any tithe commutation rentcharge, or the occupier of any land used as available meadow or pasture ground only, or as woodlands, market-gardens, or nursery grounds; and the occupier of any land covered with water, or used only as a canal or towing-path for the same, or as a railway constructed under the power of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof." In the poor-rate there are two columns, the one headed "Gross estimated rental," and the other headed "Rateable value," and the general district rate is to be assessed upon the full net annual value of such property ascertained by the poor-rate. This full net annual value, it is submitted by the apps., must, for the purposes of a general district rate by the local board of health, be in each instance the amount carried out and appearing in the column of the poor-rate, headed "Rateable value." In the poor-rate the area of the docks covered with water, and the landing-places and wharfs and quays and railways along the property of the dock company for transporting traffic to and from the

docks, and communicating with the said warehouse and with other railways, as shown in the plan marked C, and the coal-hoists and machinery for opening and shutting the dock gates, &c., are included in the description of "Dock and feeder," the rateable value of which is assessed at 5000*l.* In the general district rate appealed against the same property of the dock company is described as "docks," and incorrectly, as the apps. contended; the column in that rate, headed "Full net annual value" stated in poor-rate, is filled up with the sum of 12,800*l.*, which is stated in the poor-rate to be the gross estimated rental of the dock and feeder; but in a column headed "Assessable value," the sum carried out is the sum of 5000*l.*, which is stated in the poor-rate to be the rateable value, and the apps. are in the general district rate, in fact, assessed on the full amount of the last-mentioned sum, and that only. The resps. contended that, whether or not the word "net" be correct as used, the rate is good, and the rate upon the parties is not in any way affected by the column in question. The Newport Docks and the railways and works are made and maintained under the provisions of the before-mentioned local Act of Parliament, 5 & 6 Will. 4, c. 75, and the Newport (Monmouthshire) Docks Act 1854. And by sect. 138 of the first-mentioned Act, the docks, roads and works are made free to the public on payment of the stipulated rates, tolls and duties. These Acts may be referred to as part of the case, and a plan of the company's property may also be referred to as part of the case. The apps. contended that the area of the docks, as being "land covered with water," and also that their railways on and over the quays and other portions of their property, and the dock appliances on and along the quays, such as cranes, weighing machines, staiths, &c., come within the exceptions above set out, and contained in the 55th section of the Local Government Act 1858, and that they ought to be assessed in the proportion of one-fourth part only of the net annual value thereof, ascertained by the poor-rate aforesaid, and that the rate of 4*d.* in the pound "as on land," and not at the rate of 1*s.* 4*d.* as on "houses, &c.," being after the same rate as the Monmouthshire Railway and Canal Company and the South Wales Railway Company, are respectively in the same rate assessed in respect of their railway and canal. If the court shall be of opinion that the apps.' contention is correct in whole or in part, then the assessment of the Newport Dock Company to the general district rate appealed against is to be amended, and the apps. are to stand rated upon a sum of 1250*l.*, being one-fourth part of the sum of 5000*l.*, ascertained by the poor-rate to be the net annual value of the company's dock and railways, and at 4*d.* in the pound, as on land or otherwise, as the court may direct, and in either case the judgment of the sessions to be entered accordingly, and the costs to abide the event. If any question of figures or assessable amounts should arise, the court may appoint a person to settle the same.

*Lush*, Q.C. (*Milward* with him) now appeared for the resps., and contended that the property rated did not come within the exceptions so as to be subject to be rated at the lower rate.

*Bovill*, Q.C. and *Giffard*, for the apps., were not called upon.

The following cases were cited:—*Peto v. The Parish of West Ham*, 28 L. J. 240, M. C.; *The South Wales Railway Company*, 4 Ell. & Bl. 489; *Reg. v. The Birmingham Waterworks Company*, 1 Best & Smith, 84; 4 L. T. Rep. N. S. 242.

*COCKBURN*, C. J.—On the main question of whether or not a dock is to be rated upon the higher or lower scale, I think the case falls within the prin-

eiple of the decision in the *Birmingham* case, and that it must be rated upon the lower scale. A dock may be surrounded by buildings, and still the part which is actually the dock is "land covered with water," and falls within the exception of the statute. It is unnecessary to speculate upon what were the views of the Legislature in using these words. The words themselves are clear; and as there are no terms of restriction, I think we must hold that the dock is not rateable except upon the lower scale. As regards the buildings and adjuncts, they must be distinguished from the docks themselves, and be rated at the higher rate. As to the railway, it is one for public conveyance, though connected with the docks, and must be rated upon the lower scale.

CROMPTON and BLACKBURN, JJ. concurred.

*Judgment for the apps.*

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYD, ESQRS.  
Barristers-at-Law.

Friday, May 30.

CLOTHIER v. WEBSTER.

*Negligence—Metropolis Local Management Act (18 & 19 Vict. c. 120, ss. 135, 225)—Compensation.*

*If, in carrying out the making of a sewer authorised to be made by the 18 & 19 Vict. c. 120, s. 135, due and proper care be not used, and in consequence of the want of such due and proper care, damage be done to property, the owner of such property has his action, and is not put to his compensation under sects. 135, 225.*

This was an action for injury done to the plt.'s oven by the negligence of the deft. in the construction of a sewer.

The cause was tried before Erle, C.J., at the last assizes for Maidstone.

The plt. was a baker, carrying on business in the road between Greenwich and Woolwich. An oven had been built for the purposes of his trade, which oven extended under the road about two feet.

The deft. was a contractor employed under the Metropolitan Board of Works, in the construction of the great sewer under the above-mentioned road. The jury found in effect that there had not been due and proper care in the construction of the works connected with the making of the sewer, and assessed the damages caused thereby to the plt.'s oven at 35*l*.

It was contended for the deft. that no action would lie in such a case, but that the injury done was a subject for compensation under the 18 & 19 Vict. c. 120 (*Metropolis Local Management Act*), the 135th and the 225th sections being relied on. A verdict was found for the plt. for 35*l*, leave being reserved on the above point to move to set it aside and enter one for the deft.

A rule having been obtained,

*Rees* showed cause: (*Brine v. The Great Western Railway Company*, 31 L. J. 101, Q. B.)

*M. Chambers, Q. C., J. Brown and Craufurd* in support of the rule: (*Allen v. Hayward*, 7 Q. B. 960; *Hole v. The Sittingbourne and Sheerness Railway Company*, 6 H. & N. 488; *Pickard v. Smith*, 10 C. B., N. S., 470; *Brownlow v. The Metropolitan Board of Works and John Aird*, 2 Fes. & Fin. 604; *Steel v. South-Eastern Railway Company*, 16 C. B. 550; *Ward v. Lee*, 26 L. J. 142, Q. B.; *Sutton v. Clarke*, 6 Taun. 29; *The Governor and Company of the British Cast Plate Manufacturers v. Mercedith*, 4 T. R. 794.)

ERLE, C. J.—I am of opinion that this rule should be discharged. The action is brought against Mr. Webster for negligence which occurred in the construction of a sewer; after it was constructed, the ground was so filled up that the plt.'s oven was

damaged; and the jury found that there was negligence and want of care and skill, and that damage was done thereby. The rule was obtained on the ground that it was done by the authority of the Metropolitan Board of Works, and was the subject of compensation and not of an action. With regard to that, I am of opinion that the works were made lawful by sect. 135 giving power to the board to carry sewers along any street, and providing that they are to make compensation for damage done thereby. The carrying the sewer along the street in pursuance of powers given by a statute was a lawful act; but I am of opinion that the law requires due care and skill in exercising those powers, and if they omit to use due care and skill there is a cause of action. And I take *Lawrence v. The Great Northern Railway Company*, 16 Q. B. 643, to be one authority to that effect. The same principle appears to be recognised in *Brine v. The Great Western Railway Company*, where the works, if done with care and skill, were lawful, but if with negligence, it was the subject of an action. We quite go along with the argument that, wherever the injury is a subject for compensation under the statute, no action would lie; but the statute contemplated that works lawful to be made shall be made with care and skill. We have expressly recited the grounds of the rule; and the question is whether, if the board were guilty of negligence, the plt. can be put to claim compensation under the statute, or must he bring an action? On this very important point we give our opinion. The point which was much argued as to the relation between the deft and his employers, is not open to the deft. on this rule.

WILLIAMS, J.—I am entirely of the same opinion. Looking at this motion, we must necessarily consider that the deft. is identical with the commissioners, the same as if they were defts. The question is, whether the sections relating to the compensation preclude the plt. from his common law remedy and oblige him to have recourse to the summary proceedings pointed out. I entirely agree that if the case is within those sections the remedy is not cumulative; but I am of opinion that the causes of injury referred to in the statute do not apply to the injuries in the present case, and they do not apply to damage which would not have existed at all if the works had been carefully done. I understand the finding of the jury to be that the damage would not have arisen but for the negligence of the deft.

WILLES, J.—I am of the same opinion. Looking to the ground on which the rule was moved, it is clear that the question is, whether, assuming that the board carry on the works in a negligent manner and cause damage, such damage is the subject of an action, or whether the person who suffers damage must have recourse to the clauses of the Act relating to compensation, the only question being whether the board would be liable. I entirely agree that an action under such circumstances can be maintained.

*Rule discharged.*

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, ESQ., Barrister-at-Law.

Saturday, June 7.

(Before COCKBURN, C. J., MARTIN, B., WILLES,

BYLES and BLACKBURN, JJ.)

REG. v. EDWARD HOLMAN.

*Indictment—Misjoinder of counts—Time for objecting—Election.*

*The prisoner was indicted in the first count for embezzlement, and in the second for larceny as a bailee, under the 20 & 21 Vict. c. 54. After plea pleaded and the jury were charged, and in the course of the trial, it was objected for the prisoner that the*

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*indictment was bad for misjoinder of counts. The Court overruled the objection, and directed the prosecutor to elect upon which count he would proceed, and the prosecutor having elected to proceed upon the second count, the prisoner was found guilty thereon:*

*Held, that the conviction was right.*

At the general quarter sessions of the peace of our Lady the Queen, holden at Lewes, in and for the county of Sussex, on the 7th April 1862, before George Darby, Esq., chairman, John Ellman and others, their fellow-justices of our said Lady the Queen assigned to keep the peace in and for the county aforesaid,

Edward Holman was tried on an indictment preferred and found against him on 7th April aforesaid, of which the following is a copy:—

"Sussex, to wit.—The jurors for our Lady the Queen, upon their oath present, that Edward Holman, on the 28th Jan. 1862, being then a servant to William Lewis, did by virtue of such his employment then, and whilst he was so employed as aforesaid, receive and take into his possession certain money, to wit, to the amount of 3*l.* 7*s.*, for and in the name and on the account of the said William Lewis, his master as aforesaid, and did then fraudulently and falsely embezzle the said money. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Edward Holman then in manner and form aforesaid feloniously did steal, take and carry away the said money the property of the said William Lewis, from the said William Lewis, his master as aforesaid, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

"Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Edward Holman, on the 28th day of January aforesaid, being a bailee of certain property, to wit, of certain money to the amount of 3*l.* 7*s.*, the money of Amy Head, feloniously and fraudulently did take and convert the said money to the use of him the said Edward Holman, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity."

At the close of the case for the prosecution, the prisoner's counsel contended that the indictment was absolutely bad for misjoinder of counts, and that the objection was fatal, although not taken till after plea pleaded, and the jury had been charged; and upon the Court proposing to direct the counsel for the prosecution to elect on which count he would proceed, the prisoner's counsel further contended that the indictment was so absolutely bad that the election of counts was inadmissible.

The Court directed the counsel for the prosecution to elect on which count he would proceed, reserving, at the request of the prisoner's counsel, the points raised by him as above stated for the consideration of the Court for Crown Cases Reserved.

The counsel for the prosecution elected to proceed on the second count, and upon that count the prisoner was convicted.

The Court postponed judgment on the conviction, and ordered that the prisoner should enter into a recognisance with sureties, conditioned to appear at the next general quarter sessions of the peace to be holden in and for the said county, and receive judgment on the said conviction, and remain imprisoned until such recognisance should be entered into.

The prisoner has since entered into such recognisance and been discharged from custody.

The opinion of the Court for Crown Cases Reserved is requested, whether, upon the grounds contended for by the counsel for the prisoner as aforesaid, the prisoner was not, or whether he was liable to

be convicted on the second count of the indictment as above set forth. (Signed) G. DAREY.

No counsel appeared on either side.

By the COURT: *Conviction affirmed.*

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYR, Esqrs.,  
BARRISTERS-AT-LAW.

Friday, June 6.

THE CHURCHWARDENS OF ST. NICHOLAS, ROCHESTER (appa.) v. THE CHURCHWARDENS OF ST. BOTOLPH, BISHOPSGATE (respa.)

*Apprenticeship under an Act of 1 Geo. 2—Indenture not executed by apprentice (a pauper boy)—Indenture invalid.*

By sect. 18 of 1 Geo. 2, c. 20, it is enacted that the said guardians (meaning the guardians of the poor of the city of Canterbury) of the poor should give bond under their common seal, for themselves and their successors for ever hereafter, to provide for, clothe and maintain sixteen poor boys of the said city, to be called blue-coat boys, and furnish them with all manner of necessities, and an apartment by themselves, separate from the other poor in the said hospital, and cause the said sixteen boys to be instructed in reading, writing and accounts, and put them and every of them respectively out apprentices after they and every of them respectively should have attained their respective ages of thirteen years, and before their said ages of fifteen years, and pay with every such boy so to be put out apprentice the sum of 5*l.* at least, &c.

The pauper boy was bound by an indenture of apprenticeship dated the 13th April 1821, and bearing a stamp under the common seal of the guardians, to Samuel Paris, of the city of Rochester, cordwainer, and the indenture was executed by him but not by the boy:

*Held, that this indenture was invalid, inasmuch as it was not executed by the pauper boy, and also because he was beyond the age specified by the Act, and therefore that no settlement could be acquired by service, and inhabiting in the parish of Rochester.*

The following case was stated for the opinion of the court:—

1. It appears from an entry on the close roll 14th May, in the 17 Eliz., that the citizens of Canterbury, being greatly charged to sustain the poor living and resorting there, were desirous of obtaining the revenues of the Poor Priests' Hospital hereinafter mentioned, for the use of the poor in the city, to be employed for their sustentation and relief, as to the mayor and commonalty should seem expedient; and one Blaze Winter, the master of the said hospital, with the consent of the patron and of the dean and chapter, accordingly surrendered the hospital hereinafter mentioned, and its possessions and endowments, to the Queen, upon express trust that she should grant them out to the mayor and commonalty of Canterbury.

2. Afterwards, on the 5th July in the same year, the Queen, by letters patent, granted the said hospital, with its possessions and endowments, to the said mayor and commonalty.

3. By an Act of Parliament of the 1 Geo. 2, c. 20, entitled "An Act for erecting a workhouse in the city of Canterbury, for employing and maintaining the poor there and for better enlightening the streets of the said city," it was enacted that there should be a corporation within the said city, to consist of a mayor, recorder and justices of the peace of the said city and county of the same for the time being, and twenty-eight other persons to be chosen in manner therein mentioned, two out of each parish, and the said mayor and other persons should be called the guardians of the poor of the city of Canterbury, and they and their

successors should be for ever thereafter one body politic and corporate in law, and should have perpetual succession and a common seal.

4. Sect. 13 of the said Act recites the grant by Queen Elizabeth before mentioned, as follows: "And whereas, Elizabeth, Queen of England, had granted unto the mayor and commonalty of the said city of Canterbury and their successors for ever, the hospital for poor priests within the said city, and other lands and tenements to the said hospital appertaining, which hospital, &c., had been ever since held and enjoyed by said mayor and commonalty for the time being, and had been by them made use of, and the rents and profits thereof applied and disposed of towards the maintenance and lodging of several poor boys of the said city, commonly called blue-coat boys," and then enacted that "the said hospital, &c., as well within the said city, as in the county of Kent, should be settled and vested in the guardians of the poor of the said city, thereby constituted and made a corporation, upon trust that the several guardians of the poor of the said city should employ the said hospital, &c., for the benefit and advantage, maintenance and employment of the poor of the said city intended to be provided for, maintained and employed by the said corporation thereby erected, and as would best answer that end and purpose." And it was also enacted by sect. 16, "that the said guardians should provide a good and sufficient house of correction to and for the use of the said city, in lieu of the hospital, a part of which had been formerly used as a house of correction for the said city, and one or more masters of the same." And it was by sect. 18 of the said Act further enacted, "that the said guardians of the poor should give bond under their common seal, for themselves and their successors for ever, thereafter to provide for, clothe and maintain sixteen poor boys of the said city to be called blue-coat boys, and furnish them with all manner of necessaries and an apartment by themselves, separate from the other poor in the said hospital, and cause the said sixteen boys to be instructed in reading, writing and accounts, and put them and every of them respectively out apprentices after they and every of them respectively should have attained their respective ages of thirteen years, and before their said ages of fifteen years, and pay with every such boy so to be put out apprentice the sum of 5*l.* at least, which said sixteen poor boys should be nominated, elected and appointed by the said mayor and commonalty of the said city, and as often as there should be any vacancy by death or putting out apprenticeship of any one or more of the said sixteen boys or by any other means, the said mayor and commonalty of the said city and their successors should nominate and appoint other poor boy or boys of the said city to supply such vacancy."

5. By sect. 25 of the said Act it is enacted that the said guardians of the poor should take care and provide for the maintenance of all the poor of the fourteen parishes mentioned in the Act, and by sect. 26 power is given to the said guardians to employ the poor of the said city; and by indenture, under their common seal, to bind any poor child of the said city or parishes, after such child shall have attained the age of fifteen or sooner, provided such child be not bound for a longer time than that mentioned in this section.

6. By sect. 20 power is given to the said guardians to make rates for maintaining the poor, for building a workhouse and house of correction, and for the other purposes in the Act mentioned.

7. No workhouse was built by the guardians under the powers of the said Act, but a part of the hospital was converted into a workhouse and used as such until the building of a new workhouse under the Poor Law Amendment Act; another part of the said hospital was used for the Blue-coat School, and another part

for a house of correction. The new workhouse was erected on part of the lands belonging to the hospital.

8. A bond from the guardians to the mayor and commonalty was duly given shortly after the passing of the Act, as required by sect. 18. In the year 1821 the blue-coat boys were educated and lodged in the portion of the hospital set apart for them, but took their meals in common with the other poor in the said workhouse. The whole building comprising the hospital was commonly called and known as "The Workhouse."

9. From the time of the passing of the Act until the year 1859, the receipt of all the moneys arising from the rents and profits of the said hospital, &c., and the receipt of the moneys raised by rates for the maintenance of the poor of the said city were all entered in one book, and the disbursements made for the maintenance and apprenticing of the poor blue-coat boys, and for the maintenance and apprenticing of the other poor boys of the said city, were made generally out of the monies as received, and no accounts exist showing specially what portions of the money were expended for the benefit of the said sixteen poor blue-coat boys, or for the other purposes of the Act.

10. The said guardians kept and maintained the sixteen poor boys called blue-coat boys and the other poor of the said city, and discharged and paid the various liabilities imposed upon the said guardians by the said Act. The poor-law auditor has, since the year 1849, audited the whole of these accounts. Since the year 1849 the accounts of the rents from the said lands and tenements have been kept separate, and by different officers, those of the lands and tenements being kept by the receiver, and those relating to the poor by the clerk of the poor-law guardians.

11. The rents and profits arising from the lands and hereditaments, so granted to the corporation by Queen Elizabeth, have always been more than sufficient for the maintenance, educating and apprenticing the blue-coat boys; and, at the time of apprenticing the pauper, the said rents and profits amounted to the yearly sum of 500*l.* and upwards. The said Act, 1 Geo. 2, c. 20, is to be considered as incorporated in and forming part of this case.

12. Charles Drury, the pauper, was duly nominated and elected one of the said blue-coat boys, and maintained and educated, in pursuance of the said Act, up to the time of his apprenticeship, as hereinafter mentioned.

13. By indenture of apprenticeship, dated the 13th April 1821, and bearing a 1*l.* stamp, under the common seal of the said guardians, and executed by Samuel Paris, of the city of Rochester, cordwainer, it is witnessed that the said guardians, by virtue and in pursuance of the powers to them given in, and by the said Act 1 Geo. 2, put out, placed and bound the said Charles Drury, a poor blue-coat boy, then in the workhouse of the said city, and an inhabitant of the parish of St. Margaret, in the said city, apprentice to the said Samuel Paris, with him to dwell and serve from the 9th of the said month of April, for seven years. And, by the same indenture, the said Samuel Paris, in consideration of 20*l.* paid by the said guardians, covenanted to teach the said apprentice the trade of a cordwainer, and to provide for the said apprentice so that he were not anyways a charge to the said parish of St. Margaret or city of Canterbury.

14. The said Charles Drury, at the time of the binding was upwards of seventeen years of age, and the said indenture was not executed by him.

15. No inquiries were made by two justices, as required by 56 Geo. 3, c. 139, nor was any order made for binding the said boy. The said indenture was not allowed by two justices, nor was any notice given to the overseers of the poor of the said parish of St. Nicholas, Rochester, of the intended binding, and it may be taken generally that the provisions in force at the time

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of the binding, relating to parish apprentices, were not complied with.

16. At the time of the apprenticing of Charles Drury different forms of indentures were used by the said guardians for apprenticing poor blue-coat boys and other poor boys; the former being described in the indentures as "poor blue-coat boys," and the latter being described as "poor boys;" the usual premium paid on binding the former boys being 20*l.*, and for the latter sums varying from 3*l.* 10*s.* to 10*l.*

17. The said Charles Drury served his said master under the said binding for a time, and then ran away, and during the whole of such time dwelt in the app.'s parish of St. Nicholas, Rochester, and gained a settlement therein, assuming the said indenture to have been valid and lawful.

18. An order or warrant for the removal of the said Charles Drury and his two children from the resp. parish of St. Botolph, Bishopsgate, to the said app. parish as the place of their last legal settlement, on the ground of his said apprenticeship and service, was duly made on the 24th Aug. 1861.

19. The churchwardens and overseers of the poor of the said parish of St. Nicholas, Rochester, have duly given notice of appeal to the general quarter sessions of the peace for the city of London against the said order of removal.

The question for the opinion of the court is, whether the said indenture is valid, and whether the said Charles Drury acquired a settlement by service and inhabiting under the same in the app. parish.

If the court shall decide this question in the affirmative, then the said order of removal is to be confirmed with costs, but if the court shall be of the contrary opinion, then the said order is to be quashed with costs. And it is agreed that a judgment, in conformity with the decision of the court, shall be entered on motion by either party, at the sessions next or next but one after the said decision shall have been given. And it is agreed that the court shall have power to draw any inferences of fact.

*Poland*, for the app's., contended that no settlement had been acquired under the apprenticeship, as the indenture was invalid by reason of its not having been executed by the pauper, and also that the pauper was over the age stated in the Act. He cited *R. v. Armesbury*, 3 B. & Ald. 584.

*Le Breton*, contra, contended that, as to the age, it only made the indenture voidable and not void. He cited the *Parish of St. Nicholas, Ipswich v. St. Peter's, Ipswich*, 2 Strange 1066; *R. v. Halsworth*, 3 B. & Ald. 717; and *R. v. St. Gregory's, Canterbury*, 2 A. & E. 99.

ERLE, C. J.—I am of opinion that our judgment should be for the app's. The question is, whether an apprentice is bound at common law if he does not execute the deed. I think he is not. The case of *R. v. Armesbury* decides this point, where it was held that to create a settlement under the Act of Will. & M. it must be shown that the party was bound, and that a father had no power to bind his son at common law without his consent, unless there was some statute authorising it. The 43 Eliz. empowered parish officers to take poor boys and bind them against their will; but since then, by 56 Geo. 3, c. 139, s. 11, it has been enacted that two justices must agree to execute the indenture, and that they should consider if it was a fit transaction having regard to the interests of the child; and by a later Act that duty has been cast upon the guardians. This private Act of Canterbury, however, gives no power to the guardians of that town to bind these children whether they were willing or no. The guardians under this Act had power to app. the funds in binding the boy, if he applied to them for aid, which was shown by his executing the deed, but they had no power to bind any boy compulsorily.

In this case there is another point which would be fatal, namely, that the boy had not only not executed the deed, but that he was beyond the age, namely, seventeen years old, instead of fifteen. Upon these grounds, therefore, I am of opinion that our judgment should be for the app's.

The other learned Judges concurred.

*Judgment for the app's.*

### EXCHEQUER CHAMBER.

Reported by C. J. B. HERTFORD, Esq., Barrister-at-Law.

#### APPEAL FROM THE QUEEN'S BENCH.

Wednesday, May 14.

(Before ERLE, C. J., POLLOCK, C. B., WILLIAMS, J., BRAMWELL, B. and KEATING, J.)

REG. v. THE BURIAL BOARD FOR THE PARISHES OF ST. JOHN'S WESTGATE AND ELSWICK.

*Private burial-ground—Repair after discontinuance—18 & 19 Vict. c. 128, s. 18.*

*The 18th section of the 18 & 19 Vict. c. 128 enacts that in every case in which an order in council is issued for the discontinuance of burials in any churchyard or burial-ground, the burial board or churchwardens, as the case may be shall maintain such churchyard or burial-ground of any parish in decent order and keep its fences in repair, the expenses to be repaid by the overseers out of the poor-rates of the parish or place in which such burial-ground is situate:*

*Held (affirming the decision of the court below), to apply only to a burial-ground belonging to a parish, and not to extend to a burial-ground the property of private persons.*

This was an appeal against a decision of the Court of Q. B.

*Mandamus*, reciting that on the 1st May 1854, by an order in council under the 16 & 17 Vict. c. 134, s. 1, burials had been discontinued in the burial-ground called St. Paul's Churchyard, situate in the township of Westgate, in the borough of Newcastle, that a joint burial-board had been appointed for the parish of St. John and the townships of Westgate and Elswick, that the fences of the said burial-ground required repair, that there were no churchwardens liable to keep it in repair, and no fund legally chargeable with maintaining it, and commanding the burial board to do the necessary repairs.

Return, that the burial-ground was not a churchyard or burial-ground of any parish, or of any place having separate overseers and maintaining its own poor, but is the property of certain private persons.

Demurrer.

Judgment having been given for the defts. in the court below, the p'ts. now appealed against that decision.

*T. Jones* for the app.—The 18 & 19 Vict. c. 128, s. 18, enacts: "In every case in which any order in council shall hereafter be issued for the discontinuance of burials in any churchyard or burial-ground, the burial board or churchwardens, as the case may be, shall maintain such churchyard or burial-ground of any parish in decent order, and also do the necessary repairs of the walls and other fences thereof, and the costs and expenses shall be repaid by the overseers upon the certificate of the burial board or churchwardens, as the case may be, out of the rate made for the relief of the poor of the parish or place in which such churchyard or burial-ground is situate, unless there be some other fund legally chargeable with such costs and expenses." The court below held that that section was confined to the burial board of a parish; that in construing the section the words "of any parish" could not be struck out, and that the section did not extend to the burial-ground of private



individuals. "Of any parish" must be read "in any parish;" who otherwise is liable to maintain and keep in order private burial-grounds? By the 16 & 17 Vict. c. 134, s. 1, authority is given to the Queen in Council to order the discontinuance of burials in every burial-ground; then this 18th section of the 18 & 19 Vict. c. 128, is intended to be commensurate with that section, and to compel the burial board to keep such closed burial-ground in order. Such intention of the Legislature is only reasonable. The enactment is general, and the 24 & 25 Vict. c. 61, confirms this view. The writ here was properly directed: (15 & 16 Vict. c. 85, ss. 10, 11, 12.)

*Mellish, Q.C. contra.*—"The words "of any parish" in the 18th section, must have their ordinary meaning; they cannot be rejected, and to read them as "in any parish" would be giving them no meaning in this part of the section. A distinction is made throughout these enactments between parish burial-grounds and other burial-grounds, and it was not the intention of the Legislature that the section should apply to private burial-grounds. A distinction is made in the mode of proceeding in the two cases of parochial and non-parochial grounds, and it is clear that such was the intention in the mind of the Legislature by the enactments 16 & 17 Vict. c. 134, ss. 1, 2. The 20 & 21 Vict. c. 81, s. 8, gives authority to the vestry of any parish to purchase any burial-ground situate within it, but not belonging to it.

*ERLE, C.J.*—This was a *mandamus* calling on a burial board to repair the fences of a burial-ground. It appears by the return to the writ that the burial-ground was not a churchyard or burial-ground of any parish, or of any place having separate overseers and maintaining its own poor, but was the property of private persons. It seems to me that the words of the 18th section of 18 & 19 Vict. c. 128, are clear, and that they confine the obligation to repair to burial-grounds belonging to a parish. At first I was inclined to think, with Mr. Jones, that the Legislature intended to provide for the repair of all burial-grounds discontinued by order in council, under the authority given by the 16 & 17 Vict. c. 134, and that the words "of any parish" were illogical with reference to those preceding them; but, on reflection, I am convinced that such was not the intention of the Legislature, and that those words are not capable of the construction intended for; such a construction would lead to interference with private rights. In the 16 & 17 Vict. c. 134, there is a distinction made between burial-grounds belonging to a parish and other burial-grounds, so that it is clear that the distinction was present to the minds of the Legislature, and that the classification was purposely made. This construction, therefore, gives effect to the words of the enactment, and satisfies the intentions of the Legislature.

*POLLOCK, C.B., WILLIAMS, J., BRAMWELL, B., and KEATING, J.* concurred. *Judgment affirmed.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HERTSLET, Esqrs., Barristers-at-Law.

Saturday, June 7.

REG. V. THE TYNE IMPROVEMENT COMMISSIONERS.

*Poor-rate—Docks—Assessment—Deductions.*

*A dock was constructed by public commissioners, under an Act of Parliament, which gave them no power to remunerate themselves out of the dock funds for their services; and, in the deductions to be made in the assessment of the dock to the poor-rate, they claimed, under the head of "disbursements," a sum of 500*l.* as "allowance for direction;" and another sum of 150*l.* for watching, which was done by a police-bout, provided and paid for out of other than dock funds. They also claimed, under*

*the head of "moveable plant," a deduction of 1200*l.* for a steamboat used for towing barges, when filled with mud, out to sea and back; and, under the head of "capital for carrying on the dock," 500*l.* for "cash balance," and 500*l.* for "stores on hand," and also a deduction of 4*s.* in the pound for rates and taxes on the gross rateable value of the dock:*

*Held, that the deductions for direction and watching and for cash balance ought not to be allowed:*

*Held, also, that the deduction for the steamboat was not allowable while it was used only for the work of constructing the dock; but, if it became necessary for permanent use in removing silt, it would be a deduction in future rates:*

*Held, that the deduction in respect of stores on hand ought to be allowed:*

*Held, that the allowance in respect of rates and taxes should be upon the net rateable value of the property, after the rates and taxes themselves have been deducted.*

Case stated for the opinion of this Court by an arbitrator, after appeal against an assessment to the poor's rate.

### SPECIAL CASE.

The Tyne Improvement Commissioners were incorporated and empowered, by the River Tyne Improvement Act 1850, 13 & 14 Vict. c. 63, amended and extended by the Tyne Improvement Act 1852, 15 Vict. c. 110; the Tyne Improvement Act 1857, 20 & 21 Vict. c. 71; and the Tyne Improvement Act 1859, 22 & 23 Vict. c. 7, which several Acts, and with the several Acts therein respectively recited or referred to, or incorporated therewith, are to be taken as part of this case.

By the River Tyne Improvement Act 1850, s. 3, it was enacted that the Act be put in force within the limits of the port of Newcastle-upon-Tyne, which extend from Hedwin Streams above the borough of Newcastle-upon-Tyne to Spar Hawke in the sea, and comprise all streams, havens, creeks, bays and inlets between Hedwin Streams and Spar Hawke, within the flow and reflux of the tide, and situate within or bounded by the several parishes, townships and places therein mentioned, and amongst others the township of Chirton, in the county of Northumberland. By sect. 27 of the same Act, the commissioners were constituted the conservators of the port of the river Tyne, and the conservancy of the said port and river respectively was vested in the commissioners, and all rights, powers, privileges and authorities whatsoever at the time of the commencement of the said Act vested, had, claimed, exercised, enjoyed, performed, imposed and obligatory, and which ought to be exercised, enjoyed and performed respectively in, by and on the municipal corporation of Newcastle-upon-Tyne, by, under and by virtue of the therein-recited Acts or any of them, and any grants and prescriptions, or otherwise howsoever with respect to the conservancy of the port and river, and the improvement, maintenance and repair of the said port and river, and the quays, banks and shores thereof, save so far as regarded rates, tolls and dues, were vested in the commissioners as fully and effectually and in like manner as the same had been vested in and imposed and obligatory upon the said corporation.

Under and by virtue of the powers contained in the Tyne Improvement Act 1852, the said commissioners made and established the Northumberland Dock, and executed and carried out divers works in connection with and necessary for the formation and use of such dock. The dock being formed by inclosing part of the ancient land on the shore of the river Tyne, and purchased for that purpose by the commissioners from the Duke of Northumberland, and part of the river itself extending beyond low-water mark and including part

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of a sandbank dry at low water, lying between the low-water mark and the main channel of the river. Between this sandbank and low-water mark was part of the bed of the river always covered with water. The inclosure had been formed by a double row of piles, driven to a considerable depth, between which the mud and sand have been scooped out, and the space packed with clay. An embankment of clay has then been placed against the piles, reaching their tops and sloping outwards on each side, the whole being covered with stone varying from 1 foot to 2 feet in thickness. The area thus inclosed has been excavated by means of a floating dredging-machine, in order to obtain the requisite depth of water for ships using the dock. In a portion of the dock this depth has not yet been reached. After the works are completed it will always be necessary to continue the dredging to a certain extent, in order to remove the silt from time to time deposited in the dock and at the entrance.

By a poor-rate made on the 9th Dec. 1859, the commissioners were rated to the relief of the poor for the township of Chilton in respect of the said Northumberland Dock, in a rate of 4d. in the pound on the net rateable value of 10,000*l*. By another rate, made on the 19th March 1860, they were rated at 6d. in the pound on a like rateable value; and by another rate made on the 25th June 1860, at 6d. in the pound; and by another rate made on the 17th Dec. 1860, at 6d. in the pound on the like rateable value. Against these several rates respectively the Tyne Commissioners duly appealed to the court of quarter sessions for the county of Northumberland, which appeals have been from time to time respited and are still pending. The parties have agreed that the rateable value of the dock shall be ascertained and affixed by taking the annual receipts of the commissioners in respect of the dock, and deducting therefrom the disbursements and all other proper allowances, and the following is a correct statement of the annual receipts and of the several amounts in respect of which deduction is to be made, subject to the opinion of the Court of Q. B. on the questions hereafter submitted:—

Income.		£	s.	d.
Ship dues outwards .....	9,498	12	4	
Do, inwards .....	58	13	5	
Coal dues .....	10,934	5	2	
	30,491	10	11	
River craft and sundries .....	196	1	10	
	30,687	12	9	
DISBURSEMENTS.		£	s.	d.
Law charges .....	357	4	8	
Repairing dock gates and entrances .....	500	0	0	
Maintaining river embankment .....	380	0	0	
Dredging .....	1,900	0	0	
Moorings .....	187	10	10	
Spoon Bay dredging .....	73	13	2	
1. Allowance for direction .....	500	0	0	
Salaries to engineer, secretaries, clerks and officers .....	700	0	0	
Salaries and wages to dock master and men .....	1,655	3	4	
Dock stores .....	256	1	2	
Lighting .....	206	7	9	
Towage .....	497	18	6	
1. Watching .....	150	0	0	
Stationery and printing .....	67	13	9	
	7,409	13	2	
Capital invested in moveable Plant.		£	s.	d.
Dredger .....	5,650	0	0	
Hepper barges .....	4,000	0	0	
1 Steamboat .....	1,200	0	0	
Cables, Landings, &c. ....	661	16	7	
	11,511	16	7	
On which allow 5 per cent. interest, and 30 per cent. for tenants' profits .....	3,877	19	1	
And 2½ per cent. for depreciation .....	402	18	2	
Capital for carrying on the Dock.		£	s.	d.
1 Cash balance .....	500	0	0	
2 Surplus on hand .....	500	0	0	
	1000	0	0	

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Disbursements brought forward	£7,409	13	2
On which allow 5 per cent. interest and 30 per cent. for tenants' profits .....	230	0	0
Capital invested in Fixed Plant.			
Dock gates .....	12,583	14	6
Moorings, capstans and dolphins .....	6,383	11	10
Gas pipes and lamps .....	1,344	8	8
	20,311	14	4
Depreciation, &c.:			
6. On the dock gates 2½ per cent. ....	314	11	10
7. On the capstans, moorings, dolphins, gas pipes and lamps, 8 per cent. ....	231	16	9
Capital invested in Freehold Plant.			
Dock, quay, walls and entrance masonry .....	98,939	1	10
River embankment .....	74,664	13	11
	173,603	15	9
8. Depreciation on the masonry, 10 per cent. ....	494	18	6
9. On the embankment, 1 per cent. ....	746	13	0
	12,738	10	6
Income .....	20,687	12	9
Disbursements .....	12,738	10	6
	7,959	2	3
10. Deduct rates and taxes, 4s. in the pound, on a rateable value of 7959 <i>l</i> . 2s. 3d. ....	1,591	16	5
	6,367	5	10

The differences between the parties arise on the items numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10.

1. The resps. object to a reduction for direction, contending that the dock is managed by commissioners appointed by or pursuant to Act of Parliament, and that such management forms part of their duties as Conservators of the Tyne, for the performance of which they are not entitled to remuneration. The apps. contend that the deduction is one which a tenant would be allowed to make as remuneration for his own time and trouble in managing the business of the dock, over and above a percentage upon capital and his trade profits.

2. The resps. object to any reduction for watching. There are no police or watchmen attached to the dock. The apps. have an establishment of nine police-boats employed throughout their jurisdiction. One of these boats enters the dock each tide, and rows about the dock so long as the gates are open; with this exception, no watch is kept in the dock. There are but few goods exported or imported at the dock, and there are no warehouses. The captains and crews frequently leave their vessels in the dock, generally under the care of a ship-keeper, but occasionally with no one on board.

3. The resps. object to allow a deduction for a steamboat, the property of the apps., which is used for towing the barges when filled with mud by the dredger, out to sea, where the mud is discharged, and for bringing them back, when empty, to the dredger.

The item of 497*l*. 18s. 6d., under the head towage, is for the hire of steamboats to tow ships from the outer basin into the dock, and for moving them from one berth to another within the dock. The apps. do not tow ships into or out of the dock except from the outer basin. For towage within the dock or from the outer basin, no charge is made to the shipowner.

4. The resps. object to any allowance for cash, contending that from the nature of the business no cash would be required by a tenant. The revenue of the dock arises from coal dues, about 250*l*. per week, and for which six weeks' credit is given, and from ship dues about 175*l*. per week, paid weekly. The weekly outgoings are about 200*l*., and consist of engineer and dock-masters' pay-bills for wages, stores, and other current expenses, but not tradesmen's accounts. At the end of the year 1859 the outstanding tradesmen's accounts were between 1300*l*. and 1400*l*., against which there was upwards of 900*l*. owing to the dock on book-debts. In case the dock account is overdrawn at the banker's, interest is charged. The salary of the

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engineer is paid out of the general fund of the commissioners, a proportion being debited to the dock.

5. The resps. object to deduction for stores on hand. The item "dock stores 256*l.* 1*s.* 2*d.*" is the amount of stores used at the dock in the course of the year. The apps. have, at Howden, on the river Tyne, some distance from the dock, a dépot containing chains, ropes, buoys, timber, and other stores and materials for use throughout their jurisdiction. The amount of 500*l.* under item 5 is to be taken as the proportion of these stores kept on hand for the dock.

6 and 7. The resps. object to these items of deduction. The disbursement of 500*l.* under the head of "repairing dock-gates and entrances," is for the ordinary repairs, besides which the apps. contend that a percentage on the capital should be allowed for extensive repairs and renovation in the course of time.

8 and 9. The resps. also object to the allowance of these deductions. The ordinary repairs of the entrances are included in the above-mentioned allowance of 500*l.*, but the apps. contend that a percentage on the cost of the masonry should be allowed for renovation. With respect to the river embankment the deduction of 350*l.* for maintenance is for labour and materials expended in keeping up the embankment when it may slip or be washed away, and for other external repairs, but in the course of years the piles will probably decay and require renewal, and other extensive repairs may become necessary. To meet these contingencies the apps. claim the deduction of percentage on the cost of the embankment.

10. The resps. object to the deduction of rates and taxes on the gross rateable value of the dock, contending that such allowance should be made on the net rateable value after the rates and taxes themselves have been deducted. The above several points in difference are, therefore, submitted to the judgment of the Court.

The Court is to have power to order that all or any of the said items numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, be struck out of the above statement, but not that the amount of any such items be altered, nor that any other alteration in the said statement be made except such as may be rendered necessary by the striking out of the said items or any of them, or by the decision of the court on the tenth point respecting the principle upon which the rates and taxes are to be deducted.

The parties have agreed that the court of quarter sessions shall have full power to alter, amend, or confirm the said rates in accordance with the finding of the Court of Q. B.

*Borill, Welby and Davison* for the parish.—The parish will not dispute the right of the commissioners to deduct the 6th, 7th, 8th and 9th items. First, as to the deduction of 500*l.* for allowance for direction. That ought not to be allowed, because the commissioners are a public body, and have no remuneration nor any right thereto by the Acts under which they are appointed. In the *Southampton Dock* case, 14 Q. B. 595, the directors were entitled to remuneration, but they declined to accept it. And in the *Cambervell* case, 14 Q. B. 571, a deduction in respect of remuneration to the auditors and directors of Nunhead Cemetery Company was disallowed. The direction must be paid out of the profits in respect of which a deduction has been allowed. Secondly, as to the deduction of 150*l.* for watching, that ought not to be allowed, because there are no police or watchmen attached to the dock, and no distinct charge created by the watching. The commissioners have a police jurisdiction on the river Tyne, within the limits of the port of Newcastle-on-Tyne (sect. 27 of Act 1852), and they have established nine police boats, one of which enters the dock each tide and rows about the dock so long as the gates are open. The police are not paid out of the dock

fund, but out of the ship and boat duty (sect. 36) and tonnage rates (sect. 34). Thirdly, with respect to the deduction of 1200*l.* for the steamboat used for towing the barges when filled with mud by the dredger out to sea and back. The dock is not completed, and the present use of the steamboat is for ferrying the dock, which increases its value, and it is now only the expenditure of so much capital in forming the dock. An allowance of 497*l.* has been made for the towage of vessels. It is not shown that it is necessary to have this steamboat in order to earn the income of the dock. In the *Southampton Dock* case, where such an allowance was made, it was in the ordinary course of navigation necessary that they should have one. Fourthly, as to the deduction for 500*l.* cash balance. The *North Staffordshire* case, 30 L. J. 68, M. C., shows that that ought not to be made. Fifthly, as to the deduction of 500*l.* for stores on hand. That is objectionable. Dock stores are charged in the claim for disbursements, and it is not found in the case that it is necessary to have such a supply of stores on hand. If the commissioners choose for their own convenience to have such stores on hand, they are not entitled to claim a deduction in respect thereof. This item stands on the same footing as that for the cash balance. [BLACKBURN, J.—What is reasonably necessary for a tenant, is the question.] Lastly, as to the deduction of the rates and taxes on the gross rateable value of the dock: that is wrong. The deduction should be made on the net rateable value after the rates and taxes themselves have been deducted: (*Reaz v. Hull Docks Company*, 3 B. & C. 516.)

*Manisty, A. Liddell and Bruce*, for the Tyne Improvement Commissioners.—For rating purposes, this case is to be considered as any other commercial undertaking which is going to be let to a tenant, who would make all proper deductions in estimating the rent which he should pay. [COCKBURN, J.—We are to assume that the tenant would have to manage the docks under precisely similar circumstances to the commissioners, having regard to these Acts of Parliament, and not on the footing of a commercial speculation.] (*Reg. v. Fletton*, 30 L. J. 89, M. C.) As to deduction. First, for expenses of direction. The commissioners may take a reasonable sum for such expenses. [CROMPTON, J.—Could turnpike trustees take money out of their trust-funds for such a purpose? Commissioners have certain statutory immunities, because they are public unpaid functionaries. BLACKBURN, J. referred to sect. 48 of the Commissioners Clauses Act 1857, which is incorporated by sect. 5 of the Act 1850 into the Tyne Improvement Commissioners Acts.] This sum is to cover their expenses. [By the COURT.—No; this is salary.] Secondly, as to the item for watching. This is a matter for the discretion of the commissioners. They are not bound to send one of the police boats into the dock, and the dock should pay the reasonable charge for the benefit they receive from the police superintendence. [CROMPTON, J.—Sects. 30, 34 and 36 of Act 1852 supply the funds.] Thirdly, as to the deduction for the steamboat. It appears that the boat is used for dredging the dock, and is a reasonable charge upon the working expenses. [COCKBURN, C. J.—The question is, whether its services are necessary in the course of the construction of the docks, or for dredging purposes?] Fourthly, as to the 500*l.* for cash balance. This is not claimed twice over. It is necessary to have such a balance where the income does not or may not meet the expenditure. [COCKBURN, C. J.—The deduction in respect of interest on the capital employed may include this in it, as lying idle for wages, &c.] Fifthly, as to the deduction for stores on hand. It is found that such stores are necessary, and the item is in the nature of capital locked up. Lastly, as to the deduction in respect of rates—

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and taxes. There has been such a deduction allowed in all similar cases.

*Welsby*, in reply, was told that he need not argue as to the first and second items in dispute. As to the third item, the case disposes of that; the steamboat is now only used for works of construction, although probably hereafter it may be required for dredging purposes. [COCKBURN, C. J.—This is not a matter for deduction while the steamboat is used for works of construction; but if it becomes necessary for the permanent use of the dock, it will be in future rates.] As to the fourth and fifth items, are these in the nature of extra capital? It is submitted that they are not. Lastly, as to the deduction in respect of rates and taxes. The net rent is that on which the assessment is to be made. The principle of deduction is the same as that for depreciation.

COCKBURN, C. J.—All the questions have been disposed of in the course of the argument. The only one of a serious character is the one for the expenses of direction. But this case is particularly free from difficulty on that head, for the whole purpose of the institution of the dock is of a public nature. The commissioners, of their own free will, take upon themselves the duties imposed by these Acts, without any right to remuneration; and if they take any, it would be in violation of the Acts. By the Assessment Act we have to consider what rent an incoming tenant would give for the docks. It is the rule, as established by recent cases, that you must treat the imaginary tenant as placed in precisely the same circumstances as the present occupier of the property. There may be cases in which the existing circumstances would not be the test, but in this case there is no difficulty in that respect, for here no tenant could come into occupation of the dock except under the same circumstances. The imaginary tenant would start with the advantage of having the direction provided for him by the statute without having anything to pay for it. As to the item for cash balance, Mr. Welsby satisfied me that there would only be a temporary delay for realising the income for the first six weeks, and that after that there would be no necessity for having this cash balance so as to make it a ground of deduction. Then as to the item in respect of rates and taxes, you would get into a difficulty if you were only to assess on the balance, and I am satisfied, upon the argument, that the deduction claimed ought not to be made.

The rest of the COURT concurred.

Wednesday, June 11.

REG. v. ACASON.

*Superintendent-registrar—Appointment of—Clerk to the board of guardians—6 & 7 Will. 4, c. 86, s. 7—1 Vict. c. 22, s. 14.*

*The appointment of superintendent-registrar for the union is with the board of guardians, and the clerk to the guardians is not of right entitled to be such superintendent-registrar.*

*A. B., who was clerk to the board of guardians and also superintendent-registrar for a union, died, and within fourteen days afterwards the guardians appointed C. D. to be superintendent-registrar for the union, and subsequently they appointed E. F. as clerk to their board, who by virtue of such appointment claimed a right to the office of superintendent-registrar of the union:*

*Held, that E. F. had no right to the office of superintendent-registrar, and that C. D. was legally appointed.*

This was a demurrer to a replication to a *quo warranto* information. The information was filed at the instance of the relator Stanley Harris, and it called upon George William Acason to show by what authority he claimed to exercise the office of superintendent-registrar of the Barnet Union. The deft. pleaded that

he was duly appointed by the board of guardians of the same union on the 17th Jan. 1861. To this the relator replied, that he was not duly appointed by the said board of guardians, to which replication there was a demurrer. The facts were these:—Down to the 4th Jan. 1861 a Mr. William Acason filled both the offices of clerk to the board of guardians and superintendent registrar of the Barnet Union, when he died. On the 17th of the same month the guardians appointed the deft. to the office of superintendent-registrar, and on the 14th of the following February the relator (Mr. Stanley Harris) was appointed by them clerk of the board of guardians of such union.

By sect. 7 of the 6 & 7 Will. 4, c. 86 (an Act for registering births, deaths and marriages in England), after providing that the guardians of every union shall, on the 1st Oct. 1836, divide the union into so many districts, and that every district shall be a registrar's district, enacts that the guardians shall appoint a person, with such qualifications as the Registrar-General may by any general rule declare to be necessary, to be registrar of births and deaths within each district; and in every case of vacancy in the office of registrar, shall forthwith fill up the vacancy, "and the clerk to the guardians of every such union, parish, or place shall, if he shall think fit to accept such office and have such qualifications as the Registrar-General may by any general rule declare to be necessary, be the superintendent-registrar thereof; and in the event of his refusal or disqualification to act in that capacity, the guardians shall appoint a person with such qualifications as the Registrar-General may by any general rule declare to be necessary to be the superintendent-registrar of each union or of such parish or place, and in every case of vacancy of the office of superintendent-registrar shall forthwith fill up the vacancy; and every registrar and superintendent-registrar shall hold his office during the pleasure of the Registrar-General."

By sect. 14 of the 1 Vict. c. 22, the appointment of superintendent-registrar lapses to the Registrar-General in the event of the guardians neglecting to fill up the vacancy within fourteen days.

*Lush*, Q.C. (*Bulwer* with him) appeared in support of the demurrer, and contended that the deft. was lawfully appointed by the guardians, for that although upon the first appointment under the Act the clerk to the guardians had a right (if qualified) to fill the office, that right does not extend to any subsequent vacancy; at all events, the clerk to the guardians could not be entitled to turn out of office a superintendent-registrar who has been appointed to it, as in the present case.

*Huddleston*, Q.C. (*Philbrick* with him) argued that the relator who had been appointed clerk to the guardians has, under the statute, an absolute right (if duly qualified) to fill also the office of superintendent registrar, and this upon all vacancies of the office.

WIGHTMAN, J.(a)—I am of opinion that the provision for the appointment of the clerk of the guardians to the office of superintendent-registrar is limited to the first appointment, and that afterwards, on a vacancy occurring, the guardians may appoint any one they think fit, if duly qualified. The first portion of the section refers to the appointment of registrars. Then comes the provision as to superintendent-registrars, and it provides that the clerk to the guardians of any such union, parish, or place shall, if he shall think fit to accept such office, be the superintendent-registrar thereof, and in the event of his refusal or disqualification to act in that capacity, the guardians shall appoint another person; and then come the words "and in every case of vacancy of the office of superin-

(a) Cockburn, C. J. was not present.

tendent-registrar, shall forthwith fill up the vacancy." Now it is contended that these words mean, "in case the clerk refuses, or is not qualified." But I do not understand them so, and then comes the 1 Vict. c. 22, which confirms the view I am now taking, that the restriction has reference to the first appointment, for, in the event of the guardians not appointing the superintendent-registrar within fourteen days, the appointment is to lapse to the Registrar-General; therefore, if the guardians omit to appoint a clerk within fourteen days, the appointment of superintendent-registrar would lapse. It seems to me, taking the two statutes together, that the Legislature intended that in case of a vacancy after the first appointment, the guardians are—and, if they neglect, then the registrar-general is, to appoint. Now, if it was intended that in every case the clerk to the guardians should be the superintendent-registrar, this would be inconsistent with the terms of the 14th section of 1 Vict. c. 22. I think, therefore, that the object of the Legislature was to provide for the first superintendent-registrar, by giving the office to the clerk to the guardians; but that future vacancies were to be filled up by the guardians.

CROMPTON and BLACKBURN, JJ. gave similar judgments. *Judgment for the deft.*

Thursday, June 12.

REG. v. JUSTICES OF YORKSHIRE (WEST RIDING). *Order for diverting a highway*—4 & 5 Will. 4, c. 50, ss. 85, 90—*Appeal against—Costs.*

*After notice of appeal against an order of justices, for diverting a highway, the party obtaining the order served the app. with notice that he abandoned the certificate of justices, and would not apply to the quarter sessions for its enrolment. The appeal was entered and called on in its turn by the court of quarter sessions, and struck out, no one appearing. Afterwards, during the day, a motion was made and refused for the app.'s costs:*

*Held, that nevertheless by sect. 90 the app. was entitled to, and that the quarter sessions ought to have made, the order for his costs.*

*Maule* showed cause against a rule nisi to enter an appeal by continuance, and to make such order for costs as by law required. An order was made by justices of Bradford on the 31st Oct. 1861 for diverting a highway pursuant to the 5 & 6 Will. 4, c. 50, s. 85, and the necessary documents lodged with the clerk of the peace on the 2nd Nov. Subsequently Mr. Pearson, a party interested, gave notice of appeal on the 14th Dec., whereupon the party who obtained the order of justices (Mr. Ripley) gave Mr. Pearson notice, Dec. 20, that he abandoned the justices' certificate made under sect. 85, and that no application would be made to the quarter sessions for its enrolment. The quarter sessions were held on the 30th Dec., and the appeal was entered and placed on the usual list of appeals. The list of appeals was gone through in the usual order, and no one appearing when this appeal was called on it was struck out of the list. Afterwards, during the same day, an application was made to reinstate the appeal, and for an order for the app.'s costs. This was opposed, and the court declined to reinstate the appeal or make any order for costs. It was now contended that the court of quarter sessions acted quite right, and that the case was like one at *Nisi Prius*, where neither party appeared when the case was called on, and that it was in the discretion of the court of quarter sessions to refuse to make any order for costs.

CROMPTON, J.—By sect. 90 of 5 & 6 Will. 4, c. 50, the court of quarter sessions is bound to award to the party giving or receiving notice of appeal such costs or expenses as shall be incurred in prosecuting or resisting such appeal, *whether the same shall be tried*

*or not.* The parties might claim their costs whether the appeal has been heard or not. Then why might they not as well apply half-an-hour afterwards? The right to the costs did not arise in this case until it was ascertained whether the appeal had been heard or not.

WIGHTMAN, J.—The app. might apply for his costs at any time during the day.

Campbell Foster, in support of the rule, was not called on. *Rule absolute.*

Tuesday, June 17.

Ex parte PAYNE.

Coroner—7 & 8 Vict. c. 92, s. 27—*Duchy of Lancaster.*

*The coroner for such part of the Duchy of Lancaster as is within the county of Middlesex is not entitled to be appointed coroner of one of the districts of the county.*

Lush, Q.C. moved for a rule calling upon the justices of the county of Middlesex to show cause why a *nandamus* should not issue commanding them to assign to William John Payne one of the districts of the county of Middlesex as coroner thereof, viz. such part of the county as is within the liberty and franchise of the Duchy of Lancaster. It appeared that in 1857 Mr. Payne was appointed by letters patent to be coroner of that part of the county which belongs to the liberty of the Duchy of Lancaster. In 1844 an Act was passed, 7 & 8 Vict. c. 92, entitled "An Act to amend the law respecting the office of county coronel," whereby her Majesty might order the division of counties into districts for the purposes of that Act, and enacting that the justices should assign one of such districts to each of the persons holding the office of coroner in the county. The salary allotted in lieu of fees had been paid to Mr. Payne out of the county rate, and he had always been recognised as a county coroner, and in a return made to the House of Commons was entered as one of the coroners for the county of Middlesex. The county having been now divided into districts, Mr. Payne claimed to be entitled to be appointed to one: (7 & 8 Vict. c. 92, ss. 4, 5, 9, 19 and 27.)

WIGHTMAN, J.—The 27th section disposes of your application, does it not? It says: "That nothing in this Act contained, touching the divisions of counties into districts or the appointment or election of coroners, shall extend to the county of Chester or any county palatine, city, borough, town, liberty, franchise, part, or place, the appointment or election of coroner whereof takes place by law otherwise than under the writ *de coronatoris eligendo*."

COCKBURN, C.J.—The words of that section clearly exclude him. *Refused.*

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

June 7 and 14.

(Before COCKBURN, C. J., ERLE, C. J., WIGHTMAN and WILLIAMS, JJ., MARTIN, B., WILLES, J., BRAMWELL, B., BYLES and BLACKBURN, JJ.)

REG. v. HORATIO SAMUEL FLETCHER.

*Fraudulent trustee*—20 & 21 Vict. c. 54—*Express trust in writing—Savings bank—Rules.*

*A savings bank was duly constituted according to the 9 Geo. 4, c. 92; 3 Will. 4, c. 14; and 7 & 8 Vict. c. 83, of which the prisoner was a trustee, and also treasurer and secretary, or actuary, and acted as such. By the rules of the bank, the trustee and manager was declared to be personally responsible and liable for all moneys actually received by him on account of or to and for the use of the institution, and not paid over or disposed of according to the rules; and the secretary was to be liable for all*

money received, and pay regularly to the treasurer the balance due after each day's business. By the eighth rule "the several sums of money belonging to the institution which the trustees thereof were authorised to invest under the 9 Geo. 4, c. 92, or under the rules or regulations of this institution, were to be paid into, and invested in the Bank of England, in the names of the Commissioners for the Reduction of the National Debt, according to the provisions of the said Act, and no such sum or sums of money were to be paid or laid out by the trustees in any other manner or upon any other security whatever, except such sums of money as from time to time should necessarily remain in the hands of the treasurer, to answer the exigencies thereof. That the trustees should pay into the Bank of England any money, not less than 50*l.*, to the account of the Commissioners for the Reduction of the National Debt, upon the declaration of the trustees, or any two or more of them, that such moneys belonged exclusively to the institution." The rules gave depositors the usual power of drawing out moneys deposited. The jury found, as a fact, that the prisoner was a trustee of the savings bank, and that, whilst he was such trustee, he converted and appropriated to his own use divers sums of money (not less than 50*l.* each) which had been paid into or deposited in the savings bank, whilst he was such trustee, with intent to defraud:

*Held*, that the prisoner was a trustee within 20 & 21 Vict. c. 54, s. 1, and that the rules were an instrument in writing creating an express trust within sect. 17.

Case stated for the opinion of this Court by Cuswell, B.:—

The prisoner Horatio Samuel Fletcher was tried before me at the last assizes for the county of Stafford, under the statute 20 & 21 Vict. c. 54, entitled, "An Act to make better provision for the punishment of frauds committed by trustees, bankers, and other persons entrusted with property."

The first count of the indictment charged, that on the 1st Jan. 1859 the prisoner, then being a trustee of certain property, that is to say of certain moneys, to wit, to the amount of 100*l.* for a public purpose, that is to say, for the purpose (amongst other things) of receiving and investing the same for the benefit of certain persons who had before then deposited the same in a certain bank for savings called the Bilston Savings Bank, before then established, and then carrying on business under the authority of certain Acts of Parliament for consolidating and amending the laws relating to savings banks, did unlawfully convert and appropriate the said moneys so amounting (to wit, to the sum of 100*l.*) to and for his own use and purposes, with intent thereby then to defraud, against the statute, &c.

The second count was the same as the first, but charged an appropriation of 100*l.* on the 8th Jan. 1859, with intent, &c.

The third as before, but charged an appropriation of 50*l.* on the 15th Jan. 1859, with intent, &c.

The fourth as before, but charged an appropriation of 50*l.* on the 22nd Jan. 1859, with intent, &c.

The fifth as before, but charged an appropriation of 100*l.* on the 29th Jan. 1859, with intent, &c.

The sixth count charged that the prisoner being a trustee of certain property, that is to say, of certain moneys amounting, to wit, to the sum of 100*l.* for the benefit of certain persons who had before then deposited the same in the said bank for savings, called the Bilston Savings Bank, did on the 1st Jan. 1859 unlawfully convert and appropriate the said last-mentioned moneys so amounting, to wit, to 100*l.*, to and for his own use and purposes, with intent thereby to

defraud the said persons who had so deposited the same as aforesaid, against the statute, &c.

The seventh count was like the sixth, but charged an appropriation of 100*l.* on the 8th Jan. 1859, with intent, &c.

The eighth count was like the last, but charged an appropriation of 50*l.*, on the 15th Jan. 1859, with intent, &c.

The ninth count was like the last, but charged an appropriation of 50*l.* on the 22nd Jan. 1859, with intent, &c.

The tenth count was like the last, but charged an appropriation of 100*l.* on the 29th Jan. 1859, with intent, &c.

The eleventh count was like the first, but charged an appropriation of 100*l.* on the 19th Jan. 1861, with intent, &c.

The twelfth count was like the sixth, but charged an appropriation of 100*l.* on the said 19th Jan. 1861, with intent, &c.

Prior to the 1st Jan. 1859, the first day named in the indictment, viz. from the 26th March 1839, and thence down to and subsequently to the 29th Jan. 1861 (the last day named in the indictment), the prisoner was and acted as one of the trustees of a bank for savings established in the county of Stafford, being the savings bank in the indictment mentioned.

The prisoner was in 1849 appointed the treasurer of the said savings bank, and continued to act as such treasurer until the end of Feb. 1861. On his appointment as treasurer he with two sureties executed a bond in the penal sum of 500*l.* to the then Comptroller General of the National Debt-office.

A copy of the bond accompanies and may be referred to as part of this case.

The prisoner was also, prior to the 18th Nov. 1844, and thence down to the end of Feb. 1861, the secretary or actuary to the said savings bank.

The bank was established in the year 1838.

On the 18th Nov. 1844 certain rules, orders and regulations for the management of the said bank from and after the 20th Nov. 1844, were duly certified by the barrister-at-law appointed by the Commissioners for the Reduction of the National Debt, for the purposes of the Acts 9 Geo. 4, c. 14, and 7 & 8 Vict. c. 83. A duplicate of such rules, orders and regulations, was duly transmitted to the said commissioners.

A copy of such rules and of the certificate of the barrister so appointed to certify, accompanies and is to be taken as part of this case.

The prisoner, in the year 1859, while he was trustee of and also treasurer of and the secretary or actuary to the said bank, viz., on the 21st Feb. 1859, signed five several weekly accounts. These weekly accounts are all dated the 21st Feb. 1859, are all signed by the prisoner as treasurer of the savings bank, and also by the prisoner as secretary or actuary of the said bank. They are also signed by one Heafat, as a manager of the said bank, and who was then one of the managers of the said bank.

The first of these accounts purports to give, amongst other things, an account of moneys received by the bank from depositors, and of moneys paid out to depositors in the week ending 1st Jan. 1859. The sum actually received in the course of that week was 334*l.* 16*s.* 2*d.*; the amount returned on the account as moneys received, is only 234*l.* 16*s.* 2*d.*; the difference, 100*l.*, is the subject of the first count of the indictment.

The second account purports to be an account for the week ending the 8th Jan. 1859. The sum actually paid out to the depositors in that week was 74*l.* 19*s.* 5*d.*. The sum returned in the account as paid out was 174*l.* 19*s.* 5*d.*. The difference, 100*l.*, is the subject of the second count in the indictment.

The third account was for the week ending the 15th

Jan. 1859. The sum actually paid out to depositors in that week was 51*l.* 13*s.* 4*d.* The sum returned in the account as paid out was 151*l.* 13*s.* 4*d.* The difference, 100*l.*, was the subject of the third count in the indictment.

The fourth account was for the week ending the 22nd Jan. 1859. The sum actually paid out to depositors in that week was the sum of 142*l.* 9*s.* The sum returned on the weekly account as paid to depositors was 192*l.* 9*s.* The difference, 50*l.*, is the subject of the fourth count in the indictment.

The fifth account was for the week ending the 29th Jan. 1859. The sum actually received from depositors during that week was 283*l.* 15*s.* 10*d.* The sum returned was 183*l.* 15*s.* 10*d.* The amount actually paid out was 48*l.* 12*s.* 9*d.* The sum returned on the account was 148*l.* 12*s.* 9*d.* This difference in the sums received and paid out and those returned as such in the weekly accounts is the subject of the fifth count in the indictment.

The prisoner, whilst he was such trustee, treasurer and secretary, or actuary as aforesaid, viz. on the 8th Feb. 1861, signed a certain other weekly account purporting to be an account for the week ending the 19th Jan. 1861. The sum actually paid out to depositors in that week was the sum of 59*l.* 4*s.* 9*d.* The amount returned as paid out was 159*l.* 4*s.* 9*d.* The difference, 100*l.*, is the subject of the eleventh and twelfth counts in the indictment.

These weekly accounts are all signed by the deft. twice; once by him as treasurer or person holding the balance thereof mentioned in the account, and again by him as the secretary or actuary. The accounts were duly returned to the office of the Commissioners for the Reduction of the National Debt, and were produced from their office at the trial. The written part of accounts, with the exception of the signatures thereto other than the signatures of the prisoner, is in the prisoner's handwriting. The amounts actually paid in and paid out in each week were ascertained from books which had been kept for that purpose, the entries in which books were in the handwriting of the prisoner, or the account as cast up, to show the total of the weekly receipts or payments, was in figures in his handwriting. Copies, partly printed and partly written, of these several weekly accounts, marked respectively A, B, C, D, E and F, accompany and may be referred to as part of this case.

In addition to these weekly accounts, an annual account for the year ending 20th Nov. 1859 was, pursuant to the statute 9 Geo. 4, c. 92, s. 46, and 7 & 8 Vict. c. 83, s. 13, signed by the prisoner as treasurer and secretary, or actuary, and was delivered to the National Debt office, a copy whereof accompanies and may be taken as part of this case.

The bank was usually open on the Monday in each week: the weekly accounts were made up to the Saturday preceding. The money in hand at the close of the bank on the Monday was taken away by the prisoner from the bank to the parsonage, his private residence. On the next Monday the money was brought to the bank by the prisoner, or by his direction. The books of the bank were at the office of the bank on Monday during office hours, but at all other times were kept at the parsonage-house, in the residence of the prisoner.

The assets of the bank vested in Government securities have been realised, the amount realised net the cash in hand at the bank leaves, as compared with the amounts of deposits, a deficiency of 8000*l.* and upwards.

The jury found as a fact that the prisoner was a trustee of the said savings bank in the years 1859 and 1861, and that whilst he was such trustee of the said savings bank he converted and appropriated to his own use and purposes certain sums of money which in the year 1859 and in the year 1861, and in the several months of these years stated in the indictment, had

been paid into, or deposited in the said savings bank whilst he was such trustee as aforesaid, and that the prisoner did so convert and appropriate the said moneys with intent to defraud as stated in the indictment.

I directed a verdict of guilty to be entered subject to the question which I reserved, and on which I request the opinion of this court, whether, upon the facts so found by the jury, and those stated in this case, taken together with the said rules of the said savings bank, the prisoner was a trustee within the meaning of the 21 & 22 Vict. c. 54, as described in the several counts of the indictment, or any of them. I postponed the sentence upon the prisoner upon his entering into his own recognisance, himself in 750*l.*, and two sureties in the same amount. W. F. CHANNELL.

Copy of the bond accompanying the case:—

"Know all men, by these presents, that we, Horatio Samuel Fletcher, incumbent of St. Leonard's church, in the township of Bilston, in the county of Stafford, and treasurer of the savings bank established at Bilston aforesaid, and Richard Westley Fletcher, of Bilston, aforesaid, gentleman, as surety on behalf of the said Horatio Samuel Fletcher, are held and firmly bound unto Samuel Higham, Esq., the present Comptroller-General of the National Debt office in the sum of 500*l.* sterling, to be paid to the said Samuel Higham (as such Comptroller-General), or his successor Comptroller-General of the National Debt office for the time being, or his certain attorney, executors, administrators, or assigns, for which payment to be well and faithfully made, we jointly bind ourselves, our heirs, executors and administrators, and each of us severally and apart from the other of us bindeth himself, his heirs, executors and administrators, firmly by these presents. Sealed with our seals. Dated this 9th day of Jan. in the year of our Lord 1849."

"Whereas the above bounden Horatio Samuel Fletcher hath been duly appointed treasurer of the savings bank established at Bilston as aforesaid, and he, together with the above bounden Richard Westley Fletcher, as his surety, have, pursuant to an Act of Parliament made and passed in the session of the 7th and 8th years of the reign of her present Majesty, intituled 'An Act to amend the laws relating to savings banks, and to the purchase of Government annuities through the medium of savings banks,' entered into the above written bond or obligation, subject to the conditions hereinafter contained. And whereas the said bond has been approved of by two trustees and three managers of the said savings bank, as good and sufficient security. Now the condition of the above written obligation is such that if the said Horatio Samuel Fletcher, his executors and administrators, do and shall from time to time, upon request or demand made in pursuance of an order signed by not less than two trustees and three managers of the said savings bank, or at a general meeting of the trustees or managers thereof, give in or deliver up true and perfect accounts in writing of all moneys received by him, and of all payments made by him thereout as such treasurer as aforesaid, to the said trustees or managers, or to such general meeting as aforesaid, or to such person or persons as shall be nominated or appointed by two trustees and three managers of the said savings bank, or at such general meeting to receive the same to be examined and allowed or disallowed by the said trustees or managers respectively, and shall and do or the like request or demand pay over all the moneys remaining in his hands, and assign and transfer or deliver up all securities and effects, books, receipts, vouchers, and all and every other books, writings, documents, papers and property whatsoever relating to said office of treasurer in his possession, power, or control, to the said person or persons appointed to receive the same as aforesaid, and likewise do and shs in all respects justly and faithfully perform and ful

his said office of treasurer of the said savings bank, then the foregoing obligation to be void, or else to be and remain in full force and virtue. And it is hereby declared and agreed that all memorandums, admissions, declarations, accounts, writings, books, receipts and written notices made or given by the said Horatio Samuel Fletcher shall be admitted and received in evidence against the said H. S. Fletcher in the same manner, to all intents and purposes, as the same would be evidence against the said H. S. Fletcher, and this whether the said H. S. Fletcher be living or not, or within the jurisdiction of the Superior Courts at Westminster or not.

"H. S. FLETCHER. [L.S.]

"R. W. FLETCHER. [L.S.]

"Said and delivered by the said Horatio Samuel Fletcher and Richard Westley Fletcher, in the presence of  
"THOMAS WILTON, Clerk to John William, Solicitor, Bilston."

The following memorandum was indorsed on the head:—

"7 & 8 Vict. c. 83, s. 17.

"We, two of the trustees and three of the managers of the savings bank established at Bilston, in the county of Stafford, do hereby approve of the within written head being taken from the said Horatio Samuel Fletcher and Richard Westley Fletcher, as good and sufficient security for the just and faithful execution of the office of treasurer of the said savings bank.

"Dated this 9th day of Jan. 1849.

"THOMAS PERRY }  
"EDWD. BEST } Two trustees.

"JOSEPH B. OWEN

"JOHN ETHERIDGE

"RICHD. JEWSBURY HEAFAT

(Witness) "THOS. WILTON."

The following are the material rules of the savings bank referred to in the course of the argument:—

The rules were headed "Bilston Government Bank for Savings," and purported to have been made at a general meeting of the officers of the institution, held at the bank, Nov. 13, 1844.

1. The management of the institution shall be vested in a committee of twelve, to be chosen annually from amongst the trustees and managers. The committee (any three of whom shall be competent to act) shall meet on the second Mondays in March, June, September and December, or at any other time upon the requisition of two members of the committee or the secretary.

4. That no person being trustee, treasurer, or manager of this institution, or having any control in the management thereof, shall derive any profit or benefit directly or indirectly therefrom.

5. The committee shall appoint a secretary to transact the business of the bank, who shall give security conformably to the 7 & 8 Vict. c. 83, s. 17, and receive such allowance for his services as may be thought proper, but no fees or perquisites from the depositors. He shall be responsible for all moneys received, as well as for the accuracy of every individual account, and pay regularly to the treasurer the whole balance remaining due after each day's business is concluded.

6. The treasurer shall likewise give security conformably to the same Act.

7. That no trustee or manager shall be personally liable except for his own acts or deeds, nor for anything done by him in virtue of his office, except in cases when he shall be guilty of wilful neglect and default, nor be liable to make good any deficiency which may hereafter arise in the funds of this institution, unless such persons shall have respectively declared, by writing under their hands and deposited with the Commissioners for the Reduction of the National Debt, that they are willing so to be answerable, and it shall be lawful for each of such persons, or for such persons

collectively, to limit his or their responsibility to such sum as shall be specified in any such instrument, provided always that the trustee and manager of any such institution shall be, and is hereby declared to be, personally responsible and liable for all moneys actually received by him on account of or to and for the use of this institution, and not paid over or disposed of in the manner directed by the rules of the said institution: (7 & 8 Vict. c. 83, s. 6.)

8. That the several sums of money belonging to this institution, which the trustees thereof are authorised to invest, under the Act 9 Geo. 4, c. 92, or under the rules or regulations of this institution, shall be paid into and invested in the Bank of England in the names of the Commissioners for the Reduction of the National Debt, according to the provisions of the said Act enabling the trustees to make investments in the names of the said commissioners, and no such sum or sums of money shall be paid or laid out by the trustees in any other manner, or upon any other security whatever, except such sums of money as from time to time shall necessarily remain in the hands of the treasurer to answer the exigencies thereof. Any depositor, or any trustee or trustees acting on behalf of any depositor or depositors of any friendly society, or any charitable or provident institution or society, shall not be restrained or prevented from withdrawing from this institution, upon giving the notice hereinafter mentioned, any sum or sums of money which shall have been deposited by such depositor, friendly society, charitable or provident institution or society, and investing the same in any other securities. That the trustees shall pay into the Bank of England any sum or sums of money not being less than 50*l.* to the account of the Commissioners for the Reduction of the National Debt, upon the declaration of the trustees or any two or more of them that such moneys belong exclusively to this institution.

25. That any depositor shall be at liberty to withdraw the whole or any part of his or her deposit and interest, upon giving, during banking hours, fourteen days' previous notice, and in case any notice is given and the money not accordingly withdrawn, it shall be considered a fresh deposit, and carry interest again from the succeeding 20th day of the month.

This case was twice argued (May 3) before Erie, C. J., Martin and Channell, BB., and Blackburn and Keating, JJ., who, not agreeing in opinion, directed the case to be again argued before all the judges. The case now came on accordingly.

June 7.—*Matthews* for the deft.—The indictment is framed upon the 20 & 21 Vict. c. 54. Sect. 1 enacts, "That if any person, being a trustee of any property for the benefit, either wholly or partially, of some other person, or for any public or charitable purpose, shall, with intent to defraud, convert or appropriate the same, or any part thereof, to or for his own use or purpose, or shall with intent aforesaid otherwise dispose of or destroy such property, or any part thereof, he shall be guilty of a misdemeanor." The word "trustee" in sect. 1 is narrowed by the interpretation clause (sect. 17) to mean "a trustee on some express trust created by some deed, will, or instrument in writing." And the word "property" is to denote and include not only such real and personal property as may have been the original subject of a trust, but also any real or personal property into which the same may have been converted or exchanged, and the proceeds thereof. It is contended that the deft. was not a trustee of property within that definition. First, the deft. is not a trustee created by an instrument in writing. The rules of the society are not an instrument in writing within sect. 17. The instrument in writing must be *ejusdem generis* as a "deed or will:" (*Re Lord*, 1 K. & J. 90.) Then the rules are not an instrument in writing creating a trust within the meaning of the Act. The 9 Geo. 4, c. 92, s. 2; 3 & 4 Will. 4, c. 14; and 7 &



8 Vict. c. 83, were then referred to. [COCKBURN, C. J.—Suppose, independently of these Acts, a number of persons associated together for a similar object draw up a code of rules, would they not create a trust? And if a person receives money under them and appropriates it to his own use fraudulently, would he not be liable criminally?] If the person engaged by writing to take the money and hold it under the rules, no doubt he would be liable criminally, but here the trust is not created by the instrument in writing. [ERLE, C. J.—Suppose the trust is created by will, that precedes the acceptance of the trust, and the Act makes that sufficient.] All the elements to constitute the trust should be found in the written instrument. Under these rules there is no trustee, *cestui que trust*, or trust-fund sufficient to satisfy the conditions of 20 & 21 Vict. c. 54. [BLACKBURN, J.—The statute does not say that the acceptance of the trustee should be created by writing, but only the trust.] These rules do not create a trust: here it is to be followed by the acceptance of the trust and the deposit: (Lewin on Trusts, 56.) In the next place, it is contended that there was no such express trust as alleged in the indictment. It does not appear how any one becomes a trustee, secretary, or treasurer. [WIGHTMAN, J.—Suppose a person appointed to one of these offices, and after his appointment it is said to him, "These are your rules."] The word in the statute is "created" by some deed, will, or written instrument. [MARTIN, B.—Why is not the 8th rule the creation of the trust?] The rules precede the existence of any trust, trustee, or *cestui que trust*; it is the savings bank statute that creates the trust. In the first set of counts the deft. is alleged to be a trustee of moneys for a public purpose, and it is contended that assuming a trust to exist, it is not a trust for a public purpose. In the books, public and charitable trusts are treated as synonymous: (Lewin on Trustees, p. 19.) The trust is for the benefit of the several depositors in this case, and does not fall within the known definition of a public or charitable trust: (*The Attorney-General v. Aspinall*, 2 Myl. & C. 613.) Where the property was not applicable entirely to public purposes, but also to some purposes essentially private, it was held to be rateable to the poor-rate, not being for the public advantage only: (*Reg. v. Harrogate*, 20 L. J. 25, M. C.) As secretary, the only rule which could be said to create an express trust is the fifth rule, and that has been performed by the deft. As treasurer, there is no rule which points out what he is to do. The treasurer is to keep the money in his hands until he receives an order directing him to pay the money to some person. There is no express trust as to the treasurer. As to the trustee, the only express trust is the eighth rule. [COCKBURN, C. J.—Why was not the deft. guilty of embezzlement as secretary when he paid over to himself a part only instead of all that he received? BRAMWELL, B.—In his accounts as treasurer, he says he received so much only; then it follows that, as secretary, he embezzled the amount he did not pay over to himself as treasurer.] It may be that the prisoner was indictable under the 7 & 8 Geo. 4, c. 29, s. 49, but the question is, can this indictment be sustained? (*Reg. v. Proud*, 9 Cox C. C. 22; s. c. 31 L. J. 71, M. C.) The depositors have not the rights of *cestui que trust*. The relation between them and the bank is that of debtor and creditor: (*Ree v. Mildenhall Savings Bank*, 6 A. & E. 952; *Crisp v. Binbury*, 8 Bing 394.)

June 14.—*Dowdeswell* (Pigott, Serjt. with him) for the prosecution.—The deft. was properly convicted, for he was a trustee under an express trust, created by an instrument in writing within the meaning of the 20 & 21 Vict. c. 54. The word "trustee" is used in its widest sense in sect. 1, for when the framers give a

glossary they limit the term. The deft. was a trustee, and, as long as he had funds of the depositors in his hands, he was bound to apply them for their benefit, and not to his own use. As treasurer, also, he was a trustee of the funds, especially of a savings bank: he held the cash, not as a servant, but as one of the principal members. As secretary, he was the person appointed to receive the funds, and, upon receipt, he held them as trustee for the depositors until he had paid them over. Although he might have been indicted for embezzlement, and if *Reg. v. Proud* is an authority for that proposition, still the deft. is liable upon the present indictment for holding these funds, however they came to his hands; he was liable as a trustee: (Vin. Abr. Trust, A. 1.) The prisoner was a trustee upon an express trust: (*Maddock Ch. Pr. 446.*) Express and implied trusts are terms of art well known to the law. The Statute of Frauds, 29 Car. 2, c. 3, ss. 7, 9, requires that all declarations or creations of trusts of lands, tenements, or hereditaments, and all grants and assignments of trusts, shall be in writing; and the 8th section speaks of trusts arising or resulting by implication or construction of law: (*Cooke v. Fountain*, 3 Swans. 591.) The Statute of Limitations does not run against express trusts: (3 & 4 Will. 4, c. 27, s. 25.) In the present case the trust is created by the rules, which operate as a declaration of trust. It is not necessary that the instrument creating the trust should contain within it everything which the trustee is required to do, or that it should convey the *corpus* of the trust to the trustees. Government Stock, Bank and East India Stock, and joint-stock shares are conveyed by transfer. It cannot be contended that a trustee originally appointed by the company's deed of an insurance office is not liable for the fraudulent appropriation of the existing funds because they were not conveyed to him by the deed at the time he was appointed. All that is required by the 20 & 21 Vict. c. 54, is, that the trust should be created by an instrument in writing, that it should be an express trust as contradistinguished from oral and implied or constructive trusts. No regular formal instrument is required to create a trust: (*Bayley v. Boulcourt*, 4 Russ. 345; *Gray v. Gray*, 21 L. J. 745, Ch.; Saunders on Uses and Trusts, 343.) Mere letters and memoranda are sufficient. The statute does not require the writing to be signed by the person creating the trust. A savings bank might be created at common law, and the statute merely recognises these societies as bodies regulated by certain rules, which create the trusts, and then gives them certain protections. There is nothing so peculiar in the character of a will or deed as to prevent these rules from being an instrument in writing within the meaning of the statute. Any writing may be a will, provided it contain testamentary words, and any writing may be a deed provided it has a seal affixed. These rules are of the same nature as those that govern insurance companies, corporations, and other public associations, and they are, for the purpose of the statute 20 & 21 Vict. c. 54, *ejusdem generis* as a will or deed. Next, this was a public trust. Lastly, the set of counts which allege that the deft. was a trustee of moneys for the benefit of the depositors was fully proved. Rules 4, 8 and 25 show this. [WILLES, J. referred to *Holmes v. Tindall*, H. L.]

*Mathewes* was heard in reply.

COCKBURN, C. J.—I am of opinion that this conviction was right, and that it ought to be upheld. The first question is, was the deft. a trustee within the meaning of the Act? I think that it is clear that he was a trustee. It was contended by Mr. Mathewes that he was not a trustee, though he was called a trustee in the rules of the society, and that the deft. was only liable in an action at the suit of the depositors to repay them the amount of their respective deposits

with interest. I do not concur in that argument. I think that the deft. was a trustee upon the receipt by him of the money, which he was bound to hold for the benefit of the institution until it was repaid to the depositors under the 8th rule, which creates a trust to hold the money for the benefit of the institution. I am disposed to think that this was not a trust for a charitable or public purpose within the meaning of the statute. Although a savings bank is an institution of public concern, as tending to promote thrifty habits on the part of the public, and it is desirable that the savings of the depositors therein should be protected, yet I do not think that it is a public purpose within the meaning of the Act, which appears to me to contemplate institutions such as those which are exempted by statute from liability to pay poor-rates and similar things. On the first set of counts in the indictment the prosecution therefore fails; but on the sixth and other counts, which charged the deft. as a trustee for the benefit of the depositors in the bank, I think the prisoner was properly convicted. Looking at the whole scope of the institution, it is plain that the deft. was not to hold the funds for his own individual benefit, but for the benefit of some one else. What is the meaning of the term "institution" in the 8th rule? It includes the managers, trustees, officers and depositors. The 8th rule speaks of the "institution." Although the trust-moneys, in point of law, belong to the trustees, yet within the meaning of this rule they belong to the institution—that is, as regards the deft. to the rest of the persons as distinguished from himself; therefore I think the deft. was clearly a trustee for the benefit of other persons. Then, is it an express trust? It is clear that it was the deft.'s duty to receive the moneys, and to pay them over. The treasurer's duty is plainly chalked out: he is to hold the moneys on behalf of the institution, retaining in his hands only so much as is necessary; and if the treasurer does not discharge that duty, he is guilty of a breach of trust. Therefore I think there was an express trust. The next point is, whether there was an express trust created by an instrument in writing within the meaning of the statute. To my mind it is quite clear that the trust was created by an instrument in writing, because the rules of the society give the authority to receive the money, and point out in what way there is an obligation to apply it. The trustees are to receive the moneys and invest them with the Commissioners for the Reduction of the National Debt. The same writing which empowers the trustees to receive the moneys from the depositors and hold the same, points out the purpose to which it is to be applied by them. Then, is it an instrument in writing *ejusdem generis* as a deed or will? It is said that the rules of the society are not *ejusdem generis* as a deed or will; but, for this purpose, I think they are; for if the rules authorise the receipt of the money, and declare what the trust is, they seem to me to be an instrument in writing *ejusdem generis* as a deed or will, for they have the same effect as a deed or will, whereby a trust is created. In this case, instead of executing a deed, the deft. accepts office under a set of rules which dictate his duty. We must not overlook the intention of the Act, which was to prevent the fraudulent appropriation of moneys by trustees of moneys in their hands. The object of the proviso was to prevent implied trusts from being included in the penal provisions of this Act, and it was required that there should be an express trust as distinguished from an implied one, and that it should be in writing, and not be left to oral proof. Of the moral guilt of the deft. there can be no doubt. I entertained a doubt at one time whether the deft. could be convicted, as, by the rules, the secretary was bound to pay the moneys received over to the treasurer, and the treasurer to the

trustees, and the deft. himself acted as secretary, treasurer and trustee; but now, for the reasons I have given, I am satisfied that there was full ground for saying that the finding of the jury was right, and that the deft. was a trustee within the meaning of the Act.

The rest of the Court concurred.

*Conviction affirmed.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SANDYKERS, and C. J. B. HERTLETT, Esqrs., Barristers-at-Law.

Saturday, June 28.

BELASCO (app.) v. HANNANT (resp.)

BARTON (app.) v. HANNANT (resp.)

*Refreshment Houses Act—23 & 24 Vict. c. 27, s. 32. Knowingly suffering prostitutes to assemble at and continue in and upon the premises—Sufficiency of evidence to sustain conviction.*

BELASCO v. HANNANT.

This was a case stated by a police magistrate of the metropolis, under 20 & 21 Vict. c. 43, and which raised the question for the opinion of the court whether the app. had been rightly convicted, under the 32nd section of the Refreshment Houses Act, 23 & 24 Vict. c. 27, for knowingly suffering prostitutes to assemble in and upon his premises, at No. 6, Pantons-street, Haymarket.

The facts of the case were stated by the magistrate as follows:—

"Whereas, on the 25th day of April last, Samuel Belasco, of the refreshment-house, No. 6, Pantons-street, appeared before me in this court on summons, to answer the complaint of the superintendent of the C division of police, for an offence under the 32nd section of the statute 23 & 24 Vict. c. 27, for that he, on the 20th day of April 1862, at the house No. 6, Pantons-street, in the parish of St. Martin-in-the-Fields, in the county of Middlesex, and within the metropolitan police district, being a person licensed to keep a refreshment-house at No. 6, Pantons-street aforesaid, did knowingly suffer prostitutes to assemble at and continue in and upon his said premises, &c. Having heard the case, I find that the business of the house kept by Samuel Belasco, the deft. before me, was carried on under a refreshment licence; that the ordinary usage of the deft. is to keep his house open from about midnight to four a.m., mainly for the purpose of providing refreshment for known prostitutes; that on the morning of the day in question, between the hours named, 155 prostitutes and about an equal number of men visited the house; that the attention of the deft. was called to the fact that the women present were prostitutes, and he admitted his knowledge of the fact; that during the visits of the police they (the police) saw numbers of prostitutes in the house who were not partaking of refreshment; that upon some occasions the police were kept waiting at the door, so that time was given to do away with all evidence of disorder or impropriety of conduct if any such existed; that the said prostitutes entered the house kept by said deft. either singly or in groups of prostitutes, and in the majority of cases they came out either in groups of men and prostitutes, or a man and a prostitute in pairs; and that the Haymarket, close to which the deft.'s house is situated, is one of the great centres of London prostitutes between midnight and four a.m., or thereabouts; finally, that not one of the prostitutes present was apparently needy or in distress.

"On the other hand, I find that the police discovered no trace of indecency, drunkenness, or disorder in the said house, and that it is a *bona fide* supper-house; that a considerable number of suppers were actually served on the night in question; that it did

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not appear that those prostitutes who were not seen to take refreshment tarried in the house for a longer time than would have been needful to procure refreshment, had such been their intention. The said house is a fair sample of the Haymarket supper-house used by the upper classes of prostitutes of the district.

"Upon these facts I found that the prostitutes did assemble at the said house of the deft. in furtherance of prostitution, and I convicted the deft. in the penalty of 20s.

"The question for the opinion of the court is whether, upon finding these facts, the conviction was right in point of law.

"A. A. KNOX, Metropolitan Police Magistrate.

"Police-court, Marlborough-street, May 22, 1862."

*Field* for the resp.—The conviction was under the Refreshment Houses, &c. Act, 23 & 24 Vict. c. 27, s. 32, which enacts that, "Every person licensed to keep a refreshment-house under this Act who shall (without a licence for that purpose) sell or permit, or suffer to be sold within such refreshment-house any intoxicating liquor, or shall knowingly suffer any unlawful games or gaming therein, or knowingly suffer prostitutes, thieves, or drunken and disorderly persons to assemble at or continue in or upon his premises, or do, suffer, or permit any act in contravention of his licence, shall, upon conviction thereof before two justices, pay for the first offence a fine not exceeding 40s.; for the second offence a fine not exceeding 5*l.*; and for every subsequent offence a fine not exceeding 20*l.*, or be subject to a forfeiture of his licence at the discretion of the justices before whom he shall be convicted; and in case of such forfeiture of his licence, such person shall be disqualified for the space of one year then next ensuing from obtaining a fresh licence, and such fresh licence, if obtained within the said year, shall be absolutely null and void to all intents and purposes." It is submitted that the facts proved warranted the conviction. In *Greig v. Bendeno*, 1 E. B. & E. 133, it was held, that if the justice infers from prostitutes coming to a refreshment-house, that they in fact met for purposes of prostitution or other disorderly conduct, he should, whether there has been disorderly conduct or not, convict. And in *Parker v. Green*, 5 L. T. Rep. N. S. 46; 31 L. J. 133, M. C., it being found by the magistrate that twenty-four prostitutes and fifty men remained at the bar of a public-house for an hour or more, that the women were disorderly, and some of them swearing, that at a later hour the same evening fifty prostitutes and sixty men were there, some of the prostitutes being the same as were there at the earlier part of the evening; that several of the same prostitutes were proved to have been in the same house on other evenings, and that the deft. was present on these occasions, it was held that this was sufficient evidence of knowingly permitting and suffering persons of notoriously bad character to assemble and meet together in the house contrary to the exercise licence granted under 9 Geo. 4, c. 61. On the other side it will be urged that there was no indecency, drunkenness, or disorder; but these, according to *Greig v. Bendeno*, are not necessary ingredients to the offence.

*Huddleston* (Gifford with him) for the app.—The facts found are not sufficient to render the app. liable. Sect. 32 is, "shall knowingly suffer prostitutes, thieves, or drunken or disorderly persons to assemble at or continue in or upon his premises, or do or permit any act in contravention of his licence." Now, the form of the licence does not specify anything about prostitutes. The keeper of a refreshment-house is not to exclude prostitutes so long as good order is maintained by them. [WIGHTMAN, J.—Not when they come for the purpose of refreshment merely.] The magistrate does not say that the app. knowingly suffered the prostitutes to assemble in furtherance of prostitution. It is no

offence to provide refreshments for known prostitutes. It is not found that the prostitutes were plying their trade there. [WIGHTMAN, J.—The magistrate means that.]

BARTON V. HANNANT.

This, also, was a case stated by one of the police magistrates of the metropolis for the opinion of this court, and which raised the question whether the app. had been rightly convicted of knowingly suffering prostitutes to assemble and continue upon his premises at a refreshment-room, No. 8, Leicester-square, known as "Kate Hamilton's."

The case stated that "the defendant had for some time kept his house open, under a refreshment licence, and that on the morning of the 19th April it was so kept open between the hours of 12 a.m. and 4 a.m.; that the police visited the house from half-hour to half-hour, within the limits of time named; that upon each occasion they found numbers of known prostitutes assembled in a public room in the said house; that the largest number on any of the visits so made by the police were ninety-five women, nearly all of whom were known to be prostitutes; that no signs of refreshment, saving a few soda-water bottles and coffee cups were forthcoming on any occasion; that the prostitutes were all apparently belonging to the upper class of prostitutes; that the especial attention of the deft. was called to the fact that the women present during the visits of the police were prostitutes, and he admitted his knowledge of the fact; that many of the prostitutes seen by the police in the said public room were the same who had been seen on the occasion of their former visits during the said morning; that about equal numbers of men and prostitutes were present in the said house during the said morning; that the police were in many instances kept waiting while a bell was rung, and that an interval of about two minutes elapsed before they were admitted into the said public room, and that no evidence was produced to show that any refreshment was served in a *bona fide* way throughout the night.

"On the other hand, I do not find any evidence of drunkenness, indecency, or impropriety of conduct in the persons present at said house on said day.

"On this evidence I found the said prostitutes assembled, in some instances, continued on the premises of said deft. in furtherance of prostitution, and I convicted the deft. in the penalty of 60s., it being his second offence.

"The question for the opinion of the court is, whether, upon finding these facts, the conviction was right in point of law.

"A. A. KNOX."

*Pigott*, Serjt., for the app.—There is no evidence that the app. knew that the prostitutes were there for the purposes of prostitution. It must be found that he knowingly allowed prostitutes to use his house as a house of call or plying place as it were. The word "assemble" implies being there for a like purpose.

*Field*, who appeared for the conviction in this case also, was called upon.

WIGHTMAN, J.—The question in both these cases is, not whether the magistrate was bound to convict on the facts and circumstances proved before him, but whether he might convict, and whether such circumstances and facts warranted him in so doing. The case is different in that respect from *Greig v. Bendeno*, where the question for the court was whether on certain facts the magistrate was bound to convict. Lord Campbell there said: "It is not necessary, in order to bring a case within the Act, that there should be actual disorderly conduct. The object was to prevent it as well as to suppress it, and the keeper of the shop would be liable to punishment if he encouraged or tolerated an assembling which had such a purpose in view." And Erle, J. said: "If such women come together for the purpose of prostitution,

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[Q. B.]

or if thieves come together for their unlawful purpose, the magistrate has power to convict." And Crompton, J. said: "I quite agree that upon the facts found to be proved, the magistrate was not bound to convict. He was bound to see whether the evidence satisfied him that the women came together for the purpose of prostitution or disorderly conduct. It is a pure question of fact for him; he was bound to convict if he thought they came for that purpose; and to that extent, perhaps, I should be disposed to qualify what I understood my Lord to say." In that case the court took the distinction, and held that the facts there were consistent with the parties being in the house for a lawful purpose, viz. for the purpose of refreshment merely. That seems to me to be the real point in the case. It is said that these unfortunate women must have refreshment—no one can doubt that—it would be mere cruelty to say that they were not entitled to obtain it; but the question in this case is, whether the app., under colour of keeping a refreshment-house, which was found to be a *bona fide* refreshment-house, was not really converting it into a house of call for prostitutes. It would be a great encouragement to prostitution if such houses as this were to be kept, and it were to be held that they were not within the Act. The terms of the Act are, "knowingly suffer prostitutes, &c., to assemble at or continue in or upon his premises." If this was a house where prostitutes habitually assembled, it was a question to be ascertained whether they met for the purpose of taking refreshment, or in furtherance of prostitution. In this case there was a large assemblage of prostitutes, and the landlord knew perfectly well that they were prostitutes, and from these and other circumstances proved before him the magistrate drew the inference that the landlord knew that the object of the women coming there was in furtherance of prostitution. It was a question for him to decide, and he has so found it. He finds many facts, from the whole of which he was led to the conclusion that the deft. had committed an offence within the purview of the enactment. The question for this Court is, whether there was enough proved before the magistrate to warrant the conclusion to which he came. I think that there was sufficient in both cases.

CROMPTON, J.—The magistrate has no right to send any questions of fact to this court to determine, but only questions of law, or to ask us whether the evidence is such that he might convict upon it. In this case the magistrate find the facts, draws an inference from them and says, "therefore I convict." His statement consists of two parts—first, of the facts which he found to be proved; and secondly, of the inference which he drew from them. Looking at the facts found by him, I think there was evidence in both cases on which in point of law—we have nothing to do with the policy or hardship of the enactment—the magistrate could fairly draw the inference which he did, and that the appa. had therefore committed an offence within the Act.

BLACKBURN, J.—I am of the same opinion, and think that the convictions ought to be affirmed. The magistrate has convicted the appa. of "knowingly suffering prostitutes to assemble at and continue in and upon his premises," in the very words of the enactment. I do not think that the mere fact of the women being prostitutes, or of a number of persons being thieves, would be an assembling of prostitutes or thieves within the Act; but as soon as it appears that they come in their capacity of prostitutes or thieves, and meet there as such, it would be within the Act. It is not necessary that prostitution or some act of theft should be planned at the time; but if the assembling was a sort of thieves' club, or as a house of call, that would be sufficient to bring the case within the Act. The object of the enactment was

to prevent persons assembling in the capacity of prostitutes or thieves. The magistrate, in finding that the women assembled in furtherance of prostitution, has found more than I think he need to have found. It would have been sufficient if he had found that they had assembled in the capacity of prostitutes.

Convictions affirmed.

Wednesday, July 2.

REG. v. ST. MARY, ISLINGTON.

*Poor—Relief to lunatic child above sixteen years of age—Effect on parent's removability—4 & 5 Will. 4, c. 76, s. 56.*

*Where a pauper lunatic above the age of sixteen is confined in a parish lunatic asylum, this is not relief to the parent so as to reduce the period of her residence and render her removable.*

At the general quarter sessions for the county of Middlesex, holden on the 28th Oct. 1861, on an appeal against an order of justices made on the 5th June 1861, adjudging the settlement of Sarah Wing, a pauper lunatic then confined in a lunatic asylum at Hanwell, established in and for the said county, to be in the parish of St. Mary, Islington, in the said county, and ordering the guardians of the poor and the churchwardens and overseers of the poor of the parish of St. Pancras, the amount of expenses incurred and paid in and about the examination and conveyance and for lodging, maintenance and medicine, clothing and care of Sarah Wing, incurred within twelve calendar months previous to the date thereof, and also a weekly sum for future lodging, maintenance, medicine, clothing and care of the said Sarah Wing, in the said asylum; the said court of quarter sessions confirmed the said order, subject to the opinion of the Court of Q. B. on the following

CASE.

The lunatic Sarah Wing is the lawful child of Elizabeth Wing, and was born on the 24th May 1840. She has never become emancipated, and has no other settlement than that of her mother, which is in the parish of St. Mary, Islington. The said Elizabeth Wing, on the 20th day of May 1854, being then a widow, came to reside in the parish of St. Pancras, where she continued to reside up to the present time, maintaining herself and her children as hereinafter mentioned.

On the 9th May 1855, the said Sarah Wing having become insane, was admitted into the workhouse of the parish of St. Pancras, and was, on the 9th June 1855, sent, by an order of a justice, as a pauper lunatic to a lunatic asylum, and was maintained there as a pauper lunatic until the 17th Oct. 1855, when she was discharged as cured. Upon her discharge she returned home to her mother in St. Pancras, and remained there until the 11th April 1856, when, having become again insane, she was admitted into the workhouse, and was, on the 22nd April 1856, sent by an order of a justice as a pauper lunatic to a lunatic asylum, and was maintained there as a lunatic pauper until the 5th May 1858, when she was again discharged as cured. Upon her discharge she returned home to her mother in St. Pancras, and remained there until 6th Sept. 1858, when, having become again insane, she was admitted into the workhouse, and was, on the 17th Sept. 1858, sent by an order of a justice as a pauper lunatic to a lunatic asylum, and was maintained there as a pauper lunatic until the 27th Nov. 1860, when she was again discharged. Upon her discharge she again returned to her mother in St. Pancras, and remained there until the 10th April 1861, when having become again insane, she was admitted into the workhouse, and was on the 13th April 1861 sent by an order of a justice as a pauper lunatic to a lunatic asylum, where she is now confined. On the 5th June 1861 the order now appealed against was made, adjudging the settlement of the

lunatic to be in St. Mary, Islington, and directing that parish to pay the expenses incurred in and about her conveyance to the asylum, and her maintenance therein since the 13th April. When the said Sarah Wing was admitted into the St. Pancras workhouse she was made chargeable as an inhabitant of that parish, and her admission there was made necessary because her mother was not able to keep her under proper care and control. So long as the said Sarah Wing was sane she was not in want of any parish relief, and her mother never actually received any relief on her own behalf or on behalf of the said Sarah Wing. On the trial of the appeal it was contended by the apps. that the said Sarah Wing was a person who, at the time of her being conveyed to the asylum, on the 13th April 1861, if not a lunatic, would have been exempt from removal to the parish of her settlement, by reason of the 9 & 10 Vict. c. 66, and 11 & 12 Vict. c. 111; that the mother of the said lunatic having resided for more than five years in St. Pancras was irremovable, and that no portion of the time during which the said lunatic was in the St. Pancras workhouse, or in the said lunatic asylum as aforesaid, ought to be deducted in computing the five years' residence of the mother; or at any rate that no portion of the time after the 24th May 1856, when the said Sarah Wing attained the age of sixteen, ought to be so deducted.

It was contended on behalf of the resps. that, as Sarah Wing was unemancipated, it must be taken that her mother was receiving relief during all the time the said Sarah Wing was in the workhouse and asylum, and that after deducting that time from the actual residence, the mother had not resided for five years within the meaning of the statutes when the lunatic was conveyed to the asylum on the 13th April 1861, and that the resps. ought not to maintain the lunatic under the 16 & 17 Vict. c. 97, s. 102.

The question for the opinion of the court was, whether the time during which Sarah Wing was maintained and confined in the workhouse and asylum before the 13th April 1861 ought to be deducted in computing the five years' residence of the mother. If the court should be of opinion that it ought to be deducted, then the order of the 5th June and the order of sessions was to be confirmed. If the court should be of the contrary opinion, then the orders were to be quashed on the ground of the irremovability of this Sarah Wing.

*Le Breton* in support of the order.—Relief to the lunatic daughter above sixteen was relief to the mother. The 4 & 5 Will. 4, c. 76, s. 56, *et seq.*, whether taken as a new enactment or as merely declaratory of the old law, makes no alteration in the period of emancipation; the children remain a part of the father's family until some act of emancipation takes place, and relief given to an unemancipated child is relief given to the parents. He referred to *Walton v. Spark*, *Cumberbach's Rep.* 320; *R. v. Mile End Old Town*, 4 A. & E. 196; *R. v. Shavinton-cum-Gresty*, 20 L. J. 194, M. C.; *R. v. St. Mary Arches*, Exeter, 31 L. J. 77, M. C.; *Burn's Jus.* of P. 29, ed. 4, 33 *et seq.*, *R. v. Barnsley*, 12 Q. B. 196.

*Polaud contra.*—The time during which a child sixteen years of age or less is confined in a lunatic asylum, is not to be deducted from the term of industrial residence: 9 & 10 Vict. c. 66, shows what deductions are to be made; this is not receiving relief, it is compulsory. [BLACKBURN, J.—It certainly would be hard that under such circumstances the parent can never attain to irremovability, yet such a case may have been overlooked.] After the child is sixteen years of age, relief to it is not relief to the parent. It could never be intended that a man and his family should be removed to Ireland, for instance, under the Irish Poor Law Act, because one member had been received into a lunatic asylum, so as to make it relief to the

parent, which might be deducted from his period of residence. [BLACKBURN, J.—Under the statute of Elizabeth there is an obligation cast on the grandfather to maintain the grandchild; it would be odd to say that if the grandchild was confined in a parish lunatic asylum, that therefore it would be impossible for the grandfather to obtain a *status* of irremovability.] (16 & 17 Vict. c. 97, s. 95; 4 & 5 Will. 4, c. 76, s. 58; 3 & 4 Will. 4, c. 40, s. 2.)

WIGHTMAN, J.—This case has been so ably argued, and so much research has been displayed by both gentlemen, that if there had been any decided case upon the subject, I feel sure we should have been referred to it. It appears to me, that in this case the pauper was not removeable. The case turns on the provision in the 56th section of the Poor Law Amendment Act, which says that any relief given to any child under the age of sixteen of any widow shall be considered as given to such widow. Now in the present case relief was given to a lunatic child by sending her to an asylum, and it has been said that the mother was removeable by reason of the relief given to her through her child; then the question is, whether relief given to a child who is above sixteen years of age is relief to the mother, so as to be deducted from her term of residence, and thus make the mother irremovable. The 5 & 6 Will. 4, c. 76, s. 56, seems to be a legislative exposition of what shall be considered as relief to the parent when actually given to the child, and no doubt that relief given to a child within the age of sixteen would be relief given to the father and mother; and beyond that age, therefore, I take it it would not so be, and I find no case where it has been held that relief to a lunatic child shall be considered as relief to the parent. The question was touched upon in *R. v. Barnsley*; but there the point did not arise. Looking at the statute, it seems to me that relief given to a child under these circumstances is not relief to the parent so as to make her removeable, by reason of the want of a sufficient period of residence.

CROMPTON, J.—The case depends upon the effect of the 56th section of the 4 & 5 Will. 4, c. 76, and on that enactment our decision must depend. If the time spent in the lunatic asylum by the child is to be deducted from the mother's residence therein, her irremovability is not attained. This is a legislative exposition, as my brother Wightman says; there is no case on the subject, and it is for us therefore to decide. I think, that the section in question applies only to children under the age of sixteen, and does not extend to other children.

BLACKBURN, J.—Here the lunatic pauper, more than sixteen years of age, was still part of the mother's family, and was not removeable, unless the mother was removeable; she had resided more than five years, and was therefore irremovable, unless it could be shown that she had received relief. Now this child above sixteen years of age was receiving relief as a lunatic pauper. Now, would this be considered as relief to the parent for any other purpose? 5 & 6 Will. 4, c. 76, depends on the statute of Elizabeth. Under that enactment the mother is bound to support the child, and in the same way the child is bound to support the parent and grandparent; but I do not think that it can be carried to the extent necessary here to support the resp.'s case. The time during which the lunatic pauper received relief could not have been deducted from the parent's residence before the 5 & 6 Will. 4, and if not before that, it cannot be now.

*Judgment for app.*

C. B.]

PEDDER v. THE MAYOR, ALDERMEN AND BURGESSES OF PRESTON.

[C. B.]

## COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYD, ESQrs.  
Barristers-at-Law.

Monday, June 2.

PEDDER v. THE MAYOR, ALDERMEN AND BURGESSES OF PRESTON.

*Corporation acting as managers of local board of health and baths and wash-houses—Set-off.**Where a corporation, in addition to their functions of a municipal corporation, acted as managers of baths and wash-houses and also of a local board of health, and kept at the plt.'s bank three separate accounts, each relating respectively to these separate transactions, and at the time of the bank (the plt.'s) suspending payment a sum of money was due to the bank on the account relating to the municipal affairs of the corporation, and also a like sum due from the bank to the debts in respect of the local board of health account:**Held, that the debts might set off these claims one against the other, as the plt. and debts were debtors and creditors in the separate accounts in the same right.*

This action was brought to recover the sum of 4996l. 16s. 1d. claimed by the plt., and the following case was stated for the opinion of the court by consent.

From the 1st Jan 1854 until the death of Edward Pedder, the said Edward Pedder and the plt. carried on business together as bankers in copartnership at Preston, Lancashire, under the name of Pedder and Company.

Edward Pedder died on the 21st March 1861, and the plt. continued to carry on the said business alone until the 10th April following, when he suspended payment, and presented a petition to the Court of Bankruptcy for the Manchester district, under the clauses of the Bankrupt Law Consolidation Act 1849, relating to arrangements between debtors and their creditors, under the superintendence and control of the court.

Meetings were held under the said petition, and a proposal and amended proposal were filed under the said arrangement clauses, and the amended proposal was on the 28th June 1861 approved and confirmed by the court, and in pursuance thereof a deed was prepared and executed by the plt. and by the great body of the creditors, whereby provision was made for applying the assets of the plt. under the inspection of certain inspectors appointed by and made parties to the said deed, in satisfying the claims of creditors in manner therein mentioned, and by the said deed the estate was (subject to the provisions thereof) to be administered as in bankruptcy.

Many years ago, and before either Edward Pedder or the plt. were partners in the bank, and whilst the business of the said bank was being carried on by the predecessors in business of the plt. and Edward Pedder, a banking account was opened by the said mayor, aldermen and burgesses, with the said then banking firm, which account was continued with the said bank until the formation of the said firm of Pedder and Co., and was then continued with the said firm until the death of the said Edward Pedder, and afterwards with the plt. until his said suspension.

The account was headed "Corporation of Preston" in the books of the bank and in the pass-book, in which from time to time a copy of the said banking account was written up, and which pass-book was from time to time delivered by the bank to Mr. Phillip Park, who filed the office of treasurer and steward of the said mayor, aldermen and burgesses.

The corporation of Preston, after the passing of the Baths and Wash-houses Act 1846, and for the purpose of performing their duties arising from the adoption of the said Act, kept another account with Pedder and

Co., which was headed "Corporation Baths and Wash-houses Revenue Account with the Books of the Bank," and in the pass-book, in which from time to time a copy of the said banking account was written up, and which pass-book was from time to time delivered to the said Phillip Park.

The said treasurer from time to time made payments to the bank to the credit of the said corporation of Preston account, such payments being of moneys levied as watch-rate on the township of Preston, and of rents of land, market-tolls and other income derived from property of the said mayor, aldermen and burgesses, and cheques were from time to time drawn on behalf of the said mayor, aldermen and burgesses upon the said account, and paid by the bank.

Such cheques were drawn by the said treasurer of the said mayor, aldermen and burgesses, or by Messrs. Park, Son and Garlick, the firm of surveyors, of which the said treasurer was a partner, and were exclusively in respect of salaries to officers of the said mayor, aldermen and burgesses, payments to the police force, and of other liabilities of the said mayor, aldermen and burgesses.

The said treasurer from time to time also made payments to the bank to the credit of the baths and wash-houses account, such payments being of moneys levied as baths and wash-houses rate in the townships of Preston and Fishwick, which together comprise the whole of the said borough, and cheques were from time to time drawn on behalf of the said mayor, aldermen and burgesses upon the said baths and wash-houses account and paid by the bank.

The said corporation of Preston accounts were balanced half-yearly in the said books of the bank and pass-books; no entries were made to the credit or debit of the said accounts in respect of payments to the bank by or on behalf of the local board of health hereinafter mentioned, or in respect of payments to the said local board of health or their order; the balances of the said corporation of Preston accounts were at times in favour of the bank when the balances of the accounts of the local board of health hereinafter mentioned, or one of them, were against the bank, and the balance of the said corporation of Preston accounts were at other times against the bank when the balances of the said accounts of the local board of health, or one of them, were in favour of the bank; interest was allowed to or by the bank (and introduced into the said corporation of Preston accounts) on the balances from time to time without regard to the state of the other accounts hereinafter mentioned; a higher rate of interest was taken by the bank from their customers whose accounts were in favour of the bank than was allowed to customers on balances in their favour.

The following are specimens of the forms of the cheques so drawn on the bank in respect of the said corporation of Preston accounts:—

"No. Preston Old Bank. March 28, 1861.  
(Established in 1776.)

"Messrs. Pedder and Company, pay to Joseph Gibbons or bearer forty-eight pounds 9s. 11d., on account of the corporation of Preston.

"48l. 9s. 11d. "PARK, SON and GARLICK."

"No. Preston Old Bank. Nov. 9, 1860.  
(Established in 1776.)

"Messrs. Pedder and Company, pay to Messrs. J. A. and J. Blackburn or bearer twenty-one pounds 11s. 3d. on account of the corporation of Preston baths and wash-houses.

"21l. 11s. 3d.

(Signed) "PARK, SON and GARLICK."

At the time of the said suspension of payment there was a balance on the said corporation of Preston account other than the baths and wash-houses account in favour of the plt. of 5815l. 12s. 8d.

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The said mayor, aldermen and burgesses have since that time paid to the credit of the said corporation of Preston account the sum of 818*l.* 16*s.* 7*d.*, and the balance after such payment is the said sum of 4996*l.* 16*s.* 1*d.*, which is claimed in this action by the plt., with the assent and by the direction of his said inspectors.

There was also a balance in favour of the plt. on the baths and wash-houses account of 201*l.* 16*s.* 8*d.*, which balance has been paid by the mayor, aldermen and burgesses to the plt.

The Public Health Act 1848 (11 & 12 Vict. c. 63) was by a provisional Order in Council confirmed by the Act of 13 & 14 Vict. c. 90, put in force in the borough of Preston, the district of the said borough and the district of the local board of health under the said Public Health Act being co-extensive.

The district is exclusively composed of two townships, the township of Preston and the township of Fishwick forming together the borough of Preston.

By the Public Health Act 1848, sect. 12, it is enacted that in every district exclusively consisting of the whole or part of one corporate borough, the mayor, aldermen and burgesses of such borough shall be the council of the borough within and for such district the local board of health under this Act, and such council shall exercise and execute the powers, authorities and duties of, such local board, according to the laws for the time being in force in respect to the municipal corporations in England and Wales.

By the Local Government Act 1858 (21 & 22 Vict. c. 98, s. 24) it is provided:—"Constitution of local boards.—The duty of carrying into execution this Act shall be vested in a local board, and such local board shall be (1.) incorporate boroughs, the mayor, aldermen and burgesses acting by the council, the council of the said borough as continued to perform the powers and duties vested in it by the said Public Health Act, and the Local Health Act, and the Local Government Act 1858, and other Acts amending the same."

The said local board of health have under the powers of the said Acts, in execution of their duties connected with drainage, sewerage and other matters, from time to time made and collected general rates extending over the whole of their district; also special district rates extending respectively over portions only of their district.

The local board of health some time before the 2nd March 1854 opened two banking accounts with the said bank, one of the accounts being called in the books of the bank and the pass-books the "General District Rate Account," and the other the "Special District Rate Account," the said two accounts relating to rates levied by the said local board of health. On the 2nd March 1854 the said two accounts were closed, and the balances of the same were carried to a new account then opened by the local board of health with the said bank, called the "Preston Local Board of Health Account," and which account from the month of July 1855 to the time of the plt.'s suspension of payment was headed in the books of the bank and in the pass-book containing a copy of such account, and which pass-book was from time to time delivered to an officer of the local board of health as follows: "Preston Local Board of Health, in account with Preston Old Bank."

Payments were from time to time made on behalf of the local board of health to the bank to the credit of this account, consisting of amounts received for rates levied by the said local board as aforesaid (and not being water-rates), and of other funds belonging to the said local board, and acquired by them in pursuance of the provisions of the said Acts, and payments were from time to time made by the bank and charged to the debit of this account on account of ex-

penses and liabilities incurred by the said local board in execution of the powers and duties of the said Acts.

Such payments by the bank were made on cheques signed on behalf of the said local board of health by the engineer of the said board and two members of the council.

Such cheques were of a colour different from that of the cheques drawn on the said corporation of Preston accounts, as above mentioned, and also from that of the cheques on the local board of health water account, hereinafter mentioned.

The following is a specimen of the form of the cheques so drawn on the said bank on behalf of the said local board of health on general account:—

"No. 585. March 28th, 1861.

"Preston Old Bank. General Account.

"Established in 1776.

"Messrs. Pedder and Company, pay to Mr. Richard Hoyle or order the sum of one hundred and twenty-one pounds seven shillings and five pence, for the local board of health.

"JOHN NEWTON, Engineer.

"ROBERT BENSON, Jun. } Members of the  
"JOHN GUDGEON } Council.

121*l.* 7*s.* 5*d.*"

At the time of the said suspension of payment there was a balance in favour of and due to the said local board of health on the said general account of 1719*l.* 5*s.* 6*d.* In the year 1853 the Preston Waterworks Act 1853, 16 & 17 Vict. (Local and Personal) c. cxlviii., was passed, and the local board of health acquired the waterworks therein mentioned under the powers thereby conferred.

In pursuance of the provisions of that Act, the said local board of health levied water-rates over the whole of the said borough; and, under sect. 54 of the same Act, kept in their books a separate and distinct water account, and an account was kept with the bank from the year 1854 to the time of the plt.'s suspension of payment, and from the year 1855 to the time of the said suspension, was headed in the books of the said bank and in the pass-book containing a copy of such accounts, and which pass-book was from time to time delivered to the local board of health of health as follows: "The Preston Local Board of Health in account with the Preston Old Bank."

Payments were from time to time made on behalf of the local board of health to the bank to the credit of the said local board of health water account, and payments were from time to time made by the bank on cheques drawn upon and debited to the said water account. Such cheques were drawn in respect of liabilities of the said local board of health incurred in connection with the making and maintenance of the said waterworks and the supply of water to their district.

The cheques upon which such payments were made were signed on behalf of the local board of health by the engineer of the said local board and two members of the council.

The following is a specimen of the form of cheques so drawn on the said bank on behalf of the said local board of health on water account:—

"No. 497. Preston Old Bank. March 28, 1861.

Water Account. Established 1776.

"Messrs. Pedder and Company, pay to Mr. Richard Hoyle or order the sum of twenty-five pounds thirteen shillings and sixpence for the local board of health.

"JOHN NEWTON, Engineer.

"ROBT. BENSON, Junior } Members of  
"JOHN GUDGEON, } Council."

"25*l.* 13*s.* 6*d.*"

At the time of the said suspension of payment there was a balance in favour of and due to the said local board of health on the said water account 3277*l.* 10*s.* 7*d.*

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The said general account and water account were respectively balanced half-yearly in the books of the bank and in the pass-books, but for the purpose of ascertaining whether any and what interest was to be allowed by or to the bank, the said board of health general account and local board of health water account were treated as one account.

The treasurer of the mayor, aldermen and burgesses did not draw upon or make payments to the credit of the said local board of health general account and local board of health water account, or either of them, or in any way exercise control over either of the same.

The meetings of the council are called on by notice signed by the mayor, and by one summons from the town-clerk.

The summonses are signed in the following form:—"Robert Ascroft, town-clerk, and clerk to the local board of health," and specify all the business proposed to be transacted at the meeting, whether relating to corporation or local board business, but distinguishing the one business from the other.

At the council meetings, so called, the business both of the corporation and local board is transacted in the order mentioned in such summonses.

The minutes and accounts of the corporation are kept in separate books from those of the local board of health.

The minute-books in each case are headed as follows:—

"Borough of Preston, in the county of Lancaster.—At a meeting of the council of the said borough held, &c."

And in each case the proceedings are signed by the mayor, and published in one book.

One finance committee is appointed on the 9th Nov. in each year, which manages the financial matters, both of the corporation and local board, and their proceedings are entered in one book.

The accounts of the mayor, aldermen and burgesses are audited by a person appointed by the mayor as auditor, under the 5 & 6 Will. 4, c. 76, s. 93, and by two persons elected auditors under same statute, sect. 37; and on being audited are signed as follows:—

"ROBERT PARKER,  
"HENRY JENNINGS, } Auditors."  
"J. F. HIGGINS,

The accounts of the local board of health are audited under the Public Health Act 1848, s. 122, and the Local Government Act 1858, s. 60, and are audited by the same three auditors, and on being audited are signed by such three auditors.

The said local board of health have, under the powers of the said Public Health Act and Local Government Act, borrowed for the purposes of main drainage within the said township of Preston large sums upon mortgage of the special district rates of the said township, and which sums are still due.

The said local board have also, under the powers of the said Public Health and Local Government Acts, and the said Waterworks Act, borrowed large sums on the security of the said rents, rates, and works mentioned in the last-mentioned Act, and which last-mentioned sums are still due.

The mayor, aldermen and burgesses are indebted to various creditors, some of them by specialty, some by simple contract; but none of such creditors have any security for their debts over the said general and special district rates, and water rents and rates and waterworks, or any part thereof.

The said mayor, aldermen and burgesses claim to set off against the said balance of 4996*l.* 1*s.* 1*d.* (which balance is not otherwise disputed by the said mayor, aldermen and burgesses) the said sums of 179*l.* 5*s.* 6*d.* and 3277*l.* 10*s.* 7*d.*, the said balance of

the said local board of health general account and local board of health water account.

The said Preston Waterworks Act 1853 accompanies this case, and may be referred to.

It has been agreed between the parties that all amendments, if any, in accordance with the real facts which the court may think ought to be made in order to enable them to decide the matters in question between the parties shall be made accordingly, and that the court shall have the power of drawing all inferences of facts which a jury ought properly to draw.

The question for the opinion of the court is, whether the debts are entitled to set off the said sums sought to be set off, or any part of the same.

*S. Temple* (*Aspland* with him) for the plt.—The debts can have no defence to this action by way of set-off. They were a distinct body from the local board of health, and cannot set off a debt due to the latter against a debt due by them in their municipal capacity. The assets of the two bodies are distinct, and so are their liabilities; and it would be interfering with the rights of the creditors to allow this set-off, they having contracted with reference to the state of the separate accounts. If these debts could be set off at law, they could not in equity, as the effect of the set-off is to apply the funds of the local board of health to the payment of the municipal debts of the corporation, which would be a fraud on the local board of health. He cited 11 & 12 Vict. c. 63, ss. 12, 86, 99; 5 & 6 Will. 4, c. 76, ss. 65, 76, 92; *Gale v. Luttrell*, 1 Y. & J. 180.

*Mellish*, Q.C. for the debts.

*ERLE*, C.J.—I am of opinion that our judgment must be for the debts. The assignees of the bankrupt have sued the municipal corporation for a debt of 5000*l.*, and the corporation claims to set-off a debt due from the plt. to the corporation. There is no doubt that the corporation owes this debt, and that the debt claimed to be set off is also due to them. Ordinarily speaking, therefore, this is a case in which the debts could be set off. But it has been said, and this has been the grand point of discussion in this case, that the corporation of Preston, in fact, fills several capacities. Three such capacities have been put forward, their ordinary municipal capacity, that of local board of health, and that of managers of baths and wash-houses, and it is contended that the municipal corporation is distinct from that body in their capacity of local board of health, as an individual's ordinary capacity is distinct from his capacity of executor; in other words, that these debts were due from and to the corporation in different rights. It is clear to me, however, that the corporation of Preston is debtor and creditor in both cases, and is in contemplation of law one and the same person in both cases. No doubt cases might be put in which it would be very unjust that the corporation should take funds belonging to the local board of health and apply them to municipal purposes; and perhaps, if the effect of the set-off was to do this, this might be a good equitable objection to the set-off being allowed. But it is not necessary to go into that, because I think that this objection is put forward nominally on behalf of the local board of health, but really in order to sacrifice their interests to those of the claimants on the estate of the bankrupt. I think, therefore, the debts are entitled in law to set off this debt against the debt claimed by the plt., and I see no reason whatever why in equity he should be prevented doing so.

*WILLIAMS*, J.—I am of the same opinion. The local board of health are not a corporation, or capable of being proprietors of money; all their property is vested in the debts, and the effect of the debts opening an account with the bank upon an account headed



[Ex.]

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[Ex.]

"Local Board of Health," is simply to constitute a loan from the debts to the bank. If that money had to be recovered in an action, the debts would have to bring the action, and instead of doing that they may, under the statute, set it off. These are mutual debts between the bank and the corporation in their ordinary capacity. If the corporation were to declare in an action against the bank, they would declare in the ordinary form, and not in any special character.

WILLES, J.—I am of the same opinion.

BYLES, J.—As soon as it appeared that Mr. Mellish appeared both for the local board of health and the debts, all pretence for interference on equitable grounds was at an end, because a court of equity would only interfere where a party appeared and asserted that his rights were in peril. The question is therefore simply an ordinary one of set-off, and on that I am not indisposed to concur in the opinion of the rest of the court. I only hope that I am not too much influenced in so doing by the consideration that it is that which is demanded by the real justice of the case.

*Judgment for debts.*

### COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

*Monday, June 9.*

FREDERICKS (app.) v. HOWIE (resp.)

*Booth, show, or travelling theatre at a fair—Not a tenement within meaning of Metropolitan Police Act (2 & 3 Vict. c. 47, s. 46).*

*A booth or show consisting of two caravans or wagons on wheels temporarily staked to the ground and used as a theatre (into which admission was obtained by payment of 3d. each person) at fairs by strolling players is not "a house or other tenement for the purpose of being used as an unlicensed theatre" within the meaning of the 46th section of the Metropolitan Police Act (2 & 3 Vict. c. 47), and therefore the manager of such a booth or show is not liable to the penalty imposed by that section on persons keeping, using, or knowingly letting any house or other tenement for the purpose of being used as an unlicensed theatre.*

This was a case stated for the opinion of the court under the 20 & 21 Vict. c. 40, by John Gurney Fry and Nat. Powell, Esqrs., two of her Majesty's justices of the peace for the county of Essex.

On the 11th Nov. 1861, Howie, the resp., and who is a superintendent of the Metropolitan Police Force, brought before the said two justices, then and there acting in and for the said county of Essex, sitting together in petty session at Stratford, in the county of Essex, and within the metropolitan police district, the above-named app., and charged him that he had, on the 2nd Nov. 1861, at the parish of Dorking, in the county of Essex, and within the metropolitan police district aforesaid, been found performing in a certain tenement used as an unlicensed theatre, contrary to the statute in that case made and provided.

On the 11th Nov. 1861 the information or charge came on to be heard before us the said J. G. Fry and N. Powell, Esqrs., as such justices as aforesaid, sitting together in petty sessions at Stratford as aforesaid, when both parties appeared before us, and we then and there heard and determined the said information or charge. The said information or charge arises under the statute passed in the session of Parliament holden in the second and third years of the reign of her Majesty Queen Victoria (c. 47), for better improving the police in and near the metropolis, and under the 46th section of the said statute, by which it is enacted "that it shall be lawful for the Commissioners of Police, by order in writing, to authorise any

superintendent belonging to the metropolitan police, with such constables as he may think necessary, to enter into any house or room kept or used within the said district for stage plays or dramatic entertainments, into which admission is obtained by payment of money, and which is not a licensed theatre at any time, when the same shall be open for the reception of persons resorting thereto, and to take into custody all persons found therein without lawful excuse; and every person keeping, using, or knowingly letting any house, or other tenement, for the purpose of being used as an unlicensed theatre, shall be liable to a penalty not more than 20*l.*, or, in the discretion of the magistrates, may be committed to the house of correction, with or without hard labour, for a time not more than two calendar months; and every person performing or being therein without lawful excuse, shall be liable to a penalty not more than 40*s.*, and a conviction under this Act for this offence shall not exempt the owner, keeper, or manager of any such house, room, or tenement, from any penalty or penal consequences to which he may be liable for keeping a disorderly house, or for the nuisance thereby occasioned;" and it was contended before us on behalf of the app., as hereinafter mentioned, that the temporary theatre or building, or booth, hereinafter described, was not a tenement within the meaning of that provision. Upon hearing the said information or charge, and the evidence and arguments which each of the said parties had to lay before us it appeared to us that it was proved or admitted, and we were of opinion, that the said D. Howie was duly authorised by an order in writing of the Commissioners of the Metropolitan Police to enter with such constables as he should think necessary an unlicensed theatre situate on premises known as the Peto Arms, Dorking, in the metropolitan police district, and that with such authority and accompanied by several constables he proceeded on the evening of Saturday, 2nd Nov. 1861, at about eight o'clock, to a temporary and portable theatre or booth hereinafter described, where he saw the said F. Fredericks the app. within the said temporary and portable theatre or booth, and that the persons who were then on the stage were, together with the said F. Fredericks, then and there taken into custody. That the said F. Fredericks was then and there the owner, keeper and manager of the said temporary and portable theatre or booth, and the manager of a company of strolling players, who were with others then and there dressed in theatrical costume and acting a stage play or theatrical performance. That the said temporary and portable theatre or booth was not a licensed theatre, that it was then and there temporarily placed and situate within the Metropolitan Police District, that it was kept and used by the said F. Fredericks as an unlicensed theatre, and for stage plays or dramatic entertainments, and into which admission was obtained by payment of money, namely, 3*d.* for each person; that as regards the construction thereof the said portable and temporary theatre or booth consisted of two caravans or wagons, drawn from place to place by horses, and when the said two caravans or wagons were joined together it formed a temporary structure in size about twenty yards long by nine yards wide, and about eight yards high; that it had a boarded front as high as the top, and that the boards on the sides and end reached about two yards high; that the remainder of the sides and end, and also the roof, were of canvas, supported by poles; that there were several posts in the ground around the outside; that the door through which persons were admitted was of wood, that inside there were seats erected to accommodate about 300 persons, and that there was a stage and curtains to let down. That the said temporary theatre or booth was put together in the following manner: The said two caravans, which stand upon

[Ex.]

FREDERICKS v. HOWIE.

[Ex.]

wheels, were placed front and back; the stage was formed by two flaps, which fall down and form the level floor, the sides and back were formed by uprights, and fixed by screw bolts and fastened to the vans; the whole of the materials were portable, capable of being taken to pieces and readjusted; that it required about four hours to put it up, and two and a half hours to take down; that the materials consisted of two caravans, and materials brought in the said caravans, and taken away in like manner. And upon the whole it appeared to us that it was proved, and we were of opinion that, assuming the said temporary and portable theatre or booth to be a tenement within the meaning of the said 46th section above mentioned, the same was such an unlicensed theatre as is mentioned in the said 46th section, and that the app. was guilty of performing and being therein without lawful excuse. It was contended on behalf of the said app. that the said temporary and portable theatre did not come within the meaning of the said 46th section, on the ground that the same was not a house or tenement within the meaning of that section; but we were of opinion that the said temporary and portable theatre or booth did come within the said word tenement in each 46th section, and this, together with the facts above stated, as proved, were the grounds of our determination in the case. And we therefore convicted the app. of the said offence, and did adjudge the said F. Fredericks the elder to forfeit and pay the sum of £1, together with the costs. Whereupon the said app. did, pursuant to the first above-mentioned statute, within three days after the said determination, duly apply, in writing, to us the said justices, to state and sign a case setting forth the facts, and the grounds of our determination, for the opinion thereon of the said Court of Exchequer of Pleas; and did duly enter into a recognisance to prosecute, without delay, such appeal, and to submit to the judgment of the said Court of Exchequer of Pleas, and pay such costs as may be awarded by the same court, as required by the said statute, in that behalf. And therefore we the said justices do hereby, in pursuance of the said statute, state and sign the case accordingly. And it appears to us, and we humbly submit to the said court, that the question of law arising upon this case is, whether the said temporary and portable theatre or booth was or was not a tenement within the said 46th section of the said Act of Parliament. And we further submit, that, if the opinion of the said court be in the negative upon the said question, the said conviction should be reversed; if otherwise that the said conviction should be affirmed. Given under our hands the 15th March 1861.

J. G. FRY,

N. POWELL.

**App.'s points.**—The app. will contend on the hearing of this appeal that the temporary and portable structure mentioned in the case is not a tenement within the meaning of the 2 & 3 Vict. c. 47, s. 46; that the word "tenement" has a known legal meaning, and must be taken to have that sense in the above enactment, and that the structure in question is not within its meaning.

**Resp.'s points.**—That the word "tenement" is of large and extensive meaning, signifying *inter alia* anything used as a dwelling-house or place of habitation, consequently the said portable structure having been used for such purposes must be considered as a tenement, and thereby came within the 2 & 3 Vict. c. 47, s. 46; that the said portable structure was also a room, and consequently came within the said section of the statute.

G. Browne appeared for the resp.—This was a temporary booth or theatre, a travelling show, and was taken to the ground on which it stood. By the Metropolitan Police Act, 2 & 3 Vict. c. 47, s. 46, power is given to the Commissioners of Police to authorise

rise a superintendent belonging to the metropolitan police to enter unlicensed theatres and take away persons found there, and it provides that every person keeping, using, or knowingly letting any house or other tenement for the purpose of being used as an unlicensed theatre, shall be liable to a penalty not more than 20*l.*, or may be committed for a period of not more than two months, and every person performing or being therein without lawful excuse, shall be liable to a penalty not more than 40*s.* [BRAMWELL, B.—The question is, whether this booth was a "tenement" within the meaning of the Act; could it not be distrained?] No; it was fixed to the ground. *Davys v. Douglas*, 28 L. J. 193, M. C., is distinguishable from this case. It was there held by this court that a booth used as a theatre by strolling players was not "a house or other place of public resort for the public performance of stage plays" within the meaning of the 6 & 7 Vict. c. 68, s. 2 (the Act for regulating theatres); but this is under the Metropolitan Police Act. [MARTIN, B. referred to 2 & 3 Vict. c. 47, s. 38, as explaining the 46th section; and to Cook Litt. 20*a*, as to the definition of "tenement," which signifies properly a house or homestead, but more largely comprehends all corporeal inheritances holden of another; and to 2 Lill. Abr. 566. POLLOCK, C.B. referred to Tomlin's Law Dict. tit. "Tenement." BRAMWELL, B.—I can distinguish this case, Mr. Browne, from the one you cited; but certainly not in your favour.]

*Poland* for the app., was not called upon.

MARTIN, B.—This booth or show was simply a moveable chattel; in fact, it was nothing more than a moveable cart, and unless in use it would be as distrainable as any other chattel by the landlord. The 38th section of the 2 & 3 Vict. c. 47, says that the business and amusements of all fairs holden within the metropolitan police district shall cease at eleven o'clock in the evening, and not begin earlier than six in the morning; and that if any house, room, booth, standing, tent, caravan, waggon, or other place shall, during the fair, be open within those hours, a constable may take into custody the manager and every person being therein not quitting on being ordered, and the manager may be subjected to a penalty of not more than 5*l.*, &c.; but the 46th section refers only to "any house or room," omitting the words "booth, standing, tent, caravan, waggon, or other place," altogether from that section. It is very well known that persons do go to fairs with these kind of carts or booths, and my own impression is, that these latter words were intentionally omitted from the 46th section of the Act by the Legislature. This is a penal clause of the Act of Parliament, and we ought to see clearly that an offence has been committed, and what the offence committed is, before we subject any one to its consequences. I am of opinion that this is not within the meaning of the Act of Parliament, and that our judgment must be for the resp.

BRAMWELL, B.—The matter is so clear that nothing further need be said about it.

CHANNELL, B.—Construing the 46th section of the 2 & 3 Vict. c. 47, by the light of the 38th section, I think this booth was not a "tenement" within the meaning of the 46th section.

*Judgment reversed and conviction quashed.*

Attorneys for the app., Messrs. Ody and Paddison, 3, New Bowell-court.

**V. C. KINDERSLEY'S COURT.**

Reported by JOSHUA METCALFE, Esq., Barrister-at-Law.

June 2 and 3.

**THE GUARDIANS OF THE POOR OF THE CITY OF CANTERBURY v. THE MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF CANTERBURY.**

*Charity—Poor chargeable to the parish—Jurisdiction.*  
*By the 1 Geo. 2, c. 30, it was enacted that there should be a corporation of the city of Canterbury, to be called Guardians of the Poor, who should manage and govern certain lands, &c., for the benefit, maintenance and employment of the poor of the said city, and that the guardians should give a bond to provide for, clothe, educate and maintain sixteen poor boys, who were to be nominated and appointed by the mayor and corporation of the city of Canterbury. A boy having been nominated to the school who was not receiving parish relief, the guardians refused to admit him. The mayor and corporation having brought an action on the bond the guardians filed a bill for an injunction to restrain the action, which was granted on judgment being given in the usual way :*

*Held, that the municipal corporation were not obliged, in selecting objects, to limit themselves to persons requiring parish relief, or the children of such persons :*

*Held also, that although the question might incidentally have been decided by an action, yet, supposing the plts. at law to be right, that would not have admitted the boy, but only recovered a sum of money ; a court of equity, therefore, was the better tribunal to try the question.*

The facts of the case in this suit appear in his Honour's judgment below, so that a short statement here will suffice.

The bill was filed for the purpose of putting a construction upon an Act of Parliament, 1 Geo. 2, c. 20, for erecting a workhouse at Canterbury, for employing and maintaining the poor there, and for better lighting the streets of the city. This Act vested certain charity property in the guardians of the poor of the city, subject to the right of nomination of sixteen poor boys by the defts. the mayor and corporation of the city.

The charity in question, formerly called the Hospital for Poor Priests, and subsequently the Blue-coat School, was founded by the Archdeacon of Canterbury in 1240, for the reception of poor priests and other unbeneficed clergy unable from age and infirmity to discharge their clerical duties. This hospital escaped the general dissolution and suppression of religious houses and monasteries during the reign of Henry VIII. It was afterwards surrendered to Queen Elizabeth, who granted it to the mayor and corporation, and thereupon the poor priests and clerks were expelled. Since that period up to the time of the passing of the above-named Act, it was the practice to give the benefit of the charity to various objects—sometimes the sons of workmen, sometimes to boys characterised as fit objects of charity, and sometimes to the children of simply poor persons. In one case the father of the boy was called an innkeeper, and it was stated that the poor boys of the school were to be apprenticed, after a fixed age, at a fee of a certain amount.

In 1727-8 the 1 Geo. 2, c. 30, was passed (and upon this Act the chief question turned), entitled "An Act for erecting a workhouse in the city of Canterbury, for employing and maintaining the poor there, and for better lighting the streets of the said city," containing various enactments with respect to the maintenance of the poor, and the maintenance and employment of the school and hospital. The income of the charity, which at one time amounted to 100*l.* a-year, and the expenditure to 56*l.*

now reached the sum of 600*l.* a-year, and disputes having arisen as to the meaning of the words "poor boys," the question was raised by the nomination of Edward Godfrey Trotman to the school, whom the plts. refused to admit to the benefit of the charity on the ground that he was not chargeable to the parish, or the child of persons who were.

It appeared that under the Act of Parliament the plts. had given a bond for 1000*l.*, whereby they were bound to admit a nominee of the defts. Upon this bond the defts. brought an action, upon which the plts. filed their bill to restrain them, but the action was stayed by an order made in September. The plts. being advised that they had no legal defence applied to the Poor Law Commissioners on the question whether the proper course was to apply to this court, who expressed it to be their opinion that it was, and accordingly this bill was filed against the defts. and the Attorney-General, and an injunction obtained, judgment being given in the action to be dealt with as the court should think fit in the usual way.

The cause now came on upon motion for decree, the question being, whether the school was restricted to poor boys chargeable to the parish or not.

Baily, Q.C. and Taylor appeared for the plts.

Glass, Q.C. and Plummer for the defts.

Wickens for the Attorney-General.

Baily, Q.C. in reply.

**THE VICE-CHANCELLOR.**—In this case the municipal corporation of Canterbury, having the power and right of nomination of boys to be placed in a certain school which is kept up by the guardians of the poor of Canterbury, the question has arisen whether, in making a selection, the mayor and corporation of Canterbury ought to select from a particular class of boys, or whether, provided they are poor, they are obliged to make a selection from those who are actually receiving parish relief. That question has been raised in a manner which, at first sight, one would be almost disposed to regret, though it appears to me no practical inconvenience has arisen from the way in which it has been presented to the court. It comes before the court in the shape of a bill on the part of the guardians of the poor of Canterbury, to restrain the municipal corporation from proceeding in an action which has been commenced upon a bond given by the guardians of the poor to the municipal corporation, the condition being for the admission of those boys selected and appointed by the municipal corporation. At first sight that would appear to be a very convenient mode of dealing with the matter, but when I look upon and consider the ground which the plts. have taken, it appears to me that this court is bound to give an opinion upon the question which has been raised, namely, as to the best mode of administering a charity. Now, the points for discussion, and the decision of the court, would seem to resolve themselves into two heads. The first is this : It is insisted on the part of the defts., that the question which the court is asked to decide upon is one which can be quite as well decided by a court of law, and that it is simply a purely legal question, which arises in the action upon the bond, and that therefore this court ought not to entertain the suit, but ought at once to dismiss the bill. That is one head. The other is the general question which might arise either in this court or in a court of law, whether there is any particular limit, and what that limit is as to the class of persons from whom the municipal corporation are to select the objects of this educational charity, consisting of a school for the maintenance and education of poor boys. Now, with regard to the first question, the matter appears to me to stand thus : By the Act of Geo. 2, on which a great deal of this question turns, the guardians of the poor of Canterbury were, to maintain and clothe sixteen poor boys of the city of Canterbury, and the

objects of the charity were to be appointed by the municipal corporation of the city. The corporation of the guardians who were to keep up this school are required by the Act of Parliament to give a bond to the municipal corporation that they will receive the children appointed by the municipal corporation in pursuance of the Act, and such bond was accordingly given, and it is upon that bond that the municipal corporation has brought an action, which this bill seeks to restrain. Now, it appears to me that that bond is so framed that the whole of the questions raised may now be decided by this court; that this court is capable of, and may decide upon the action. Of course, so far as the bill asks for a scheme, that would not be within the capacity of a court of law; but so far as relates to the question upon which the matter technically turns, namely, whether the individual Trotman, nominated by the municipal corporation, is a fit and proper object to be so nominated, the question really would arise on the action, and every matter which this court could take into consideration might be taken into consideration in trying the action; but, supposing the plts. to be right in their views of the case, and that they are not bound as the other corporation considers that they ought to be, in their selection of objects for the charity, the result of the action would be, not that they were not right in making their selection from persons chargeable to the parish, but the result would be, that the plts. in the action, the municipal corporation, would recover the 1000*l.* mentioned in the bond, and although this would determine the abstract question, it would not benefit the boy in the slightest degree. It has been suggested they might give the boy a compensation, but this would not accomplish what is the principal object, namely, to put the boy into the school, and the effect would be, that a certain class of ratepayers would be liable to be assessed by the corporation of guardians, who would be obliged by a rate to provide for the money recovered and costs, in order to pay them to the municipal corporation in aid of a class of persons whom they are entitled to assess; and although this class of persons who are liable to pay their proportion of the 1000*l.* recovered might not be entirely the same as the class who are liable, the great mass of persons forming these two classes are the same, and might therefore be both liable to pay and receive the benefit of the payment; and therefore I am of opinion that that would be a most unsatisfactory mode of disposing of the matter. At the same time, there is no doubt the Legislature, by the Act of Geo. 2, did give to the municipal corporation the mode of redress they adopted to make the other corporation do that which the Act of Parliament intended should be done. It appears to me therefore, conceding as I do to the municipal corporation that the whole matter was competent for a court of law to deal with, yet still I think the mode of proceeding by action is not the mode by which a question of this sort can be most satisfactorily settled. The Legislature has given this power to carry out the objects of the school; and, as this action would not do that, except incidentally, and not benefit Trotman, it appears to me to be right that the matter should be brought before this court, and that this court should express an opinion upon the main question that is raised—namely, ought the municipal corporation, in selecting objects, to confine themselves to that class of persons who are either themselves poor boys, requiring poor-law relief, or the children of persons requiring it? If so, Trotman is not a proper object; if they are not, he is. It appears that, in the nineteenth year of the reign of Queen Elizabeth, this hospital having escaped the measures taken for the suppression and dissolution of religious houses, owing to such dissolution, that idle and lazy class of persons who were accustomed to be the recipients of

bounty at the doors of those institutions would have to be got rid of, and one portion of the machinery essential for that purpose was a house of correction, for there were a great many persons constantly requiring not only maintenance but punishment, and, therefore, from the earliest period, it would appear the House of Correction was considered a very essential thing in a town or in a parish, with a view to the curbing of a class which really had been brought up in habits of indolence by the religious houses. The corporation of the city evidently desired, with a view to assist in some shape in dealing with the question, to possess this hospital, with its resources. With respect to what would be for the benefit of the poor, there were no such provisions as to parochial assessments as at present, but it was a great object to find the raw material whereon to set people to work, and then came the surrender to Queen Elizabeth of the grant by her. In this grant no trust whatever is imposed upon the corporation; the grant is made entirely to the use of the corporation, leaving them to deal with the property in any way they should think fit. Previously to this, the corporation had ordered a cess or tax to be made on the inhabitants to raise money for the purpose of obtaining this grant, and they raised 50*l.*, but whether that money was paid to the Queen or to the patron and ordinary of the hospital does not appear, or whether it went in expenses and fees to the persons subordinate to Crown does not appear; but, at all events, it was bought with money levied on the inhabitants, and intended for their benefit. The object was to meet a difficulty with respect to the poor; but having got it, what were they to do with it? It might have been a question whether they were bound to apply it for the poor, but what did they do up to the passing of the Act of Geo. 2? It having been dealt with since partly as a workhouse. We have had entries of three periods, entries between the time of the grant of Elizabeth and the year 1665, and then of a second period up to the date of 1727 or 1728, the time of the passing of the Act of Parliament of Geo. 2, and it appears to me there is no indication of this building having been used as a receptacle for the poor. We have considerable reference to the "poor boys" in this hospital, but what is very remarkable is this, that if it was intended for and was used by the corporation for the purpose of a workhouse for the poor, that you never find in any of the extracts of the reception into the hospital of any female. Now of course, if it were a general receptacle for the poor it would be for the reception of the females as well as the males, but we do not find the reception of any female into the hospital, or an adult male. It appears that during the period after the grant of Elizabeth, and between that and the Act of Geo. 2, the corporation, whether with particular reference to the revenues of the hospital or with a more general reference to their own revenues, were from time to time making some provision for setting the poor at work. We find, for example, in exhibit marked A, entries of orders to this corporation to purchase cards and wheels and instruments by which hemp or flax or other rough material is to be worked by the poor; but it appears to me there is no indication that was for setting the poor to work in this hospital. In one instance it was clearly not so, it was to give the people work at their own houses and in their own parishes, and I do not find any evidence that there was a general receptacle there of the poor into this hospital for the purpose of being maintained. It appears that one purpose to which this building and the revenues of this property were applied was the maintenance of a school—whether originally for a limited number of boys or not I do not know—as

all events, sixteen boys having been admitted, became the recipients of the bounty of the hospital; but they were not admitted into the hospital until they were scholars. I see no single instance of any adult person being admitted. There is no indication of any but boys being admitted during the periods I have mentioned as recipients of the bounty of the charity, and of being received into the building. Of course there were persons who received relief out of the building, but I see no instance of any adult male, or of any female being received into the hospital. Now, I find among the orders and documents in exhibit A, an order under the date of 20th April 1858, in these terms:—"It is ordered by this court that Mr. Alderman Lode, Mr. Chamberlain, Mr. Alderman Knight, Mr. Moud, Mr. Fry, and Mr. Woollett, or any three of them, two being aldermen, shall, as a committee of this house, take the accounts of Mr. Alderman Frayman, now master of the hospital, and that they inform themselves what the yearly revenue of the said hospital, doth amount unto, and also what the yearly charge for the maintenance of the poor boys there, and the master's allowance for looking unto the said boys, and other duties and disbursements touching the said hospital do, arise and amount to one year with another, and to report the same to the court as soon as they can." I advert to that in order to show the object seems to be a general inquiry into the receipts and payments made merely in respect of the hospital, and what do they speak of as the objects of disbursement? They speak of it as the yearly charge of the "poor boys." There is nothing mentioned specifically but what relates to "poor boys." That is a strong inference that the general poor were not there, and that if there were boys there, they were boys that were in the school; they were boys and not adults, and not females. Then we find in the next entry the subject of the report in answer to that, and the entry is this:—"19th May, 1658.—The committee appointed to take the accounts of the Hospital of Poor Priests in this city. That there is in the hands of Mr. Frayman, now master of the said hospital, the sum of 18*l*. 4*s*., and that there is arrears of Mr. Colepepper's rent the sum of 40*s*., and of Mr. Oxenden's rent the sum of 6*l*. 10*s*.; and further, they report that the whole yearly revenue of the said hospital amounts to 102*l*. 3*s*. 4*d*., and that the certain yearly charge of the said hospital is 56*l*. 18*s*. 9*d*., besides the casual and incidental charges of clothing the poor boys, and other incidental charges." Now, putting that with the terms of the reference by this court of inquiry, it appears to me, on these and the other words which I have mentioned, that during the period of the grant of Elizabeth and the Act of Geo. 2, the municipal corporation exercised their own discretion as to the application of this property, and that they exercised it with a view for the benefit of the poor, either directly or indirectly; and moreover we find that the main purpose to which the revenues were directed was the maintenance of the school for poor boys. It appears the revenue exceeded the fixed expenditure by nearly 50*l*. per annum, and that the funds of the hospital were received by the corporation and indiscriminately used with their own revenues. Now, with regard to the class of persons from which during this period the "poor boys" were taken, and who were put into the school, it appears to me the fair inference to be drawn from all the circumstances is, that boys were selected at the discretion of the corporation from those who were poor persons, or the children of poor persons, without reference to the question whether they were actually chargeable to their parishes, or were receiving parochial relief, or had ever done so. I think there are many instances to that effect. [Here his Honour referred to a number of entries of orders occurring

between the period of the grant of Elizabeth and the Act of Geo. 2, and said that from them he drew the conclusion that this building was not used as a common receptacle of the poor or for the purpose of the poor being set to work there.] Having arrived at the date of the Act of Geo. 2, let us see what this Act in its recital states with regard to the employment of their property. In the 13th section we have this recital:—"Whereas, Elizabeth, Queen of England, by her letters patent under the Great Seal of England, bearing date at Westminster, the 5th day of July, in the 17th year of her reign, did grant unto the mayor and commonalty of the said city of Canterbury and their successors for ever, all that the Hospital of Poor Priests, which said hospital, lands, tenements, hereditaments and other the premises, have been ever since held and enjoyed by the said mayor and commonalty for the time being, and have been by them made use of, and the rents and profits applied and disposed of towards the maintenance and lodging of several poor boys of the said city, commonly called blue-coat boys, and part of the said hospital and buildings thereto have been constantly made use of for a house of correction in the said city, and the same is now commonly called or known by the name of the Bridewell." Now it will be observed that the only purposes mentioned are the maintenance and lodging of the blue-coat boys and the maintenance of the house of correction, if that is for the poor. There is not anything besides; those are the only two purposes. Surely the recital alone is a sufficient indication that this hospital was not used as a receptacle for the poor, except so far as part of it is used as a house of correction, and so receives the poor, not for the purpose of being maintained there, but for the purpose of being punished as well as maintained. The object of the Act was to establish a corporation of the guardians of the poor as they are called, for the purpose of maintaining the poor of the whole city. In the 9th section of the Act we have this: "That for the better government of the said corporation, the said guardians, or the major part of them, shall have, and hereby have, authority to meet on the first Tuesday in July 1718, in some convenient place within the said city, and shall on that day, or on some other day to which they shall think fit to adjourn for that purpose, elect a person to be called a president, and also to appoint a schoolmaster, clerk, and other officers and servants as shall be thought needful to be employed in and about the ordering, care and management of the poor by the said corporation to be provided for." Then we come to the 13th section, which I have already adverted to, which is the recital of the grant of Elizabeth, and it recites that the mayor and corporation "are willing and desirous that the said hospital of poor priests, now commonly called or known by the name of Bridewell aforesaid, shall be settled and vested in and upon the said corporation by this present Act, made, erected and constituted, to the intent that the same hospital, land and premises, being under the entire order and disposal, direction and management of the said corporation, may be of greater use, benefit and advantage to the poor of the said city, intended to be provided for, maintained and employed by the said corporation: be it enacted," then it goes on to vest the property in the new corporation, the guardians of the poor. Then we come to the 14th section: "Provided always, nevertheless, and upon this condition, and under this trust and confidence, that the several guardians of the poor of the said city of Canterbury, and their successors, do for ever thenceafter manage, govern, order, direct and employ the said hospital, lands, tenements and premises, and the rents and profits thereof, to and for the benefit and advantage, maintenance and employment of the poor of the said city of Canterbury, intended to be provided for, maintained and employed by the said cor-

poration hereby erected, and so as will best answer that end and purpose." If it stopped there, and if there were no subsequent sections, the whole would be to maintain the poor, but it goes on in the 16th section to state this: "Provided always, and be it enacted by the authority aforesaid, that the said guardians of the poor of the said city of Canterbury, and their successors, shall and do for ever hereafter, provide, maintain, repair and uphold, at their own proper costs and charges, a good and sufficient house of correction within the precincts of the said hospital, to and for the use of the said city of Canterbury. Provided also that it shall and may be lawful to and for the alderman and aldermen of the ward of Northgate, in the said city, to hold or keep the court leets, law days or other courts within the said hospital as such alderman or aldermen have used to do, anything in this Act contained to the contrary in anywise notwithstanding." Then we come to the 18th clause, which relates to another charge imposed upon them, namely, the charge of keeping up the school. "Provided also, and be it further enacted, by the authority aforesaid, that the said guardians of the poor of the said city of Canterbury shall and do give bond under their common seal for themselves and their successors, to the said mayor and commonalty of the said city of Canterbury, and their successors for ever hereafter, to provide for, clothe and maintain sixteen poor boys of the said city of Canterbury." Then it goes into details. Then we have imposed upon the new corporation this important obligation, that sixteen poor boys are to be kept not as ordinary poor in the hospital, but they are to have separate diet and separate apartments by themselves, separate from the rest of the poor, and they are to be put out apprentice, and to pay a sum with the apprentice of not less than five guineas. In sect. 26 we have a clause stating what is to be done generally with the poor under this Act of Parliament; and amongst the recitals there is this, speaking of the children in the poor-house: "After such child or children shall have attained their age of fifteen years, or sooner, the said corporation, by indenture under their common seal, have hereby power to bind and put forth such child or children apprentices." Now, what is this but a clause attaching the charges and obligations as the guardians which would not arise out of their duties to provide for the poor of Canterbury? As I think I must assume, up to the date of this Act of Parliament, the corporation did not confine themselves to persons who had poor-law relief, and it appears to me the intention was to keep up the same school, under the guidance of the corporation, in the same manner and from the same class of persons from whom they were accustomed to make their selection prior to the passing of the Act of Parliament. With regard to what has taken place subsequent to the passing of the Act, it is not very material, except so far as that may throw light on the matter which preceded the passing of the Act. Now, I cannot think that, after this Act passed, the corporation of the city, who had nothing to do with the hospital except the nomination of the boys to be admitted into the school, would take upon themselves to interfere with that which was exclusively within the jurisdiction and control of the guardians of the poor, to make their own order that a certain poor boy should be admitted into the hospital, treating it as a workhouse. The object of the application for this property in the reign of Elizabeth was, that they might do something for the poor. They used their own discretion as to the mode of doing it, and the mode they selected was to establish a school for the maintenance and education of poor boys, and also a house of correction to which they might send idle and disorderly people. That being my view, it appears

to me that I cannot come to any other conclusion than that there ought not to be the limit imposed on the corporation of the city which it is insisted by the pta. ought to be imposed upon it. In coming to this conclusion it may appear that I am differing from the opinion of the Poor Law Commissioners, who had to consider whether there was a sufficient foundation for an application to the Court of Ch. for a determination of the question whether the applicant ought to be admitted, and looking at it in that point of view they say that they think that the same class of persons who are mentioned as the best objects of selection for the school are the class of persons who are the general objects of provision by this Act of Parliament, and therefore they come to the conclusion there is no sufficient ground for applying to the Court of Ch. for its opinion on the subject. But even if the Poor Law Commissioners had been dealing with the question and deciding it, I should be quite free to come to a conclusion of my own, and I should not hesitate to do so, though with great deference to their opinion, even if they had had all the materials before them, which they had not; at the same time, I think that opinion of the Poor Law Commissioners was a justification of the guardians (the pta. in this suit) for their application. I have already expressed my reasons why I think I ought not to dismiss the bill simply, and leave the matter to be decided at law. There is the judgment; and, even if this judgment could be got rid of, and the matter was tried at law, and the pta. at law succeeded (as I think they ought to succeed), they would only recover a sum of money in a particular case, the result of which would be to make one class of rate-payers, who are almost the same persons as the other class, pay what they would have to receive again. I think the proper course to take is to make a declaration stating that, in selecting the objects to be admitted into this hospital the corporation of the city of Canterbury are not obliged to confine themselves to poor boys chargeable to the parish or children of poor parents chargeable to the poor-rates. The costs of all parties, including the costs of the action, to be paid out of the rents.

Solicitor for the pta., *Flucker*, Symond's inn, agent for *Wilkinson*, Canterbury.

Solicitor for the defts., *Nethersole*, New-inn, agent for *S. and E. Plummer*, Canterbury.

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. NATHANIEL, and C. J. B. HESTLETT, Esqrs., Barristers-at-Law.

June 11, 12 and 28.

REG. on the Prosecution of THE VAUXHALL BRIDGE COMPANY v. THE VESTRY OF LAMBETH.

*Bridge—Lighting—Transfer of duty from the company to the vestry of the parish.*

*The Vauxhall bridge was built under the 49 Geo. 3, c. cxxii., which empowered the company to make a certain road (among others), and required them to put up lamp posts and lamps for lighting the bridge upon the sides of it and the said road; and the tolls were to be applied, among other purposes, to the lighting; and half of the bridge was to be deemed to be in the parish of St. Mary, Lambeth.*

*By 9 & 10 Vict. c. ccl., the commissioners under that Act were empowered to keep the above road to the middle of Vauxhall-bridge, properly lighted, and the lamps and lamp-posts were vested in the commissioners.*

*By the 18 & 19 Vict. c. 120, s. 90, the powers and duties of the commissioners were transferred to the vestry of Lambeth:*

*Held, that the duty of lighting the above road to the half of the bridge, was transferred to the vestry of the parish of Lambeth.*

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*Mandamus.*—To the Vestry of the parish of Lambeth, Surrey, greeting. Whereas the said parish is one of the parishes mentioned in schedule A to the Act passed in the nineteenth year of our reign, entitled "An Act for the better local management of the Metropolis," and you the said vestry have been and are a body corporate by virtue of the said Act; and whereas the Vauxhall-bridge Company have, many years since, by virtue of an Act passed in the forty-ninth year of the reign of King George III., and of another Act passed in the fifty-second year of the reign of George III., built a bridge across the river Thames from or near Vauxhall-turnpike, in the said parish of St. Mary, Lambeth, to the opposite shore in the parish of St. John, in the city and liberty of Westminster and county of Middlesex, and have made certain roads as approaches thereto, and have from thence hitherto maintained the same, and the same is used by the public subject to the payment of the tolls authorised by the said Act 49 Geo. 3; and whereas by virtue of the last-mentioned Act half of the said bridge next adjoining to the city and liberty of Westminster, is deemed to be and is in the city and liberty of Westminster and county of Middlesex, and part of the parish of St. John, Westminster, and the other half of the said bridge adjoining to the county of Surrey, and part of and in the said parish of St. Mary, Lambeth, and never has been nor is deemed or taken to be a county bridge so as to subject the city or liberty of Westminster, or the counties of Middlesex or Surrey, or any of the parishes or places in the said Act mentioned, or either of them, to the repairing or supporting of the same or of any of the roads by the said Act directed to be made. And whereas by an Act passed in the 10th Vict. entitled "An Act to repeal an Act of the 52nd year of the reign of King George the Third, for lighting and watching the road leading from Newington Butts to the Nag's Head, in Wandsworth-road, and other places communicating therewith in Lambeth, Clapham and Battersea, in Surrey, and for making other provisions for lighting and improving the said road and other places adjacent or near thereto," the commissioners therein named and appointed were authorised and empowered to cause to be properly lighted and kept lighted, amongst other streets, roads and places, the road and street from and including the said house in the occupation of Robert Drummond opposite Vauxhall-turnpike to the middle of Vauxhall-bridge, and so much of the said bridge as was and is in the said parish. And whereas the said commissioners by virtue of the said Act of the 10th Vict. took upon themselves to light, and up to the time when their powers ceased by virtue of the said Act of the 19th Vict. continued to light part of the said road made and maintained by the said Vauxhall-bridge Company (to wit), the road or street from and including the said house in the occupation of Robert Drummond, opposite Vauxhall turnpike to the foot of Vauxhall-bridge, and that you the said vestry have since continued to light so much of the said road or street; and whereas we have been given to understand and been informed that the said half of Vauxhall-bridge is a street within your parish which you are authorised and empowered and directed to light, and that the same has not been well or sufficiently lighted by you, and that you have been duly required on behalf of the said Vauxhall-bridge Company well and sufficiently to light the same, and for that purpose to maintain, or set up and maintain, a sufficient number of lamps in the said street, and cause the same to be lighted with gas or otherwise, and to continue lighted at and during such times as you the said vestry may think fit, necessary, or proper, but that you the said vestry have neglected and refused well or sufficiently, or in any manner, to light the said part of the said bridge so being such street in your parish, or any part thereof, or

to maintain, or set up and maintain, a sufficient or any number of lamps in the said street, or any lamp there, in contempt of us and to the great damage and prejudice of the said company; we do command you the vestry of the said parish of Lambeth, that you do cause that part of the Vauxhall-bridge which is within the said parish of St. Mary, Lambeth, to be well and sufficiently lighted, and for that purpose to maintain, or set up and maintain, a sufficient number of lamps, and to cause the same to be lighted with gas or otherwise, and to continue lighted, according to the 19 & 20 Vict. c. 120, or that you show us cause to the contrary thereof.

*Return.*—That the said half of Vauxhall-bridge is not a street within our parish, which we are authorised and empowered and directed to light, as by the said writ is suggested.

*Plea to the said return.*—That the said Vauxhall-bridge, including the said half thereof in the said parish of Lambeth, was for a long time before, and at the time of the passing of the 9 & 10 Vict. c. ccc., dedicated to, and used by the public as, and was a public highway and thoroughfare (subject to payment of tolls to the said company) from and to divers highways and places in the said parish of Lambeth to and from divers highways and places in the city of Westminster, and was much frequented and used by the public as such thoroughfare and highway, as well by night as by day, and at all times of the night and day upon foot, and with carriages and cattle, and it had become and was necessary for the public convenience and safety that the said bridge should be lighted at night, and the said bridge has continued so to be used by the public as such thoroughfare and highway from thence hitherto, and it has been from thence hitherto, and still is, necessary for the public convenience and safety that the said bridge, including the said half thereof in the said parish of Lambeth, should be so lighted, and so, the said company say, that the said half of Vauxhall-bridge, in the said parish of Lambeth, in the said writ mentioned, is a street within the said parish, which the said vestry are authorised and empowered and directed to light as by the said writ is suggested.

*Demurrer. Joinder in demurrer.*

*June 11 and 12.*—*Borill* in support of the demurrer, and *Denman* (Prendergast with him) contra.

*Cases cited.*—*The London and Blackwall Railway Company v. Limehouse*, 26 L. J. 164, Ch.; *Rex v. Barlow*, 2 Salk. 609; *Reg. v. The Tide Commissioners*, 14 Q. B. 459; *McDougall v. Paterson*, 14 C. B.; *Daw v. The Metropolitan Board of Works*, 6 L. T. Rep. 353.

The statutes cited are sufficiently referred to in the judgment. *Cur. adv. vult.*

*June 28.*—*WIGHTMAN, J.*—It is extremely difficult, if not impossible, to reconcile satisfactorily the provisions of the several Acts of Parliament referred to upon the argument of this case, but upon the best consideration that we can give to the questions raised between the parties it appears to us that the duty of lighting the half of Vauxhall-bridge which is in the parish of Lambeth, has devolved upon the vestry of the parish by are absolved from that duty. The bridge was built Vict. c. 120, and that the Vauxhall-bridge Company virtue of the 9 & 10 Vict. c. ccc., and the 18 & 19 under and subject to the provisions of the 49 Geo. 3, c. cxlii., and by the 46th section of that Act the bridge company have power to make roads with a proper access to the bridge, and amongst others, one from the foot of the bridge to the Vauxhall-road, leading to and near Vauxhall turnpike, in the parish of Lambeth. By the 113th section of that statute the bridge company are required "to put up lamp-posts and lamps for lighting the bridge upon the sides of it, also in and upon or along the sides of the said road, or upon or against any

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wall or palisade of any house, messuage, or tenement fronting the said road;" and, by the 123rd section, one of the first purposes to which the tolls are to be applied is, the keeping the bridge and road lighted; and, by the 125th section, the company may be indicted if they fail in so doing. By the 120th section of the Act the half of the bridge which adjoins the county of Surrey is to be deemed part of and in the parish of St. Mary, Lambeth. From the time the bridge was built until the passing of the 9 & 10 Vict. c. cocl., there seems to have been no question but that the bridge company, and they only, were subject to the duty of keeping not only the bridge but also this road, properly lighted. By the 9 & 10 Vict. c. cocl., intitled, "An Act to repeal an Act of the 52nd year of the reign of King George the Third, for lighting and watching the road leading from Newington-butt to the Nag's Head, on the Wandsworth-road, and other places communicating therewith, in Lambeth, Clapham, and Battersea, in Surrey, and for making other provisions for lighting and improving the said road and other places adjacent or near thereto," certain commissioners were appointed by the 3rd section for putting that Act into execution; and by the 50th section the commissioners were authorised and empowered to cause the several roads, streets and places, and parts thereof respectively as thereafter mentioned and described, to be properly lighted, and to be kept lighted; and then follows an enumeration of roads, streets and places, and amongst them, "The road or street from and including the house in the occupation of Robert Drummond, opposite Vauxhall-turnpike to the middle of Vauxhall-bridge," thereby giving the commissioners express power and authority to light and keep lighted the road or street opposite Vauxhall-turnpike to the middle of Vauxhall-bridge. As the Vauxhall-bridge Company were already bound to keep the whole of their bridge and of this road lighted under peril of an indictment if they did not, it is not easy to discover the object of the Legislature in including half of the bridge within the authority of the commissioners in respect to the lighting. By the 54th section it was enacted, "That it shall be lawful for the commissioners to cause such streets as they shall think proper to be lighted, at such times and in such manner as they shall think fit." And it was contended for the resp. that the terms of the 50th and 54th sections were such as not to make it imperative upon the commissioners to light the half of Vauxhall-bridge at all, but that they might leave it to be lighted as it is and was, by the bridge company, who were bound by their Act of Parliament to do so, the commissioners, having, however, power by the Act to light the half of the bridge if they thought fit. Considerable difficulty in putting a proper construction upon the Act in respect of the question in this case, arises from the very peculiar wording of the 62nd section, by which it is enacted, "That the present lamps and lamp-posts in the streets and other places within the district or limits mentioned in the Act, and which shall or may hereafter be erected or fixed up by virtue of this Act, shall belong to and be the property of the commissioners." At the time the Act took effect, there could not have been any lamps or lamp-posts erected or fixed up by virtue of the Act; and it is difficult to understand what the Legislature meant by the expression "present lamps" in connection with the words that follow, "and which shall or may hereafter be erected or fixed up by virtue of this Act." It may be that the Legislature intended by the terms they used to include only the lamps which had been already fixed up in the streets and places within the limits mentioned in the Act by virtue of the Act of Parliament mentioned in the recital and cited in the 9 & 10 Vict. c. cocl., "and also lamps to be fixed up in future." If this was the intention of the

Legislature, neither the lamps upon the bridge nor those upon the road leading to it, which have been erected by the company on the lands of others adjoining to that road, would be vested in the commissioners; but the Legislature may have intended, that all existing lamps set up within the prescribed places and limits, in the fulfilment of a public duty to set them up, should become vested in the commissioners. This, which would not be an unreasonable construction of the meaning of the Legislature, by the terms used in the 62nd section of the 9 & 10 Vict. c. cocl., would vest the lamps and lamp-posts, on the half of the bridge and the road to Vauxhall-turnpike, in the commissioners, and would go far to show that the bridge company would not be compellable to light the bridge, as they would have no right to meddle with lamps or lamp-posts which are vested in the commissioners. No distinction can, in this case, be made between the obligation on the bridge company to light the road and the obligation to light the bridge; and, though it is by no means clear that the Legislature had such a state of things in their contemplation, we think that the language that they have used is such as to vest the lamps fixed up by the bridge company along the road, though not on their own premises, and the lamps on half the bridge, in the commissioners, and thereby to disable the bridge company from lighting or interfering with them. If the obligation to light half the bridge was thrown upon the commissioners, as we are disposed to think it was, for the reasons we have given, the effect of the Metropolitan Local Management Act, 18 & 19 Vict. c. 120, is, to vest the duty of lighting the half of Vauxhall-bridge, which is in the parish of Lambeth, as well as the road from the bridge to the turnpike, in the vestry of that parish. By the 90th section of the Metropolitan Local Management Act, all the duties, powers and authorities for and in relation to the lighting any parish mentioned in the schedule (Lambeth being one), or any part of such parish, which at the passing of the Act was vested in any of the commissioners, or in any other body than the vestry of such parish, is to be vested in or performed by the vestry of such parish. And by the 93rd section, "all the property, matters and things vested in such commissioners, or other body in connection with any such duties or powers, is vested in the vestry of the parish." The commissioners under the Act 9 & 10 Vict. c. cocl. had power and authority, by the 50th section, to light the half of the bridge that was in the parish of Lambeth, and as their powers and authorities are transferred to the vestry, it follows, as a consequence, that the vestry of Lambeth has power and authority to light the half of the bridge; and the terms of the 90th section of the 18 & 19 Vict. c. 120, are indeed so comprehensive that it might well be contended that, even if the 9 & 10 Vict. had not transferred the obligation to light the bridge, and the property in the lamps, from the bridge company to the commissioners, it would be transferred to the vestry of the parish from the bridge company. But we do not think it necessary to decide this, as we think they are transferred from the commissioners to the vestry. By sect. 130 of the last-mentioned Act, it is enacted "that the vestry shall cause the several streets within their parish or district to be well and sufficiently lighted;" and by the interpretation clause of sect. 250, the word "street" applies to and includes any bridge not being a county bridge (which the Vauxhall-bridge is not). It appears to us that, putting the best construction we can upon these Acts of Parliament, and upon the provisions in them to which reference has been made, the effect of them is, to transfer the obligation to light so much of the bridge as is in Lambeth to the vestry of that parish; and that the duty of lighting it, imposed upon the bridge company by the 49 Geo. 3, c. cxliii., is transferred to the vestry of Lambeth; and there is no hardship or injustice in this, as



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the bridge company are liable to be assessed, and indeed are assessed, to a general rate for lighting the whole parish; and we therefore think that the Crown is entitled to our judgment.

*Judgment for the prosecutors.*

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYD, Esqrs.  
Barristers-at-Law.

June 9 and 13.

MILES v. HARRIS.

*Sheriff—Right to poundage, where seizure of goods made, but writ withdrawn without the sum raised, the proceedings being irregular—What is a "levy"—28 Eliz. c. 4, s. 1.*

*The sheriff, having received from an attorney a writ of *fi. fa.* requiring him to levy on the goods of G., in satisfaction of a judgment obtained against him, the sum of, 107*l.* 9*s.* 5*d.* for debt and 1*l.* 6*s.* for costs, also sheriff's poundage, officer's fees, costs of levying, &c., in obedience to the writ, entered the premises of G., and seized there goods sufficient to satisfy the writ. When he had remained two days in possession, the judgment against G. was found to have been improperly signed, and the writ was set aside for irregularity. The sheriff then, by order of the attorney who sued out the writ, withdrew, but he afterwards claimed a sum for poundage as on levy made:*

*Held, on a special case stated for the opinion of the court, that the sheriff was not entitled to poundage, because the mere seizure of the goods without a sale was not a levying within the meaning of statute 28 Eliz. c. 4, s. 1, so as to entitle him to poundage.*

After writ, declaration and pleas in this cause and before judgment, the question of law raised between the parties was, by consent and by order of Keating, J., stated in the form of a special case for the opinion of the court.

#### CASE.

The plt. is bailiff of the sheriff of Norfolk, from whom, by post, from the London agent of his undersheriff, the plt., on the morning of the 11th Sept. 1860, received a warrant in the usual form, by virtue of a writ of *fi. fa.*, commanding the plt., as such bailiff, of the goods and chattels of Alfred Oldfield Gathergood, within the said sheriff's bailiwick, he should cause to be made 107*l.* 9*s.* 5*d.*, together with interest upon the said sum at the rate of 4*l.* per cent. per annum from the 30th Aug. 1861, so that the said sheriff might have that money, with such interest as aforesaid, before the Barons of the Exchequer of Pleas of the Queen at Westminster immediately after the execution thereof, to render to Henry Solomon, in the said writ named, for the sum recovered and interest in the said writ mentioned.

In the margin of the warrant the indorsement on the writ of *fi. fa.* was set forth, and such indorsement was in the words and figures following, that is to say: "Levy 107*l.* 9*s.* 5*d.* and 1*l.* 6*s.* for costs of execution, &c., and also interest on 107*l.* 9*s.* 5*d.* at 4 per cent. per annum from the 30th day of Aug. 1861 until payment, besides sheriff's poundage, officer's fees, costs of levying and all other legal incidental expenses. This writ is issued by Henry Harris, of No. 34A, Moorgate-street, in the city of London, attorney for the said Henry Solomon. The deft. is an auctioneer, and resides at Lynn, in your bailiwick." In obedience to the said warrant the plt. entered certain premises of the said Alfred Oldfield Gathergood, at King's Lynn, in the county of Norfolk, being within the bailiwick of the said sheriff, and seized there goods of the said Alfred Oldfield Gathergood, sufficient to make the said sum recovered, interest and expenses. The plt. remained two days in possession, and then

the judgment was found to be, and had in fact been, irregularly signed, and it and all subsequent proceedings having been after the seizure aforesaid set aside for irregularity, the plt. withdrew from possession by order of the deft., who was the attorney who sued out the writ, and caused the said warrant to be issued; afterwards plt. sent his account to the deft., 6*l.* 15*s.* 3*d.*, as follows:—

Sheriff's poundage on levy for 108 <i>l.</i> 15 <i>s.</i> 5 <i>d.</i>	£5	4	3
Executing warrant	1	1	0
Two days' possession	0	10	0

£6 15 3

It was not paid, and this action was brought. The declaration contains an appropriate money count. The deft. does not dispute the last two items, and has in fact paid into court 1*l.* 11*s.* in respect of them under the appropriate plea; but he denies his liability under the circumstances above stated to pay sheriff's poundage, and puts such liability in issue by a plea of never indebted, except as to 1*l.* 11*s.* parcel, &c., and the parties are to be at liberty to refer to the pleadings which are annexed.

The question for the opinion of the court is, whether, under the circumstances, the plt. is entitled to recover from the deft. sheriff's poundage.

If the question should be answered in the affirmative, judgment is to be entered for the plt. on the first issue for the sum of 5*l.* 4*s.* 3*d.*

If the question should be answered in the negative, judgment is to be entered on the first issue for the deft.

*D. Keane* for the plt.—It makes no difference whatever that the sheriff, after his levy, had not sold the goods; he is entitled to poundage all the same. No doubt the statute 28 Eliz. c. 4, s. 1, will be relied on by the other side as showing that the poundage is payable for raising the money and upon the sum levied, and not for merely seizing the goods; but we contend that it is payable whenever there has been, as here, an actual seizure of goods: (Watson on Sheriff, 109, citing Loft, "A sheriff shall not be entitled to poundage if the writ be irregular;" *Bullen v. Ansley*, 6 Esp. 111; *Rawstorne v. Wilkinson*, 4 M. & S. 256; *Orchard v. Wills*, 5 T. R. 470.) [WILLES, J.—Is there any case overruling those you have cited?] None. The books of practice are uniformly in support of plt.'s argument.

*Joyce* for the deft.—The sheriff has no right to poundage; there can be no title to it in him till he has levied; and here the whole proceeding was irregular. The present case differs in a material point from those cited, because here there was only the commencement, not the completion of a levy. *Colls v. Coates*, 11 A. & E. 828, is a case in point. The money must actually be made to entitle the sheriff to his poundage; the direction in the writ of *fi. fa.* shows that this is so. Here the money was not made, and the fact that the writ was set aside for irregularity makes no difference. [ERLE, C.J.—The question is, whether "levy" means turning into money, or merely seizing the goods.] Yes. [BYLES, J. referred to *Rez v. Robinson*, 4 Dowl. The sheriff was in possession two days; was he to have nothing for that?] He has no trouble till the money is made. Before the sheriff is entitled to a shilling he must show that the execution is executed, *Colls v. Coates* notwithstanding. The levy is not complete till the money is made. The next point is, that the sheriff, and not his officer, is the party to sue. The third point is, that the deft. being the attorney on the record is not liable: (*Mayberry v. Mansfield*, 9 Q. B. 754.) [WILLIAMS, J.—If the attorney had named the officer it would have got over both points. WILLES, J. referred to *Baxter v. Jones*, 24 L. J. 27, Ex., where it was held that the attorney was liable.]

C. B.]

WHITE v. STEEL AND ANOTHER.

[C. B.]

June 13.—*Keane*, in reply, referred to 1 Vict. c. 55, s. 2.

*ELLS, C.J.*—In this case there was a seizure of goods by the sheriff, and the writ of execution was set aside for irregularity. The question is, whether the officer is entitled to poundage, and that turns on the construction of stat. 28 Eliz. c. 4, s. 1, which enacts that it shall not be lawful to or for any sheriff, under-sheriff, bailiff, &c., by reason or colour of their office or offices, to have, receive, or take of any person or persons whatsoever, directly or indirectly, for serving and executing any extent or execution upon the body, lands, goods, or chattels of any person, more or other consideration or recompence that in this present Act is limited and appointed, which shall be lawful to be had, received and taken, that is to say, twelve pence of and for every twenty shillings, when the sum exceedeth not one hundred pounds, and sixpence of and for every twenty shillings, being over and above the said sum of one hundred pounds, that he or they shall so levy or extend, and deliver in execution," &c. Is the seizure in this case a levying within the statute? We think it is not. There is no turning of the goods into money. We do not think it necessary to decide the ulterior question raised by Mr. Joyce.

*WILLIAMS, J.* concurred.

*WILLES, J.*—The plt., it should be observed, has had all the benefit he chose to have; more he might have had but for his own act.

*BYLES, J.* concurred. *Judgment for the deflt.*

May 5, 6 and 28.

WHITE v. STEEL AND ANOTHER.

*Church-rate*—Money borrowed under statute 3 Geo. 4, c. 72, s. 26—*Vestry meeting*—Poll demanded and refused.

*The churchyard of a parish having been closed under an order in council, the parishioners in vestry assembled authorised the churchwardens to borrow according to the provisions of 3 Geo. 4, c. 72, on the security of the rates, a sum of money sufficient to purchase a portion of ground adjoining the churchyard, and to convert it into a burial-place. At the meeting a poll was demanded by the plt. and refused. The money was borrowed after the approval of the Ecclesiastical Commissioners, and the churchwardens laid a rate of 4d. in the pound to repay the first instalment of the loan, which rate the plt. refused to pay on the ground that the parish had never legally expressed its desire to procure a burial-ground under sect. 26 of the above-mentioned statute, a poll having been demanded at the vestry meeting and refused, and therefore that the rate in question was illegal:*

*Held, that the parish had legally expressed its desire, and the proceedings had not come to their legal termination, such termination being the result of a poll when claimed.*

This case has already been tried in the Consistory Court, and also on appeal in the Court of Arches, the decision in each case being adverse to the plt., who was, by direction of this court, declared in prohibition. In the Consistory Court the churchwardens had brought in a bill, in which they set forth, first, that an order in council having issued for closing the churchyard of Plumstead, from and after the 1st Nov. 1860, a provisional agreement was entered into by the then churchwardens for the purchase of suitable ground for burial. The second article pleaded the statute 3 Geo. 4, c. 72, s. 26, and 19 & 20 Vict. c. 55, s. 1. The bill stated, "that, on the 9th Jan. 1860, a vestry was held, in pursuance of notice, to take into consideration the expediency of purchasing and adding to the churchyard a piece of ground therein defined, and to determine the raising by rate or rates, or by a loan on the credit of the same, of such sum or sums as

might be required, in order to meet the expenses of and incident to the purchase and conveyance of the said land and the preparation of the same as and for the purposes of a burial-ground; and further to consider the propriety of cancelling or rescinding any resolution passed at a vestry which had been held on the 28th Nov. 1859, and to substitute a resolution in lieu thereof, for effecting the above-mentioned purposes; that the Rev. William Ackworth took the chair as vicar, and it was moved and seconded that the first and second resolutions which had been passed at the previous meeting should be rescinded; that an amendment was moved that the meeting be adjourned until an early day in the following week, for the purpose of electing a burial board; that the amendment was duly put and rejected, and the original resolution was put and carried. It was then proposed and seconded that 1000*l.* should be raised for the purposes mentioned in the notice, at a rate not exceeding 5 per cent., and on the credit of the rates to be levied for the repayment thereof, such repayment to be made in two instalments, one in 1860 and the second in 1861; that the churchwardens be authorised to take the proper steps, under statute 3 Geo. 4, c. 72, to raise the money and to execute the proper securities. The motion was put, and carried by a majority of fifty-nine against five ratepayers." The fourth stated that application was made to her Majesty's Secretary of State for the Home Department, for his approval of the land intended to be used for an additional burial-ground, which was given; and also to the Ecclesiastical Commissioners for authority to carry out the resolution; that they, in pursuance of the authority given them by statute 3 Geo. 4, c. 72, signified their approval of the purchase of the land, and of the arrangements for borrowing and repaying the money required, and authorised the parish to carry them out. The sixth stated that the churchwardens accordingly borrowed 1000*l.* at 5 per cent. repayable as before mentioned, from the London and County Joint-Stock Banking Company; and by an instrument under their hands they charged the parish of Plumstead with the sum of 1000*l.*, and with repayment thereof, according to the terms and conditions before mentioned, and declared that the said sum should continue to be charged and chargeable upon the rates raised and to be raised in the said parish, under the authority so obtained from the Ecclesiastical Commissioners until the said sum, with interest at 5 per cent., should have been fully repaid; that the land so purchased had been conveyed to the Ecclesiastical Commissioners, and had been duly consecrated. The seventh stated that, under the authority granted by the Ecclesiastical Commissioners by the several statutes, and by the resolution of the vestry held on the 9th Jan. 1860, the churchwardens, on the 14th July 1860, made a rate of 4d. in the pound on all rateable properties in the parish, for repayment with interest of the first instalment of the loan. It further stated that George White had refused to pay the sum assessed upon him, and, before a magistrate, had declared he disputed the validity of the rate. In answer to this libel, Mr. White brought in an allegation, in the first article of which he set out the resolutions passed at the vestry held on the 28th Nov. 1859, as follows:—"first, that the churchwardens be authorised to purchase, on behalf of the parish, upon the terms stated, the land referred to by the churchwardens; to adapt the ground as a burial-ground, by throwing it into the present churchyard or otherwise, and draining and laying it out; provided that one-third at least of the area be allocated as an unconsecrated place for the interment of Nonconformists; secondly, that for the purposes mentioned including a double chapel, 2600*l.* be borrowed on the credit of the rates, to be levied for the repayment thereof;

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and that the churchwardens apply to the proper authorities for approval of the new burial-ground, and for authority to carry these resolutions into effect, under the 3 Geo. 4, c. 72, s. 26, and that, on obtaining the same, they should take the necessary steps for procuring the loan of money, and exacting securities; thirdly, that as soon as the aforesaid resolutions are carried into effect, and the land before described is added to the churchyard, they should make the proper approaches to it." The second and third articles set out the proceedings at the vestry held on the 9th Jan. 1860, in the same manner as in the libel, except that they added that on each question then put by the chairman, and said to have been carried, a poll was demanded and refused; and that everything done, or attempted to be done, at such meeting, after the demand and refusal of a poll, as before pleaded, or subsequently thereto, in consequence of any resolution passed or alleged to have been passed, at such meeting, was null and void to all intents and purposes, &c.

*A. Wills*, for the plt. in prohibition, cited *Re v. The Churchwardens of St. Mary's, Lambeth*, 3 B. & Ad. 651; *Blunt v. Harwood*, 1 Curt. 648; *Hopton v. Kemerton*, 6 Notes to Ecc. Cas. 74; *Reg. v. Hodger*, 12 A. & E. 139; *Campbell v. Maund*, 5 A. & E. 865; *Reg. v. The Governors and Guardians of the Parish of Newington*, 6 D. & L. 162.

*F. M. White* (Phillimore, Q. C. with him), for the defts., cited, *Anon.*, 6 Mod. 308, case 502; *Darby v. Cosens*, 1 T. B. 552; *Re Batkin and the Justices of Stafford*, 25 L. J. 126, M. C.; *Rand v. Green*, 30 L. J. 80, C. B. *Cur. adv. vult.*

**May 28.**—WILLES, J. now delivered the judgment of the court.—In this case, we are of opinion that our judgment should be for the plt. The material facts may be explained in a very few words. At a vestry meeting of the parish of Plumstead, a resolution was passed, that the churchwardens should purchase, on behalf of the parish, a piece of ground, as an addition to the existing churchyard. A minority, who seem to have been desirous, instead of proceeding under the Church Building Acts, to proceed under the Burial Acts (whereby a cemetery might be obtained, partly consecrated, and partly unconsecrated, for the general use of all the inhabitants), demanded a poll, which was refused. The resolution of the vestry was communicated to the Church Building Commissioners, who thereupon authorised the parish to purchase the land, and to levy the rates to defray the expense. Money was borrowed, the land purchased, and the rate now in dispute was accordingly made. The now plt. declined to pay the rate. The churchwardens thereupon instituted against him a suit in the Consistory Court of London, for subtraction of church-rates. The now plt. being deft. in that suit, claimed to put in a responsive allegation, to the effect that a poll having been refused, the parish had never legally expressed its desire to procure a burial-ground under the statute 3 Geo. 4, c. 72, s. 26, and that the order of the commissioners and all proceedings based upon it, including the rate in question, were consequently illegal. The Consistory Court decided in favour of the churchwardens by rejecting the responsive allegation. The present plt. appealed to the Court of Arches, which court affirmed the decision of the court below. Thereupon the unsuccessful party, the now plt., by direction of this court, declares in prohibition. The main question here and in the Ecclesiastical Court is the same, and it is this: Has the parish expressed its desire in a legal manner, so that the commissioners can legally act upon that expression of desire? We think that the parish has not legally expressed its desire. We know of no legal mode of ascertaining the desire of a parish but by convening a vestry and duly conducting the proceedings therein, to their legal

termination. The result of a poll, when claimed, is the legal termination of a vestry. It is obvious that a vestry which refuses a poll may not, and most likely does not, speak the sense of a parish. Moreover, the right to a poll exists at common law, and rests on the strongest authority: (see *Campbell v. Maund*, 5 A. & E. 865, in error.) It has several times been held, that the right to a poll is not taken away by mere general words in a statute, which words might at first sight seem to import that the inhabitants assembled at the vestry might there and then finally decide a question: (*Reg. v. St. Mary Lambeth*, 3 Nev. & P. 416.) It is objected that the statute 3 Geo. 4, c. 72, s. 26, gives the parish the powers conferred by the former Acts, and therefore, among others, the powers conferred by 59 Geo. 3, c. 134, s. 25, which section, it is alleged, impliedly takes away a poll. But the answer is, that that section, 59 Geo. 3, c. 134, s. 25, only relates to the power of the vestry in raising rates. It is therefore unnecessary to decide whether a poll could or could not be refused at a vestry duly convened under that statute for that purpose. Next, it is objected that chapelries, townships and extra-parochial places, which are mentioned in 3 Geo. 4, c. 72, s. 26, along with parishes, have no vestries. But the answer is that, from the fact that in districts like these, in which they having no vestries no vestry can act, it by no means follows that where there is a vestry, as in the case of a parish, the legitimate representatives of the inhabitants should be impliedly superseded. Indeed, the reason why a vestry is not mentioned in terms in this part of the 26th section may well be that the power of speaking by a vestry exists in some only of the districts mentioned, and not in all. How the desire is to be expressed in other cases, whether by unanimity, or by a majority with or without any restriction imposed by statute, we have not now to decide. Upon these grounds we have come to the conclusion that the desire of the parish to procure a burial-ground has not been expressed according to law. We are confirmed in this decision by the opinion of the learned judge of the Court of Arches; and, as we are informed, of the learned judge of the Consistory Court also. Yet these learned judges seem to have thought that the Ecclesiastical Court could not look behind the order of the commissioners, and were therefore bound to regard it as effectual. But the plain words of the statute 3 Geo. 4, c. 72, s. 26, empower the commissioner to act only in cases where the parish is desirous that they should act. The desire of the parish legally expressed appears to us a condition precedent, without which any order or authority of the commissioners is devoid of any legal force; and surely, this is a reasonable construction, when it is considered that to hold the order of the commissioners binding without the desire of the parish, would be to invest them with the arbitrary power of inflicting pecuniary burdens and imposing taxes. We therefore come to the other conclusion, that the order is void, and that all proceeding based upon it, including the rate in question, is void also. It is suggested, that if the Ecclesiastical Courts have misconstrued the Act of Parliament, that misconstruction is the subject of appeal, and the third plea states the pendency, or at least notice, of an appeal. But it by no means follows that because the misconstruction of an Act of Parliament by the Ecclesiastical Court may be corrected on appeal, it is not also ground for prohibition; for, as was observed in *Burder v. Veley*, 12 A. & E. 259 the error may be repeated in a court of superior jurisdiction, as has indeed already been done in the case now under consideration, and the proceedings may there go on to final judgment, and being regular on the face of them, the power to prohibit may be lost. With respect to the form of our judgment on the issues of law raised on this record, that which arises

upon the demurrer to the third plea has been already disposed of. The second plea appears to have been pleaded with a view to direct the attention of the court to the question whether, in case of judgment for the plt., a peremptory prohibition should go, or only a prohibition *quousque*, viz., until the judge of the Court of Arches may alter his opinion upon the construction of the statute, and admit the responsive allegation. Upon this point no authority has been cited, nor has the court found any for issuing the writ otherwise than in the general form where the erroneous decision goes to the merits of the case. The party seeking a prohibition upon the ground that the subordinate court has rejected as irrelevant a defence under a statute which is said to have been misconstrued, must, in order to establish the gravamen, show not merely that the defence was valid in law, but also that it is true in fact. That course is in accordance with many precedents, and it has, we think, been correctly adopted in the present case. The defts. in prohibition have therefore the opportunity of trying in this proceeding the question whether the matter alleged in answer to the libel be true. If it is not established in proof, then judgment will go for a consultation until its truth is established. No peremptory prohibition will go. If its truth should be established, then it will appear to the court judicially and in a suit between the same parties, that any proceedings in the subordinate court would, or ought to be, fruitless. Thus, the prohibition, if in the event it shall go, ought to be peremptory. The case cited by Mr. White in his able argument for the defts. (*Ann. 6 Mod. 308*), to show that the court, if adverse, ought to grant the prohibition *quousque*, only seems, when properly considered, to be an authority to the contrary; for the application was for a prohibition, upon the ground, first, that a copy of the libel was refused; and, secondly, upon the merits; and that application was rejected by Lord Holt and his companions, as improperly asking inconsistent remedies, the prohibition for refusing a copy of the libel being conditional only, and the prohibition upon the merits being peremptory, as we think the prohibition in this case, being upon the merits, ought, if and when issued, to be. The practice of issuing a prohibition *quousque*, for denying a copy of the libel, may be traced through Fitzherbert *Naturæ Brevia*, 43, E, to the Year Book of Edward IV., where a special prohibition *quousque* appears to have been framed by this court, in order to enforce the statute of 2 Hen. 5, stat. 1, chap. 3, which entitled parties cited in that Court Christian to demand a copy of the libel. In such cases, when prohibition is asked by reason of a refusal to grant a copy of the libel, the difficulties present themselves that in the absence of the libel there can be no prohibition for defect or absence of jurisdiction, that the subordinate court has not yet given any decision upon the merits, and that it has jurisdiction to proceed so soon at least as the copy of the libel is granted. These difficulties were got over in the case in the Year Book by issuing the special form of prohibition a *successor*, *tempore illi ad deliver le libel al pl' accordant al stat.* There may be other cases in which such a special writ may be proper; for instance, there is authority for saying that in matters purely of ecclesiastical cognisance, where evidence is refused which, according to the rules of the common law, ought to have been admitted as a matter which affects the manner and form of proceeding only, the prohibition is *quousque*. This meaning is inapplicable to the present case, and although there are numerous cases in the books, in which prohibitions have been granted for rejection of a plea to the merits, in none can we find any trace of a suggestion in such a case warranted, nor of any prohibition therein issued *quousque* only. We must therefore treat such a special prohibition as exceptional, applicable only to the man-

ner and form of proceeding, and inappropriate to a case where a defence upon the merits has been rejected below, and must be established in law and fact in order to sustain the prohibition. The special writs mentioned in Fitzherbert *Naturæ Brevia*, 39, H., and in which directions were given as to the course to be pursued in the subordinate court in the nature of admonitions to such courts, if or unless certain matters should judicially appear to them to relate to obsolete proceedings, governed by peculiar considerations; those writs were confined to the manner and order of proceedings, and were quite distinct in their character from a prohibition upon the merits. The writs in register and elsewhere, which conclude with a *mandamus* to the Court Christian, to recall an excommunication already erroneously fulminated, or a sequestration wrongly issued, are all, as to the prohibitory part, peremptory, and the *mandamus* to revoke the unauthorised proceeding only accessory to the peremptory prohibition, and necessary to give it effect. A *mandamus* to the judge of the Court of Arches, to receive the responsive allegation, contrary to his solemn judgment already pronounced, which is presumably his final opinion, would be not only an ungracious, but, so far as the research of counsel and the industry of the court enable us to judge, an unprecedented proceeding. Even the Court of Q. B., in the exercise of its independent superintending jurisdiction over subordinate courts, may issue a *mandamus* to proceed, but not to pronounce any particular judgment. Convenience also seems to require, that, as the whole case is before us, it should, so far as we are capable of dealing with it, be disposed of here once for all. Our conclusion therefore is, that the allegation which the Court of Arches rejected, as constituting no defence to the libel, though assumed to be true, was so rejected by reason of an erroneous construction of the statute, being a matter of temporal cognisance, and this court being of opinion that the rejected allegation was a complete and substantial answer to the libel in point of law, ought, if and when such allegation shall appear to be true in fact, peremptorily prohibit any further proceeding. For these reasons we think there should be judgment for the plt. *Judgment for the plt.*

## COURT OF EXCHEQUER.

Reported by F. BAILEY, and H. LEIGH, Esqrs., Barristers-at-Law.

Tuesday, May 27.

BOTTOMLEY v. FISHER.

*Building society—Secretary of signing promissory note as such—Personal liability—Counter signature—Statute 10 Geo. 4, c. 56, s. 7 (Friendly Societies Act)—Rules of society; on whom binding.*

*A promissory note was made in the following form:—"Midland Counties Building Society, No 3. Birmingham, Sept. 1, 1856.—One month after demand we jointly and severally promise to pay J. B. the sum of 120L., with interest, &c., for value received.—(Signed) W. R. H. and S. D. S., trustees. W. D. F., secretary."*

*Held, that W. D. F. (the deft.) was personally liable on this note, and that the addition of the word "secretary" to his signature did not cut down or exclude his liability, his signature being placed where a party usually signs such a document, and from its position showing nothing like a counter signature as "secretary" merely.*

*Per Bramwell, B.—The rules of a benefit building society, duly certified and allowed under sect. 7 of Geo. 4, c. 56, are only binding upon members of the society inter se, and do not affect the rights of third persons, who are not members, but stand in the position of strangers to the society.*

[Ex.]

BOTTOMLEY v. FISHER.

[Ex.]

Declaration.—First count, on a promissory note made by deft. to plt. Second count, for money lent and on accounts stated. Plea, amongst others, denying the making of the note.

At the trial before Cockburn, C. J., at the last spring assizes at Warwick, it appeared that plt. had been a shareholder in a society called "The Midland Counties Benefit Building Society, No. 1," of which the deft. was auditor, and which society was very prosperous, and was brought to a successful issue, the plt.'s one share being of the value of 120*l*. Shortly before the winding-up of society No. 1 another society was formed, called "The Midland Counties Building Society, No. 3," of which the deft. became a member and shareholder, and was appointed the secretary and one of the auditors; in fact, nearly all the officials who had been connected with and managed Society No. 1 became connected with the new Society No. 3. By their rules, which were duly registered and certified in compliance with the Friendly Societies Act, 10 Geo. 4, c. 56, s. 7, the Society No. 3 was empowered to borrow money at interest, for which the trustees might give their own personal or other security, and be indemnified by the members generally. Upon the shareholders in No. 1 Society being paid off, plt., instead of being paid his 120*l*., agreed, at deft.'s request, to lend it to the Society No. 3 at 6 per cent. interest, whereupon the 120*l*. was accordingly transferred to No. 3 Society, and plt. received, in a letter from deft., the following promissory note, signed by two of the trustees of No. 3 Society, one of whom was also a trustee of No. 1 Society, and by deft., the secretary:

"Midland Counties Building Society, No. 3,  
Birmingham, Sept. 1, 1856.

"One month after demand we *jointly and severally* promise to pay Mr. John Bottomley the sum of one hundred and twenty pounds, with interest thereon after the rate of six pounds per centum per annum, payable half-yearly, for value received.

(Signed) "W. R. HEATH, } Trustees.  
"S. D. SMITH, }

"W. D. FISHER, Secretary."

Plt. received his interest for a year or two, when the new society, owing to bad management, blew up, and became defunct. Upon applying to deft. for payment of his principal, plt. was informed that the money had been disposed of for the purposes of the society, and that deft. was not personally liable, having countersigned the promissory note as "secretary" merely, and that the trustees were, under the rules of the society, alone responsible.

The following rules (from the printed book of the certified rules of the society) were referred to in the argument:—

"V. Duties of Officers.

"Trustees.—The trustees shall pay all sums of money ordered by the committee to be paid on behalf of this society, by cheques on the appointed bankers. And *these cheques* shall be signed by two of the trustees, and countersigned by the secretary.

"All deeds, writings and securities to and from the society shall be made and taken in the names of the trustees for the time being; and all the property, whether real or personal, belonging to the society, shall be vested in them.

"That the trustees shall (with the consent of the committee) be empowered to borrow or take up, at interest, any money from the bankers of this society, or from any member or other person, to secure which the trustees may give their own personal or other security, and they shall be indemnified by the members."

A verdict was found for plt. for the full amount of his claim, with leave to deft. to move. A rule nisi was accordingly obtained by Field, in Easter Term last, to set aside the plt.'s verdict and enter it for deft.,

on the ground that deft. was not the maker of the note declared upon, against which rule,

May 27.—*A. Wills* (with whom was *Hayes*, Serjt.) now showed cause.—The point relied on by the other side is, that deft.'s signature to this bill does not bind him. *Prima facie*, a signature to a bill binds the person who puts it there, and to escape from the ordinary liability he must show something in the signature or the circumstances under which he signed, which relieves him. Is there anything of that sort here? It is contended that there is not. In *Thomas v. Bishop*, 2 Str. 955, it was held that the addition of the word "cashier" to the deft.'s name was only to denote the person with more certainty. In *Leadbitter v. Farrow*, 5 M. & S. 349, Lord Ellenborough says: "Is it not a universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion? Unless he says plainly, 'I am the mere scribe,' he becomes liable." [CHANNELL, B. refers to *Lindus v. Melrose*, 3 H. & N. 177 (in error); 31 L.T.Rep. 36; 27 L.J. 326, Ex.] There the note was given "on account of the company," and the form and appearance of it were different from the present. There it was countersigned by the secretary on the opposite side to that on which the trustees signed. But here there is no counter-signature, or anything analogous to it. Countersigned is *contré signé*, and means over against; and a counter-signature is always in the left-hand corner of the document. Nor is there anything in the rules of the society which renders the secretary's counter-signature necessary to these loan notes. The rules of the society were authorised by statute 10 Geo. 4, c. 56, s. 8, and became binding on members, but not on any one else. Plt. was not a member, but in the position of a stranger. Rule 5, which is relied on by the deft., that "all cheques are to be signed by two trustees, and countersigned by the secretary," has nothing to do with the case. The rules contemplate that the security given shall be the security of the persons signing the note, and the word "severally" must have the meaning attached to it in *Lindus v. Melrose*, and mean "personally." There is no reason why the secretary should not sign and make himself liable as well as the trustees. He was a member, and had an interest. If he is not liable on this note, nobody is. *Healey v. Storey*, 3 Ex. 3; 18 L.J. 8, Ex., is an authority in favour of plt. In *Price v. Taylor*, 5 H. & N. 540; 2 L.T.Rep.N. S. 221, where the defts. signed the note describing themselves as "trustees," as deft. has here described himself as "secretary," they were held liable. The word "secretary" is mere description. As to the point as to the rules, the plt. is a stranger, and is not bound by them; and if he were, the rules do not apply.

Field, contra, in support of the rule.—None of the authorities which have been quoted show that deft. is liable. The cases of *Thomas v. Bishop*, and *Leadbitter v. Farrow* may be admitted. In the former case the acceptance was general, and there was nothing to show that deft. accepted in any other way than to render himself personally liable. He signed without limitation, and so it was in *Leadbitter v. Farrow*. It cannot be said the note in the present case was accepted generally, and not as a servant of the society, for it is signed on a different line, and the word "secretary" is added. In the case cited the instrument would have had no effect if not against deft., and he was held personally liable; but here it is good against the trustees, and if the secretary here is held liable he would have no means of paying except out of the funds of the society. *Lindus v. Melrose* is in deft.'s favour, and on all fours with the present case; the only distinction attempted

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to be drawn in, that the signature here is not *contre signé*. [MARTIN, B.—What is the meaning of “counter-signing?”] It is a verification between the body and their manager, that the proposed loan is a proper thing to be done. The 7 & 8 Vict. c. 110, s. 45, is an illustration of what a counter-signature is. By the Act 10 Geo. 4, c. 56, s. 21, all the property of these societies is vested in the trustees, and rule 5, which was in evidence, shows that it was needful the secretary should “countersign” such a document: (*Forbes v. Marshall*, 11 Ex. 166; 24 L. J. 305, Ex.) In *Price v. Taylor*, which was an action against the trustees and secretary of this very society, the secretary, who was this very deft., let judgment go by default, so the point was not raised; but the decision there, that the trustees were liable, by no means shows that the secretary is liable. On the contrary, it gets rid of the objection that no one else would be liable if the deft. is not, and also of the effect of the words “jointly and severally,” because here there are two trustees to whom the words apply. *Healey v. Storey* also is to the same effect. *Bull v. Morrell*, 12 A. & E. 745; 10 L. J., N. S., 52, Q. B., which is undistinguishable from the present case, is in point, and a strong authority to show the signature is not binding on deft.

POLLOCK, C.B.—I am of opinion that this rule must be discharged. A person reading the promissory note as it is framed in the present case, would reasonably come to the conclusion that all the persons whose signatures appear at its foot had signed it as parties. The portion of the names upon the paper shows nothing like a *counter-signature*. The secretary's signature is undistinguishable from that of the trustees, and the inference is, that he signed it as the others did, as a party. The case of *Bull v. Morrell*, relied on by the deft., went on the material fact that the party did not sign as acceptor, and it was impossible to get over that fact; but that is quite different from the present case. It is not needful to allude to the other cases which have been cited.

BRAMWELL, B.—I am of the same opinion. Except the note itself, there was no evidence to show in what capacity or with what intention deft. signed his name. The only evidence given was, first, that plt. lent his money to the society, and next an account of their rules. But these rules are only binding upon members of the society *inter se*, and have nothing to do with and do not affect the rights of third persons who, like the plt., are not members, but stand in the position of strangers to the society. The case then must be decided by what appears on the face of the note. Now, on the authority of *Price v. Taylor* it clearly binds the trustees. Is not the secretary then also liable? They all three signed the note where parties usually sign such a document, and each adds the character in which he signs. Suppose the words “trustees” and “secretary” had been left out, there could be no doubt of his liability then. But it is said the addition of this word “secretary” precludes his liability. I do not think so. It may be that he did not intend to make himself liable, but that is immaterial. The case of *Bull v. Morrell*, which Mr. Field relied on, is very distinguishable from the present case. There the bill was addressed to “the Directors of the Imperial Alkali Company.” The drawees were directors, then the person signing the acceptance says, “I accept per proc., &c.,” and if the acceptors are taken to be the drawees, then Parker not being in fact a drawee he would not be liable, and so that case has no bearing on the present question.

CHANNELL, B.—I also think the rule must be discharged. Looking at the evidence in the case, apart from the note, I see nothing to exclude his liability. Plt. was a stranger, and might well intend to take the security of the secretary as well as the trustees. Is there then anything in the note, or in the form or place of the signature, to cut down or exclude his

liability? I think there clearly is not. I see nothing to prevent his being “jointly and severally” liable, and I think, as my brother Bramwell has said, the case is quite distinct from *Bull v. Morrell*.

Rule discharged. (a)

Plt.'s attorneys, *Hilliard, Dale and Stretton*, 3, Gray's-inn-square, agents for *J. Stubbins*, Birmingham.  
Deft.'s attorney, *H. C. Barker*, 7, Furnival's-inn, agent for *J. Smith*, Birmingham.

### EXCHEQUER CHAMBER.

Reported by C. J. B. HERTSFLET, Esq., Barrister-at-Law.

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*Repair of bridge—Taking toll—Peremptory mandamus—Discretion of court.*

*Deft. was the proprietor of a bridge and received tolls; the bridge being out of repair and impassable, he established a ferry and took tolls, under the provisions of the Acts of Parliament which authorised the building of the bridge. An action was brought against him by the plt., praying for a mandamus, commanding the deft. to repair the bridge, and on a case being stated for the opinion of the court, the question left was, whether the deft. was liable to reinstate the bridge under the provisions of the Acts; and if the court should be of opinion that he was so liable, then judgment should be entered for the plt. for 40s. damages and costs of suit, and a mandamus might issue commanding the said deft. so to reinstate the said bridge:*

*Held (affirming so far the decision of the court below), that, under the Acts of Parliament, the deft. having received toll, was liable to reinstate the bridge; but reversing the decision of the court below ordering a mandamus to issue.*

This was an action brought by the plt. against the deft. for the recovery of damages sustained by them by reason of the passage of the bridge hereinafter mentioned being impracticable, and praying for a *mandamus* commanding the deft. to repair and reinstate the said bridge, and maintain the same in a fit state for passage; and by the consent of the parties, and by the order of a judge, according to the C. L. P. A. 1852, the following case was stated for the opinion of the court, without any pleadings.

#### CASE.

In the twentieth year of the reign of George II. an Act of Parliament was passed intitled “An Act for building a bridge across the river Thames from the parish of Walton-upon-Thames, in the county of Surrey, to Shepperton in the county of Middlesex.”

Shortly after the passing of this Act the bridge thereby authorised to be built was, under and by virtue of the powers therein contained, built by Samuel Dicker, Esq., in the said Act mentioned.

In the twentieth year of the reign of George III. another Act was passed for enlarging the powers of the said first-mentioned Act. Both these Acts were referred to as part of the case.

From the time of the said bridge being built until it became impassable as after mentioned, no repairs were required for, nor were any done to the structure of the said bridge, save those contemplated by the said Act 20 Geo. 3; but all other repairs required for the maintenance of the said bridge and the roadway thereof were from time to time done by the successive proprietors thereof; and during all the time aforesaid the said bridge was used by the public for the purpose of passage, on payment of the tolls by the said Acts authorised to be demanded and taken in that behalf.

These tolls and other the powers, privileges and immunities by the said Acts given and granted have

(a) WILDE, B. had left the court.

been received, exercised and enjoyed by the successive proprietors of the said bridge, from the time of the same having been built as aforesaid. In or about the year 1829 the deft. became and was, and from thence hitherto has been and still is, the proprietor of the said bridge, and as such proprietor has received, exercised and enjoyed the said tolls, powers, privileges and immunities. On the 11th Aug. 1859 the principal arch of the said bridge fell in; but whether in consequence of some original defect in the structure or foundations of the bridge, or for want of needful and necessary maintenance and repairs, has not been ascertained, and by reason thereof, and of the said damage or injury not having been in any way repaired or made good, the passage of the said bridge became and was, and from thence hitherto has been and still is, wholly impracticable.

On the passage of the said bridge so becoming impracticable as aforesaid, the deft., under and by virtue of the powers in that behalf vested in him as the proprietor of the said bridge by the said Acts, provided and set up, and from thence hitherto has maintained, a ferry across the Thames near to the said bridge, and for passage over the said river by the said ferry he has demanded and taken, and still continues to demand and take, the tolls in that behalf authorised by the said Acts. A reasonable time for repairing and reinstating the said bridge, and rendering the passage thereof practicable, elapsed before the commencement of this suit, and before the incurring of the damages by the pta. for which this action is brought.

The pta. are the owners of a considerable estate lying near to and on the Middlesex side of the said bridge, and also of another considerable estate lying near to and on the Surrey side of the said bridge, and have sustained damage by reason of the passage of the said bridge being impracticable as aforesaid, and are personally interested in the said bridge being repaired and reinstated and maintained in a state practicable for passage.

The question for the opinion of the court was, whether the deft. as the proprietor of the said bridge, is, under or by virtue of the said Acts, bound to reinstate the said bridge and maintain the same in a state practicable for passage.

If the court was of opinion that the deft. is so bound to reinstate, then judgment is to be entered up for the pta. for 40*s.* damages and costs of suit, and a *mandamus* may issue commanding the said deft. so to reinstate the said bridge, that the same might become practicable for passage.

If the court was of opinion that the deft. is not so bound, then judgment of *mol. pros.* with costs of defence, is to be entered up for the deft.

The following are the material parts of the Acts of Parliament, 20 Geo. 2, c. 22 and 20 Geo. 3, c. 32:—By the first Act, after reciting that it was convenient that a bridge should be built across the Thames, from the parish of Walton-upon-Thames, in the county of Surrey, to the opposite parish of Shepperton, in Middlesex, for the better ease and commerce of the inhabitants of the said counties and the parts adjacent, and that Samuel Dicker, Esq., had proposed to build the bridge for the purposes aforesaid, whereby many mischiefs and inconveniences would be remedied, it is enacted that it shall and may be lawful to and for the said Samuel Dicker, his heirs and assigns, and he and they are hereby authorised and empowered, and shall have full power and authority, by virtue of this present Act, at his and their own proper costs and charges, by himself and themselves, his and their deputies, agents, officers, workmen, servants, and others, to build the said bridge from Walton-upon-Thames to Shepperton aforesaid; and that for the purposes aforesaid he and they shall have full power and authority by himself and themselves, his and their servants,

agents, workmen and others, to remove any shelf or shelves, or to deepen or widen the said river of Thames, or any ayts or stops in the same between the parishes of Walton-upon-Thames and Shepperton aforesaid, and to dig or cut the banks of the said river in such manner as shall be necessary and proper for the building of the bridge and the navigation and passage of boats, barges, lighters and other vessels, and for the more convenient and better carrying on and effecting the said undertaking, and making the navigation of the said river more easy for the boats, barges, lighters and other vessels as aforesaid, under or to and from such bridge when built (be it the soil or ground of his Majesty, his heirs or successors, or of any other person or persons, bodies politic or corporate whatsoever), and also to cut, remove and take away all trees, roots of trees, beds of gravel, sand, or mud, or any other impediment whatsoever, which may in any way hinder the said navigation, either by obstructing the sailing, haling, towing or drawing boats and vessels, with men or horses, or otherwise, upon the said river of Thames between the said parishes of Walton and Shepperton; and to build, erect, and set up, and to make in, over, or on the said river and lands adjoining, or near to the same, any camp-shot, trenches and landing places, and to amend, alter, remove, or heighten any foot-bridge, foot-paths, or horse-paths, or to turn or alter any highways in, upon, or near unto the said river, leading to the said new intended bridge, within the parishes of Walton and Shepperton aforesaid, so as not to stop up any common highway leading to, from, or through either of the towns of Shepperton or Walton, and to appoint, set out, and make any towing paths, banks and ways, for towing, haling, and drawing of boats, barges, lighters and other vessels, passing in through and upon the said river under the said intended bridge, between the parishes of Walton and Shepperton aforesaid, or any part thereof, and from time to time, and at all times hereafter, to do all matters and things necessary or convenient for making, maintaining, continuing and perfecting the said bridge and the navigable passages under or near the same, or for the improvement or prosecution thereof, the said S. Dicker, his heirs and assigns, doing as little damage as may be, and first giving satisfaction to the respective owners and proprietors of such trees, ground, land, tenements or hereditaments as shall be pulled down, demolished, altered, dug up, cut, removed, or otherwise made use, for every or any of the purposes aforesaid, or that in anywise shall be prejudiced or damaged by, or for the carrying on the building, effecting, preserving and continuing, or maintaining the said bridge or the navigation near thereunto, and also giving satisfaction for all damages that shall be done, such damages to be ascertained in the manner hereinafter directed.

An open passage was to be left for the water of 212 feet.

The Commissioners of Land Tax are appointed commissioners for settling disputes, &c. between S. Dicker and the owners or occupiers of any such lands, &c., and if the parties are not satisfied with the commissioners' determination, a jury are to be impanelled for the purpose of assessing the sums to be paid for the purchase of the estate and interest of all persons in the lands, &c. to be taken, and on payment of the sum agreed on or assessed, it shall then, and not before or otherwise, be lawful for S. Dicker, his heirs and assigns, to remove, pull down and dig, or use so much of the said trees, lands, tenements, &c. for which satisfaction shall have been agreed or assessed.

It is further enacted, that for and in consideration of the great charges and expenses that the said S. Dicker, his heirs or assigns, shall be at, not only in building the said bridge, but also in making, erecting, repairing, cleaning, maintaining, keeping up and con-

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financing other matters necessary to be made and erected as aforesaid, it shall and may be lawful to or for the said S. Dicker, his heirs and assigns, and no other person whatever, from time to time and at all times hereafter, to ask, demand, receive, recover, and take to and for his and their own proper use and behoof in respect of his charge and expenses aforesaid, for pontage, or in the name of a toll or duty for any passage over the bridge, or any part thereof, the sums hereinafter mentioned before any person, or any coach, &c., horse, waggon, wain, cart, dray, carriage, horse, mule, or ass, oxen, sheep, lambs, hogs, or other cattle or carriage whatsoever, shall be permitted to pass over the said bridge to be erected by virtue of this Act, the several sums following [then follow the tolls]; which said respective sums of money shall be demanded and taken in the name of pontage, or as toll or duty; and the moneys to be received as aforesaid, and all other moneys to be received by the authority of this Act, are hereby vested in the said S. Dicker, his heirs and assigns, and the same and every part thereof shall be applied accordingly. And the said S. Dicker, his heirs and assigns, is and are hereby empowered and authorised to receive the toll or duty hereby laid and made payable upon any person or persons." The tolls may be levied by distress and sale, but the tolls are only to be paid once a day.

"And whereas it may so happen that the said bridge may in times to come receive such damage by unforeseen accidents or by tempests or otherwise, that the passage thereof may for some time become dangerous or impracticable, it is further enacted that in all such cases it shall and may be lawful to and for the said S. Dicker, his heirs and assigns, from time to time, as often as occasion shall require, to provide, maintain and set up a proper and convenient ferry or ferries across the said river at such place or places as he or they shall judge to be most proper and convenient, and as near to the said bridge as conveniently may be, and there to take for passage over the said river by such ferry or ferries, such rates and duties as are granted by this Act for the toll or pontage aforesaid; provided always, that such ferry or ferries shall not continue for any longer time than shall be necessary for repairing or rebuilding the said bridge, or longer than the passage over the same shall or may be dangerous or impracticable as aforesaid."

"Provided that it shall not be lawful to erect or build the said bridge or any part thereof before or until full and ample satisfaction be made for all such prejudice, loss, or damage as shall or may be sustained or suffered by any of the owners, proprietors, lessees, or others having any property or interest in the present ferry called Walton-ferry, which damage or prejudice shall be determined and adjudged by the said commissioners" in the manner pointed out by the Act.

"That the said bridge shall not be rated or assessed for or towards the land-tax, the repairs of the highways, poor-rate, churchwardens, or any other parish rate whatsoever, nor shall the said bridge or any part thereof be deemed or looked upon to belong to or to be within any parish, but be extra-parochial to all intents and purposes whatsoever.

"Provided always that the said bridge when built shall not be deemed or taken to be a county bridge, as to subject the counties of Middlesex and Surrey, or either of them, to the repairing or supporting the same."

The Act is made a public Act and to be judicially taken notice of as such.

The 20 Geo. 3, c. 32 (an Act for enlarging the powers of the former Act), after reciting that by the former Act several tolls, duties and powers were given and granted to S. Dicker, Esq., to build a bridge across the river Thames from the said parish of Walton

to Shepperton, in the county of Middlesex, and a bridge was accordingly built and passable for many years; and that the said bridge is now in a ruinous condition, and if not effectually repaired or rebuilt will be manifestly to the inconvenience of the public; and that Michael Dicker Sanders is now sole proprietor of the said bridge, and hath proposed effectually to repair or rebuild the said bridge across the said river, conformable to the powers and subject to the provisos in the recited Act, but it having been found by experience that the pontage toll or duty for passing over the said bridge, or any part thereof, is greatly inadequate to the expense of building and keeping in repair the same, it is enacted that, from and after the passing of this present Act, it shall and may be lawful to and for the said M. D. Sanders and his heirs and assigns, or such person or persons as shall be authorised and empowered, and shall have full power and authority by virtue of this present Act from time to time and all times thereafter, to ask, demand, receive, recover and take to and for his and their own proper use and behoof the tolls following: (Then follows the enumeration of certain increased tolls.)

The above-mentioned pontage-toll or duty shall be asked, demanded, received and taken every time and as often as a passage shall be demanded over the said bridge, or any part thereof, anything in the above recited Act to the contrary notwithstanding, to be levied by Sanders, &c., in the same manner as the tolls under the former Act. "And whereas by the said recited Act it is enacted that after the said bridge should be built, 212 feet should be left a free open passage for the water to run and flow through the arches thereof; and whereas it is found necessary and expedient for the better security of the said bridge if the same shall be repaired, or it shall be found necessary to rebuild the same, to erect another pier in the said river, it is enacted that 208 feet shall be left a free and open passage for the water to run and flow through the arches when the said bridge shall be effectually repaired, or, if found necessary, rebuilt. And the said M. D. Sanders, his heirs and assigns, shall have liberty to erect a temporary bridge near to the present bridge whilst the same shall be repairing or rebuilding, provided that when the said temporary bridge is built 208 feet shall remain a free and open passage for the water to run and flow through the arches or passages within the present banks of the said river. That the same pontage-toll or duty shall and may be demanded, taken and received for a passage over the said temporary bridge as over the present bridge, or when the same is effectually repaired or rebuilt. And the said temporary bridge shall not be continued for any longer time than shall be necessary for repairing or rebuilding the present bridge. That all and every the powers and authorities given and granted by the said recited Act (other than and except such as are hereby varied or altered) shall extend to, be applied and put in execution for the purpose of rebuilding, repairing, altering and keeping in repair the said bridge thereby directed to be built from the parish of Walton-upon-Thames, in the county of Surrey, to Shepperton, in the county of Middlesex, as fully and effectually to all intents and purposes as if the said powers and authorities had been given, repeated, and re-enacted in the body of this present Act." The Act is made a public Act, and to be judicially taken notice of as such.

The court below was of opinion that the deft. below was bound to reinstate the said bridge, and ordered a writ of *mandamus* to issue commanding the deft. to reinstate the said bridge, that the same might be made practicable for passage.

Upon this decision the deft. brought error.

The pls.' points of argument, were: first, that the



Acts of Parliament mentioned in the case impose a duty upon the deft. as the proprietor of the bridge to reinstate the bridge and maintain it in a state practicable for passage; secondly, that the deft., by receiving, exercising and enjoying the tolls, powers, privileges and immunities given and granted by the said Acts as mentioned in the case, is bound to bear the burden of reinstating the bridge, and maintaining it in a state practicable for passage.

The defts. points were: that there are no enactments in the statutes referred to in the case rendering it compulsory upon him to repair the bridge in question; that there is no clause rendering it imperative on the deft. to rebuild the bridge or to apply for that purpose the tolls which by the first of the said Acts the deft. is authorised to receive in respect of his ferry.

*Lush, Q.C.*, for the deft. below, the plt. in error.—These Acts of Parliament are like Railway Acts, they are merely permissive, and do not impose any obligation to build or repair. A ferry may be established when the bridge is out of repair until it is reinstated, but there are no words obligatory: (*Reg. v. York and North Midland Railway Company*, 1 E. & B. 178; *Edinburgh, Perth and Dundee Railway Company v. Phillips*, 2 Mc. Q. H. of L. C. 514.) The words are all permissive. [*POLLOCK, C.B.*—Is he not taking tolls?] Yes, but the power to take tolls is a distinct branch of the Act, the words of the Act do not impose upon him the maintaining the bridge: (*Reg. v. Severn and Wye Railway Company*, 2 B. & Ald. 646.) The second Act uses the same words as the first, and there is power to take tolls for the ferry while the bridge is undergoing repair in the place of pontage-tolls, but there is no clause to prevent other boats competing. [*POLLOCK, C.B.*—But if he ferried over by virtue of the Act of Parliament he would have an exclusive right to pontage-tolls and to tolls for ferrying. *CHANNELL, B.*—Have not the public a right to have the bridge in convenient repair on paying these tolls?] The taking of tolls does not necessarily impose the obligation to rebuild the bridge. Can it be said that there is such an obligation which is to exist perpetually? The judgment creates a perpetual obligation.

*Kemplay (Hoggins, Q. C. with him)* for the plt. below, the deft. in error.—If an action will lie, a *mandamus* should issue. The intention of the Legislature must be gleaned from the whole of the provisions in the Act. The deft., by accepting the benefit, takes upon himself the burden. [*POLLOCK, C.B.*—Suppose the deft. became bankrupt, what then? *ERLE, C.J.*—Take the case of a lighthouse. Whilst you take tolls you are to repair, but if the lighthouse is washed away;—is it not that the obligation exists so long only as the thing exists? We all agree that whilst he receives the tolls he must repair. We are all of opinion with you as to the liability, but the thing is to limit the *mandamus*.] The *mandamus* should order him to repair and reinstate. It is not asserted that he has abandoned the power to rebuild. The tolls were granted for the purpose of repairing and rebuilding. The order should be to reinstate the bridge, that the same may be practicable for passengers. [*ERLE, C.J.*—The court are all with you as to the construction of the Acts, that whilst the deft. took tolls he was bound to repair; but they may, and perhaps will, reverse the decision of the Court of Q. B., if you persist in asking for a peremptory *mandamus*.] The court has no option. There is no decision of the court below as to the *mandamus*; that was by the consent of the parties. If the deft. requires redress or a modification of the Acts, he must get it through the Legislature. [*POLLOCK, C.B.*—But suppose you are asking us to compel the doing of a thing that is comparatively, by change of circumstances, useless. In many cases the tolls of bridges are not one-tenth of what they were. *BYLES, J.*—And that would bring ruin

upon the man. *ERLE, C.J.*—If we issue a writ, ordering the man to do something he is unable to do, the man might be imprisoned for life.] The obligation continues, and this court cannot limit it. By the second Act larger tolls are given and greater benefits conferred on the deft. He referred to Co. Rep. 33.

*ERLE, C.J.*—We agree with the court below as to the action lying; the statutes are not permissive. Until the deft. took the tolls he might hold his hand, but having taken the benefit he also took the burden, and I think the case of *The Mayor and Burgesses of Lyme Regis v. Henley*, 1 Bing. N.C. 222, is a strong authority in point; there the Crown having granted a borough in fee farm to a corporation, and acquitted them of a part of the rent, willing that they should repair the buildings, banks, mounds, seashores and pier within the same; and it was held by the H. of L. that an action lay against the corporation at the suit of an individual whose house had been injured by the sea in consequence of the neglect of the corporation to repair the seashore and mounds. In the course of the judgment in that case, Park, J. referred to the case of *Bret v. Cumberland*, Cro. Jac. 521, and he said: "So in the charter in question, the words are in show the words of the king only, but the corporation having accepted the charter and enjoyed the benefit of it, as is averred in the declaration, they are as strongly bound as if they had covenanted expressly by an indenture." And now, this bridge having fallen in, and a ferry having been established in its place, and the deft. having received the tolls, I am clear that at that time he had a special obligation to repair, and that therefore the action would lie. Now, the parties have agreed that in such a case a *mandamus* may issue, but before I confirm that part of the case I shall see that the deft. can perform it. It is the duty of the court to see whether or not a peremptory *mandamus* should issue; for if the man cannot do it, he may be attached perhaps for the whole of his life, and being quite unable to perform the works it may ruin him. We cannot, therefore, consent to the issue of this writ. I think some of my learned brothers are of opinion that the deft. may give up the benefit he has hitherto possessed, and so get rid of the obligation. The judgment of the court below will therefore be affirmed as to the liability of the deft., but reversed as to that part that a writ of *mandamus* should go.

*POLLOCK, B.*, concurred.

*WILLES, C. J.*—I wish to say that I do not think it was the intention of the parties that a *mandamus* should issue as a matter of course; it is thus left. If the court is of opinion that the deft. is so bound (that is to reinstate the bridge), then judgment shall be entered up for the plt. for 40s. damages and costs of suit, and a *mandamus* may issue commanding the deft. so to reinstate the said bridge, that the same might become practicable for passage; it does not say if the plt. think proper only. I do not think there is sufficient in this paper case to induce us to impose on the deft. such serious consequences.

*BYLES, J.*—We are at liberty, in our discretion, to disaffirm what the parties have agreed to if we think fit; here we think that a peremptory *mandamus* should not issue.

*Judgment affirmed as to the liability of deft., and reversed as to the issuing of a peremptory mandamus.*

[Q. B.]

HOWARTH v. THE MAYOR OF MANCHESTER.

[Q. B.]

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HENNELLY, Esqrs., Barristers-at-Law.

Friday, Feb. 14.

HOWARTH (app.) v. THE MAYOR OF MANCHESTER (resp.)

*Local Act—Licence for slaughter-house—Resolution of committee—Revocation.*

The Manchester Police Act empowered the town council of the borough to grant licences for the erection of slaughter-houses. H. applied for a licence. The markets committee inspected the site, and recommended the grant. The committee then passed a resolution to grant the licence, and communicated the same to H., and the resolution was confirmed by the town council:

*Held, that though it was usual afterwards to grant a formal licence in a certain printed form, still the grant was complete on the confirmation of the resolution and communication thereof to H., and operated as a licence.*

Case stated by justices under 20 &amp; 21 Vict. c. 43:—

At a petty sessions of the peace for the city of Manchester, on the 9th April 1861, John Howarth, of Cheetham, butcher, was charged for that the said J. Howarth, on the 13th March 1861, did use as a slaughter-house a certain place, to wit, a building in a yard, such building not having been theretofore used as such, and without having obtained a licence from the town council of the said city, as required by an Act made and passed in the 8th year of the reign of Queen Victoria, intitled "An Act for the good government and police regulation of the borough of Manchester," contrary to the form of the said Act.

Upon the hearing of the information and complaint, the said deft. was convicted in a penalty of 5*l*.

The informants referred to sects. 123 to 129, both inclusive, of said Manchester Police Act, and it was proved or admitted that the town council had not made any by-laws relating to or for regulating the granting of licences for the erection or use of slaughter-houses within the said city, or for the registration thereof; that the markets committee is delegated by the town council all powers relating to slaughter-houses contained in the Manchester Police Act; that on parties applying for a licence under the sections of the Act before referred to, the practice is to give the applicant a notice in the form following, to be filled up and posted on the premises:—

"I, of street, in the city of Manchester, do hereby give notice that it is my intention to apply at a meeting of the markets committee of the council of the said city of Manchester, which shall be held next after the expiration of one calendar month from the date thereof, for the approval by the said committee of a plot of land, situate in street, within the said city, upon which this notice is affixed, as the site of an intended slaughter-house.—Dated this day of 18

"K.B.—The markets committee will not entertain my application for the approval of the site of an intended slaughter-house, or for a licence to use any premises as a slaughter-house, unless a notice of the intention to make such application shall have been posted and maintained on the land or premises during one calendar month at least prior to the application being made."

That in Feb. or March 1860 the app. (a butcher) valued upon the inspector of slaughter-houses duly appointed by the said committee to know what he (app.) must do to obtain a licence for the erection of a slaughter-house in St. Mark's-lane, Cheetham, when the inspector gave him a printed copy of the said notice to be posted on the premises, and which was posted accordingly.

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That after the expiration of the time mentioned in the said notice, two members of the markets committee deputed for that purpose, and accompanied by the said inspector, attended in accordance with the practice of the committee, and inspected the proposed site of the said slaughter-house, and subsequently reported to the markets committee and recommended that the app. should be allowed to erect a slaughter-house upon the site in question.

That after such report and recommendation, and no opposition to the sanction of a slaughter-house on the site proposed being offered, the committee passed a resolution, a copy of which was transmitted to the app. in the following form:—

"At a meeting of the markets committee of the council, held 4th May 1860, it was resolved:—That, as recommended by the slaughter-house sub-committee, Mr. J. Howarth be allowed to erect a slaughter-house in St. Mark's-lane, Cheetham.

"JOSH. HERON, Town Clerk.

"Mr. John Howarth."

That the above resolution of the markets committee was confirmed by the town council on the 6th June following.

That, immediately upon receiving the copy resolution of the committee, the app. directed his architect to proceed at once with the building, which was done, and the contract was let, and the foundations dug out, but no brick-work was commenced prior to the 15th June, on which day the resolution of the markets committee next referred to were passed.

That, in consequence of representations subsequently made to the markets committee, that the erection of a slaughter-house on the site proposed was very objectionable to a large number of the inhabitants in the neighbourhood, the committee at a meeting, held on 15th June, passed certain resolutions, a copy of which was duly transmitted to the app. in the following form:—

"At a meeting of the markets committee, held on the 15th June 1860, it was resolved:—That, under the circumstances, and upon consideration of the objections urged both on the part of the representatives of St. Mark's Schools and of others, and of the representations made as to the inconvenient and unsuitable position of the proposed site for a slaughter-house, Mr. Howarth be informed that this committee cannot approve of the site, or grant a licence for the use as a slaughter-house of any building which may be erected thereon.

"Resolved, that a copy of the proceedings in relation to the said slaughter-house be transmitted to Mr. Howarth, and that he be informed, under the circumstances, it will be useless to submit for the consideration of the committee the plan of any proposed building.

"Mr. Howarth." "JOS. HERON, Town Clerk.

That the app. continued the erection of his building, and deputations of the inhabitants of Cheetham both in favour of and against the slaughter-house attended subsequent meetings of the markets committee, and on the 8th March last a resolution was passed, a copy of which was also sent to the app. in the following form:—

"At a meeting of the markets committee of the council held 8th March 1861, Slaughter-house, St. Mark's-lane,

"It was resolved, after a careful consideration of the various memorials and communications received in relation to the application for a licence made by Mr. Howarth, this committee adheres to the resolution adopted on the 15th June 1860, and declines to grant a licence for the use as a slaughter-house of any portion of the buildings which since that resolution was passed and communicated to Mr. Howarth have been erected upon the site in St. Mark's-lane.

"JOS. HERON, Town Clerk."

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FISHER v. PROWSE. COOPER v. WALKER.

[Q. B.]

The above resolutions of the 15th June and the 8th March were afterwards duly confirmed by the town council.

It was also proved and admitted that the practice of the town council is (but not known by the app.), that when the buildings to be used as a slaughter-house are completed and ready for occupation, they are inspected, and, if approved, a licence to use the same as a slaughter-house is then granted in a certain form which is printed.

It is also the practice (but unknown to the app.) that the particulars of all licences are entered in a book in which is stated the date of the entry, the name of the owner or occupier, and the situation of the premises, and which is divided into two parts, in one of which slaughter-houses used as such prior to and at the time of the passing of the said Manchester Police Act are entered, and in the other part slaughter-houses subsequently licensed. When a licence for a slaughter-house is entered in the said book a certificate of registration is given in the form following:—

“Registration of Slaughter-houses.

“Borough of Manchester, } This is to certify that the  
to wit, } premises belonging to or  
in the occupation of } situate at }  
within the said borough, have been duly registered as  
a slaughter-house under the provisions of a certain Act  
of Parliament, passed in the 7th and 8th years of the  
reign of her present Majesty, intitled ‘An Act for  
the good government and police regulation of the  
borough of Manchester.’

“Dated this day of 18 .

“Jos. HERON, Town Clerk.”

There is not any entry in the said book of any licence having been granted to the app. No licence for the erection of a slaughter-house has ever been granted, unless, as contended by the app., the resolution of the 4th May 1860 is to be so considered; nor has any licence to use a slaughter-house been granted in any case before the buildings were completed.

The app. proceeded with the erection of his slaughter-house, and the same was completed and used by him as a slaughter-house on the 14th March last, without any licence having been obtained for the same or registered other than as appears from the facts above stated.

At the hearing of the information it was contended on the part of the app. that the resolution of the markets committee of the 4th May 1860, afterwards confirmed by the council, was a licence granted to him for the erection of the slaughter-house in question under and in accordance with the 124th section of the said Manchester Police Act; and that after the erection thereof the app. was entitled to use the same as a slaughter-house without any further licence or authority from the town council; that the town council had no power or authority to withdraw or rescind the said licence by the resolutions of the 15th June 1860 and the 8th March 1861; that the app. was not required to register the said licence, inasmuch as the provisions for registration contained in the said Act apply only to licences granted to retail butchers under the 125th section of the said Act and to every place which at the time of the passing of the said Act shall be used as a slaughter-house; that there is no mode provided by the said Act for the registration of licences for the erection of slaughter-houses, nor have the town council made any provisions for such registration; that the resolution of the town council of the 4th May 1860 being recorded renders any other registration unnecessary.

The justices being of opinion that the resolution of the 4th May 1860 was not the grant of a licence under the 125th section of the said Act, adjudged the app. guilty of the offence, and convicted him accordingly.

The Manchester Police Act (7 & 8 Vict. c. xl.), sect. 124, enacted, “That it shall be lawful for the council, upon application made to them for that purpose, to grant licences from time to time for the erection of slaughter-houses to such butchers, and upon such terms and conditions, as the council shall think proper.”

Sect. 125 empowers the council to grant licences from time to time to retail butchers for the killing of cattle on their own premises, for sale to their ordinary customers, “provided always, that no licence shall be valid until the same shall have been registered in the manner hereinafter directed.”

Sect. 127 enacts, “That no place shall be used or occupied as a slaughter-house which shall not have been so used previously to the passing of this Act, unless a licence for the erection thereof, or for the use and occupation thereof as a slaughter-house, shall have been previously obtained and be in force.”

*Mellish* for the resp.—The real question is, whether the copy of this resolution forwarded to the app. operated as a licence. The case finds that when the buildings are approved, a licence is then granted in a certain printed form. So that it appears that the intention is not to grant the licence until then, and if so, the resolution does not operate as a licence. The resolution is not on the face of it a licence; the licence must be granted in the name of the town council, and must be expressly for the erection of a slaughter-house. It is merely a notice by the clerk that they are willing to grant a licence. The statute contemplates that the licence shall be a written document. [WRIGHTMAN, J.—They do put it in writing in their own book.]

*Quain*, contra, was not called upon.

CHROMTON, J. — We think that when the town council confirmed the resolution of the 4th May they made it their own act, and that particular paper their writing. *Judgment for the app.*

May 13 and June 16.

FISHER v. PROWSE.

COOPER v. WALKER.

*Highway—Dangerous nuisance—Existence of obstruction at the time of dedication to the public.*

*If, after a highway exists, anything be newly made so near to it as to be dangerous to those using it, this will be unlawful and a nuisance:*

*If an ancient erection, as a house, is suffered to become ruinous, so as to be dangerous, this is also a nuisance:—But where an erection or excavation, not otherwise unlawful, exists at the time the highway is dedicated, the dedication is made to the public and accepted by them subject to the inconvenience.*

FISHER v. PROWSE.

*A. was the occupier of a house adjoining to a public street, with a cellar belonging to it, which had existed before his occupation commenced. The mouth of the cellar opened into the footway of the street by a trap-door, which was open during the day, but at night was closed by a flap which slightly projected above the footway, in which state it had been as long as living memory went back. The plt. in coming along the footway at night stumbled over the flap, fell, and received injury. No negligence was proved on the part of the plt. contributing to the accident, and the flap obstructed the footway to such an extent that if it had been newly put down it would have been a nuisance, for the consequences of which those who maintained it would have been responsible:*

*Held, that the conclusion to be drawn from the long existence of the flap in that state was, that it had existed as long as the street, and that the dedication of the way to the public was with the cellar flap in*

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FISHER v. PROWSE.

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it, and subject to the reservation of its being continued there.

J. Browne, for the deft. showed cause against a rule to enter the verdict for the plt.

The plt. in person contra.

*Cur. adv. vult.*

#### COOPER v. WALKER.

*Is a declaration for negligently and improperly placing in a public street certain stone steps, so that the same became and were an obstruction and hindrance to persons using the street, and dangerous to persons passing along it at night, and alleging that plt. passing along the street fell over them and was injured: the deft. pleaded that the street was subject to the right of the occupiers of a house adjoining it to have steps standing in the highway on a part thereof and leading to the outer door of the said house, all persons passing along the highway being entitled to pass on foot over the said steps as a part of the highway, but not to remove the steps, the highway being at the part thereof which was occupied by such steps a way for foot passengers over the said steps, which steps were part of the said house. This plea was found for the deft. The steps were so far an obstruction and hindrance and dangerous to passengers, that if they had been placed in the highway after its dedication they would have been a nuisance, and the party placing them there responsible for damage thence arising:*

*Held, that the plea was a good plea, and a sufficient defence to the action.*

Mellish, Q. C. (Henry James with him) showed cause against a rule to enter a verdict for the plt. on the second plea, *non obstante veredicto*.

Woollett contra.

*Cur. adv. vult.*

June 16.—BLACKBURN, J.—The decision in both these cases depends upon the same question of law. In *Fisher v. Prowse*, the deft. was occupier of a house adjoining to a public street, with a cellar belonging to it, which cellar had existed before the deft. had anything in the house. The mouth of this cellar opened into the footway of the street by a trap-door. During the day this trap-door was open, but at night it was closed by a flap, which slightly projected above the footway. The plt., coming along the footway at night, stumbled over this flap, fell, and sustained injury, for which he brought this action. At the close of the plt.'s case, Erle, C. J., before whom the case was tried, directed a nonsuit, but gave leave to the plt. to move to enter a verdict for 75*l.*, it being "to be taken as proved that, as long as living memory went back, the flap had been as described in the evidence." A rule nisi to enter the verdict for the plt. was obtained, against which cause was shown by Mr. Browne in the sittings after last Trinity Term; the plt. appearing in person, in support of the rule, in Michaelmas Term, before my Lord and myself. We think we must, on this reservation, coupled with the evidence, take it to have been proved that there was no negligence on the part of the plt. contributing to the accident, and that the flap did cause obstruction to the footway to such an extent that, if the flap had been put down for the first time after the highway was dedicated to the public, it would have been a nuisance, for the consequences of which those who maintained the nuisance would have been responsible. On the other hand, we must take it to have appeared that the flap continued in its original condition, and that the deft. had not altered it or suffered it to get out of repair so as to increase the danger and obstruction beyond what always must have existed since it was there. And we think that on its being shown that the cellar-flap had existed in its present condition so far back as living memory went, the jury ought to draw the conclusion that it had existed as long as the street, and that the dedication of the way to the public

was with this cellar-flap in it, and subject to the reservation of its being continued there, so far as by law the highway could be subject to it. It seems to us, therefore, that the question reserved was whether after the dedication of the highway the maintenance of such an ancient cellar-flap was unlawful. During the pendency of the rule in this case of *Fisher v. Prowse*, a rule nisi had been obtained in the other case of *Cooper v. Walker*, and as the same question arose in that case, we delayed judgment in *Fisher v. Prowse* till after the case of *Cooper v. Walker* should have been argued. In *Cooper v. Walker* the plt. declared against the deft. for negligently and improperly placing in a public street certain stone steps, so that the same became and were an obstruction and hindrance to persons using the street, and dangerous to persons passing along it at night, and averred that the plt. passing along the street fell over them and was injured. The deft., in addition to the plea of not guilty, pleaded a second plea on which the present question arises. This plea was, that the street was subject to the right of the occupiers of a house adjoining it to have steps standing in the highway on a part thereof, and leading to the outer door of the said house, all persons passing along the highway being entitled to pass on foot over the said steps as a part of the highway, but not to remove the said steps, the highway being at the part thereof which was occupied by such steps a way for foot-passengers over the said steps, which steps were part of the said house. The plea then proceeded to show that the street was lowered under the Metropolis Local Management Act; that in so doing the old steps were necessarily removed, and the present steps placed in their room, and it was averred that the new steps were placed on the same part of the highway on which the old steps had stood and nowhere else; and that they were proper steps, and caused no greater obstruction, hindrance, inconvenience, or danger to persons passing along the lowered highway than did the old steps to persons passing along the highway before it was lowered. Issue was joined on these pleas. On the trial before my brother Hill the jury found for the plt. on the plea of not guilty, but for the deft. on the second plea. Mr. Woollett having obtained a rule nisi for judgment *non obstante veredicto*; against this rule cause was shown last term before my Lord Chief Justice, my brothers Crompton and Mellor and myself. No damages had been assessed at the trial, so that, if we had thought the plea bad after verdict, the rule could not have been made absolute in this form, though probably it might have been moulded so as to afford an opportunity for a new trial; but this we need not consider, as we are of opinion that the plea is good. It was hardly disputed on the argument before us, that, if the former highway was subject to a right on the part of the occupiers of the deft.'s house to keep steps in it without their being, although to some extent obstructing the highway, a nuisance or illegal, the lowered highway must be subject to a similar right. The main contention was that no such right could exist in law. The plea of not guilty having been found for the plt., we must take it to have been proved that the steps in question were so far an obstruction and hindrance and dangerous to passengers that if they had been placed in the highway after its dedication they would have been improper and a nuisance, so that the party placing them there would have been responsible for any damage thence arising. We must construe the plea as confessing this, but avoiding it by showing that the highway was subject to the right to keep such steps there; and we think that, after verdict, this is sufficient, if in point of law there can be such a private right in a highway. This depends on the same principle as *Fisher v. Prowse*. The law is clear that, if after a highway exists anything be newly made so

near to it as to be dangerous to those using the highway, such, for instance as an excavation (*Baines v. Ward*), this will be unlawful and a nuisance, as it also is if an ancient erection, as a house, is suffered to become ruinous so as to be dangerous (*Reg. v. Watts*); and those who make or maintain the nuisance in either case are liable for any damage sustained thereby, just as if the nuisance arose from an obstruction in the highway itself. But the question still remains whether an erection or excavation already existing, and not otherwise unlawful, becomes lawful when the land on which it exists, or to which it is immediately contiguous, is dedicated to the public as a way, if the erection prevents the way from being so convenient and safe as it otherwise would be; or whether, on the contrary, the dedication must not be taken to be made to the public and accepted by them subject to the inconvenience arising from the existing state of things. We think that the latter is the correct view of the law. It is, of course, not obligatory on the owner of the land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions and subject to certain reservations, and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand, great injustice and hardship would often arise if, when a public right of way has been acquired under a given state of circumstances, the owner of the soil should be held bound to alter that state of circumstances to his own disadvantage and loss, and to be bound to make further concessions to the public altogether beyond the scope of his original intention. More especially would this be the case when public rights of way have been acquired by mere use. For instance, the owner of the bank of a canal or sewer may, without considering the effect of what he is doing, permit passengers to pass along until the public have acquired a right of way there. It is often hard upon him that the public right should have been thus acquired; it would be doubly so if the consequence was that he was bound to fill up or fence off his canal. The question whether the owner of the soil is under such an obligation arose in *Cornwell v. The Metropolitan Commissioners of Sewers*. Alderson, B. there says: "Suppose there is an inclosed yard with several dangerous holes in it, and the owner allows the public to go through the yard, does that cast on him any obligation to fill up the holes? Under such circumstances *caveat viator*." And Parke, B. says: "This is not the case of a new sewer, and therefore we may dispense with the consideration of what the commissioners are bound to do when they make a sewer. This is an ancient sewer which has existed with the highway time out of mind, and therefore the public have only a right to the highway subject to the sewer." The case of *Coupland v. Hardingham*, 3 Camp. 398, on which the plts. in the present cases principally relied, was cited in the argument in *Cornwell v. The Metropolitan Commissioners of Sewers*. There, Martin, B. observes on it, that "in all probability the road in that case had been used long before the house was built." The statement of facts in the report in 3 Camp. is perhaps scarcely consistent with this explanation, as it is there stated that "the premises had been exactly in the same situation as far back as could be remembered, and many years before the deft. was in possession of them." But Lord Ellenborough seems to have directed his attention principally to the part of the proposed defence grounded on the fact that the deft. did not himself erect what was alleged to be a nuisance. His ruling on that was, that he who maintains a nuisance is as much responsible as if he had

erected it. If his attention was called to the other part of the defence, which, from the report, seems to have been raised on the facts, and he held that though the area had existed with the highway time out of mind, the public had a right to the way not subject to the area, his holding is inconsistent with the judgment of the Ex., and being only a holding at Nisi Prius, though by a very great judge, it must yield in point of authority to a judgment in banco. In *Jarvis v. Dean*, 3 Bing. 447, the report leaves it uncertain whether the area in that case existed before the dedication of the way or not. As it is stated to have belonged to an unfinished house, it probably had not been long in existence; and as Best, C. J. states in his judgment, that the way had been a public thoroughfare for many years, it seems that the way must have been more ancient than the area, and that the present point could not therefore have been raised. It certainly does not appear to have been raised, and no opinion is given on it. There is no other authority that has been brought to our notice that conflicts with the decision of the Court of Ex. In *Barnes v. Ward* the judgment is carefully worded. The Court there say: "The result is, considering that the present case refers to a newly made excavation adjoining an immemorial public way." This is not a decision that the case would have been different if the way had been more recent than the excavation, but it rather implies that such was the leaning of the court. In *Morant v. Chamberlain*, though it was unnecessary to decide the point, the Court of Ex. state that it was the inclination of their opinion that the dedication of a highway might, in point of law, be made subject to the reservation of a private right to some extent interfering with the public way. As was pointed out in the course of the argument, there are in many towns ancient streets in which steps descending from the ancient houses are a permanent obstruction to the passengers, while in the foot pavements there are often flap-doors, opening into vaults and cellars, and plates opening into coal-cellars, which, when opened, offer a temporary obstruction to the use of the way, and which therefore, unless justified as having been reserved as of right on the dedication of the way, would obviously be illegal. So in the country there are innumerable footways which would be much more convenient if the ancient stiles were removed or even lowered. Yet it has never been held, or even suggested, that such things were illegal and might be removed as nuisances, and it seems difficult to say how they can be legal on any other principle than that the way has been dedicated subject to them. For these reasons we think that in both cases the rules must be discharged.

Rule discharged.

Wednesday, July 2.

REG. v. BIGGINS.

*Conviction under 4 Geo. 4, c. 34—Handicraftsmen—Master and servant—Allegation as to the capacity in which the servant contracted to serve his master—Amendment.*

In this case there had been a *certiorari* granted to bring up a record of conviction of the Rev. Harry Curteis Lipscombe, of Staindrop, in the county of Durham, clerk, one of the justices of the said county, made on the 20th June last, whereby Thomas Biggins was convicted for that he, the said Thomas Biggins, on the 27th March then last, at the parish of Cockfield, in the said county of Durham, being then and there a handicraftsman, did contract with one Henry Weaver, of Staindrop, in the same county, contractor, to serve him for an indefinite period, determinable nevertheless by either of the contracting parties at the end of any day by either of them giving to the other of them verbal notice to that effect, at and for the daily wages of 5s., payable at the end of each fortnight, with a weekly allowance

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for subsistence in the meantime; and that he the said T. Biggins having entered into such service accordingly, did afterwards, to wit, on the 19th June then inst., at the parish of Cockfield, absent himself from his said service before the term of his said contract was completed, without the consent of the said H. Weaver, without just cause or excuse, and had, from thence, neglected to fulfil his said contract, contrary to the form of the statute in such case made and provided; and whereby the said justice adjudged the said T. Biggins for the said offence to be punished by abating the sum of 10s., being a part of the wages due to him for and in respect of his said service and employment, according to the form of the statute, &c.

For the deft. Thomas Biggins, it was contended that the conviction was bad, for that it did not appear, on the face of the said conviction, that the said T. Biggins contracted to serve the said Henry Weaver, his master, in any capacity mentioned in, or referred to, in the statute under which the conviction took place.

And, in support of the conviction, it was contended that it was good, and that, if it was not good, it ought to be amended, and an amendment was craved accordingly.

T. Jones for the prosecution.

Holl contra.

By the COURT.—Conviction to be amended, no costs on either side.

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYD, Esqrs., Barristers-at-Law.

Jan. 24 and June 2.

SHEPARD AND ANOTHER v. PAYNE AND ANOTHER.

*Registrars of Archidiaconal Courts—Right to fees at visitations—Churchwardens—Presumption of immemorial usage.*

*The pls. are registrars of an archidiaconal court, holding office for life by patent from the archdeacon. By the practice of the Ecclesiastical Courts the presence of a registrar is necessary whenever any act is done by an ecclesiastical judge. The defts. are the churchwardens of a parish within the archdeaconry. Two ordinary visitations have been by custom held in the parish in each year severally at Easter and Michaelmas, for the past 300 years, at which each of the churchwardens have been required to make presentments. The practice has been for the registrar on each occasion to prepare and forward printed articles of inquiry called "presentment papers" to the rural dean, who arranges a time with the churchwardens when he shall inspect the church, and in his presence the churchwardens fill up and sign their "presentment papers" ready for delivery at the next visitation. At the day appointed for the visitation, and before appearing at church, the churchwardens attend the registrars, and are furnished with printed declarations of office, which they sign, and at the same time pay the fees due from the clergy to the archdeacon, also the fees claimed as due from themselves to the officers of the court. The duties of the registrars occupy much time and occasion considerable outlay, and the registrars have no remuneration for their services, except certain fees called "visitation fees," which they claim as follows:—*

*At Easter visitation—For process and schedule, citation and service, act on appearance of outgoing churchwardens, articles of inquiry, presentment and fling, return of churchwardens elect and fling declaration of office, and fling, &c., the sum of 7s. 6d., out of which 1s. is due to the "official" (judge of the court) and 1s. to the apparitor.*

*At Michaelmas visitation—For process and schedule,*

*citation and service, act on appearance of churchwardens, articles of inquiry, presentment and fling, the sum of 4s. 6d., out of which 1s. is due to the official and 1s. to the apparitor.*

*In respect of Easter visitation and Michaelmas visitation 1857, and the two following years, and at Easter 1860, the sums respectively payable as above were demanded by the pls., and payment refused by the defts. Whereupon the pls. brought their action to recover the said fees, as being, first, just and lawful fees, settled by competent authority; secondly, as ancient and accustomed fees due to them by virtue of their office; and thirdly, as a reasonable compensation for work and labour done.*

*The evidence showed that the office of registrar is a freehold office, with duties of a continuous and presumably perpetual character, and its existence essential to some of the functions of the archdeacon, and therefore an office to which fees may be annexed by immemorial usage; that as early as the sixteenth century payment of some fees were made by the churchwardens to the registrar; that from the year 1727 to the present dispute fees of smaller or greater amounts than those now claimed have been paid, and except in one instance in 1739 not disputed:*

*Held, that the claim to be valid must be founded on immemorial usage, and that the continuous receipt of the fees in question had been established in point of fact for a period so long that the court would presume immemorial usage, and the pls. were therefore entitled to recover:*

*Held, also, that the fees claimed were reasonable in amount, and payable as for services actually rendered; and that the visitation being intended to operate and operating for the benefit of the parish at large, and amongst others of the churchwardens themselves, the performance of whose duties is facilitated by the services of the registrar, the churchwardens are the parties compellable to pay the said fees.*

*This was an action to recover certain moneys, amounting to 2l. 3s. 6d., and by consent of parties and order of a judge the following case was stated for the opinion of the court.*

#### CASE.

The pls. hold the office of Registrars of the Archdeaconry Court of Colchester, in the diocese of Rochester. The defts. are churchwardens of the parish of Little Totham, in the county of Essex, which is within the archdeaconry.

The Archdeaconry of Colchester comprehends about 200 parishes in the county of Essex, divided into eighteen rural deaneries, over the whole of which the archdeacon (the Venerable Charles Parr Burney, D.D.) has jurisdiction as ordinary, and in subordination to him are the following officers:—

The "Official," who is the judge of the Archdeaconry Court, and the substitute for the archdeacon when not personally present. The office is held for life by Maurice Charles Mertins Swabey, D.C.L., by patent under the hand and seal of the archdeacon, dated the 15th Dec. 1856. A copy is annexed marked A, and is to be taken as part of this case.

The "Registrars," whose duties are partly indicated by their name. The pls. hold this office "jointly and severally for their lives and the life of the survivor of them," by patent under the hand and seal of the archdeacon, dated 11th April 1853. A copy is annexed, marked B, and is to be taken as part of this case. One of the registrars is a proctor in the Archdeaconry Court of Canterbury, and the other is an attorney of this court. By the practice of the Ecclesiastical Courts the presence of a registrar is necessary whenever any act is done by an ecclesiastical judge: (see Canon 123.)

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The "Apparitor," who is the summoning officer of the court. The present officer is Mr. Samuel William Maryon, and the office is usually considered to be held at the pleasure of the archdeacon, and is sometimes conferred by deed. In this instance there was no written appointment.

By custom, churchwardens are chosen yearly in Easter week, and are admitted into their office by the ordinary at his visitation shortly afterwards. In this archdeaconry it has been the custom for at least three centuries to hold two ordinary visitations in the year, at each of which the churchwardens have been required to make presentments: (see Canons 116, 117, 118.)

The Archdeaconry of Colchester is divided into four districts or "calls," for which visitations are held yearly at the principal towns of Colchester, Walden, Kelvedon and Halstead. The parish of Little Totham is comprehended, with thirty-nine others, in the Kelvedon call, to which alone reference will henceforth be made.

The following is the mode in which the business of the court is conducted.

Shortly after Easter in every year, a process is issued by the registrars, under the seal of the archdeaconry, addressed to all clerks and literate persons whomsoever in and throughout the archdeaconry, appointing a day for holding the "Easter visitation" in the parish church of Kelvedon, or occasionally in the neighbouring parish of Witham, and directing them to cite the churchwardens to attend. A copy of the usual process is annexed, marked C, and is to be taken as part of this case.

The process is delivered to the apparitor alone, who issues citations accordingly, which in special cases are personally served, but more frequently sent by the post. A copy of the usual citation is annexed, marked D, and is to be taken as part of this case.

Printed articles of inquiry (commonly called "presentment papers") are prepared and forwarded by the registrar to the rural dean of each of the eighteen deaneries: (see Canon 119.) The rural dean arranges a time with the churchwardens of each parish when he shall inspect their church, and in his presence, and in their own parish, the churchwardens fill up and sign their presentments ready for delivery at the visitation. A copy of the usual articles of inquiry is annexed, marked E, and is to be taken as part of this case.

At the day appointed for the visitation, and before appearing at church, the practice is for the churchwardens to attend the registrar at an inn, or other convenient place, where they are furnished by him with printed declarations of office, under the stat. 5 & 6 Will. 4, c. 62, s. 9, which they sign. A copy of such declaration is annexed, marked F, and is to be taken as part of this case. At the same time they pay the "procurations and synodals" claimed as due from the clergy to the archdeacon, as well as the fees claimed as due from themselves to officers of the court. A copy of the usual form of receipt is annexed, marked G, and is to be taken as part of this case.

At the appointed hour, the archdeacon, official, or surrogate, takes his accustomed seat in the church, attended by one of the registrars, and (after Divine service) the court is formally opened, and the churchwardens of the several parishes are called over in rotation. The outgoing churchwardens appear, and deliver in their "presentment papers," which are inspected by the judge, and delivered by him to the registrar to be filed. The registrar enters a minute on the visitation book of the appearance of the churchwardens, as well as of any special order as to repairs or otherwise, which may be made by the court.

At the same time the churchwardens elect, who are in the majority of cases the old churchwardens rechosen,

deliver in their "declarations of office," which are acknowledged before the judge, and filed by the registrar, who also enters a minute of the fact in the visitation book.

Another visitation is held shortly after Michaelmas in each year, before the official or his surrogate, the object of which is to ascertain whether the defects presented at the Easter visitation have been amended, and the orders then given obeyed. Process is issued, citations and presentment papers sent out, and the proceedings conducted in the same form as at Easter, except that the facilities of the post-office have of late years been made use of to obviate the personal attendance of the churchwardens in those cases in which they are able to make a satisfactory return. Copies of the usual Michaelmas process, citation and presentment paper are annexed, marked respectively "H, I, K," and are to be taken as part of this case.

The various duties before described occupy a large portion of time, and occasion a very considerable outlay in travelling and other expenses, clerks' salaries, printing, postages and sundries. The registrars have no remuneration for such services, except certain fees called "visitation fees," which they claim as follows:—

At the Easter visitation—For process and schedule, citation and service, act on appearance of outgoing churchwardens, articles of inquiry, presentment and filing, return of churchwardens elect and filing, act on appearance of churchwardens elect, declaration of office and filing—the sum of 7s. 6d. in the whole; out of which the sum of 2s. is due to the official and 1s. to the apparitor.

And at the Michaelmas visitation—For process and schedule, citation and service, act on appearance of churchwardens, articles of inquiry, presentment and filing—the sum of 4s. 6d. in the whole; out of which 1s. is due to the official and 1s. to the apparitor.

The ptes. are not liable to the official, or to the apparitor, for payment of any fees which they do not themselves actually receive.

The gross amount of visitation fees retained by the ptes. as registrars of the whole archdeaconry is under the sum of 100l. per annum.

The claim for which the present action is brought arises under the following circumstances:—

On the 20th May 1857 a visitation called the Easter Visitation was held in the manner before described at the parish church of Kelvedon, to which the defts. were cited in the manner hereinbefore described as churchwardens of Little Totham. The deft. John Payne attended, and made and subscribed the statutory declaration, and was admitted into office for the ensuing year. The deft. Henry Quihampton did not appear when called on.

In respect of such visitation the sum of 7s. 6d. is claimed by the ptes., and the payment thereof was at the time, and still is, refused by the defts.

On the 26th Oct. 1857 a visitation called the Michaelmas Visitation was held for the whole archdeaconry in the parish church of St. Peter's, Colchester, to which the defts. were cited, with an intimation that "in case they were able to make a satisfactory return through the post-office before the day of visitation, their personal attendance on that occasion would not be required." The defts. did not personally appear at such visitation, but the deft. Henry Quihampton signed and sent a presentment through the post, which was duly received and exhibited. A copy of such presentment, marked L, is annexed, and is to be taken as part of this case.

In respect of such visitation the sum of 4s. 6d. is claimed by the ptes., and payment thereof was and is refused by the defts.

On the 31st May 1858 and the 27th Oct. 1858

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visitations were held, in like manner, in the parish churches of Kelvedon and St. Peter's, Colchester, respectively. The defts. did not appear at either of such visitations, nor did they sign or acknowledge any declaration of office, but at each of such visitations presentments were sent in and exhibited, signed by the deft. Henry Quihampton.

In respect of the visitations so held in 1858, the several sums of 7s. 6d. and 4s. 6d. are claimed by the plts., and the payment thereof was and is refused by defts.

On the 7th June 1860 a visitation was held, in the manner before described, at the parish church of Witham. The defts. were cited, and appeared; they exhibited their presentment, and made and subscribed their declarations of office, copies of which are hereto annexed, marked respectively M and N, and are to be taken as part of this case.

In respect of such last-mentioned visitation the sum of 7s. 6d. was and is claimed by the plts., and the payment was and is refused by the defts.

All such fees are claimed by the plts.: first, as just and lawful fees, settled by competent authority secondly, as ancient and accustomed fees due to them by virtue of their office; and thirdly, as a reasonable compensation for work and labour done.

A table of fees is preserved in the registry, which is without date, but is in the handwriting of Philip Knightbridge, notary public, who was deputy-registrar of the archdeaconry from the year 1721 to his death in the year 1745 or thereabouts, from which the following is annexed:—

	Judge. s. d.	Registrar. s. d.	Apparitor. s. d.
For every citation of churchwardens to attend at an Easter visitation, setting out the book, act on appearance, and filing presentment, books of articles and oaths, for every seven shillings and sixpence ..	2 0	4 6	1 0
For every citation of churchwardens to attend at a Michaelmas visitation, setting out the book, act on appearance, and filing presentments, per shillings and sixpence ..	1 0	2 6	1 0

A copy of the said table of fees is annexed, marked O, and is to be taken as part of this case.

This table of fees does not bear the seal of the court, nor is it authenticated otherwise than by being in the handwriting of the said Philip Knightbridge. It has never been placed in the usual place where the court is kept (no court for contentious business has been held for many years), nor in the registry in such sort as every man whom it concerneth may, without difficulty, come to the view and perusal thereof, and take a copy of them: (see Canon, 136.) It has never, within living memory, been hung up in any conspicuous place, but was found in a drawer in the registry with other miscellaneous papers.

There are very numerous entries in the earlier visitation books of the archdeaconry, showing generally the payment of fees by churchwardens at the several visitations, and amongst them are the following, in which the particular amounts are specified:—

1719 (Oct. 28) .... Birchanger .....	Deb. 7s. 6d.
	[pro festum Pasche]
1727 (Dec. 4) .... All Saint's, Colchester .....	Sol. 4s. 6d.
	[For Boyes]
1728 (Oct. 14) ... } All Saint's, Colchester ....	[Deb.]
1729 (Apr. 17) ... }	[Sol. freed.]
1729 (Apr. 17) .... St. Botolph's, Colchester ..	Sol. freed.
	[7s. 6d.]
1729 (July 7) .... Mount Bares .....	Sol. freed.
	[To Mand, 7s. 6d.]
1729 (Oct. 23) .... Berden .....	Due, 4s. 6d.
	for last Mich. wch y <sup>e</sup> churchw'd promises to pay next Easter.
1729 (July 9) .... Little Wigborough .....	N.B. No appearance for 3 visitations past. In all now due with this, 12 s. 6d.

And it appears from numerous memoranda, indorsed on the original churchwardens' presentment papers now remaining in the registry, that the fees of 7s. 6d. and 4s. 6d. mentioned in the table marked O were recognised as existing and payable at various periods anterior to the appointment of John Oxley Parker, hereinafter mentioned, and especially in the several years 1756, 1758, 1759, 1762, 1764, 1765, 1766, 1767, 1768, 1773, 1774, 1776. Such memoranda chiefly relate to cases in which the payments were in arrear, and for the most part show the payment of such arrears.

No entry or memorandum has been found in any of the visitation books or presentment papers of later date than the presumed compilation of the said table marked O, showing the payment or receipt of any visitation fees of less amount than the fees specified in such table.

It also appears to have been the uniform practice, at least as far back as the period last referred to, for the churchwardens to pay the usual fees, even when from illness or other causes they failed to attend the visitation. The instances thereof appearing in the visitation books are very numerous, amounting to several hundreds.

It is shown by the fee books of the said John Oxley Parker, who was deputy-registrar of the archdeaconry from the year 1778 to his death in the year 1826, as well as by the original churchwardens' presentment papers, during that period, that, down to the year 1801, or thereabouts, the said John Oxley Parker received from the churchwardens of every parish in the archdeaconry, with few if any exceptions, the same fees as are mentioned in the table marked O.

But it appears that the said John Oxley Parker, in the years 1802, 1803, 1808 and 1814, made certain additions to, or alterations in, the said fees, as shown in the table hereinafter set forth.

On the death of the said John Oxley Parker, in 1826, his son Charles George Parker succeeded him as deputy-registrar, and held the office until his death, in 1847.

In years 1841 and 1842 the said Charles George Parker made an addition of 1s. to the fees demanded at the Michaelmas visitation, as shown in the table hereinafter set forth. In other respects, and in other years, he adhered to the fees received by the said John Oxley Parker from 1814 to 1825.

No reason or ground appears for any of the changes made by the said John Oxley Parker and Charles George Parker respectively, further than is shown by a memorandum in the handwriting of the said John Oxley Parker, made at the Michaelmas visitation in 1808, to the following effect:—"A. C. Presentments.—I charged 5s., being an increase of 6d., on account of additional expenses of travelling," &c. And there is nothing to show that the said John Oxley Parker and Charles George Parker, or either of them, had the authority of the archdeacons or officials, or the sanction or approval of the principal registrars for the time being.

On the death of the said Charles George Parker, the plt. John Shephard succeeded him as deputy-registrar, and held that office till the death of Anthony Hamilton, clerk, the principal registrar in 1851, since which time the plts. have jointly acted as principal registrars.

The following table shows the visitation fees actually claimed and received from time to time since the date of the table of fees marked O, as evidenced by the visitation books, fees books, and presentment papers, before referred to, and corroborated by the churchwardens' accounts for several of the parishes in the Kelvedon coll.



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	Easter Visitation.		Michaelmas Visitation.		Yearly Total.	Registrars and Deputy Registrars.	
	s.	d.	s.	d.			
1737 to 1744 .....	7	6	4	6	12	0	Philip Knightbridge, deputy registrar.
1745 to 1758 .....	7	6	4	6	12	0	James Lucas, deputy registrar.
1759 to 1777 .....	7	6	4	6	12	0	James Taylor, deputy registrar.
1778 to 1801 .....	7	6	4	6	12	0	John Oxley Parker, deputy registrar.
1802 .....	8	6	4	6	12	0	"
1803 to 1808 .....	9	6	4	6	14	0	"
1809 to 1813 .....	10	0	5	0	16	0	"
1814 to 1825 .....	9	0	5	0	14	0	"
1826 to 1840 .....	9	0	5	0	14	0	Charles George Parker, deputy registrar.
1841 & 1842 .....	9	0	6	0	15	0	"
1843 to 1847 .....	9	0	5	0	14	0	"
1848 to 1851 .....	9	0	5	0	14	0	John Shephard, deputy registrar.
1852 to 1856 .....	9	0	4	0	13	0	John Shephard and Augustus Charles
1857 to 1860 .....	7	6	4	6	12	0	Veley, principal registrar.

The older visitation books have been examined, and contain numerous entries of sums differing in amount from any above set forth as charged and paid for visitation fees.

Sofar as any general results can be extracted, it appears that fees were claimed and paid from time to time as in the following table:—

Years.	Easter Visitation.		Michaelmas Visitation.		Yearly Total.
	s.	d.	s.	d.	
1682 .....	2	8	1	8	5
1697 .....	8	0	3	0	8
1699 .....	5	6	3	6	9
1700 .....	8	0	2	6	7
1708 .....	5	6	3	6	9

But various other charges occur, such as 4s., 1s., 6s. 6d., 4s. 6d., 3s. 4d., for which it is difficult to account, but which appear to stand, except in their comparative infrequency, on the same footing as the sum set forth in the preceding table.

It is, however, to be noticed in all the above instances, that the memoranda are made only in two cases, in which for some reason or other the fees were not paid at the time. As regards the great majority of parishes, the visitation books, which do not purport to contain any regular account of fees, are silent on the subject.

Moreover, there is nothing to show, at the period now referred to, whether or not the fees to the official and apparitor were included in the amounts charged; or whether or not they were separately received, or whether in fact any were charged or paid.

Going still further back, the visitation books for the years 1587 and 1588 have also been examined. No entry or memorandum of any fees is to be found in the books for Easter 1587, and Easter and Michaelmas 1588. But in that part of the book for Michaelmas 1587 which relates to the Colchester call, there appears in fifty instances out of sixty-two, an entry or mark of "4d.," in the margin of the usual memoranda of the appearances of the churchwardens in that year; the said entry appearing in a part of the page corresponding to that in which the entry of fees owing is frequently found in the more modern books; in which latter no memorandum is usually entered of payments, but only of the sums left unpaid and owing; the entry being usually accompanied by the word "debet" or "debent."

It appears further from the visitation books, that at the Easter visitation in 1739, the churchwardens of the parish of Holy Trinity, Colchester, refused to pay the fees. The following is a copy of the entries relating to the subject:—

1739. May 2.—Visitation held before the archdeacon and Dr. Strahan his official.

Boyse and Naggs, churchwardens. Naggs appeared and exhibited.

Naggs and Wayley elect. Sworn. Refused to pay the fees, and are admonished to give their reasons in writing on or before the first Monday in July next.

1739. July 2.—Court held before the Rev. P. Morant, surrogate.

Wayley appeared and delivered his reasons in writing. The surrogate continues this affair to hear the Judge's pleasure to next court the 27th day of August next.

[N.B. No court held in August.]

1739. Oct. 10.—Visitation held before the Rev. P. Morant, surrogate. Naggs and Whaley, churchwardens. Appeared and continued to hear the Judge's pleasure upon the churchwardens' reasons for not paying the fees of court.

1740. April 17. Visitation held before Dr. Strahan, official. Naggs and Wayley, churchwardens. Appeared and exhibited.

Both again. And sworn. They tendered 2s. for the oaths and other fees, but not otherwise specified, which was left, but not accepted of.

1740. Oct. 15.—Visitation held before the Rev. B. Symson, surrogate.

[Nothing appears.]

1741. April 9.—Visitation held before the archdeacon, and Dr. Strahan, his official.

Naggs and Wayley, churchwardens. Appeared and exhibited.

Wayley and Brockwell elect.

1741. Oct. 21.—Visitation held before the Rev. P. Morant, surrogate.

[Nothing appears.]

1742. April 29.—Visitation held before the archdeacon, and Dr. Strahan his official.

Wayley and Brockwell, churchwardens. Wayley appeared and exhibited.

Brockwell and Mayhew elect—and Mayhew sworn.

1742. Oct. 13.—Visitation held before the Rev. P. Morant, surrogate.

[Nothing appears.]

1743. April 14.—Visitation held before Dr. Strahan, official.

Brockwell and Mayhew, churchwardens. Mayhew appeared and exhibited.

The same, and Clarke elect—and Mayhew sworn.

1743. July 17.—Court held before the Rev. P. Morant, surrogate.

Clarke appeared and was sworn.

1743. Oct. 19.—Visitation held before the Rev. P. Morant, surrogate.

Brockwell, Mayhew and Clarke, churchwardens. Fees paid by Mr. Morant.

It appears further from very numerous entries in the churchwardens' account books of the parishes of Great Totham, Little Totham and Goldhanger, in the Kelvedon call, that besides the fees which were taken by the registrars between 1727 and 1820, a fee generally of 1s. was commonly paid to the apparitor. The practice appears to have been at this time for the apparitor to be paid a fee of 1s. at the time of serving the citation on the churchwardens usually a few days before the visitation took place. The entries of such payments "to apparitor for a citation," or "for a citation to Kelvedon," or "to the archdeacon's visitation," immediately followed by the payment of "visitation fees," "presentment fees," court fees," or "proctor's fees," are very numerous. Similar entries appear between the years 1801 and 1817 in the account books of the churchwardens of Pattiswick, Bradwell, and Virley, which commence in the years 1797, 1805 and 1811 respectively. They are interspersed with numerous entries of fees paid to the apparitors of much larger and varying amounts; and entries of the latter class appear frequently in the account-books of all the above-mentioned parishes after the year 1820; but it is impossible to tell from the entries for what such fees were charged or paid, although it is alleged that the apparitors at that time performed duties from which they are now relieved. But the registrars for the time being had no interest in, or control over, the charges of the apparitors.

No entries appear in any of the visitation books or books of account, or in any of the churchwardens' account, of any mention of any fee paid directly by the churchwardens to the official. But the fees due to the official and the apparitor respectively have always been accounted for to them by the registrars.

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The duties performed by the registrars, as before set forth, are analogous to the duties performed in petty session by clerks to justices of the peace in relation to other parish officers, that is to say, overseers, surveyors and constables.

The fees paid by statute to the clerk to justices of the division within which the defts.' parish of Little Totham is situate, for the performance of the ordinary duties of his office in relation to overseer of the poor, amount to 13s. 6d. per annum. Those in relation to surveyors of the highways amount to 10s. per annum. And those in relation to parish constables 9s. 6d. per annum. Such fees were actually received by him during the period referred to in this case, viz. from 1857 to 1860.

The following canons are considered to have a bearing on this question:—

89. The choice of churchwardens and their accompt.  
90. The choice of sidesmen and their joint office with churchwardens.

116. Churchwardens not bound to present oftener than twice a-year.

117. Churchwardens not to be troubled for not presenting oftener than twice a-year.

118. The old churchwardens to make their presentments before the new be sworn.

119. Convenient time to be assigned for framing presentments.

123. No act to be sped but in open court.

138. A certain rate of fees due to all ecclesiastical officers.

136. A table of the rates of fees to be set up in courts and registries.

A copy of the table of fees referred to in the 135th canon, and known as Archbishop Whitgift's table of fees, is annexed, marked P, and is to be taken as part of this case. No such fees as those claimed appear in this table.

The question for the opinion of the court is, whether the p'ts. are entitled to recover from the defts. the before-mentioned sums of 7s. 6d., 4s. 6d., 7s. 6d., 4s. 6d., 7s. 6d., 4s. 6d. and 7s. 6d., making together 2l. 3s. 6d., or any or either of them, or any part of them respectively. And the court is to be at liberty to draw inferences of fact.

If the court shall be of opinion in the affirmative, then judgment shall be entered up for the p'ts. for the whole or such part of the said sum of 2l. 3s. 6d. as the court shall order. If the court shall be of opinion in the negative, then judgment of *nolle prosequi* shall be entered up for the defts. It is agreed that in any event no costs shall be paid by the p'ts. to the defts., or by the defts. to the p'ts.

J. D. Coleridge, Q.C. and Hannen for the p'ts.

A. Wills for the defts.

The following authorities were referred to:—For p'ts.: 4 Inst. 339; Com. Dig. tit. "Courts," M. 9; 2 Roll's Abr. tit. "Prohibition," 285; Com. Dig. tit. "Ecclesiastical Persons," C. 5, "Prohibition," F. 4; Bac. Abr. "Prerogative," B. 2; Godolphin's Abr. cap. 8, s. 1, 2, 4, 7 (Oxford edit. 1769); Lindwood, 49, 50, c. 10, s. 21; 2 Bur Eccl. tit. "Courts," 307; *Bradley v. Purnell*, 2 Lev. 136; Co. Litt. 44, A.; 1 Stillingfleet's Ecc. Can. 136; 7 Hen. 8, c. 17; 21 Hen. 8; 58 Geo. 3; *Toller v. Gerard*, 1 Ld. Raym. 703; 1 Salk. 233; Bac. Abr. tit. "Offices," N.; Co. Litt. "Extortion" 368, b; 1 Cardwell's Documentary Annals, 1451.

For defts.:—*Fleetwood v. Finch*, 2 Hy. Bl. 220; *Gifford's case*, 1 Salk. 333; 2 Inst. 533; Bacon's Abr. tit. "Fees," *Cooper v. Biron*, 3 Coll.; *Spry v. Gellam*, 16 M. & W. 209; *Berdos v. Lancaster*, 1 Salk. 332; *Middleton v. Croft*, cited in 1 Stephen's *Laws of Clergy*, 227; *Bishop of St. David's v. Lucy*, 1 Salk.; Lindwood, 49; *De Officio Archidiaconi*, 53; 1 Salk.; Constitution of Otho; Lindwood, 52;

Constitution Othobone, 114; 2 Kennett's *Parochial Antiquities*, 369; 6 Decretal, book 3, tit. 20, c. 1; 4 Burns' *Ecclesiastical Law*, 37; 2 Kennett, 252, 243 & 364; Canon 119; 5 & 6 Will. 4, c. 62, s. 9.

Cur. adv. vult.

June 2.—WILLES, J. now delivered the judgment of the court. This case was argued before the Lord Chief Justice, Keating, J., and myself. It was an action brought by two persons filling the office of registrars of the Archdeaconry Court of Colchester, in the diocese of Rochester, to recover certain fees alleged to be payable to them by the churchwardens of Little Totham, within the archdeaconry, in respect of services rendered by the registrar upon the archdeacon's visitation of the parish at Easter and Michaelmas in 1857, and the two following years, and at Easter in 1860. The duties of the registrars, in all instances except the last, were performed, so far as they could be, without the actual attendance of the churchwardens, and, in the last instance, they were completely performed. They related at Easter to the issuing of the process and schedule, citation and service, act on appearance of outgoing churchwardens, articles of inquiry, presentment and filing, return of churchwardens elect and filing, act on appearance of churchwardens elect, declarations of office and filing; and at Michaelmas for process and schedule, citation and service, act on appearance of churchwardens, articles of inquiry, presentment and filing, all relating to visitation for the purpose of ascertaining the state of repair of the parish church. The claim, to be valid, must be founded upon immemorial usage; and the fees in question have been paid and received for so long a time, and up to so recent a period, that, according to the ordinary rules of evidence applicable to long and continuous modern usage in regard to a right capable of a legal origin, the immemorial receipt of such fees ought to be presumed, if they could have had such an origin. We must consider the alleged objections to their legality *seriatim*. First, as to the origin of the payment. First, as to the existence of the office, the case finds in effect that it is a freehold office, with duties of a continuous and presumably perpetual character, and that its existence is essential to the due exercise of some of the functions of the archdeacon. It is therefore one to which fees may be annexed by immemorial usage. As to the evidence of such usage, the origin of the payment does not precisely appear. There is some evidence, beginning at the sixteenth century, that is not very satisfactory, showing at that early period the payment of some fees by the churchwardens to the registrar. Such payments before the eighteenth century were of less amount than the fees now claimed. There is ample evidence to show that from a time not later than 1727 to the present dispute fees of smaller or greater amount than those now claimed, and in respect of the same services, have been paid, and, except in one instance, in 1739, not disputed. In the course of this latter period the amount was raised, first in 1801, and afterwards in 1841. Mr. Wills, in his able argument for the defts., placed much reliance upon the variance in the amount paid, as establishing a breach in the evidence of usage, and as proving that the claim was founded upon virtual usurpation. He also argued that, considering the increase in the value of money since the epoch of legal memory, the claim was rank. This reasoning, however, if applicable to such a fee, is not conclusive of the present case, because it need not necessarily be of a fixed sum, but may be of a reasonable amount, and in exercising the power conferred upon us by the case to draw inferences of fact, we consider that, if the claim can be sustained in point of law, it was in point of fact a reasonable fee for the services to be rendered. If so, then, looking to the amounts

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established by statute for similar services by other officers, and remembering what fees have been paid and received within the memory of us all in the Courts of Westminster-hall and at the assizes, we think there can be little doubt that the fees in question, so far as the amount is concerned, are in fact reasonable. With respect to the claim of the *plts.* being for services actually rendered, we agree in the argument for the *defts.* that it is only in respect of services rendered the *plts.* can establish their claim. But in this case the services in respect of which the fees were payable were rendered, so far as the *plts.* could, and as the *defts.* thought proper to accept them. Some services were actually rendered, and the *plts.* were ready and willing to do all that belonged to their office. It appears from the case that, during more than a century, it has been the uniform practice for the churchwardens to pay the fees even when, from illness or other causes, they failed to attend the visitation; and that the instances thereof appearing in the visitation books are very numerous, amounting to several hundreds; so that the fee, according to the usage, is payable in respect of the services of the registrars so far as they have been performed; the registrars being in their place, ready and willing to perform all the duties appertaining to their office. There seems, therefore, to be no objection to the fees upon that ground. A service has been rendered, and, by the usage, the fee therefore becomes payable, though the churchwardens make the receipt unnecessary by non-appearance. This view renders it unnecessary to see how far the fee in question might be maintained in respect of simple readiness and willingness to render the services, as in *Lord Falmouth's* case and others, to which we advert lest it might be thought that the point had escaped notice. As to the persons who are called upon to pay the fees: having regard to the period when the fees must have been introduced, and to the office which the churchwardens fill, those fees would almost, as a matter of course, be imposed upon those functionaries. The churchwardens represent the parish in respect of the custody of its property and the care of the fabric of the church; and, for the information of the bishop, with the view to the exercise of his superintending care, they are bound to make presentments, *inter alia*, in respect of the state of the fabric of the church to the archdeacon, who is *oculus episcopi*, at his periodical visitation. The visitation of the archdeacon was intended, and, in those times of uniformity, was supposed to be, for the benefit of the parish at large. We are not at liberty to assume the functions of the Legislature, and to take into account the changes which a difference of opinion has since introduced, and we must consider that subject as at the time when the church fees had their origin. The visitation must, therefore, for that purpose be considered as a visitation intended to operate, and operating, for the benefit of the parish at large, and, among others, of the churchwardens themselves, the performance of whose duties is facilitated by the services of the registrars. In this point of view it is not unreasonable that those who receive the benefits should share in the expense of the visitation, and it is in accordance with the history of such visitations that the expense should be borne by those who are visited. It is not suggested that the churchwardens are without funds or the means of reimbursing themselves. Even if they were in such a condition, it does not follow that they could avoid the burden; but upon this we need not pronounce an opinion. Another objection was said to be founded upon the ancient constitutions of Archbishop Langton and others, cited from Lyndwood, namely that the visitation ought to have been made in each parish individually, and that a visitation, such as that held in the present case, in one parish, for that and thirty-nine others collec-

tively, constituting with it one district or call, was a visitation of such a constitution out of which no legal claim could arise. In considering this objection we must bear in mind that the visitations in respect of which all claimed have been held in the same manner as now for three centuries. The practice has been during that time, instead of visiting each parish individually, to divide the archdeaconry into districts, and to hold the visitation for all the parishes of a district at some one parish church within that district. The obvious reason of that has been to avoid expense and delay. The place at which such visitation is held is in each instance within the jurisdiction of the archdeacon. It does not appear that any other course has ever been followed within the diocese. It may be that the constitutions are considered as substantially complied with by such visitations, combined with the functions of the rural deans. But, however this may be, the objection, which having regard to the practice of the last three centuries, may be thought rather intricate, savours more of spiritual than temporal cognisance, and cannot prevail to defeat a claim founded upon immemorial usage which confers a temporal right, to be enjoined in a court of common law. This latter remark is also applicable to the objection founded upon canons 135 and 136, in the collection of 1603, and Archbishop Whitgift's table of fees; as to which, however, it is only necessary to say, that, when closely considered, the canons and table would be found to deal only with fees received at the Consistory, or place at or near the cathedral, in respect of the business ordinarily transacted there, and that they do not touch the subject of visitations. It might as well be said that the canons had abolished the archdeacon's procurations, as his officer's lawful fees. On this construction, the canons would not touch the point. If they did, then, in point of law, as the canons of 1603 are not of any binding force upon the laity, they could not destroy a customary right. We think that none of the objections thus raised, in point of law, ought to be allowed; and as the continuous receipt of the fees has been established, in point of fact, for a period so long that we ought to presume immemoriality, the *plts.* have made out a legal title, and the judgment of the court ought to be in their favour.

*Judgment for the plts.*

*Aldridge and Bromley, Gray's-inn, for Veley and Cunningham, Braintree, plus' attorneys.*

## ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Saturday, July 19.

CHOWNE AND HOPKINSON (the registered Public Officers of the Commercial Bank of London) v. BAYLIS, WALKER AND THE ATTORNEY-GENERAL.

*Robbery—Debt—Conveyance and assignment of property by the thief—Subsequent conviction of thief. The following propositions of law were laid down in the judgment of the M. R. in this case:—*

1. *That after the commission of a felony, and before his conviction, a felon may sell or assign over his personal property for a valuable consideration.*
2. *That a debt existing at the time of the commission of the offence is a sufficient consideration to warrant such an assignment.*
3. *That the sale must be bona fide, and not colourable merely, for the purpose of avoiding the forfeiture consequent on conviction.*
4. *That the civil remedies for suing the felon, which belong to the person whose property has been feloniously taken, are suspended, after the discovery of the commission of the offence, until the conviction for the felony; and,*
5. *That it is indifferent by whom the felon is prose-*

cuted, provided that he be convicted on the prosecution of any one.

*D., a clerk in the plts.' bank, robbed them of a large sum of money. As soon as the robbery was discovered, he gave notice to an insurance office (in which he had effected two policies on his life) of his wish to transfer the policies to the bank to secure so far as possible the repayment of the moneys stolen by him. D. subsequently made an actual assignment of the policies to B., and a further actual conveyance and assignment of all his property to W. D. was afterwards prosecuted by the bank, convicted, and sentenced to transportation for the robbery. On a bill filed by the bank against B., W. and the Attorney-General, it was, upon the application of the above-stated principles,*

*Held, that D. had effectually charged the policies in favour of the plts., who were declared entitled to the same accordingly.*

*At the time when D. so charged the policies in favour of the plts. he also deposited with them the title-deeds of some real estate, which was subject to a mortgage. The mortgage was afterwards paid off, and the legal estate in the property conveyed to the plts., as trustees for their bank:*

*Held, upon the application of the above-stated principles, that the plts. were also entitled to such real estate.*

The object of this suit was to obtain from the court a declaration that one John Durdin, who had been a clerk in the plts.' bank, had effectually and primarily charged in their favour certain freehold and other hereditaments, at Northampton and elsewhere, together with two policies of assurance on his life, effected by him with the Victoria Legal and Commercial Life Assurance Company.

The facts of the case appeared from the bill to be shortly these:—

In the month of Feb. 1861 it was discovered that John Durdin had robbed the bank of very large sums of money, to the amount in the aggregate of upwards of 50,000*l.* On the 11th Feb. 1861, immediately upon the discovery of the robbery, Messrs. Robert Stacey Price and Thomas Winckworth, two of the directors of the bank, went to the residence of John Durdin and charged him with the robbery, when he at once acknowledged his guilt, and expressed his desire to make good as far as he was able the amount he had taken from the bank, stating that he had certain freehold and leasehold property at Northampton and elsewhere, as well as two policies of assurance effected on his own life with the Victoria Legal and Commercial Life Assurance Company, the one for 300*l.* and the other for 200*l.*, and he agreed to create an equitable mortgage of the freehold hereditaments, and also to make over his interest in the policies and all the moneys which were then or might thereafter become payable thereunder to or in favour of the bank, for securing the payment, so far as the securities would extend, of the amount which was owing from him to the bank; such mortgage, as to the freehold hereditaments, to be effected by a deposit of the deeds relating thereto; and as to the policies, by a notice to the office by which the same were granted of the transfer of the interest of John Durdin therein to the bank. John Durdin agreed to create the charge without any promise being made to him on the part of the bank to forego a criminal prosecution, and without any inducement in that behalf held out to him by the bank; and, in fact, he was afterwards duly prosecuted by the bank. When John Durdin agreed to give the security, the title-deeds of the freehold property were in the hands of Mr. E. Western, his then solicitor; and in order to enable the bank to obtain the deeds, J. Durdin, on the 16th Feb. 1861, wrote a

letter to Mr. Western, and gave it to the directors. That letter was as follows:—

“E. Western, Esq.

“16th Feb. 1861.

“Dear Sir,—Have the goodness to hand over the deeds of my Northampton property to the Commercial Bank of London, whose receipt for the same be pleased to take, and oblige your obedient servant.

“J. DURDIN.”

On the following day, the 17th Feb. 1861, the title-deeds were handed over to the bank. Part of the freeholds were subject to a mortgage; but that was paid off; and the legal estate in the property was duly conveyed to the plts. in trust for the bank, who had since been and still were in the receipt of the rents and profits of the estates.

With respect to the policies, the bill stated—that they were both effected by Durdin on his own life in the Victoria Legal and Commercial Life Assurance Company, and were described as being, the one of them numbered 1539, for 300*l.*, and dated Oct. 16, 1846, at the annual premium of 7*l.* 11*s.* 6*d.*, due Oct. 16th in each year; and the other, numbered 2066, for 200*l.*, dated Oct. 16, 1849, at the annual premium of 5*l.* 9*s.* 10*d.*, also due the 16th Oct. in each year.

At the interview between John Durdin and the two directors of the bank, on the 16th Feb. 1861, John Durdin, in the first instance, said he would hand over the policies at once to the directors: but he afterwards affected to remember that he had left them in his desk, at the banking-house, in Covent-garden, of the bank, from which he stated that the directors could obtain them; and he then said, that he would at once make over, or assign his interest in, the policies, by writing a note, expressing his wish in that behalf to the manager of the assurance company, which he said would have the same effect as delivering over the policies; and, accordingly, he wrote a letter to the secretary of the assurance society, and gave it to the directors of the bank. That letter was as follows:—

“Marlborough-cottage, Park-village east,  
“London, N.W., Feb. 1861.

“The Manager or Secretary of the Victoria  
“Life Association.

“Please to take notice that I wish to transfer my interest in the policies taken out in your office for 200*l.* and 300*l.* respectively, to Alfred Richard Cutbill, Esq., manager of the Commercial Bank of London.

“I am, Sir, yours truly,  
“JOHN DURDIN.”

On the 11th March 1861 that notice was duly served on the Victoria Insurance Company, who acknowledged such service on the next day.

John Durdin was indicted by the bank for the robbery committed by him; and, on the 10th June 1861, he was convicted, and sentenced to fourteen years' penal servitude—which sentence the bill stated that he was now undergoing at her Majesty's prison, at Woking, in the county of Surrey.

On the 14th Aug. 1861 the deft. Baylis gave notice to the Victoria Assurance Company of an assignment by John Durdin to him, on the 4th May 1861, of the two policies of insurance, to secure to him certain costs incurred in defending Durdin on his trial for the robbery. The bill stated that Baylis had notice, at the time of his alleged assignment, of the prior one made by Durdin to the plts.

The deft. Walker insisted that John Durdin had, before his conviction, assigned all his property to him, and he claimed an interest in the freeholds and policies accordingly.

The Attorney-General also claimed, on behalf of the Crown, to be entitled to the equity of redemption in the policies.

Under these circumstances the bill prayed—

That it might be declared that John Durdin had effectually charged the hereditaments at Northampton, and the policies and moneys due and to become due in respect of the policies with the payment of the amount which became owing from him to the bank, in respect of the moneys taken and appropriated by him to his own use, and that the charge of the bank thereon was prior to the interest therein of the defts., or any of them :

That an account might be taken of what was due to the bank from John Durdin, and charged on the hereditaments and policies, and that it might be decreed that the defts., or one of them, might pay to the bank what should, on taking the account, be found due to the bank, together with the costs of that suit, or that in default of such payment the defts. might be barred and foreclosed of all right and equity of redemption in the hereditaments and policies, or otherwise that the same might be sold, and the produce of such sale applied in or towards satisfaction of what should be found due to the bank, and that for the above purposes all necessary directions might be given :

That the defts. Baylis and Walker might, if necessary, be restrained by injunction from selling, assigning, or otherwise dealing with the hereditaments and policies ; that, if necessary, a proper person might be appointed receiver of the proceeds thereof ; and for further relief.

*Cole*, Q.C. and *Langworthy*, for the plts., contended, first, that the robbery by Durdin constituted a debt from him to the bank to the extent of the money stolen ; secondly, that, that being so, there was a valid consideration for the assignments made by the two above-stated letters from Durdin ; thirdly, that those assignments were valid assignments, and that the plts. were therefore entitled to the relief they prayed by this bill.

*Wickens*, for the Attorney-General, insisted, first, that the robbery did not constitute a debt, and that there was, therefore, no consideration for the assignment, and no valid charge ; secondly, but that even if the robbery did constitute a debt, as alleged, still no security could be given by Durdin for it, because all his rights *quoad* his property were suspended until the conviction ; thirdly, that the taking of the security was, under the circumstances, a transaction in the nature of the compounding a felony, which, as it might induce persons robbed to forego the prosecution of the felon, was contrary to public policy, and therefore void ; and he argued, lastly, that the equity of redemption in the policies was forfeited to the Crown by the conviction of Durdin.

*Baggallay*, Q.C., *Beaumont* and *F. Clifford*, appeared for the defts. Baylis and Walker.

*Cole*, Q.C. in reply.

The following authorities were cited in the arguments :—*Stone v. Marsh*, 6 B. & Cr. 551 ; *Marsh v. Keating*, 1 Bing. N. C. 198 ; *Dudley v. West Bromwich Banking Company and Spittle*, 1 John. & Hem. 14 ; *Arnory v. Delamirie*, 1 Strange, 504.

The MASTER of the ROLLS said :—The question in this case is, whether the plts. have any priority over the defts. Baylis in respect of two policies of assurance effected in the Victoria Life Assurance Society on the life of John Durdin, formerly a clerk in the plts.' company, and alleged by them to have been assigned to the manager of the company in Feb. 1861. The question depends on two points: first, whether John Durdin was, having regard to the circumstances in which he was placed, liable to the bank in such a debt as was sufficient to constitute a good consideration for the assignment of the policies of assurance ; secondly, whether, if that question be answered in the affirmative, the transaction itself constituted a good assignment of the policies. The first question depends on the answer to this, viz. whether, when one man robs another, the amount taken by the man who has com-

mitted the felony constitutes such a debt as may be made the consideration for an assignment of his property by the felon before conviction, to secure the debt to the person robbed. In order to determine that question it is necessary to see what is already established by the decided cases. Some things seem to be very clearly settled by them. In the first place, after the commission of the felony, and before his conviction, the felon may sell or assign over his personal property for valuable consideration. And secondly, that a debt existing at the time of the commission of the offence is a sufficient consideration to warrant such an assignment. Thirdly, that the sale must be *bonâ fide*, and not colourable merely for the purpose of avoiding the forfeiture consequent on conviction. Fourthly, that the civil remedies for suing the felon, which belong to the person whose property has been feloniously taken, are suspended after the discovery of the commission of the offence, until the conviction for the felony ; until the dignity of the law, to use the fanciful and metaphorical expression which personifies it, has been vindicated by the prosecution and conviction of the felon ; and fifthly, that it is indifferent by whom the felon is prosecuted, provided that he be convicted on the prosecution of any one. The law on these points seems to be settled. The fourth proposition, which applies to the suspension of the civil remedies, seems to point to some of the evils which may arise from a law, founded on a principle of sentimentality applied not to a person, or a set of persons, but to a name. The effect of it is to suspend any power of suing the felon until all his property, which would be available for the payment of the creditors, is forfeited to the Crown, and in the meantime to enable the felon either to prefer one creditor to another at his option, or to sell his property for money, which money he may give away or employ as he pleases, before conviction. And the law is the more singular on this subject, as the nominal prosecutor—in fact, in the eye of the law the only real prosecutor—of the felon is the Crown itself. However, the law is established, and the province of this court is merely to administer it. Applying the various points I have stated—as being the correct law on the subject—to the state of facts in the present case, the conditions there enumerated have all been here fulfilled, provided the amount taken from the plts., the stealing of which constituted the offence for which the felon was convicted, was a sufficient consideration for the assignment by the felon of his property to the plts., to secure the amount taken from them. Considering the transaction on principle, my opinion is, that it does constitute a sufficient consideration for the assignment. The real question is, does it constitute a debt due from the thief to the person robbed ? One man takes the property of another ; by every principle of law, the man who has lost his property is entitled to recover it back from the taker, or to compel him to pay the value of it in the shape of damages. It cannot make any alteration in this respect, that the taking of the property in one sense constitutes an offence which the law calls a felony. This is not the place to pursue any philosophical inquiry into what is the foundation of the distinction between that species of taking the property of another which constitutes a felony and that which only entitles the person deprived of his property to bring a civil action against the taker—why taking a pocket-book from the pocket of a stranger should be a crime, and cutting down and taking away a tree from his estate should be the cause of a civil action only. But without attempting to do this, it is obvious that in many cases the line of distinction between tort and felony is very narrow. If a man finds a jewel on the high road, and knowing, or having good reason to believe, who the person is to whom it belongs, and after that he takes and appropriates it to his use—that is a felony. But

if he do not know to whom it belongs it is no felony ; and he acquires a property in it which he can maintain against all the world except the true and lawful owner. That is *Armory v. Delamirie*, which is frequently cited in the courts. It would seem to be impossible on any principle of law or jurisprudence to hold that the right of the lawful owner to recover his lost property can be in any manner affected by the knowledge of the taker that it belonged to the particular person who had lost it. It is obvious that the civil rights and remedies must be the same, subject always to the suspension of those same rights for the purpose of vindicating the law. It is obvious also that, if that be so in the case of a personal chattel, it must be the same in the case of taking money. The actual notes and coin, if they could be discovered on the felon, would be the property of the person robbed, and would after conviction be returned to him; if not found, the property of the felon would, in my opinion, have been liable to make good the amount to the person robbed, were it not that by reason of the forfeiture the property of the felon became vested in the Crown. I am of opinion, therefore, that on every principle of civil law, not using that word in its technical sense, the robbing constitutes a debt due from the robber to the person robbed. And, indeed, that is assumed by the terms of the rule laid down (to which I referred in the fourth proposition), which only suspends the civil remedies of the person robbed until after the conviction of the robber, though it is true that the suspension necessarily operates as a prohibition, as the remedies cannot be enforced against the property of the taker until that property no longer exists. Nor is this all; the reported cases seem to me all to support that view. *Stone v. Marsh*, and *Marsh v. Keating*, so far as they go, tend in this direction; and the case of *Dudley v. The West Bromwich Banking Company and Spittle*, before Wood, V. C., seems to me to be in point and to decide this very case. I am of opinion, therefore, both upon principle and authority, that a debt existed in this case, due from John Durdin to the plaintiffs' company, good and valid for all purposes; with the exception that the company's civil remedies by action were suspended until after the conviction of John Durdin; and that it constituted a good consideration for the assignment, assuming an assignment to have been made by John Durdin to the company. I now come to consider whether what took place constituted a valid assignment of the policies in equity? John Durdin, after the discovery of his offence, at the instance of two of the directors, wrote and signed a letter, to the effect that he wished to transfer his interest in the policies to the bank. First, I will consider the effect of that apart from the felony. If so considered, I am of opinion that it constitutes a good assignment of the policies to the manager of the Commercial Bank. I do not see how it can be treated otherwise. A creditor comes to a debtor and asks for security for his debt, and the debtor writes a letter to an assurance society, with which he has insured his life, expressing his wish to transfer his interest therein to his debtor, and he gives that document to his debtor. It is impossible to say that such a transaction and such a document have no meaning, and that they were intended to have no meaning; and yet unless it assigned his interest in the policy it means nothing. It is to be observed that no formal instrument is required for that purpose; all that is wanted is, that the document should express the intention of the assignor thereby to constitute the assignment. I read it exactly as if written, "I hereby transfer." Unless it means that, what was there for the office to take notice of? A desire not fulfilled? It is, I think, absurd to suppose that any person who writes and signed such a document could so intend it, or that the office could so receive it. On the other

hand, it was said that though this might be so if it were merely a civil transaction, not affected by any taint of felony, yet the circumstance that the debt sought to be secured was created by the felonious taking by the debtor of that amount from the creditor, creates a new element in the matter, and makes it highly dangerous to allow such an assignment to be effected by such means. It was also said that, it is to be presumed that this document must have been obtained from John Durdin under a hope entertained by him that the directors would not prosecute him to conviction; and that, if the court would countenance such transactions, it would be to lead to the compounding of felonies, or to the obtaining securities from felons through the fraudulent representations held out to them, either expressly or impliedly, that their felonies would be compounded. That argument, so far as whether any debt exists under such circumstances, I have already considered. As to the rest of it, it is not, in my opinion, capable of being supported in this case. Undoubtedly, if the assignment had been obtained by any fraudulent representation to the effect suggested, or if the directors had made use of such a belief existing in the mind of John Durdin, of which they had taken advantage for the purpose of obtaining this assignment, then the document, however perfect in form, would be bad in this court, and would be set aside. In this respect I consider that equity would no more allow a deed to be supported which was obtained by fraud from a felon, than if obtained from a man of spotless integrity. But that case, like all other cases of fraud, must be alleged and proved. Here, however, it is neither alleged nor proved; but merely suggested as possible. And further, it was suggested, that if this case is supported it will probably occasion such frauds to be committed hereafter. I am not able to concur in that view. It is probable, no doubt, that creditors will put such pressure on their debtors as they can fairly do to get security for their debts; but I cannot suppose, or act on the supposition that this decree will induce the creditor to commit a fraud, even in the case of a felonious debtor, any more than in the case of any other debtor. If I am right in considering that there was a good assignment by John Durdin of his interest in the policies, then it follows that due notice of it was given to the Victoria Life office on the 11th March 1861, which was done by sending the letter to the actuary, the receipt of which was duly acknowledged by him on the 12th March 1861. That was prior to the 4th May 1861, the date of the assignment in favour of the debt. Mr. Baylis. The deposit by John Durdin of the deeds of his Northampton property, as a security for the debt of the bank, is also complete, by his direction in writing to Mr. Western to hand them over to the Commercial Bank on their receipt; which was done, accordingly, by Mr. Western, and they have since been retained by the Commercial Bank, as equitable mortgages of the property to which they relate, as a further security for their debt. The legal estate in that property has since been conveyed by the first mortgages to the plaintiffs in fee, in trust for the banking company upon payment of the mortgage-money. In that state of circumstances I am of opinion that the plaintiffs are entitled to the relief asked by the bill.

*Note.*—*Confer etiam* on the subject of this case: (*Wickham v. Gattrell*, 23 L. J., N. S., 783, Ch.; a. c. 23 L. T. Rep. 252.)

**V. C. WOOD'S COURT.**

Reported by W. H. BENNET, Esq., Barrister-at-Law.

Jan. 14 and 16.

**BIDDER v. LOCAL BOARD OF HEALTH FOR CROYDON.***Injunction—Sewage—Pollution of river.*

*By direction of a local board of health the sewage of a town had been by means of drainage conveyed to a river, which sewage, not having been completely deodorised before coming in contact with the river, had so polluted the stream passing the plt.'s property as to kill the fish therein, and otherwise causing a nuisance :*

*Held, that the plt. was entitled to an injunction to restrain the further pollution of the water passing by his property.*

The object of this suit was to restrain the local board of health for Croydon from continuing to discharge sewage filth or other offensive or injurious matter, either solid or liquid, into the river Wandle, to the injury of the plt. and his property. The plt. was the owner of property near Croydon, with gardens and pleasure-grounds running down to the river Wandle, which was originally a clear pure stream noted for its trout. In 1853 the local board of health constructed a sewer for discharging the drainage of Croydon into the Wandle, at a point between two or three miles above the plt.'s property. The upper portion of the river was so polluted by the discharge from this sewer, that proceedings were taken against the board for creating a nuisance by a Mr. Lambert. These proceedings resulted in an injunction against the board, and payment by them of 200*l.* to Mr. Lambert for damages. The board thereupon constructed a fresh sewer through Beddington-park, for which leave was obtained from the tenant of the park, Mr. Brydges. The river having become polluted and the fish destroyed by this sewer, Mr. Brydges, in March 1859, obtained an injunction restraining the board from discharging any offensive matters into the river. After this injunction had been granted, the board dug a ditch, the effect of which was to divert the sewage from the Beddington-park channel and convey it through small tributary channels into the Wandle, where it flows through the plt.'s property. The sewage before its discharge into the river had been deodorised by M'Dougall's disinfecting fluid; but the bill stated that this fluid contained a large quantity of carbonic acid, which was highly injurious to animal life. After the sewage had been mixed with this fluid, it was transmitted through the sewers into tributary channels of the Wandle, or was spread upon the ground and allowed to percolate through the ground or run off into the river. In Dec. 1860 the plt. first discovered the pollution of the stream, and complained to the board of health. The nuisance was for some time diminished, but in May 1861 it again increased, and legal proceedings were threatened by the plt., and the stream was less perceptibly polluted during June and July. In August the nuisance was very great, and several dead and dying fish were found in the river. The nuisance from time to time varied very much in extent, but at the beginning of October had again become very serious. Under these circumstances the plt. had filed his bill to restrain the local board of health from discharging the sewage into the river to the injury of his property.

For the defence it was contended that the particular nuisance complained of as having happened in August last, was occasioned by the accidental discharge of the refuse of some gasworks into the river, for which the board of health were in no way responsible, and that the mischief had been greatly exaggerated in the evidence of the plt., while the defts. did everything

in their power to purify and deodorise the sewage before its escape into the river.

*Roll, Q.C., J. Pearson and Bidder* in support of the application.

*Giffard, Q.C. and Miller* appeared for the board of health.

The VICE-CHANCELLOR (without calling for a reply) said that the plt. was entitled to an injunction. As early as Dec. 1860 the plt. had complained of the state of the river. In the interval between December and May a considerable change had been introduced by the defts. They deodorised the sewage by means of M'Dougall's disinfecting fluid, and they had acquired an additional 200 acres of land for the purpose of absorbing the organic particles of the sewage. An improvement no doubt was effected, but there were fresh complaints in May, and again at the end of June. As the sewage water, after passing over the fields, came into the river one mile above the plt.'s property, he was bound to show some special injury as occasioned to the water running through his grounds. In August the nuisance beyond dispute became excessive. Even assuming that it arose from the accidental circumstance of the discharge of the refuse of the gasworks into the river, it was to be observed that the defts. had not in the first instance raised this case of the nuisance being accidental. The result of the accident was that a great number of fish were killed, and whether or not the fish had been killed above, and floated down to the plt.'s portion of the river, was really not material, as he was entitled to have the fish as they circulated from one part of the river to another. Complaint was immediately made by the plt., and if the matter had rested there, there might have been a case to send to law before coming to any conclusion upon the particular instance complained of. Even assuming that the pollution in August was from an accidental cause, there was evidence beyond all question of a very considerable nuisance in October. There could be no doubt that if sewage was poured into the river without the precaution of filtering it through fields, &c., very great damage would result. This was established by the scientific evidence by the defts., to the effect that if care was taken in the combined preparation and filtration of the sewage matter, no damage would be occasioned to the river, which was, in other words, saying that unless there was great care and attention in the filtering process, evil consequences would result. His Honour then proceeded to comment upon the evidence as to the nuisance occasioned in the early part of October, and said that a plain and distinct case was shown of sewage having been poured into the river in an offensive state, and so as to pollute the water and render it unfit for use. Two plain cases of negligence were thus established against the defts., and it was a proper case for putting them under an injunction. His Honour, after some further observations upon the arguments on behalf of the defts., granted an injunction restraining the defts. from causing or permitting to pass any sewage, filth, or other offensive or injurious matter, either solid or liquid, down, through, or from any sewer or drain or otherwise into the river Wandle to the injury of the plt.

*Injunction as prayed.*

Solicitors : *Moseley, Taylor and Co.; Tayloe.*

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REG. v. THE INHABITANTS OF EAST LOOE.

[Q. B.]

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. MAUDSLER, and  
C. J. B. HESTERLEY, Esqrs., Barristers-at-Law.

Saturday, July 12.

REG. v. THE INHABITANTS OF EAST LOOE.

County rate—Municipal borough—Exemption from liability.

*A borough was incorporated by Royal charter, and had a separate commission of the peace, with a non-intromittant clause, and held a separate court of quarter sessions. It had never contributed to or paid the rates for the county at large. Sessions had been regularly held by the borough justices, but the only business done was the presentment of nuisances. Offenders were sent to the county gaol for trial at the assizes or county sessions, and the cost of maintaining such offenders had been sometimes paid by the corporation out of the borough poor-rate:*

*Held, that the borough fell within the meaning of the word "county" in the 15 & 16 Vict. c. 81, s. 51 (County Rates Act), by which it is enacted that "the word 'county' shall mean and include any liberty, franchise, or other place in which rates in the nature of a county rate may be levied, having a separate commission of the peace, and not subject to the jurisdiction of the county at large in which such liberty, franchise, or place may be, nor contributing or paying to the county rates made for such county at large," and that although no rates in the nature of county rates had been levied in the borough, there was no reason why they should not be levied, and that therefore the borough was not liable to be assessed to the rate for the county at large.*

This was an appeal against the basis or standard for a county rate for Cornwall, and this case was stated for the opinion of this court, pursuant to the statute 12 & 13 Vict. c. 45, by consent and by order of Mellor, J., whereby it was ordered that a special case be stated between the parties for the opinion of the Court of Q. B., and that a judgment in conformity with the decision of such court and for such costs as such court shall adjudge be entered at the sessions as provided by the statute 12 & 13 Vict. c. 45.

The apprs. have been an ancient corporation from time immemorial, and in the year 1588 received a charter from Queen Elizabeth confirming their ancient rights and privileges and granting others.

By this charter they were, amongst other things, to have a common gaol, to appoint a mayor, to elect a recorder, and have and hold a court of record for civil causes.

A further charter was granted by King James I. in the 30th year of his reign, confirming and extending the charter of Elizabeth, and containing, amongst other things, the following clauses:—

"And furthermore we will and by these presents for us, our heirs and successors, do grant to the aforesaid mayor and to the free burgesses of the borough aforesaid and to their successors, that the mayor, recorder and last predecessor of every mayor of the borough aforesaid for the time being for ever, shall be justices of us, our heirs and successors, for preserving and keeping the peace of us, our heirs and successors, within the borough aforesaid, the liberties and precincts thereof, for the keeping and causing to be kept all ordinances and statutes for the good of our peace and the preservation thereof, and for the quiet rule and government of us, our heirs and successors, mentioned in all their articles in the aforesaid burgess-ship, the liberties and precincts thereof, according to the virtue, form and effect of the same statute and ordinances, and to do all other things which do belong to the office of justices or keepers of our peace in any county within this our kingdom, and to chastise and punish all who shall

offend against the form of their ordinances and statutes, or any of them, in the borough aforesaid, according to the form of ordinances and statutes that they have or shall have, and that the said mayor, recorder, and last predecessor of every mayor of the borough aforesaid for the time being, or any two of them, of which the mayor or recorder of the borough aforesaid for the time being we will that he be one, that they be justices of us, our heirs and successors, to inquire, by the oath of honest and legal men of the borough aforesaid, by whom the truth of the thing may be better known, of all and all manner of felony and other evil acts and offences, concerning which the justices of our peace, our heirs and successors, may lawfully inquire, or ought by any manner of ways to inquire after those things that shall be so committed within the said borough, liberty and precincts thereof, so notwithstanding they do not proceed to the determining of any treason, murder, or felony, or any other offence touching the loss of life or member, without the special licence of us, our heirs and successors. And furthermore we will by these presents, for us, our heirs and successors, do grant for the aforesaid mayor and free burgesses of the borough aforesaid, and their successors, that the mayor and recorder and last predecessor of every mayor of the borough aforesaid for the time being, or any two of them (of whom the mayor or recorder of the borough aforesaid for the time being we will that he be one), by their warrant sealed and to be sealed with their hands subscribed, can and may send all such persons who hereafter shall be taken, arrested, or attached, or found within the borough aforesaid, liberties and precincts of the same, for treason, murder, felony, manslaughter, or robbery done or to be done, or for suspicion of felony, to the common gaol of our county of Cornwall aforesaid, in that place to be stayed to be tried, and to answer for their offences before the justices of us, our heirs and successors, in the said county, or before the justices assigned or to be assigned to hear and determine, willing and by these presents, for us, our heirs and successors, commanding as well the sheriffs of the county of Cornwall aforesaid as the common keeper of the gaol of the same county for the time being, that they and every of them upon such warrant by the aforesaid justices of the peace within the borough of East Looe for the time being, or any two of them (of which the mayor or recorder of the borough for the time being we will that he be one), to be directed to them or any of them, all such persons as aforesaid by the said justices of the peace within the said borough hereafter, shall be taken, arrested, attached, or found, within the borough aforesaid, liberties and precincts thereof, for treason, murder, homicide, robbery, or other felonious fact, or for suspicion of felony, to be sent to the said common gaol of Cornwall as is aforesaid, that they receive and take into safe custody and keep in the same place, to be tried and to answer before the justices of us, our heirs and successors, to hear and to determine, or the justices assigned or to be assigned to deliver the gaol of our said county of Cornwall, and these letters patent or their enrolments shall be a sufficient warrant and discharge in this behalf for the sheriffs of this county aforesaid and keepers of the common gaol of the county of Cornwall aforesaid for the time being."

In 1685 a further charter was granted by King James II. upon the surrender of the previous charter, granting, amongst other things, a common gaol and power to appoint a mayor and recorder, and the following clause is contained in the last-mentioned charter:—"And furthermore our will and pleasure is, and for us, our heirs and successors, by these presents we grant to the mayor and free burgesses and their successors, that the mayor and recorder of the borough aforesaid for the time being, and their successors for



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over, and also every mayor of the said borough during one year after he shall depart from the office of mayor of the borough aforesaid for ever in future times, shall and may be respectively justice of us, our heirs and successors, in the said borough of East Looe, and the liberties and precincts of the same, and also to preserve and keep and correct the statutes of artificers and labourers, of weights and measures within the borough aforesaid, the liberties and precincts of the same, to be done, kept and corrected.

"And that the said mayor and recorder for the time being, and the said mayor during one year after he shall depart from office of mayor, or any of them, shall and may have full power and authority for ever hereafter to hold the sessions of the peace twice by the year (to wit), one time within a month after the Feast of St. Michael the Archangel, and the other time within a month after Easter, yearly and every year to inquire, hear and determine of whatsoever trespasses, misprisions, and other defects and articles whatsoever within the borough aforesaid, the precincts and liberties of the same, done, moved, or committed, which before the keeper or justices of our peace in any county in this our kingdom of England, by the laws and statutes of the same kingdom they shall and may be able to inquire, hear and determine, so that the said mayor and recorder, and justice of the peace for the said borough for the time being, and their successors, may not, by any manner hereafter proceed to the determination of any treason, murder, felony, or any matter touching the loss of life within the borough aforesaid, the circuit and precincts of the same, without the special command of us, our heirs and successors, and notwithstanding they shall and may be able to hear, inquire, perform and determine all and singular other trespasses, offences, defects and articles, which, to the office of justice of the peace within the borough aforesaid belongs to be done as fully and wholly, and in such ample manner and form as any other justices of the peace, of us, our heirs and successors, in any county or counties of our kingdom of England shall or may be able to inquire, hear, or determine, so that the justices in no manner hereafter may any way intrude themselves, nor one of them may intrude himself to anything belonging or appertaining to the offices of justice of peace within the borough of East Looe, and the bounds and precincts of the same by any cause whatsoever arising or happening there, without the special command of us, our heirs and successors, in that behalf obtained."

Under the provisions of the last-mentioned charter, justices of the peace have been appointed, and acted in and for the borough of East Looe.

Sessions under such charter have been regularly held, but no prisoners or other persons have been indicted or tried for any offences at such sessions, the practice having been to send all offenders to the county gaol for trial at the assizes or sessions of the county. The only business done at the borough sessions has been presentments by the grand jury for nuisances not followed by any indictment.

A building called the gaol for the borough, consisting of two rooms, has been kept and maintained by and at the expense of the appa., in which offenders have been temporarily confined until they were sent to the gaol of the county for safe custody until their trial at the assizes or sessions for the county. No other use has been made of such building.

The justices of the peace in and for the county of Cornwall have never, save as appears by this case, exercised any jurisdiction in the borough until the borough was included in the present basis for a county rate, the subject-matter of the present appeal.

The borough of East Looe, under the before-mentioned charters, returned two members to the Commons House of Parliament, until the passing of the Re-

form Act, which Act included the borough in schedule A.

The borough has never (until the present cause of appeal arose) been assessed, rated, or in any way contributed to the county rate; nor has any rate, in the nature of a borough or county rate, been assessed or made in the borough.

Persons charged with felony or misdemeanors, committed within the borough, have been committed by the borough justices to the county gaol, for trial at the county assizes or sessions, and the costs of the maintenance of persons so committed have on some, but not on all occasions, been charged to the borough. In general the borough has paid these charges out of the borough poor-rate (the parish of St. Martin's, in which the borough is situate, having a separate rating); but, in one instance, where an arrear had been allowed to accumulate, the borough did not pay.

No separate court of quarter sessions of the peace has been granted to the borough since the passing of the Municipal Corporation Act, 5 & 6 Vict. c. 76.

A committee of justices for Cornwall, for the purpose of preparing a basis or standard for county rates under the provisions of the 15 & 16 Vict. c. 81, was appointed in 1858.

The inhabitants of the borough of East Looe attended a meeting of such committee for the purpose of receiving objections to such standard or basis, and denied the liability of the inhabitants of the borough to be assessed to county rates, and protested against the jurisdiction of the county justices. The county justices have, however, included the borough of East Looe in the basis or standard for county rates. The following is an extract from such basis for the county rates:—

"County of Cornwall.

"Basis or Standard for the County Rate,

"Prepared by the county rate committee appointed under the statute 15 & 16 Vict. c. 81, intituled, "An Act to consolidate and amend the statutes relating to the assessment and collection of county rates in England and Wales, and allowed and confirmed by the justices assembled at the general quarter sessions of the peace held at Bodmin, in and for the said county, on the 19th Oct. 1858.

Borough or Parishes.	Value for General Rate.	Rate at 1 of a Farthing.	Value of Portion of Parish liable to Police Rate.	Rate at 1 of a Farthing.
East Looe	£ s. d. 1456 0 0	£ s. d. 0 3 9½	£ s. d. 1456 0 0	£ s. d. 0 3 9½

"COODE, Clerk of the Peace."

It is agreed that if the Court was of opinion that the inhabitants of the borough of East Looe are not liable to be assessed to the county rates for Cornwall, then the said basis or standard is to be amended by striking out from such basis or standard the borough of East Looe, as set out in the above extract, otherwise the said standard or basis to stand confirmed, save that as to the amount mentioned as to value, "Value for general rate," the said inhabitants shall not hereafter be precluded from appeals for the purpose of showing that such value is or may be excessive.

June 28.—*Kinglake*, Serjt. (*Buller* with him) argued for the appa.; and *M. Smith* (*Kingdon* with him) for the resps. *Cur. adv. vult.*

CROMPTON, J.—The question in this case is, whether the inhabitants of the borough of East Looe are liable to be assessed to the county rate. The mayor and burgesses of the borough of East Looe are a corporation by prescription, and appear to have been regulated by two charters, which are referred to in the case; one in the reign of Queen Elizabeth, and the other, which is the governing charter, in the reign of King James the Second, the latter of which contains a non-intromittant

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clause as regards the justices of the peace of the county. Certain officers of the borough are by the charters to be justices of the peace in the borough, and may hold sessions of peace, and may inquire of, hear and determine whatever trespasses, misprisions and other defects and articles, within the borough committed, which the justices of the peace in any county might hear and determine, so that they did not proceed to the determination of any treason, murder, felony, or any matter touching the loss of life or member within the borough. Sessions have been regularly held by the borough justices, but no persons have been indicted or tried there, it having been the practice to send all the offenders to the county gaol for trial at the assizes or sessions of the county, the only business done at the borough sessions being presentments for nuisances. The cost of maintaining the persons so committed has been sometimes paid by the corporation out of the borough poor-rate, but they have not always paid such expenses. The county magistrates have never interfered or exercised any jurisdiction in the borough except in the custody and trial of the prisoners sent to them by the borough justices. Nor have the inhabitants of the borough ever been assessed to the county rate, nor has any rate in the nature of a county rate been levied in the borough. The county justices, however, now for the first time include the borough of East Looe in the basis for a county rate, under the provisions of the 15 & 16 Vict. c. 81. By the 31st section of the Act, the county justices may assess and tax every parish, township and other place within the respective limits of their commissions; and by the 2nd section they may appoint a committee to prepare a basis or standard for a county rate, according to the annual value of the property rateable to the relief of the poor in every parish, township, borough, or place within the limits of the justices' commissions. By the 51st section it is enacted, "That the word 'county' shall mean and include any liberty, franchise, or other place in which rates in the nature of a county rate may be levied, having a separate commission of the peace, and not subject to the jurisdiction of the county at large, in which such liberty, franchise, or place may lie, nor contributing or paying to the county rates made for such county at large." The borough of East Looe seems to fall within the description of a liberty, franchise, or place, that would itself be meant by and intended in the word "county" as defined by that section. It is a place in which, although no rates in the nature of county rates have been levied hitherto, there appears no reason, and none has been suggested, why they should not be levied. It has a separate commission of the peace, it is not subject to the jurisdiction of the county at large by reason of the non-intromittant clause in the charter, and it has never contributed or paid to the county rates made for the county at large. If we are right in this, East Looe is a place not liable to be assessed to the county rate for the county at large, being a place in which a rate in the nature of a county rate may be levied, not being itself a county within the definition given in the 5th section of the Act. Several cases were cited upon the argument which are not very easy to reconcile; but we think that the cases of *Weatherhead v. Drewry*, 11 East, 168; *Merced v. Davis*, 10 Barn. & Cr. 617; and *Reg. v. Shepherd*, 2 Ad. & Ell. 298, as far as they are applicable to cases arising under the recent stat. 15 & 16 Vict. c. 81, tend to support the view of the subject that we are disposed to take, and we think, upon consideration of the provisions of the statute referred to upon the argument, no sufficient ground has been shown for altering the state of things that has hitherto existed with respect to the borough of East Looe, for including it within the general county rate, to which it has never hitherto been assessed, and

our judgment therefore is, that East Looe is not liable to be assessed to the rate for the county at large.

*Judgment for the apps.*

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MATY, Esqrs.,  
Barristers-at-Law.

Saturday, June 28.

TAYLOR v. HICKS.

*Factories—Employment of children—  
7 & 8 Vict. c. 15.*

*By sect. 30 of the above Act it is enacted, "That no child shall be employed in any factory for more than six hours and thirty minutes in any one day, save as hereinafter excepted, unless the dinner time of the young persons in such factory shall begin at one o'clock, in which case children beginning to work in the morning may work for seven hours in one day; and no child who shall have been employed in a factory before noon of any day shall be employed in the same or any other factory, either for the purpose of recovering lost time or otherwise, after one of the clock in the afternoon of the same day, save in the cases when children may work on alternate days, or in silk factories more than seven hours in one day, as hereinafter provided."*

*By the 73rd section it is enacted that the word "factory" shall mean "all buildings and premises situated within any part of the United Kingdom, &c. wherein or within the close or curtilage of which steam, water, or any mechanical power shall be used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incident to the manufacture of cotton, wool, hair, silk, flax, hemp, jute, or tow, either separately or mixed together, or mixed with any other material or any fabric thereof; and any room situated within the outward gate or boundary of any factory wherein children or young persons are employed in any process incident to the manufacture carried on in the factory, shall be taken to be a part of the factory, although it may not contain any machinery; but this enactment shall not extend to any part of such factory used solely for the manufacture of goods made entirely of any other material than those herein enumerated," &c.*

*The app. was a manufacturer of what is termed webbing, which was made by machinery from cotton and wool, and this material was in the same building made up into braces and girths, by attaching pieces of leather and buckles to the webbing after it was cut into proper lengths. A child, under thirteen years of age, was employed in a different part of the building to that in which the machinery was, boring holes in the leather, and the app. was convicted under the statute for employing the child after one of the clock of the day, he having been employed during the forenoon of the same day:*

*Held, that the conviction was right, as the room in question could not be said to be a room employed solely for the manufacture of goods manufactured there of any other material than those enumerated in the Act.*

#### CASE.

On the 23rd April 1862, Benjamin Taylor (herein called the app.) appeared before me, the undersigned police magistrate for the borough of Birmingham, in answer to a summons issued upon the complaint of Weston Hicks, sub-inspector of factories (herein called the resp.), charging that he the said Benjamin Taylor, being an occupier of a certain factory being a factory within the true intent and meaning of the Factories Act, did, on the 14th March preceding, employ in the said factory, after the hour of one in the afternoon of the same day, one George Heeley, a child, the said George Heeley

having been employed in the same factory before noon of the same day.

The sections of the Factory Act applicable to the case, are the following:—

7 & 8 Vict. c. 15, s. 73. Interpretation clause:—

"*Child*."—The word *child* shall be taken to mean a child under the age of thirteen years.

"*Employed*."—Any person who shall work in any factory, whether for wages or not, or as a learner or otherwise, either in any manufacturing process, or in clearing any part of the factory, or in cleaning or oiling any part of the machinery, or in any other kind of work whatsoever (save in the cases hereinafter excepted), shall be deemed, notwithstanding any other description, limitation, or exception of employment in the Factory Act, 3 & 4 Will. 4, c. 103, "to be employed" therein within the meaning of this Act.

"*Factory*."—And the said "factory" (notwithstanding any provision or exemption in the Factory Act) shall be taken to mean all buildings and premises situated within any part of the United Kingdom, &c., wherein or within the close or curtilage of which steam, water, or other mechanical power shall be used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incident to the manufacture of cotton, wool, hair, silk, flax, hemp, jute, or tow, either separately or mixed together, mixed with any other material or any fabric made thereof.

"*Room*."—And any room situated within the outward gate or boundary of any factory, wherein children or young persons are employed in any process incident to the manufacture carried on in the factory, shall be taken to be a part of the factory, although it may not contain any machinery.

And any part of such factory may be taken to be a factory within the meaning of this Act.

But this enactment shall not extend to any part of such factory used solely for the purpose of a dwelling-house, nor to any part used solely for the manufacture of goods made entirely of any other material than those herein enumerated, nor to any factory, or part of a factory, used solely for the manufacture of lace or hats, or of paper, or solely for bleaching, dyeing, or printing, or calendering.

Sect. 30.—No child who shall have been employed in the factory before noon of any day shall be employed in the same or any other factory, either for the purpose of recovering lost time or otherwise, after one o'clock p.m. of the same day, save, &c.

Sect. 64. "*Penalty*."—The penalty for any offence against the Factory Act (as amended by this Act), for which no specific penalty is hereinbefore provided, shall be any sum not less than 2*l.*, and not more than 5*l.*

The app. is the occupier of buildings and premises in Birmingham, in which steam power is used to move and work machinery employed in manufacturing cotton and wool into a material termed "webbing." Of this material men's braces and horses' girths are made, by cutting the same into lengths and attaching to the ends of such lengths (by sewing) pieces of strong leather, and fitting the same with buckles, &c.

The app. is also a manufacturer of braces and girths, using for the purpose the webbing manufactured by himself, and other webbing purchased by him. The webbing, when made, is a perfect fabric of itself; and the process of manufacturing webbing from cotton and wool, and the process of manufacturing braces and girths from webbing, are generally separate and distinct.

The buildings of the app. form an inclosed square, entered from the street by a gateway. On the left hand, as you enter, is the building in which the steam power is used, and the webbing is manufactured. This is admitted to be a factory, and the education and hours of labour of the children employed in it are regulated by the provisions of the Factory Act. On

the right hand of the square (within the outer gates and boundary, and within the close and curtilage of the same buildings) the manufacture of braces and girths is carried on in rooms entered from the square; and on the day mentioned in the summons, both before noon and after one o'clock in the afternoon of the same day, George Heeley, a child under thirteen years of age, was engaged in labour for the app. in the last-mentioned manufacture.

His occupation was the preparation of the pieces of leather (above mentioned) for being stitched to the webbing, by boring holes round the edges with a fine awl.

This was the only process in which he was employed, no part of the webbing itself was ever placed in his hands or brought into the room. There was no machinery in the room. The question was, whether this was an employment in a "factory" within the meaning of the Factory Act above mentioned?

It was contended, on the part of the app., that it was not, inasmuch as the work on which the said George Heeley was employed was not a process incident to the manufacture carried on in the factory; that the room in which he was employed could not be taken to be a part of the factory; the manufacture of girths and braces being a wholly distinct and separate business, and the material upon which he was employed not being one of those enumerated as requisite to constitute a "factory" regulated by the Act.

On the other hand, it was contended by the resp., that, under the comprehensive terms of the interpretation clause, every part of the buildings and premises of the app., within the close or curtilage, must be taken to be part of the "factory;" that it was the object and intent of the Legislature that every child and young person engaged in any manufacturing process within the same should be under the protection of the Act for the purposes of education, &c., and that the work in which the said George Heeley was engaged on the day in question was an "employment" within its meaning. I was of opinion that the latter was the true construction of the statute, and I therefore convicted the app. in the penalty of 40*s.*, whereupon he being dissatisfied, &c. applied for a case, &c.

Harrington appeared for the app. and *Welsby* for the resp.

June 28.—*WILLIAMS, J.*—In this case, which was argued before us upon the construction of the 73rd section of the 7 & 8 Vict. c. 15, in respect to this case, Mr. Harrington, in a very able and ingenious argument, was driven by his good sense to admit that the point after all resolves itself into an inquiry, whether the case comes within the exception in the 73rd section, which, after defining in the interpretation clause what shall be considered as the meaning of certain terms, says, "and any room situated within the outward gate or boundary of any factory wherein children or young persons are employed in any process incident to the manufacture carried on in the factory shall be taken to be a factory, although it may not contain any machinery; and any part of such factory may be taken to be a factory within the meaning of this Act; but this enactment shall not extend." Now the question is, is the case before us within what follows: "But this enactment shall not extend to any part of such factory used solely for the purposes of a dwelling-house, nor to any part used solely for the manufacture of goods made entirely of any other material?" It seems to me plain that the room in question cannot be said to be a room employed solely for the manufacture of goods manufactured there of any other material contemplated by the Act. Upon that short ground, it not being within the exception given in the Act, the argument must prevail that the conviction is right.

*WILLES, BYLES and KEATING, JJ.* concurred.

*Conviction affirmed.*

C. B.]

HOWARD v. COLES.

[C. B.]

Saturday, June 28.

HOWARD v. COLES.

*Employment of children in factories—Conviction under ss. 31 and 56 of 7 & 8 Vict. c. 15—Bleaching and Dyeing Works Act, 23 & 24 Vict. c. 78, s. 1—What processes do not come within the meaning of the latter Act.*

This was a special case sent up for the opinion of this court.

Case.—Mr. Robert Howarth, of Gaythorn, in the city of Manchester, percher, stiffener, raiser and shearer, that is to say, a finisher of fustians (the app.), appeared before me, Cuthbert Edward Ellison, Esq., the stipendiary magistrate duly appointed and acting in and for the said city, on the 3rd day of Sept. 1861, pursuant to a summons obtained against him by Mr. Robert William Coles, sub-inspector of factories, upon an information and complaint which, omitting formal parts, was in the following words, that is to say:—

That the said Robert Howarth had offended against the Act made in the seventh year of her Majesty's reign, intituled "An Act to amend the laws relating to labour in factories," as amended by the Act made in the thirteenth and fourteenth years of her Majesty's reign, intituled "An Act to amend the Acts relating to labour in factories;" and by an Act made in the sixteenth and seventeenth years of her Majesty's reign, intituled "An Act further to regulate the employment of children in factories;" and by an Act made in the twenty-third and twenty-fourth years of her Majesty's reign, intituled "An Act to place the employment of women, young persons and children in bleaching works and dyeing works under the regulations of the Factories Acts," "forasmuch as the said Robert Howarth, on the 15th day of Aug. 1861, at Manchester, in the said city, being then and there the occupier of a certain bleaching works within the true intent and meaning of the last-recited Act, did then and there in his said bleaching works employ one John Davies, a child under the age of thirteen years, without having obtained a certificate from a schoolmaster that the said child had attended school during the foregoing week, as required by the said first-recited Act, contrary to the said recited Acts."

It was proved upon the hearing of the information that John Davis, being a child under thirteen years of age, was employed by and worked for the app. at his works in the city of Manchester; that on the 15th Aug. last the said John Davis was employed at work done by a machine called a raising machine; that raising is part of the process of finishing fustians; that the operation of finishing fustians was done at the app.'s works, but it was proved that no bleaching or dyeing was done at those works.

It was admitted, on the part of the app., that the certificate of school attendance required by the stat. 7 Vict. c. 15, ss. 31 and 56, had not been obtained, and that the said Robert Howarth was liable to the penalty imposed by sect. 56 of the 7 & 8 Vict. c. 15, and sect. 1 of the 23 & 24 Vict. c. 78 (the Bleaching and Dyeing Works Act 1860), if the works of the said Robert Howarth were bleaching works within the provisions of the said Bleaching and Dyeing Works Act 1860. This was the only question in dispute before me.

The following description of the various operations carried on at the bleaching works ordinarily so called, at a dyeing works ordinarily so called, and at the app.'s works respectively, were given before me, and were to be taken for the purpose of this case to be correct.

Cotton cloth, as taken from the loom of the manufacturer, is designated by the name of grey goods, and whilst in that condition is described in the trade as being "in the grey." In order to fit it for the market (unless sold by the merchant in the grey) it is necessary for it to undergo one or more processes.

Certain description of heavy cotton goods, called

fustians, moleskins, &c., are sold to the merchant by the manufacturer in the grey, without being either bleached or dyed. Previously to these being sold by the merchants they are sent by him from his warehouse to the percher, stiffener, raiser and shearer, and to the fustian cutter, and are subjected to various processes. When sent to the fustian cutter they are cut—that is, the surface is divided, by a knife, into various ribs for the entire length of each piece. Perching, stiffening, raising, shearing and cutting are all processes of finishing, and with some classes of goods they, some, or one of them, are the only processes performed upon them after manufacturing.

Preparatory to cutting, the cloth requires to be perched, which is a process whereby a nap or pile is raised or produced on the back of the cloth or stiffened; that is, coated with a paste or size.

Raising and shearing may be shortly described as follows: The cloth is sent in the grey from the warehouse of the merchant to the raisers and shearers, by whom in the process of raising it is passed over revolving rollers clothed with wire cards (the machine being known by the name of a raising machine), which raises or produces a nap or pile on the face of the cloth. In shearing, the cloth is run through a machine to shear or cut off a certain portion of the nap or pile which has been raised by the raising machine.

If the cloth requires stiffening, it is stiffened previous to shearing. The cloth is hooked or plaited, and returned to the merchant. These operations of raising, shearing, perching, and stiffening are done at the app.'s works, and constitute his sole occupation or business. This occupation or business is carried on as a separate and independent trade by the app., and no processes connected with bleaching or with dyeing are conducted upon the premises. After the app. has performed the last-named processes upon cloth that requires to be dyed, it does not come again to his hands, but is cut by the fustian cutter, and is then sent to be dyed and finished. This applies to goods that are only in part finished by the app.

Bleaching converts grey goods into white goods. This is effected by various processes, and these differ according to the kind of cloth and the purposes for which it is intended. In the case of the lighter description of cotton cloth, called calicoes, the first process at the bleach works is to fire it. That is done by passing the cloth over heated iron or gas lights, and the object is to take the woolly fibres off the face of the cloth. It is next washed and boiled in various vessels, in connection with which various chemical compounds are used until the cloth becomes white. It is then passed through a machine called a wetting-out mangle, or squeezer, for the purpose of taking out the creases. This completes the process of bleaching (calicoes) strictly so called. The cloth is afterwards finished. To effect this the cloth is stiffened, which is effected by compressing a certain quantity of liquid starch into the cloth by means of a machine called a stiffening machine; after which the cloth is dried; and lastly, it is calendered, that is, pressed between revolving cylinders, or rollers, which are either heated or cold, according to the kind of finish intended to be put upon the cloth. It is then hooked or plaited into folds, and finally packed, that is, placed between bleachers' boards or wrapped in sheets for the purpose of conveyance from the works to the warehouse of the manufacturer or merchant. All the various processes above mentioned as being undergone by the cloth subsequent to the squeezing and previous to packing, are called in the trade by the collective name of finishing, and are almost invariably, but not always, carried on at the same works as the bleaching, and in connection with and as part of the trade or occupation of bleaching.

In the case of fustians, the first process at

the bleach works is to ash and scour it. That is done by first passing the cloth through a liquor composed of soda and boiling water, and afterwards through a liquor composed of vitriol and water. It is then passed through other liquors, in which various chemical compounds are used, until the cloth becomes white. It is then passed through the wetting-out mangle or squeezer for the purpose of taking out the creases. This completes the process of bleaching fustians, strictly so called. This cloth is afterwards finished; to effect this upon bleached fustians the cloth is stiffened as above described; after which it is dried, re-raised, and lastly it is hooked or plaited, and sent into the warehouse of the manufacturer or merchant. The processes of finishing lastly mentioned are almost invariably, but not always, carried on at the same works as the bleaching, and in connection with and as part of the trade or occupation of a bleacher.

Dyeing converts grey goods into coloured goods by the use of various colours in solution. In the case of calicoes, the first process is to fire the cloth as mentioned above, it is afterwards bleached as hereinbefore described (if necessary for the purpose for which it is intended, but not otherwise); and then passed through the coloured liquid, and is then dried. This completes the process of dyeing calicoes properly so called. The cloth is afterwards finished. To effect this the cloth is stiffened, dried and calendered in like manner as mentioned above. It is then hooked or plaited, and finally conveyed to the warehouse of the manufacturer or merchant.

All the various processes above mentioned, as being undergone by the cloth for the purpose of finishing, are carried on at the same works as the dyeing process, and in connection with and as part of the trade or occupation of a dyer, but none of them are carried on at the app.'s works, the app. not being a finisher of the class of goods to which the above-mentioned processes apply.

In the case of fustians, the first process is to perch the cloth on the back, if the colour requires that it should be so, but not otherwise; the cloth is afterwards bleached, as hereinbefore described, and is then passed through the coloured liquid, and then dried. This completes the process of dyeing fustians, properly so called. The cloth is afterwards finished. To effect this the cloth is stiffened, dried, raised, and sheared, in the like manner as mentioned above. It is then hooked or plaited, and finally conveyed to the warehouse of the manufacturer or merchant. Many of the various processes of finishing are usually carried on at the same works as the dyeing process, and in connection with and as part of the trade or occupation of a dyer. The app. does not perform any of the said several last-mentioned processes on dyed fustians. In addition to what is heretofore stated as to packing, the same expression is used to describe the making-up of goods (by means of hydraulic pressure) in bales, for exportation. Steam power is used for this purpose; but this process is generally carried on at the warehouses, and not at the bleaching works, or at the works of a percher, stiffener, raiser and shearer.

The trade, business, or occupation of the app. Mr. Robert Howarth is that of a percher, stiffener, raiser and shearer, otherwise a finisher of grey goods exclusively; no process connected with bleaching or with dyeing is carried on by him or upon his premises or any part thereof. The app. does not buy or sell any goods, but only performs the four processes above mentioned upon grey goods belonging to other persons, which, after being returned by him to the customer, may be in whole or in part sold in the grey, or may be in whole or in part bleached and dyed on other premises. His premises consist of a building in which children, within the meaning of the Factories Act, are employed, and in which steam power is used in the occupation of

perching, stiffening, raising and shearing, otherwise finishing, of cloth of cotton commonly called fustian.

On behalf of the app. it was contended before me, that the Bleaching and Dyeing Works Act 1860, viz. 23 & 24 Vict. c. 78, only applied to bleaching works ordinarily so called and dyeing works ordinarily so called, and that as no process connected with bleaching or with dyeing was carried on by or on the premises of the app., and as his business was an occupation entirely separate and distinct from each of them respectively, his works were not bleaching works or dyeing works within the meaning of the statute.

Also that the word "finishing" used in the statute was meant to apply strictly to the process of finishing performed by the bleacher on the bleached goods, and by the dyer on the dyed goods as described above, and as ancillary to the principal operation of bleaching or dyeing, and that the words "finishing works" used in the 11th section of the statute were meant to apply to that portion of the bleaching works or dyeing works, as the case might be, where the process of finishing, as ancillary to the principal operation as lastly described, was carried on.

Upon these facts I decided that the offence charged against the app. was proved, and convicted him in a penalty of 20s; the ground of my decision being, that, according to the true interpretation of the 7th section of the Bleaching and Dyeing Works Act 1860, taken in conjunction with the 11th section of the same statute, the works of the app. were works within the provisions of that Act.

The app. being dissatisfied with my decision, as being erroneous in point of law, has required me to state a case pursuant to the statute 20 & 21 Vict. c. 43, for the opinion of this honourable court, which I have therefore stated accordingly as above.

The question for the opinion of the court is is, therefore, whether my decision was or was not erroneous in point of law.

*Mellish, J. C. and Leresche* for the app.

*Welby* for the resp.

WILLIAMS, J.—I am of opinion that our judgment ought to be for the app. This Act of Parliament is certainly drawn in language that admits of the argument that has been raised in support of the conviction. I cannot say that there is not a mode of expression in respect of bleaching that leads to some argument, especially when you look to the language of the 11th section of the Act of Parliament, and looking to the particular words employed as addressed to the case of bleaching works in the sense in which the app. carried on finishing works. And looking to the general language of the Act, and particularly to the schedule to which my brother Byles has called our attention at the close of the argument, I think it impossible to doubt that the finishing that is mentioned in the Act is the finishing incidental to the occupations of bleaching or dyeing, and the finishing carried on by the apparent operation antecedent to finishing and dyeing is not at all incidental to that operation, and therefore not within the meaning of the Act; and therefore this conviction was wrong.

WILLES, J.—I see no reason for dissenting from the decision of my brother Williams.

BYLES, J.—I agree with the rest of the court. If it had not been for the 7th and the 11th sections it would have been plainly beyond a doubt that this Act of Parliament applies to bleaching and dyeing works properly so called, and to nothing else, for the interpretation of the preamble only strikes at bleaching works and dyeing works, and, as my brother Williams has pointed out, the two schedules only relate to the bleaching works, dyeing works, and there is nothing to be found in the first six sections of the Act, nor in any of the subsequent sections except the 7th and 11th, to make it possible that they shall have a wider construction. With re

[Ex.]

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[Ex.]

spect to the 7th section, the word "finishing" is used twice; first in the middle of the section, and then at the end of the section: it is used among the processes which precede packing, and are described as the "bleaching, dyeing, or finishing." I conceive that that clearly means finishing as incidental to bleaching and dyeing. And that is rendered clearer still, as has been already pointed out, if you look to the close of the 7th section. There the operation of bleaching in the open air is alluded to and includes every process for bleaching, dyeing and finishing. It seems to me it is a finishing which is probably bleaching in the open air. The only real difficulty is raised by the 11th section. But probably the real history of the 11th section is, that when the person who drew that section came to look at the 7th section, he adopted the words "bleaching, dyeing, or finishing," without altering it into "bleaching, dyeing and finishing." But it is impossible to have a literal construction quite consistent with the construction Mr. Mellish put upon the words. It may be this Act of Parliament refers to and includes finishing works which are after the bleaching and dyeing. Suppose in the course of the subdivision of labour the bleaching should be divided into two processes, the last part is the finishing part; and that construction is quite consistent again with the two schedules. Therefore, that may be a satisfactory explanation of the 11th section. But however that may be, I cannot say that I can entertain any doubt at all that the finishing there spoken of is the finishing which is the completion of the bleaching and dyeing.

KRAATING, J.—I am of the same opinion.

*Judgment for the app.*

### COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Monday, June 9.

TAYLOR (app.) v. ORAM (resp.)

*Refreshment-house licence—Dancing-room—Meaning of "public refreshment, resort and entertainment" under the 23 & 24 Vict. c. 27.*

*The occupier of a house kept in it a public dancing-room, where each person who entered was charged 3d. No liquor was kept there, but if any visitor to the dancing-room required beer the money for the quantity required was previously paid to the servant, who then sent for it to a neighbouring public-house.*

*The occupier of such dancing-room had no licence, upon an information against him for keeping open his house for public refreshment, resort and entertainment without a licence under the Refreshment-houses and Wine Licences Act, 23 & 24 Vict. c. 27, the magistrate dismissed the information on the ground that the evidence did not bring the house within the definition given by the Act, as a house kept open for public refreshment, resort and entertainment:*

*Held (upon appeal to the Court of Ex.), that the magistrate's decision was correct.*

*Martin, B. dubitante.*

This was a case stated for the opinion of the court by the magistrate of Cardiff, under the 20 & 21 Vict. c. 43.

The app. Taylor was an officer of excise, and he laid this information against the resp. Oram under the 23 & 24 Vict. c. 27, for keeping a refreshment-house without a licence. The offence was charged to have been committed on three several days, in respect of each of which a penalty of 20*l.* was claimed under the 9th section of the Act of Parliament. The resp.'s premises, in Butte-street, Cardiff, consisted of a long passage communicating with a room partly furnished as a bar, and opening into another room of larger

size which was used as a dancing-saloon, and on the occasions referred to a great number of men and women were seen dancing there. Many men were also seated at a table in the centre of the room, drinking beer and singing. There was not any store of liquor on the premises, nor any other liquor, except beer, seen there. Any person who desired beer had to hand the money to the resp. or his servant, in order that the beer might be sent for from a public-house near. Each person was charged and paid 3*d.* on admission.

The resp. had not obtained any licence for a refreshment-house. By the 23 & 24 Vict. c. 27, s. 6, it is provided that "All houses, rooms, shops, or buildings kept open for public refreshment, resort and entertainment at any time between the hours of nine o'clock at night and five o'clock the following morning, not being licensed for the sale of beer, cider, wine, or spirits, respectively, shall be declared refreshment-houses within this Act, and the resident owner, tenant, or occupier thereof, shall be required to take out a licence, under this Act, to keep a refreshment-house; and every person who shall keep any house, room, shop, or building for the purpose of selling therein any victuals or refreshment to be consumed on the premises where the same shall be sold (except beer, cider, wine and spirits, sold respectively under a proper licence in that behalf); and every person who shall keep any house, room, shop, or building for the consumption therein by the public of any refreshment (except as aforesaid), although the same shall not be sold therein, may, if he shall think fit, take out a licence under this Act to keep a refreshment-house."

The form of licence (as given in the schedule of the Act) is: "We, the undersigned, being the collector and supervisor of excise for, &c., do hereby authorise and empower A. B., a householder, in &c., to keep open his house as a refreshment-house, and to sell any victual or refreshment to be consumed therein and in the premises thereunto belonging, provided that for the sale of any exciseable liquor he shall have in force a proper licence granted to him on that behalf," &c.

The magistrate, R. O. Jones, Esq., on hearing the information, dismissed it on the grounds that the evidence given in support of it did not bring the house within the definition, because, although a place of public resort, it was not a place for public refreshment, because no refreshments at all were kept, only one kind was obtainable, and the obtaining of that depended upon the chance of procuring it elsewhere; nor of public entertainment, because that word signifies not diversion or amusement, but the provision of food, drink, and whatever else may be reasonably required for the personal comfort of guests, and of such entertainment there was no evidence; because the taking out of a licence for such a house as the one mentioned in the section is optional; because the licence, if taken out, would not authorise the sale of beer or other exciseable liquor; because it appears from the form of licence in the schedule to the Act that the sale of beer is expressly excepted from its authority, so that a person could not obtain a licence under this Act if beer were the only refreshment offered for sale or consumption by him; and because it followed from this, that where beer is the only refreshment consumed the definition in the first part of the section would not be satisfied, and the keeper of such a house could not be held liable to the penalties imposed by the Act for not taking out a licence which would not have the effect of enabling him to do that which he is charged with doing.

Locke, Q.C. (*Welsby* with him) for the app.—This was a dancing-saloon where any visitor to it who provided the money was supplied with any quantity of beer ordered there. It was, therefore, a place kept open for public refreshment, resort and entertainment. The 6th section would apply to the case of a man

[Ex.]

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[Ex.]

who took his own beer into such a house and drank it there. The music and dancing there certainly make it a place of public entertainment.

*Poland, contra*, for the resp.—The magistrate has found that this house was kept open for dancing, and for that alone. There was no profit on the beer ordered, it was paid for by the person giving the order, and then sent for by the servant of the resp. from some neighbouring public-house. The 1st section regulates the rates at which refreshment-houses are to be licensed; and if, with the assistance of the 6th section, the provision is to be extended to this case, so must it be to the case of a lecturer who supplies his audience with iced water in an interval of his address. The latter part of the 6th question applies to cases like the present. Persons in that situation may take out a licence if they please, but are not compelled to do so. Suppose a man were to put a drinking-fountain in a room and invite the public to drink, would he be compelled to take out a licence? If the case is a question of fact, and the magistrate has considered it, the court will not send it back: (*Hall v. Green*, 9 Ex. 247; *Gregory v. Tavernor*, 6 Car. & P. 280; *Marks v. Benjamin*, 5 M. & W. 565; and sect. 41, were referred to.)

*Locke* was heard in reply.

*POLLOCK, C. B.*—I am of opinion that the appeal should be dismissed. The question is, whether the respondent's house was a place of public refreshment, resort and entertainment. If not all three, it is not within the meaning of the Act of Parliament. No doubt it was a place of resort, and it may have been a place of refreshment; but as to the meaning of the word "entertainment," I think the magistrate was right. If the word "entertainment" had been found along with the word "refreshment," in other places, I should have been disposed to think that it was meant to express the gratification of other senses than the taste—those which cause enjoyment to the eye or the mind. "Entertainment" is another expression for that which may be tantamount to "refreshment," and more, it may include a more adequate provision. It is a word of ambiguous meaning, and if different things were intended, I should have thought music and dancing would have been mentioned in terms; as the Act stands, the probable meaning is that the entertainment is to be *ejusdem generis*. The 41st section of the Act appears to strengthen this view of the matter. It enacts that "any person who shall be drunk, riotous, quarrelsome, or disorderly in any shop, house, premises, or place licensed for the sale of beer, wine, or spirituous liquors by retail to be consumed on the premises, or for refreshment, resort and entertainment under the provisions of this Act, and shall refuse or neglect to quit such shop, house, premises, or place upon being requested so to do by the manager or occupier, or his agent or servant, or by any constable, shall, on conviction thereof before one justice, be liable to pay a fine not exceeding 40s." In construing a penal Act of Parliament we should take care not to extend the provisions beyond what the Legislature has clearly expressed. The magistrate found there was no evidence of the house being a place of entertainment within the meaning of the Act of Parliament, and I incline to think his exposition of the word "entertainment" is correct; but whether right or wrong, he finds that there was not sufficient evidence before him to satisfy him upon it; he had jurisdiction to consider the matter, and he did so upon the proper legal footing; he determined it in the way that I have stated, and we ought not to interfere with his decision or send it back.

*MARTIN, B.*—I do not differ from the rest of the court, but as to the question of fact, if that were left for my decision, I should differ from the magistrate, because I think the house was kept open for public resort, refreshment and entertainment. It is not re-

quisite to define exactly what "entertainment" is, but there can be little doubt that there was entertainment there. The magistrate found, as the fact was, that this place was a dancing-room; that there was a public-house near it, where the beer ordered and paid for was obtained for the use of those frequenting the dancing-room, and in all probability, if the real truth were known, the resp. had some share or participated in the profits of the sale of the beer so supplied. It appears that some persons went to the dancing-room for the purpose of dancing only, and others that did not dance at all, but sat there listening to songs, observing what was going on and drinking their beer. I do not attach very much weight to the language of the form of the licence, but the conclusion which I should have come to upon the facts would have been, that this room was kept open for the three purposes mentioned in the Act of Parliament. It was, however, for the magistrate to decide, and the question for us to determine is, whether he was wrong in point of law; I am not now prepared to say that he was, although, if the matter should be argued again, I wish distinctly to be understood as having not spoken conclusively upon it.

*BRAMWELL, B.*—I think the magistrate was correct in the conclusion he came to, and I agree with him entirely on all the law and the facts. It is not necessary, in my opinion, to distinguish between "entertainment" and "refreshment." The facts are, that there was a dancing-room, in which many persons assembled; some of them went for the purpose of dancing, some went for beer, and some for neither purpose, but merely to look on, and I am of opinion that the place was not, under these circumstances, kept open for public refreshment. The refreshment which could be there obtained was not its main object, and it was not kept open for the purpose of supplying refreshment. The language of the licence is a licence to sell. To bring this case within the meaning of the Act of Parliament the resp., to qualify himself to keep a dancing-saloon, which he does, would be compelled to qualify himself to sell beer, which he does not, as the beer which is obtained is brought from a public-house at some distance. If it were the resp.'s public-house where the beer was procured, or he thereby obtained profit arising from the sale of the beer supplied to the persons in his house, the result may be different, but the case does not disclose this. I think the magistrate was therefore correct on the facts, and on the evidence as given before him, that this was not a place kept open for public refreshment, resort and entertainment within the meaning of the Act of Parliament, and I agree also with him in the reasons he has given for arriving at that conclusion, and that his decision is right on all points.

*CHANNELL, B.*—I am also of opinion that this appeal should be dismissed. The house may be kept open for public resort, but that is not sufficient to render the resp. liable to the penalties imposed by the Act of Parliament. It is necessary the house should be kept open for refreshment and entertainment. The magistrate, after hearing the evidence, came to the conclusion that this place was not kept open for public entertainment. It is not requisite to say what my own conclusions would have been either of law or fact. The question now is, was the magistrate wrong? He has given three reasons for his decision, and if either one of them is good, the appeal cannot be allowed. I am disposed to go further, and say that all his reasons must be bad before we can allow the appeal, or that the three together constitute no sufficient reason for his decision. I am not prepared to say, upon the evidence given as stated in the case, that the magistrate was wrong.

*Judgment for the resp.—Appeal dismissed.*  
Attorneys for resps., *Harle and Co.*

[Ex.]

BUSH AND ANOTHER v. BEAVAN.

[Ex.]

June 2, 4 and 28.

BUSH AND ANOTHER (Executors, &c.) v. BEAVAN  
(Clerk to the Bradford Town Commissioners).

*Action claiming mandamus under C. L. P. A. 1854  
—Against clerk to commissioners to levy rate—To  
pay executors of deceased clerk his agreed salary and  
other charges—Retrospective rate—Statute of Limitations—Pleading.*

*The executors of an attorney, who had been a clerk to commissioners of a town, sued the commissioners, in the name of their present clerk, for "agreed salary," payable by them to him for services rendered as clerk to the commissioners (not saying as such commissioners, or for the business in carrying out the purposes of the Act, or for services done in carrying the Act into execution), and also for other work by him done, as the attorney of and otherwise for the commissioners. The declaration alleged that the debt became a charge on any moneys in their hands, and should have been collected by them under their local Act of Parliament; and that, if they had not such moneys in hand, then such debt became a charge on a rate leviable by the commissioners, and the plts. claimed a writ of mandamus under the C. L. P. A. 1854, s. 68, to compel them to pay. The deft. pleaded as to so much of the debt as became due on simple contract, the Statute of Limitations; also that no signed bill had been delivered, according to the Attorneys Act, 6 & 7 Vict. c. 73; and also that the local Act did not authorise or allow a retrospective rate:*

*Held, on demurrer, that the claim for the services as distinct from "agreed salary" was one for which the commissioners must only be personally liable; that there was not sufficient to show that it could be lawfully levied out of the rate. Assuming the deceased to have been retained by the commissioners, within the scope of their authority as such, an action would lie against their clerk, and then, on the judgment against the clerk, a mandamus may be had. As regards the claim for salary, it did not follow that it could not be recovered by action of debt, and that there was no other remedy than by enforcing the levying of a rate; that the declaration was therefore bad, and the third and fourth pleas good:*

*Resble, that the action of mandamus does not lie when there is any other remedy, or the claim to the debt or duty may be litigated therein. Neither the Statute of Limitations, nor the Attorneys Act, 6 & 7 Vict. c. 73, applies to the action of mandamus.*

This was an action by the executors of Mr. John Bush, an attorney, against deft., as clerk of the commissioners for putting into execution the Act (2 & 3 Vict. c. 63, private and local) for improving the town of Bradford, in Wiltshire; and the plts. claimed in their declaration a writ of *mandamus*, pursuant to the C. L. P. A. 1854, sect. 68.

The declaration alleged that, after the passing of the said Act (2 & 3 Vict. c. 63), and in the lifetime of the said J. Bush, deceased, the said commissioners became and were indebted to the said J. Bush deceased, in debts and money for the agreed salary of the said J. Bush payable by the said commissioners to the said J. Bush in his lifetime for the services of the said J. Bush by him in his lifetime done and rendered for the said commissioners, as the clerk to the said commissioners, duly nominated and appointed in that behalf by the said commissioners under the provisions of the said Act, and upon the retainer of the said commissioners, and at their request. Also for other the work and labour, journeys and attendances, of the said J. Bush by him in his lifetime done, performed, made and given, as the attorney and solicitor of, and otherwise for the said commissioners, on their retainer and at their request, in and about the business of the said com-

missioners, and for fees due and of right payable to the said John Bush in his lifetime in respect thereof by the said commissioners, and for money and materials and necessary things by the said J. Bush in his lifetime provided and expended and used in and about the said work and labour and journeys for the said commissioners, and at their request, and for money paid by the said J. Bush in his lifetime for those of the said commissioners at their request, and for money found to be due from the said commissioners to the said J. Bush on account in his lifetime stated between the said J. Bush and the said commissioners of and concerning the moneys due to the said J. Bush for the aforesaid work and labour, moneys expended, materials provided and moneys paid, which said debts and moneys before and at the time of the death of the said J. Bush were and remained due and owing to him, and still remain due and owing to the plts. as executors as aforesaid. And the plts. say that the same debts and moneys being and remaining so due and owing to them as such executors as aforesaid, the same debts and moneys became and are a charge and chargeable upon any moneys and funds which might be in the hands of the said commissioners, and which should have arisen and been collected by them under and by virtue of the said Act, and if the said commissioners should not have in their hands any such moneys and funds sufficient to pay and satisfy such debts and moneys so due and owing to the plts. as such executors as aforesaid, then the said debts and moneys became and are a charge and chargeable upon a rate and assessment leviable and to be levied and collected by the said commissioners under the provisions of the said Act. And the plts. further say, that by reason of the said debts and moneys being still owing to them as such executors as aforesaid, they became and were and are as such executors personally interested therein, and also personally interested in any such moneys and funds which may be in the hands of the said commissioners, and which should have arisen and been collected by them under and by virtue of the said Act; and if the said commissioners should not have any such moneys and funds sufficient to pay and satisfy such debts and moneys to the plts. as such executors as aforesaid, personally interested in the rating and assessing and collecting and levying a rate to be charged and chargeable with the payment to the plts. as such executors as aforesaid of the said debts and moneys so due and owing to them as aforesaid within the meaning of the C. L. P. A. 1854, to wit, to the amount of all the moneys so due and owing to them as executors as aforesaid. And the plts. say, that being so interested, afterwards, and within a reasonable time in that behalf before the commencement of this suit, they demanded of and requested the said commissioners to pay and satisfy the plts., as such executors as aforesaid, the said debts and moneys so due to them out of any such moneys or funds as aforesaid, if any, in their hands available for such purpose, but if not, then the plts. demanded and requested the said commissioners to levy a rate under the powers of the last-mentioned Act, for the purpose of the payment of such debts and moneys so due and owing to them as aforesaid, but that the said commissioners have wholly neglected and refused so to do, and the plts., as such executors as aforesaid, by reason of the non-performance by the said commissioners of their duty in that behalf, have sustained damages to the amount of all the debts and moneys so due and owing to them as aforesaid, and therefore the plts. claim a writ of *mandamus* commanding the said commissioners to pay and satisfy the plts., as such executors as aforesaid, the said debts and moneys so due and owing to them as aforesaid, out of any such moneys or funds as aforesaid, if any, in their hands available for that purpose; and if the said commissioners have not any such



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moneys or funds as aforesaid in their hands available for such purpose, then commanding the said commissioners to assess and levy a rate under the powers in the said first-mentioned Act, for the purpose of the payment of the said debts and moneys so due and owing to them as such executors as aforesaid.

Pleas:—1. Never indebted. 2. Payment. 3. To so much of the p<sup>l</sup>ts.' alleged debts and moneys as became due upon simple contract, that the said causes of action hereby pleaded to did not arise or accrue within six years before the commencement of this suit. 4. As to the debts and moneys claimed, except the said "agreed salary," that the work was done and the service rendered by the said J. Bush, deceased, as an attorney and solicitor, and that no signed bill had been delivered as required by the Attorneys and Solicitors Act, 6 & 7 Vict. c. 73.—The 5th, 6th, 7th, 8th and 9th pleas traversed the various allegations in the declaration. 10. To so much of the declaration as relates to the said claim for a *mandamus*, that the debts and moneys in the declaration mentioned accrued due many years before the commencement of this suit, i. e. part thereof, to wit, 15l. 4s. 9d., accrued in or prior to the year 1841, other part thereof, to wit, 266l. 13s. 2d., in or prior to the year 1850, and the residue thereof, to wit, &c., in or prior to the year 1857; that the commissioners had not at that time nor since funds or moneys in hand applicable to the p<sup>l</sup>ts.' claim; that they have duly collected, &c., and duly applied all moneys which had come to their hands as such commissioners according to the Act of Parliament, except a small part which had been set to satisfy other just claims upon the said commissioners, which had arisen and accrued long since the debts and moneys in the declaration mentioned; that the whole amount of any moneys that could be raised by the commissioners by any rate made or to be made would be required to meet said just claims, and the current costs, charges and expenses of the year in which such rate might be made, other than the p<sup>l</sup>ts.' claim; that the amount which the commissioners are empowered to raise in any one year has not been and will not be more than sufficient to pay the said current expenses of the year; and that there never has yet been, and is not likely to be, any surplus in the commissioners' hands whereout they could pay the p<sup>l</sup>ts.' claim.

Demurrer to the p<sup>l</sup>ts.' declaration.

Demurrer to the 3rd, 4th and 10th pleas.

The p<sup>l</sup>ts.' points were:—1. That good and sufficient grounds are shown in the declaration for granting the *mandamus* claimed. 2. That with reference to the commissioners' local Act, and the statement in the declaration, it was and is their duty to pay the p<sup>l</sup>ts. their debts out of any moneys or funds in the commissioners' hands available for such purpose, and that, if the commissioners have not any such moneys or funds as aforesaid in their hands available for such purpose, it was and is the duty of the commissioners, and they are bound to levy and assess a rate under the provisions of their local Act, for the purpose of paying the p<sup>l</sup>ts., and that a *mandamus* will lie to compel them to do so. 3. That such duty on the part of the commissioners is an absolute and not a conditional duty. 4. That with reference to the local Act, it clearly was and is the duty of the commissioners to pay, or, if necessary, to make and levy a rate to pay the debt due for their late clerk's salary.

As to the third plea—First, this being an action of *mandamus* for the performance of an admitted duty, and not being an action on contract, or of a debt, or for the recovery of a debt, the case is not within the 21 Jac. 1, c. 16. Secondly, that the cause of action disclosed in the declaration is the neglect to perform an admitted duty, the remedy for which is given by the C. L. P. A. 1854, and that neither that statute nor any other limits such remedy to six years.

As to the fourth plea—First, that this being an action of *mandamus* for the performance of an admitted duty, it is not in consequence an action maintained for the recovery of fees, charges, or disbursements for business done by the said John Bush, deceased, as an attorney and solicitor, within the 6 & 7 Vict. c. 73, and that no signed bill of costs was required to be delivered under that Act before this action was commenced for the neglect to perform such duty. Secondly, that the ground of action disclosed in the declaration is the neglect to perform an admitted duty, the remedy for which is given by the C. L. P. A. 1854, and that neither that statute, nor any other, requires the delivery of any bill of such fees, charges, or disbursements before bringing or maintaining such action.

As to the tenth plea—First, that upon the statements in this plea, the commissioners were and are bound to make a rate under their local Act to pay the p<sup>l</sup>ts. their debt, particularly the debt due for salary as clerk, and that with reference to such statements, there is nothing to prevent the commissioners so doing, and a *mandamus* will lie to compel them to do so. Secondly, that the power of the commissioners to levy rates under their local Act is not limited to 2s. 6d. in the pound, but that where a necessary occasion arises they may make and levy a rate beyond that sum in the pound, and that the p<sup>l</sup>ts.' claim disclosed a necessary occasion, particularly with reference to the claim for salary as clerk, and that the commissioners therefore may and are bound to make or levy a rate in excess of 2s. 6d. in the pound to pay p<sup>l</sup>ts., and a *mandamus* will lie to do so.

The defts.' points for argument were:—1. That the declaration is bad in substance, and shows no sufficient ground for granting a *mandamus*. 2. That the claim of a *mandamus* is bad, as asking for an alternative writ. 3. That the declaration shows no duty on the commissioners to satisfy the p<sup>l</sup>ts.' claim. 4. That the declaration ought to have shown that the commissioners had moneys or funds in hand applicable to the p<sup>l</sup>ts.' claim, or that they could legally obtain the same by making a rate, which the declaration wholly fails to do. 5. That the declaration fails to show that the p<sup>l</sup>ts. have a personal interest in the fulfilment of the alleged duty.

The deft. will further contend that the third and fourth pleas show that the p<sup>l</sup>ts. could not enforce their claim in an ordinary action, and that such pleas therefore afford a good answer to the claim for a *mandamus*; that, even assuming the declaration to be *prima facie* sufficient, the tenth plea shows that the commissioners have committed no breach of duty, and have not and cannot levy or procure any moneys or funds whereout they could and ought to satisfy the p<sup>l</sup>ts.' claim, and that therefore a *mandamus* ought not to be granted; that it stands admitted that the commissioners have no moneys or funds in hand applicable to p<sup>l</sup>ts.' claim, and that the commissioners cannot now lawfully levy a rate to pay such claim; wherefore a *mandamus* ought not to be granted.

*Phipson, Q. C. (Bullar with him)*, for the deft. in support of the demurrer to declaration.—The declaration is bad; it alleges that the commissioners became indebted to the testator for "agreed salary" as their clerk, and also for services as attorney and otherwise rendered by him on their retainer, and in and about their business and at the request of the said commissioners, not saying "as such commissioners," and there is nothing to show but that it was for services rendered to the commissioners in their private capacity for which they might or might not be personally liable—and not such for which the clerk could be sued, or the debt paid out of the rates. It does not show that the services of the testator were required for the commissioners, as such commissioners, or in the execution of the powers of the Act. This does not differ from any

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ordinary debt of a private individual, and the declaration shows no right to a *mandamus*. *Mandamus* does not lie for a mere personal debt, and the declaration shows that the commissioners were personally indebted. This court will not grant a *mandamus* to make a party pay his debts. If it would lie as to that part of the claim "agreed salary," the commissioners having power to charge the rates (but not retrospectively) for salaries of their officers, it would not lie for the rest of the demand, and the writ must be good entirely, or it is bad altogether. There is no case where a *mandamus* has issued simply for a debt as here. *Kendall v. King*, 17 C. B. 783, is in the debts' favour. There the action was brought by an architect against a committee of visitors of county asylums in the name of their clerk on a contract entered into by a former committee: it was held that the action would lie and the judgment be enforceable by *mandamus*, the clerk not being personally liable, but the clerk should be sued first, and then judgment recovered against him, and afterwards a *mandamus* to enforce that judgment. *Hall v. Taylor*, 1 E. B. & E. 107, is to the same effect. The *mandamus* is to pay out of the rates or to levy rates for the purpose. The writ would be bad for being in the alternative; but the rates are not liable to this demand, for it seems to be rather a personal debt, and the commissioners could not make a retrospective rate: (*Reg. v. Rotherham Local Board*, 8 E. & B. 906; *Reg. v. Hull and Selby Railway Company*, 5 Q. B. 76; and *Ward v. Lowndes*, 28 L. J. 265, Q. B.; and in error, 39 L. J. 40, Q. B., were also referred to.) The Statute of Limitations would be a bar to the action if against the debt personally; but by adopting this course the plts. seek to avoid it.

*Coleridge, Q.C. (Lush, Q.C. and Lopes with him)* for the plts. in support of the declaration and of the demurrer to the debts' pleas.—This case is in principle the same as that of *Ward v. Lowndes*, upon which I rely for the plts. There is a liability here under the Act of Parliament upon the commissioners, and under the 69th section a duty rests on the debts. In this action in which the plts. were interested, and the writ of *mandamus* will lie. If the debts have funds, they should pay the plts.' claim; if they have not, the Act of Parliament enables them to get it and pay the debt. This is substantially the same claim as in *Ward v. Lowndes*. The commissioners are not personally bound to pay; but they have a duty to perform, and this is the proper remedy, and the declaration is good under the 69th section of the C. L. P. A. 1854. The Statute of Limitations does not apply to this claim of *mandamus*, as has been decided by the cases referred to. It was assumed in the argument by the other side, that this claim of *mandamus* would only lie where the old prerogative writ would have lain. It was decided not to be so in *Norris v. The Irish Land Society*, 27 L. J. 115, Q. B., where *Benson v. Paul*, 25 L. J., Q. B., is explained. There is no rule of law which prohibits a retrospective rate, nor any reason why a retrospective rate may not be made: (see *Reg. v. Read*, 13 Q. B. 534.)

*Phipps*, in reply, was stopped, the Court having intimated, if they desired to hear him, notice should be given to him of it.

*Cw. adv. vult.*

June 28.—CHANNELL, B. delivered judgment.—This was an action, brought by the executors of one John Bush, against the defts., "as and being the clerk of the commissioners for putting into execution the Act for improving the town of Bradford," in which action the plts. claim a writ of *mandamus* under the C. L. P. A. 1854. The declaration stated, that in the lifetime of the testator the commissioners became and were indebted to him for the "agreed salary" payable by them to him for services rendered by him as clerk to the commissioners, and also for other works done

by him "as the attorney of and otherwise for the commissioners in and about the business of the commissioners." The declaration alleges "that the said debts became and were a charge on any moneys which might be in the hands of the commissioners, and should have been collected by them under and by virtue of the Act." And if the commissioners should not have in their hands any moneys sufficient to pay the said debts, "then such debts became a charge, and were chargeable on a rate leviable and to be levied by the commissioners under the Act." There is no allegation of matter of fact to show that the debts became so chargeable. The declaration then, after an allegation that the plts., as executors, were "personally interested" (which of course they would be, assuming such a charge, but which rests entirely on the same legal ground as the allegation of the charge itself), goes on to aver a request of the commissioners to pay or levy a rate to pay the said debt, and their neglect and refusal so to do; and then claims a writ of *mandamus* to compel them to pay out of any funds in their hands, or to make a rate for the purpose. To this declaration the defts. pleaded *inter alia* the plea as to so much of the debts as became due on simple contract, that the cause of action did not accrue within six years, and a plea of the Attorneys Act, and also a plea to raise the question whether the Act allows of a retrospective rate. These pleas have been demurred to by the plts., the two former on the ground that the statutes pleaded do not apply to the "action of *mandamus*." The declaration is objected to on the ground that it shows no right to a *mandamus*. It is manifest that this is the main question in the case. The Local Act, 2 & 3 Vict. c. 63, by sect. 13, provides, "That the commissioners at any meeting may nominate and appoint a clerk and such other officer for the execution of the Act, and may out of the moneys to be collected under the Act pay to such officers such salaries and allowances as the commissioners think reasonable. As the commissioners in the execution of the Act would or might have to build sewers and other works, pave streets and keep them in repair, provide engines, lamps, &c., &c." it is obvious there would or might be a necessity for various other officers besides those specially mentioned in the Act, and of a permanent character, such as an engineer, a surveyor, a superintendent of firemen, a scavenger, and the like, and there is a distinction between the employment of such officers and the casual services of others, such as attorneys, who might be from time to time employed by the commissioners more or less for the purposes of the Act, or other business arising out of their acts as commissioners. Beyond the "agreed salary" of the clerk, who may or may not be an attorney, there is no power to pay out of the rate for the services of an attorney simply as such, save so far as it may be gathered from the section referred to, and the general terms of the rating clause, sect. 69, "to make rates to defray the expenses of carrying into execution, the several purposes of the Act;" or from a subsequent clause, sect. 94, "in paving, cleansing, lighting, draining and watering the streets and places of the town and otherwise improving the same, and of carrying the purposes of the Act into execution." In respect of the power of the commissioners to make sewers, provision is made by sect. 28 for compensation to persons injured or damaged by the necessary works; and in sect. 31 there is a power to take stone on lands not garden ground, on paying compensation. Of course the legal expenses in proceedings within the powers of the Act would as much be within the scope of the rating clause "as expenses of carrying the Act into execution," and the payment of the compensation itself. But in cases of works by which parties were unnecessarily injured, and for which they might maintain actions, or in cases of

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materials unlawfully taken, the commissioners must be liable, or such of them as authorised the acts, and the expenses thereby incurred could not be charged on the rates as the expenses of "carrying into execution the purposes of the Act." So as to other powers under sect. 41 to lay gaspises; they are, under sects. 42 and 43, expressly to be liable for letting gas escape, or letting foul liquid run into the river, &c.; and so in sect. 46, as to contamination of water by gas; and sect. 46 expressly provides that nothing in the Act is to prevent the commissioners from being indicted for a nuisance; and expenses incurred by the commissioners in defending such indictment or other proceedings for wrongful acts of theirs not authorised by the Act could hardly be deemed expenses for carrying out the purposes of the Act, and therefore could not be paid out of the rates. It is not necessary to notice any more provisions of the Act, except that in sect. 16 it is provided, "that the commissioners may sue and be sued for or in respect of any matter or thing relating to this Act in the name of their clerk for the time being," "the clerk to be paid out of the moneys to be raised by virtue of the Act, all such damages, costs and charges as he shall be put to by reason of his being so made plt. or deft., and shall not be personally answerable or liable for the payment of the same, unless the suit shall arise in consequence of his own wilful neglect or default, or shall have been brought or defended without the order or direction of the commissioners." This provision implies, we think, what has already been intimated, namely, that there may be cases in which wrongful acts had been done which the commissioners as a body disclaimed, or might disclaim, and which had not been in pursuance of any directions or orders of theirs, nor by any one engaged in the carrying out of their directions, and for which, therefore, the persons, commissioners, and others who had done or directed such acts would be personally liable, and for the same reason the clerk, as representing the commissioners, could not be rightly sued, and so could obtain a verdict and his costs; or even if it should appear that the commissioners were by reason of the assent of any five of them liable for the acts complained of, the effect is, if the commissioners as a body declined to direct the clerk to defend, it would be practically that, as the costs and damages could not then come out of the rates, they would be thrown upon such commissioners as had directed the acts, and who therefore would be made personally liable both for the damages and the costs of the defence. There are, then, various ways in which we think the commissioners might retain the services of an attorney in matters relating to their duties and their business as commissioners, and yet for such services they could not charge the rates, and would be personally liable. The allegation in the declaration, on which the whole depends, is, that the commissioners became indebted to the testator for "agreed salary" as their clerk, and also for services as attorney and otherwise rendered by him on their retainer, and in and about their business, and request of "the commissioners;" not saying "as such commissioners." Now, as regards the first head of claim, the "agreed salary, as clerk to the commissioners, and duly nominated and appointed in that behalf," that might, probably, be brought within the express power to pay salaries of officers out of the rates; and there is a great distinction between that and the other head of claim for services to the commissioners, which might have been services for which they would have no authority to pay out of the rates, and for which they would only be personally liable. The pleas proceed on this distinction: The plea of the Statute of Limitations being "to so much of the said debts as are on simple contract;" whilst the plea of the Attorneys Act is "except as to the agreed salary." The claim for the services

as distinct from agreed salary, is one for which the commissioners must only be personally liable, and for which the rates would not. Assuming this distinction to be correct, the argument on the part of the defendants, that the claim of the writ, being entire and referring to both the debts, the declaration must be deemed entire, and, if bad in part, was bad *in toto*. But it was further argued on the part of the defendants, that, although as to the claim for the agreed salary, it might be one that could be paid out of the rates, yet no specific fund was charged with the payment of the debts claimed by the plaintiffs, and there was no obligation to pay any particular creditor, nor to raise rates for the purpose, and that there would be no such duty or obligation—at least until the commissioners had been sued by their clerk in an action of debt, and judgment recovered against them. In *Benson v. Paul*, 6 E.L. & B. 275, it was held that the right to a *mandamus* does not extend to the fulfilment of duties arising from mere personal contract; and though, in the subsequent cases of *Norris v. The Irish Land Society*, 27 L.J. 115 Q.B., it was held that the remedy is not restricted to cases where the old writ of *mandamus* would have lain, no case seems to have done away with, in respect of the action of *mandamus*, the doctrine which is always applied to the writ of *mandamus*, that it does not lie where there is any other remedy. Thus, in the case cited and relied on by the counsel for the defendants, *Kendall v. King*, 17 C.B. 483; 25 L.J. 132, C.P., where the action was brought by an architect against a committee of visitors of county asylums in the name of their clerk, on a contract entered into by a former committee, it was held that the action would lie, and, per Williams, J., that the judgment would be enforceable by *mandamus*, the clerk not being personally liable. The case of *Hall v. Taylor*, 1 E.B. & E. 107, tends to the same conclusion. In *Ward v. Lovelace*, 28 L.J. 265, Q.B., reported in error, 29 L.J. 40, Q.B., the debt had been originally incurred by commissioners under a local Act, and their property had been by statute transferred to the Board of Health, and by implication the debt was charged on the rates, and though the commissioners might originally have been personally liable, clearly the Board of Health was not, and as regards them the debt was not a charge upon the rates. That was the ground of the decision in the court of error, that *mandamus* would lie. The court held, in effect, that it was not a charge or expense incurred by the board, and, per Byles, J., "*Mandamus* lies where there is not a duty to perform, and no means of enforcing it by action." It was further said: "The debt was there charged on the rates by statute, and an implied power was given to make a rate to raise the money." Of course, when the statute had created the charge, it created a duty to liquidate it, and to levy rates for the purpose; and, as was said per Erie, C.J., "There were no means of enforcing the levying of a rate but by *mandamus*," and if the only remedy is by enforcing the levying of a rate, of course the remedy must be by *mandamus*. But as regards a portion of the present claim, there is not sufficient to show that it could be lawfully levied out of the rate; and even as regards the claim for salary, which perhaps might be, it by no means follows that it could not be recovered by action of debt, and that there was no other remedy than by enforcing the levying of a rate. As regards the claim for services as an attorney, assuming them to have been retained by the commissioners within the scope of their authority as such, then, as in *Kendall v. King*, an action would lie against their clerk on their behalf, and on the judgment a *mandamus* would lie, for the judgment would affirm a debt or duty from the commissioners as such. But until then *non constat* that there is any

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such debt or duty, only a claim of it, the proper remedy for which is the action of debt; and although no doubt in *Ward v. Lowndes* it was held that where a debt is of such a nature that a *mandamus* will be granted to enforce it, and is the proper remedy, the amount may be ascertained in the action of *mandamus*, neither that nor any other case has, that we are aware of, determined that the claims to the debt or duty may be litigated therein. On the contrary, the language of the C. L. P. A. 1854, sect. 68, rather excludes this view, for it enacts that an action of *mandamus* shall be to compel the performance of a duty, and it thus assumes and implies that the duty exists when the action is brought, and the claim to a *mandamus* is inserted in the writ. Now, the *mandamus* in this case is to pay out of the rates, or to levy rates for the purpose. It is objected that the writ is bad, for being in the alternative; but passing this by, both branches of the alternative assume and imply a legal duty, when the writ of *mandamus* issued, to pay these claims out of the rates, or levy rates for the purpose; and this without even alleging that the services were rendered to, or on the retainer or request of the commissioners as such, or for the business in carrying out the purposes of the Act. Assuming the services not to have been "in execution of the powers of the Act," then they would not be even payable out of the rates. As the commissioners are a fluctuating body, and it is possible that the present commissioners knew not whether the services now claimed for were in execution of the purposes of the Act, and so payable out of the rates, there could hardly be a legal duty on them to pay for those services out of the rates, and make rates for the purpose before that had been legally determined. It is true that in the declaration there is an averment that the commissioners were indebted for services rendered on their retainer in and about the business of the said commissioners. It is nowhere alleged that they were indebted as such commissioners for services done in carrying the Act into execution; and even if it were so, that would only be uniting in one and the same claim an action of debt with one of *mandamus*. It is clear, according to *Kendall v. King*, that an action would lie against the clerk of the commissioners, assuming the services such as would be properly payable out of the rates, and then that a remedy by *mandamus* may be had on the judgment; but if the services were not, as avowed to be, payable out of the rates, it is clear no action would lie against the commissioners by their clerk at all, and there could be no recourse to the rates; and of course, in that case, no remedy by *mandamus*. It seems to us to follow that the declaration is bad, and on the same principle that the two former pleas demurred to are good. In *Ward v. Lowndes* it was held that there was no statute of limitations which can be taken as applying to the action of *mandamus* (and a similar remark would apply to the *Attorneys Act*). If we hold the case to be one for a *mandamus* (when, until a judgment has been reversed, the remedy is by action of debt), we deprive a party of defences which, whilst the debt is in dispute, he has a right to resort to. Taking the view we do, that the declaration is bad, we think it unnecessary to determine as to the last three pleas demurred to, which raises the question, whether the rate might be retrospective. Probably that question would be found very unwise to resolve itself, however, into that which we have already determined. This is the judgment of my Lord Chief Baron and myself, and it is to be taken as the judgment of the court. My brothers Martin and Bramwell were not present during the whole of the argument, and decline taking any part in the judgment.

*Judgment for the debts.*

*Attorneys for the plts., Kingsford and Dorman, for Spackman, Bradford.*

*Attorneys for the debts., Whitaker and Woolbert, for Slack and Simmons, Bath.*

Monday, April 28, 1862.

THE MAYOR, ALDERMEN AND BURGESSES OF GREAT YARMOUTH v. GROOM.

THE SAME v. DANIEL.

*Market toll—Stallage and pittance—Liability to—Exclusive use of soil of market—What constitutes a stall—Tenants in ancient demesne—Exemption of from toll.*

*At and prior to 1448, and thence continually to the present time, plts., who were an ancient corporation, were the owners of the soil of the market-place, in which, during all the aforesaid time, public markets had been held; and all persons, except as hereinafter mentioned, having stalls or stands in or using the market with "peds" or baskets, had always paid the corporation for so doing, and had places for their stalls or peds allotted to them. The peds were wooden or wicker baskets with lids turning back, which were convertible into tables, supported by stools or pieces of wood, not fixed in the soil, for exposing their goods for sale.*

*The manor of O. was a manor of ancient demesne extending into the parish of O. and other parishes. By several confirmation rolls, from 4 & 5 Phil. & M. to 2 Car. 1, the freedom of tenants in ancient demesne from toll and stallage, &c. was recited and confirmed. Some of the inhabitants of the parish of O. and the said other parishes, who were either owners or occupiers of land in those parishes, had kept the market, as far as living memory extended, without being required to pay, and there was no evidence that such persons had ever paid for their chairs and peds.*

*The debts., who were owners and occupiers of lands, not of the tenure of ancient demesne, in the parish of O., had kept the market with chairs and peds for the sale of goods, and had refused to pay toll or stallage to the plts. for the same:*

*Held, that debts., not being tenants in ancient demesne, were liable to pay stallage for the exclusive occupation of the soil of the plts.' market by their peds.*

*Per Wilde, B.—Any erection used for the purpose of selling goods in the market is a stall, and how it is constructed, and whether fixed in the ground or not, is immaterial.*

These were actions brought to try the right of the debts., who claimed to be exempt from toll, stallage, chiminage, frontage, pavage, pittance, murrage and passage, as tenants in ancient demesne of the manor of Ormesby, and men of the town of Ormesby, in the county of Norfolk, to place, during the sale of their goods on the ordinary market days, in the public market-place of Great Yarmouth, a stall, or stand and seat, for the purpose of exposing goods and provisions to sale, without making any payment for the same. In the first action, the first count of the declaration was for money payable by debt for the use, by plts.' permission, of plts.' land, and for stallage, groundage, and other duties for and in respect of the debt. having put, placed, and kept in the market, and upon the market-place of the plts., certain stands, peds, seats and chairs, for the purpose of exposing goods for sale, and for having placed and fixed in the soil of the market-place divers poles and posts; and the second count was in trespass for breaking and entering the land of the plts., and putting and placing thereon divers stands and peds, chairs and seats, and placing and fixing in the soil thereof divers poles and posts, and keeping and continuing the same. The debt.

pleaded to the first count, never indebted, and to the second count: 1. Not guilty. 2. That the land was not the pils'. 3. Leave and licence. 4. Except as to placing chairs, seats and stands other than peds, a special plea that there was a public market held by the pils. upon the said land, and the deft. attended the market with marketable articles, and justifying the use of the peds, as being necessary and proper for holding and containing the articles brought to market, and such as were commonly of right used in the market for that purpose, and commonly put and placed on the land for the purpose of exposing to sale their contents, and being a reasonable and customary mode of exposing the articles for sale. 5. As to placing the chairs and seats, a custom from time immemorial, for persons using the market for the sale of provisions, and being desirous of having a chair or seat to sit upon during the market, to put and place, and have and enjoy the easement of putting and placing upon the land, a chair or seat near to the provisions exposed to sale. 6 and 7. Similar pleas, alleging the custom to have existed for forty years and twenty years respectively. Issue was joined on these pleas. In the second action the declaration was for money payable by the deft. for the use, by the pils.' permission, of the pils.' land, and of divers standings in a certain market-place of the pils., and for tolls and other duties payable in respect of the deft.' having put, placed and kept upon the market-place certain stands, peds and baskets, for the purpose of exposing goods to sale. The deft. pleaded never indebted, and issue was joined. By an order made in both actions, by Bramwell, B., bearing date the 13th March 1861, and by consent, it was ordered that these causes should be referred to an arbitrator to find the facts in dispute between the parties, and to state a case for the opinion of the court, and that judgment should be entered for the pils. or defts. in the said actions respectively, according to the opinion of the court. The said arbitrator has accordingly stated the following

## CASE.

At and prior to the year 1448 there was, and thence continually until the present time there has been, a public market for the sale of goods and provisions in the town of Great Yarmouth, in the county of Norfolk, belonging to the pils., who are an ancient corporation, and have been incorporated from time immemorial; and the pils. at and prior to the said year 1448 were, and have ever since been, the owners of the soil of the market-place where the market is held. The market is held on Wednesday, and Saturdays in every week, the principal market being on Saturday, and persons (except as hereinafter mentioned) having stalls or stands in the market, or using the market with peds or baskets, and with or without chairs or seats, for the sale of provisions, have always paid the corporation for so doing, no money difference having ever been made as to whether chairs or seats were used or not. The places in the market-place, where the stalls or stands, or peds, or baskets were placed, have always been determined and allotted to the parties using them, by the corporation, and the rate of payment has been from time to time varied by the corporation, but not at any time exceeding a reasonable sum, and the payments have continued to be made up to the present time.

The ped is a wooden or wicker basket of the length of 4 feet, of the width of 2½ feet, and of the height of 2 feet, with a lid which turns back, and, when supported by a stool or pieces of wood not fixed in the soil, forms a table upon which the provisions brought to market are exposed for sale. The deft. Groom used the market on the several days mentioned in the particulars of demand in the action against her, with a chair and two peds, in which she brought provisions for sale, and the lids of the peds were turned back and supported by pieces of wood not fixed in the soil, and

formed a table on which she exposed the provisions for sale. The chair and peds were protected by a covering, supported by four poles which were shod with iron spikes, and fixed in the soil, and upon which poles a wooden frame was placed, covered with a tarpaulin. The chair and peds and stall were her property. Payment for her so occupying part of the market-place was first demanded of her by the pils. on the 5th Feb. 1859. The sum demanded was a reasonable sum, and she refused payment. The deft. Daniel, by his wife, used the market during the period mentioned in the particulars of demand in the action against him, with a chair and a ped (but without a tarpaulin covering), in which she brought provisions for sale. The lid of the ped was turned back, and supported by pieces of wood not fixed in the soil, and formed a table on which she exposed the provisions for sale. Payment of a reasonable sum was, on the said 5th Feb., in like manner, demanded of him, and was refused. The deft. Groom is the owner and occupier of about six acres of freehold land, in the parish of Ormesby St. Michael, in the county of Norfolk, of which about three-quarters of an acre was allotted to her under a local Inclosure Act passed in 1842, in respect of rights of common belonging to her other land. She also occupies three acres of land as a yearly tenant. The deft. Daniel is the owner and occupier of about seven acres of freehold land in the parish of Scratby, in the county of Norfolk of which about two acres were allotted to him under the same Inclosure Act. He also occupies about seven acres of land in Scratby as yearly tenant.

It was proved on behalf of the defts. that the manor of Ormesby, with the members, is a manor of ancient demesne, and extends into the several parishes of Ormesby St. Margaret, Ormesby St. Michael, the hamlet of Scratby, and several other parishes in the county of Norfolk. The papers marked A and B, hereunto annexed, and which are to form part of this special case, are correct translations of parts of Domesday Book. The paper marked C hereunto annexed, and which is also to form part of this special case, is a correct translation of an extract from the hundred roll of Norfolk. There is, in the parish of Scratby, another manor called Scratby Bardolphus, which does not appear to have ever been in the hands of the Crown.

The defts. put in, and proved before the arbitrator, extracts from five confirmation rolls of the following dates, that is to say, 4 & 5 Phil. & M., 4 Elis., 23 Elis., 4 Jac. 1, and 2 Car. 1. Although slightly differing in language, they were the same in substance, and refer to the men and the tenants of the manor and town of Ormesby; and the papers marked D and E thereunto annexed, and which are to form part of this special case, are correct translations of two of them. The parish of Ormesby St. Margaret, Ormesby St. Michael, and the hamlet of Scratby adjoin, and are together about three miles and a half in length, by about one mile and a half in breadth.

The inhabitants of the parish of Ormesby St. Margaret and Ormesby St. Michael are never summoned to serve on juries at the assizes or sessions of the peace for the county of Norfolk, but the inhabitants of the hamlet of Scratby are summoned and do serve on juries. The manor of Ormesby, with the members, was granted by King John to a subject. It again became the property of the Crown on the accession of Henry VII., and continued so until about the year 1735, when it was again granted to a subject. Some of the inhabitants of Ormesby St. Margaret, Ormesby St. Michael and Scratby, have attended at and kept the market at Great Yarmouth as far as living memory extends, and during that period have never paid, nor until the year 1859 been required to pay, for their chairs and peds in the market-place, whether the same have been covered and protected as in the deft.

Groom's case or not; and there was no evidence given before the arbitrator on behalf of the plts. that such persons ever paid for the use of the market-place for their chairs, peds, or coverings. Such of the inhabitants of Ormesby St. Margaret, Ormesby St. Michael and Scraby as have kept the market, have been sometimes owners and occupiers of land in those parishes, sometimes occupiers only; and the provisions they have brought for sale have sometimes been only the produce of their own land, sometimes bought for the purpose of sale, and sometimes the property of other persons residing in those parishes and in other parishes, for whom they have sold them on commission. No inquiry was made by the collector for the corporation (who was appointed in 1851) as to the tenure of the lands of the persons so attending and keeping the market. The rents are paid to the lord of the manor of Ormesby with the members, in respect of lands scattered over the different parts of the three parishes; but no such fee rents are paid by either of the defts. in respect of their land, and for allotted land none would be payable.

The pleadings in the said actions are to form part of this special case, and the court is to be at liberty to draw such inferences from the facts stated as a jury might have drawn.

The question for the opinion of the court is, whether the plts. are entitled to recover in the said actions, or either of them?

And judgment is to be entered for the plts. for 1s. debt or damages, or for the defts. or either of them, according to the opinion of the court.

The case came on for argument on 11th Nov. 1861, when it was by consent remitted to the arbitrator to be retried, the arbitrator to find or set out the tenure of land of the defts., and whether the goods sold were the produce of such land, and also to raise the question whether placing the peds entitled the corporation to stallage.

The arbitrator found accordingly as follows:—“That the land of the before-named deft. Martha Groom is not of the tenure of ancient demesne, but is, as is stated in the said special case, part of freehold tenure and part of leasehold tenure; and that the land of the before-named deft. Benjamin Daniel is not of the tenure of ancient demesne, but is, as is stated in the said special case, part of freehold tenure and part of leasehold tenure, and that part of the goods sold by the said Martha Groom was the produce of her said land, and other part of such goods was not the produce of her land, but the produce of the land of another inhabitant of the said parish of Ormesby St. Michael, and that all the goods sold by the said Benjamin Daniel were the produce of his said land.”

The questions for the opinion of the court are:—“Whether the plts. are entitled to stallage, or any payment in the nature thereof, for or in respect of the placing and using the said peds in the said market-place, in the manner stated in the case; and whether the defts., or either of them, are exempt from paying any toll, or making any payment to the plts., for the use of the market by them in the manner stated in the case?”

If the court shall be of opinion that the plts. are entitled to stallage, or any payment in the nature thereof, for or in respect of the placing and using the said peds as aforesaid, and that the defts., or either of them, are not exempt therefrom, or that the plts. are entitled to toll, or any payment in the nature thereof, for the use of the market as aforesaid, and that the defts., or either of them, are not exempt therefrom, judgment is to be entered for plts.—1s. debt or damages against both or one of the defts., as the court shall decide.

If the court shall be of opinion that the plts. are not entitled to stallage or toll, or any payment in the

nature of stallage or toll, as aforesaid, or that the defts., or either of them, are exempt from stallage and toll, and from making any payment as aforesaid, judgment is to be entered for both or one of the defts., as the court shall decide.

The document mentioned in the case, marked E, was a “Confirmation Roll 19 to 23 Eliz., concerning the confirmation of the custom of the town of Ormesby;” and, after reciting (*inter alia*) that “according to the custom of our kingdom of England, the men and tenants of the ancient demesne of the Crown of England are and ought to be quit from the taking of *toll, stallage*, chiminage, frontage, pavage, *piccoage*, murrage, and passage throughout the whole of our kingdom aforesaid; and the manor and town of Ormesby, in the county of Norfolk, are of the ancient demesne of the Crown of England, as appears,” &c., it enjoined all and singular the sheriffs, mayors, &c. (to whom it was addressed), “that you permit the same men and tenants to be quit of such *toll, stallage*, &c. concerning their goods and matters by you or any of you to be executed, and according to the custom aforesaid. In witness whereof, &c. Witness the Queen at Westminster, on the 8th May, 23rd year.”

*Welsby* appeared, and argued the case on the part of the plts.—There is no claim of exemption by custom set up in the special case. The exemption there claimed is by way of prescription for tenants of land in ancient demesne within the manor. It is nowhere found that the lands of these defts. are within the manor, and if they were, they are expressly found by the arbitrator not to be lands of ancient demesne. It is consistent with every statement in the special case that the lands of both defts. are out of the manor, and that other persons who have been exempt from toll, held lands of ancient demesne within the manor; whereas these defts. might have simply held lands in the parish and not within the manor. It may be reasonably inferred, from the fact of all persons except a particular class having always paid toll, that plts. are entitled to toll from all except that particular class. [MARTIN, B.—The corporation are entitled to claim toll from all but those who are exempt; tenants in ancient demesne are exempt, but these defts. are found not to be tenants in ancient demesne, so that ground is out from under them; but why may not there be a custom that the inhabitants of a certain parish should be exempt from toll?] The market was established in 1448, and there is no evidence of any custom with the character of immemoriality about it. [MARTIN, B.—May there be such a custom in point of law?] It is apprehended there is no law to that effect. The case contains no mention of such a custom, and there is no pretence that any custom has ever been relied upon. No such custom is set up in the case, and there are no materials from which the court could find it even if they had, which it is contended they have not, the power to do so. The case states that “some of the inhabitants” of Ormesby St. Margaret, &c. have never paid toll. Can the court hold a custom, exempting some of the inhabitants of a particular parish, to be good? [BRAMWELL, B.—Is not this the meaning of it, viz. that those inhabitants who frequented the market, frequented it toll free?] With a market dating within legal memory, and payment and nonpayment of no remoter date, the exemption must be referred to something else than custom, as custom must be immemorial in its origin. The charters, declaring that certain parties should be from toll, explain the practice; and tenants from this Crown manor being free, others probably from the neighbourhood, although not entitled, got the benefit of the exemption as well. Moreover, defts. have put in these ancient documents on which they rely for exemption, and all the facts fit in therewith, and it is too late for them now to turn round and set up a

custom no older than 1448. But again, the title of tenants in ancient demesne to exemption is only in respect of toll proper and payments of that nature, and does not extend to *stallage* or *picage*. The law on the matter is set forth in Fitz. Nat. Brev. 562, where the "writ of being quit of toll" is treated of, and nothing is said as to tenants in ancient demesne being exempt from stallage. Toll is in respect of things brought into the market and sold; stallage is like a rent for the use of the land. In Com. Dig. tit. "Market." Stallage, F. 2, it is said, "Erecting a stall in a market is not of common right; the stall-keeper must compound as he can;" citing *The Mayor of Northampton v. Ward*, 2 Strange, 1238; 1 Wils. 107, a case of great authority on the point. What stallage is, appears from *Roberts v. Churchwardens and Overseers of Aylesbury*, 22 L. J. 34, M. C., in which it was held that stallage was a payment made in respect of the exclusive use and occupation of the soil for a time, and was therefore properly included in the rate; but that market tolls having no connection with the exclusive use of the soil were not rateable. [WILDE, B. refers to the case of *Heddy v. Wheelhouse*, Moore, 474, cited in Com. Dig. *ubi supra*, as to stallage and picage.] *The Mayor of Norwich v. Swann*, 2 W. Black. 716, is completely *ad hoc*. It was held in that case that trespass lay for setting tables in a market-place for the sale of goods therein without the leave of the owner of the soil. Stallage and toll are different. The present is a claim of stallage by the owner of the land to receive a compensation for the use and occupation of his soil, and is quite distinct from toll, which must be claimed by immemorial custom, by prescription, or by grant.

*Hurlstone* (with whom was *Palmer*) contra, for defts.—The p<sup>l</sup>ts. have assumed that toll is payable, but it is contended that the *onus* is on those who make the claim to show that this toll and stallage are payable at all. [MARTIN, B. refers to *Mayor of Newport v. Sanders*, 3 B. & Ad. 411.] Strictly this is not stallage at all, which is something which disturbs the owner of the soil, and interferes with his rights, as shown by all the authorities, and especially the case referred to by Wilde, B. in Com. Dig. The mere bringing goods into the market is not such an interference. [WILDE, B. refers to *Termes de la Ley*, where stallage is defined as money paid for holding a stall in a market, and picage for breaking the soil.] There need be no breaking of the soil to constitute stallage, but it must be annexed. Tomlin's Dictionary, which adopts Blunt's definition, thus describes it: "Stallagium, from the Saxon *stal*, i. e. *stabulum*, *statio*, the liberty or right of pitching and erecting stalls in fairs or markets, or the money paid for the same;" and Spelman in his Glossarium defines it as a *jus stationis*, *jus erigendæ officinæ*, &c. At common law every one has a right to bring goods to market, and the claimers of toll must show a right to it by custom or prescription. Here one deft. brings baskets and the other sticks up a pole. [WILDE, B.—The case begins by finding a market at and prior to 1448, and that all persons using it with a stall or basket, &c., have paid toll. MARTIN, B.—The use of the market by persons with baskets occasionally put down and taken up again is different from a permanent stall used from the opening to the end of the market. *Welsby*.—The case states that the places for the stall holders were determined and allotted by the corporation.] *Townend v. Woodruffe*, 6 Ex. 506; 19 L. J. N. S., 315, Ex., decided that a person exposing goods in a market has a right to place them on the soil in the usual baskets necessary for containing them; and per Alderson, B. (Ib.), "erecting a stall is a different thing from placing goods on the ground for sale." See also the definition of stallage by Littledale, J., in *Mayor of Newport v. Sanders*, 3 B. & Ad. 411.

Trespass would not lie against a person bringing goods and placing them on baskets on the ground: (*Wigley v. Peachy*, 2 Ld. Raym. 1589.) [BRAMWELL, B.—That case does not help you; it was there merely held that the owner of the soil could not restrain the goods for the toll.] Placing the baskets did not constitute a stall, and the pole is no more than an umbrella. There was here nothing stationary or interfering with the p<sup>l</sup>ts.' right of soil.

POLLOCK, C.B.—We are all of opinion that judgment must be given for the p<sup>l</sup>ts. None of the cases which have been cited by Mr. Hurlstone on behalf of the defts., in my judgment, show that the p<sup>l</sup>ts. cannot maintain this action. In *Wigley v. Peachy* the wrong remedy was adopted, and that case only decided that the distress was not justifiable.

MARTIN, B.—I am entirely of the same opinion. The case found by the arbitrator, that the defts. were not tenants in ancient demesne, puts an end to the question altogether, and cuts away that ground from them entirely. Then comes the question of stallage. Now, it is clear that, *primâ facie*, all persons using these "pods" permanently and exclusively, were liable to pay toll for the use of them, and the reason why the defts. refused to pay it was, that they were tenants in ancient demesne, and so not liable to stallage. But the argument for the defts. to-day has been, that these "pods" were not stalls at all. That is a question for the jury. Without doubt, in the case of persons carrying articles in baskets into the market for sale, and making no other use of the ground than putting their baskets down on it when tired of carrying them, in such cases there would be no stallage at all payable for such use of the soil. But in this case there was, as found by the arbitrator, an exclusive occupation of the soil of the p<sup>l</sup>ts.' market by these "pods" falling within the definition of stallage which has been given. Judgment must be for the p<sup>l</sup>ts.

BRAMWELL, B.—As I understand, Mr. Hurlstone agrees that the only question here is, whether what the defts. used was, or was not, a stall, and whether stallage was payable from anybody, and to the argument on that point alone I have addressed my mind. That, as my brother Martin has said, is a matter of fact, and, as a matter of fact, my judgment upon it is against the defts.

WILDE, B.—I also am of the same opinion as the rest of the court. The case fell to the ground upon the finding of the arbitrator that the defts. were not tenants in ancient demesne. At one time I was inclined to think that an exemption existed, as old as the date of the market; but Mr. Welsby, in his argument, satisfied me as to the origin of that exemption, and that it applied only to tenants in ancient demesne. The p<sup>l</sup>ts.' right to stallage was by concession established if what the defts. used was a stall. Now, it seems to me, that any erection used for the purpose of selling goods in the market is a stall; how it is constructed, and whether fixed in the ground or not, is immaterial. I think that what the defts. used in the present case was a stall, and that p<sup>l</sup>ts. are therefore entitled to judgment.

*Judgment for the p<sup>l</sup>ts.*

P<sup>l</sup>ts.' attorney, P. A. Hamrott, 15, Bedford-row, agent for C. Cory, Town-clerk, Great Yarmouth.

Defts.' attorney, A. Storey, 6, King's-road, Bedford-row, agent for S. B. Cory, Great Yarmouth.

Q. B.]

REG. V. THE OVERSEERS OF HUDDERSFIELD.

[Q. B.]

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SANDERS, and  
C. J. B. HESTILET, Esqrs., Barristers-at-Law.

Friday, Jan. 31, 1862.

## REG. V. THE OVERSEERS OF HUDDERSFIELD.

*County police—Rating part of parish only—  
15 & 16 Vict. c. 81, s. 32.**Part of a township (not a borough nor subject to contribute to the county rate) was regulated by an Improvement Act, and its police provided and paid for under the improvement rate. The police of the residue of the township was provided under the County Police Acts:**Held, that the overseers of the township could not make a special rate under the County Police Acts for the expenses of the police of the residue of the township.*

*Bale nisi* calling upon the overseers of the poor of the township of Huddersfield to show cause why a *wandemur* should not issue, commanding them to make and levy a special rate upon the part of the township not within the limits of the Huddersfield Improvement Act 1848, in order to reimburse themselves the sum of 27*l.* 16*s.* 7*d.* collected by them within the part of the township that is within the limits of the said Act, towards the district police-rate for the said West Riding, in pursuance of a call made by the guardians of the Huddersfield Poor Law Union on the 29th Sept. 1861.

The operation of the Huddersfield Improvement Act, 1848 (11 & 12 Vict. c. cxi.) extends to a radius of 1200 yards from the 'market-place, but over about three-fourths of the township only. The watching of the part of the township within the radius is regulated by the Act, and police constables are appointed and paid out of the improvement rate. The part of the township not within the Act is watched under the County Police Acts, and the sum of 27*l.* 16*s.* 7*d.* was the expense incurred on that account. The County Police Acts provide for the levying the rates in the following way. The court of quarter sessions makes its precept upon the guardians of the union to levy a county rate, including the district police rate. And the guardians make their precept to the overseers of the several parishes within the union to levy their respective quotas. Accordingly the guardians of the Huddersfield Union, on receipt of the precept, made a call on the overseers of the township of Huddersfield for a police rate to be levied upon the entire township. The overseers refused to levy a special rate upon the part of the township not within the Improvement Act, and which alone had received the benefit for which the 27*l.* 16*s.* 7*d.* had been incurred, on the ground that they have no power to do so.

The following are the sections of the County Police Acts referred to in the argument:—

The 3 & 4 Vict. c. 88, sect. 3, enacts, "that so much of the 2 & 3 Vict. c. 93, as provides that the expenses of putting the said Act in execution shall be paid out of the county rate shall be repealed, and that for the purposes of defraying the expenses of the said Act in any county in which, or in any part of which, the said Act shall be put in force, the justices of such county in general or quarter sessions assembled shall make a fair and equal police rate, and for that purpose shall assess and tax the whole district for which the constables are appointed, rateably and equally according to a certain pound rate of the full and fair annual value of all messuages, lands, tenements and hereditaments liable to the county rate, or which, if the whole of the said district were to all intents and purposes within their county, would be liable to the county rate, therein including all detached parts of other counties, and also all liberties and franchises (except as hereinafter excepted) which are

locally situate in such county, or wholly or partly surrounded by such county, and declared by the said Act to be considered as forming part of such county for the purposes of the said Act, but excluding all detached parts of the said county, all parts of the county contributing to the police rate of any other county, or to the metropolitan police rate, and all incorporated boroughs which are or shall be within the provisions of the 5 & 6 Will. 4, c. 76, for regulating corporations, or of any charter granted in pursuance of the last recited Act, or of any Act made for the amendment thereof, and all those towns and places for which constables or watchmen shall have been appointed under the Act of the 4 Will. 4, making provisions for the lighting and watching of parishes in England or Wales, or under any local Act authorising the appointment of constables or watchmen in any town or place, and authorising rates to be made for defraying the expenses of such constables or watchmen, and shall not be discontinued before the passing of this Act until they shall be discontinued, or until the chief constable of the county within which, for the purposes of this and the first recited Act such parish, town, or place is situated shall have notified, as he is hereinafter empowered to do, that he is ready to undertake the charge of such parish, town, or place."

Sect. 5 enacts "that the police rate shall be collected in the county from the persons who are liable to contribute thereunto, with and as part of the county rate."

The 15 & 16 Vict. c. 81, s. 32, enacts "that where any parish or place separately maintaining its own poor shall be divided so that a part is comprised in a borough not subject to contribute to the county rate, while the part out of the borough is liable to contribute thereto, and any county rate shall be assessable upon the part of the parish or place which is comprised within the county and excluded from the borough, the overseers of such parish or place shall, on receipt of any precept or other lawful demand from the justices of the county, or other due authority in that behalf demanding the payment of any sum of money as the contribution of the part of such parish or place out of the borough towards any such rate as aforesaid, with all convenient speed assess the sum so required upon the persons liable within such part of the parish or place to pay the poor-rate therein by means of a separate rate to be made, allowed and published in like manner as the poor-rate, and either by themselves, or by the collector of poor-rates for the time being appointed for the said parish or place, shall collect the same separately or with the poor-rate payable by the parties assessed thereto, and for the purpose of assessing and collecting the same, shall have all such powers, authorities, privileges, protections and incidents as belong to them in the assessing and collection of the poor-rate, and all provisions of the law for enforcing the collection of the poor-rate, and recovering the costs of the proceedings therein, shall be applicable to the collection of the rate or rates herein last above mentioned and provided for."

Sect. 34. "That where a precept shall be issued to the guardians of the union comprising any such parish or place, under the provisions in that respect hereinbefore contained; and such precept shall contain a sum to be assessed and charged in respect of any such rate as herein provided for upon a part of such parish or place as aforesaid, the said guardians may require the overseers of such parish or place to pay to their treasurer a sum of money sufficient to enable the said guardians to pay the sum so assessed, with the other sums mentioned in the said precept to the treasurer of the county, or other person lawfully authorised to receive it; and the said overseers shall pay the amount out of any moneys in their possession belonging to the parish or place, or to the part of such parish or place



respectively, and reimburse themselves, if necessary, by a rate to be levied as hereinbefore described upon the persons liable thereto; or if they have no such moneys, shall forthwith proceed to levy and collect the requisite amount by such rate, and pay the same over to the treasurer of the said guardians; provided, nevertheless, that if such overseers make default, and do not make the requisite payment within the appointed time, they shall be subject to be proceeded against in like manner as the overseers of a parish wholly situated within the county are subjected to under the provisions of this Act."

Sect. 35. "That where the amount required in respect of any such county rate from any part of such parish or place as last aforesaid shall, in the judgment of such overseers, be so small as to render the levying and collecting of a separate rate for it inconvenient, the overseers may postpone the reimbursement of themselves for any such advance as aforesaid, and they or their successors may afterwards, on the recurrence of the next precept or other lawful demand, or of that next but one, levy and collect such a rate as aforesaid to raise the whole amount so previously advanced and unsatisfied out of the poor-rates of the parish, as well as the amount required by the then precept or demand, and shall apply the sum so collected in reimbursement of the previous payments, and the satisfaction of such precept or demand, and shall apply the balance, if any, towards the discharge of the next precept or demand."

*Welsby*, on moving for the rule *nisi*, stated that the guardians had paid this charge out of the general poor-rates ever since 1857, whereupon Cockburn, C.J. observed that they ought to have paid it only in respect of the outlying district. The case of *Reg. v. The Overseers of Duckingfield*, 26 L. T. Rep. 236, was cited, which decided that "under the Cheshire Constabulary Act, which directs that the police rates are to be collected in the same manner as the county rate is by law directed to be collected, the overseers of a parish are the proper persons to collect a rate, although a portion of the parish should form part of a district maintaining its own police, and be on that ground exempt from the general police rates for the county."

*Mellish* showed cause.—The only case in which overseers are empowered to levy a rate under the County Police Acts upon a part of a parish only, is that provided for by the 15 & 16 Vict. c. 81, s. 22, where the part of the parish or place is comprised in a borough not subject to contribute to the county rate, while the part out of the borough is liable to contribute thereto. But it is impossible to say that Huddersfield, an unincorporated town which does contribute to the county rate, falls within that provision. There is no other enactment which warrants the making of a special rate over part of a parish or place only.

*Welsby* in support of the rule.—Sect. 34 has been followed hitherto; but that only authorises the overseers to reimburse themselves "by a rate to be levied as hereinbefore described." That is in sect. 32. [WIGHTMAN, J.—But Huddersfield is not a "borough" within the meaning of the Act.] There is no definition of the term "borough" given in the Act. [COCKBURN, C. J.—You must bring the case within the Act.] In Tomlin's Dictionary, "borough" is said to mean a corporate town, not a city, and also such a town or place as sends burgesses to Parliament; but sometimes it is used for *villa insignior*, or a country town of more than ordinary note not walled.

COCKBURN, C. J.—This case is not shown to be within sect. 32. It seems to be *casus omissus*, which can only be remedied by the Legislature.

The rest of the Court concurring,

*Rule discharged.*

## ROLLS COURT.

Reported by H. R. Youns, Esq., Barrister-at-Law.

Monday, May 12, 1862.

Re HAYLE'S CHARITY.

*Charity—Appointment of new trustees—Vestry—The 18 & 19 Vict. c. 120, and the 19 & 20 Vict. c. 112 (the Metropolis Local Management Act).*

*Where a decree of the court and a scheme framed thereunder in 1851 gave "the parishioners and inhabitants" of a metropolitan parish "in vestry assembled" the power to elect new trustees of a charity, such power was*

*Held, to be exercisable by the vestry appointed under the above-mentioned statutes.*

This was a petition presented under the Law of Property and Trustees Relief Amendment Act, 22 & 23 Vict. c. 35, s. 30, for the opinion of the court, as to the power of the existing vestry of St. Mary, Lambeth, to appoint new trustees of the above-named charity.

In 1671 certain estates were conveyed by a Mr. Hayle to charitable purposes for the benefit of the parish of St. Mary, Lambeth. By a decree in a suit of *The Attorney-General v. Dalton*, in 1851, it was declared that there ought to be in future seventeen trustees of the charity, including the rector and four churchwardens of the parish of St. Mary, Lambeth; and that twelve of such trustees ought to be parishioners and inhabitants of such parish, to be elected and chosen to be such trustees "by the parishioners and inhabitants of the said parish in vestry assembled;" and it was referred to the master to consider a scheme for regulating future appointments.

A scheme was accordingly settled and approved by the master; and, by the 9th clause of it, it was provided that "so often as there should be a vacancy or vacancies in the twelve elected trustees, by death, resignation, incapacity, or disqualification, the number of such elected trustees should be filled up to twelve by the election to that office of one or more person or persons who should be a parishioner or parishioners, and a rated inhabitant or inhabitants of such parish, and who shall be so elected at a vestry meeting of the said parish."

When the scheme was so settled, the constitution of the vestry of the parish of St. Mary, Lambeth, was made up out of all the parishioners and ratepayers who thought fit to attend and take part in it. By the 18 & 19 Vict. c. 120, amended by the 19 & 20 Vict. c. 112 (the Metropolis Local Management Acts), the old vestries were abolished as to metropolitan parishes. In Nov. 1855, a vestry composed of 140 ratepayers of a certain qualification was duly elected under the provisions of the said Acts for the parish of St. Mary, Lambeth. Two vacancies occurred in the trusteeship of the above-named charity; and in April 1857 that vestry filled up by election those two vacancies. Others had since occurred; and the present vestry being about to fill up those in a similar manner, the court was now asked by the continuing trustees to say whether the vestry of St. Mary, Lambeth, elected in pursuance of the said Acts, had the power to appoint new trustees of the charity, or whether such power was vested in "the parishioners and inhabitants of such parish in vestry assembled."

*Buggallay, Q. C. and R. W. E. Foster* appeared for the petitioners.

*Selwyn, Q. C. and C. T. Swanston*, for the new vestry.

*Wickens* for the Attorney-General.

The following cases were referred to:—*Carter v. Cropley*, 26 L. J. 246, Ch.; *Attorney-General v. Drapers' Company*, 4 Drew. 299.

THE MASTER OF THE ROLL:—The question in this case is, whether the right to elect the trustees of the

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BEARDMORE v. TREDWELL.

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charity remains in the old, or has been transmitted to and become vested in, the new body, constituting the existing vestry of the parish of St. Mary, Lambeth? I am clearly of opinion that the statutes control the decree of 1851 and the scheme, if such decree and scheme can be construed to mean anything else than that the election is to be made by the "vestry" for the time being. The Legislature altered the constitution of the "vestry," but its meetings were still the meetings of the parishioners "in vestry assembled." All the powers of the old vestry are transferred to the new body. If, indeed, the election of the trustees is not to be made by the vestry as now constituted, I do not see how it can be made at all, because there cannot now be a vestry meeting except under the recent Acts. The cases cited do not affect the question. In *The Attorney-General v. Drapers' Company*, almspeople were to be chosen "by the ministers, churchwardens, overseers of the poor, and such parishioners of the said parish (St. George's, Southwark) as shall pay taxation to the poor, and shall not keep inmates or poor lodgers." Nothing was said about a vestry; and it was held, that by the passing of the Act the right of election did not go to the vestry, but belonged to the persons forming the assembly mentioned in the deed. Here, however, I think the power of election was vested in the vestry meeting "for the time being," and whatever was the constitution of the old vestries, the powers and the duties which attached to them passed under the Acts to the new body. The petition will be answered accordingly.

### V. O. STUART'S COURT.

Reported by JAMES B. DAVIDSON, Esq., of Lincoln's-inn, Barrister-at-Law.

July 1, 12, 14, 23 and 26, 1862.

BEARDMORE v. TREDWELL.

*Injunction—Nuisance—Brick burning—Jurisdiction.*  
Where A., in the exercise of private rights over his own property, on a portion of his own land, does acts which interfere with his neighbour's right to the enjoyment of pure air, and cause injury to the neighbour's property, and it appears that there are other situations on A.'s land where he might do the same acts with equal or nearly equal benefit to himself, and without any or with considerably less inconvenience to his neighbour, the court will interfere by injunction.

The deft. having entered into a contract with Government for the supply of a large quantity of bricks for the construction of fortifications, obtained a lease of a tract of land and began brick-burning operations by constructing a line of kilns or clamps at a distance of about 340 yards south of the plt.'s mansion-house, and thirty from her boundary fence.

The court restrained the deft. by injunction from lighting or firing any kilns within a distance of 650 yards from the plt.'s house.

The court refused to direct an action to try the question of whether the acts complained of amounted to a legal nuisance or not, being satisfied of the facts, both of the deft. having other available land at his disposal and of the plt. having sustained an injury.

*Observations on the case of Hole v. Barlow, 4 C. B., N. S., 334 (now overruled).*

This bill was filed by Mary Anne Beardmore, of Uplands, near Fareham, Hants, widow, to restrain, by injunction, the deft. William Tredwell, his servants, &c., "from lighting or firing, or causing to be lighted or fired, such of the brick-kilns which had been constructed by him as had not already been lighted or fired, and also from refilling with bricks, relighting or refiring, or causing to be refilled and relighted or refired, such of the said kilns as had been already fired or

lighted; and also from burning or causing to be burnt any bricks so near to the plt.'s property as to cause damage or annoyance to the plt., or to the inmates of her mansion-house, or injury or damage to the trees, plantations, shrubberies and herbage, or any of them growing on the property of the plt. or any part thereof." The bill also prayed that damages might be awarded to the plt. in respect of the injury sustained by her by means of the burning by the deft. of bricks in the kilns which had been already lighted.

Mrs. Beardmore was the owner in fee, under her husband's will, of the mansion-house and grounds of Uplands; and the deft., who was a contractor, had entered into a contract with the Government for the completion of three forts on Portedown-hill.

The deft. had recently become the occupier of lands to the extent of 102 acres, lying to the south of the Uplands estate, for which he paid a rent of 600*l.* a-year, and a royalty of 1*s.* 6*d.* for every 1000 of bricks over 5,000,000. In January last he began to make preparations for the manufacture of bricks, by constructing kilns, &c.; whereupon the plt. addressed the following letter to Messrs. Kelsall and Co., of Fareham, the deft.'s solicitors:—

"Uplands, 31st Jan. 1862.

"Gentlemen,—I have just heard that Messrs. Tredwell are preparing to build kilns and burn bricks on the upper part of Mr. Paddon's field, near my property. I have no desire to interfere unnecessarily with Messrs. Tredwell's works, but I must object to anything that will be a nuisance or injury to my house or property; and burning of bricks in the above situation will bring not only smoke but most disagreeable smells to Mayling's house, and also to my own residence; and, in various ways, the trees and ornamental plantations will be injured. They have been planted and kept up at a great expense for several years. I hope that Messrs. Tredwell can place their works at such a distance and in such a position as to be no annoyance or injury to me or my property; and they must take this as notice that I shall take every means to protect myself and my property. I am informed that in several recent cases the Court of Chancery has, by injunction, stopped brickworks that were an annoyance or nuisance.

"I am, Gentlemen, yours truly,

"M. A. BEARDMORE."

To this letter the deft. replied as follows:—

"Portedown-hill Fortifications.

"(William Tredwell, Contractor.)

"Office, Fareham, Hants. Feb. 1, 1862.

"Mrs. M. A. Beardmore.

"Madam,—I beg to acknowledge receipt of yours dated 31st Jan. 1862, through the hands of Messrs. Kelsall, as also to state that the reference made therein shall be attended to.

"I am, Madam, yours truly,

"J. R. IVERY (per J. T. Hardyman.)"

It was alleged, that since the above correspondence the deft. had proceeded with his preparations, and had constructed, at the northern portion of his land, twenty-eight large kilns for burning bricks. Of these, eleven were erected in a line nearly parallel to the boundary of the plt.'s park, and eight of the eleven at distances varying from 32 to 35 yards from the plt.'s boundary. Three others of the twenty-eight kilns were erected near a projecting angle or corner of the plt.'s park, where there was a valuable plantation. Of the eleven kilns, eight had been already lighted, and the three kilns at the corner had also been lighted, and since they had been lighted the plt. alleged it had become apparent that her property would be irreparably injured if the burning were continued at the spot in the mode proposed. It was further alleged, that the smoke and noxious vapours had so far injured the trees in the park that many must unavoidably die, besides

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which, the noxious fumes had been driven into the mansion-house.

To an application on the part of the plt.'s solicitors, dated 23rd June, giving notice of an intention to apply for an injunction, in default of an assurance in writing that the kilns already prepared for burning should not be fired, the following answer was returned:—

"Address J. R. Ivory.

"Portadown-hill Fortifications. (Wm. Tredwell, Contractor.)

"Messrs. Parke and Pollard,

"Offices, Fareham, Hants, June 24, 1862.

"Gentlemen,—Mr. Tredwell not living here, your letter has been forwarded him this day's post for instructions.—I am, Gentlemen, yours obediently,

"JOHN R. IVORY (per J. T. H.)

"63, Lincoln's-inn-fields, London."

No further answer was sent, and the bill was filed on the 30th June.

It appeared that each kiln or clamp was capable of burning on an average 70,000 bricks. Each burning occupied about six days, and the common interval between each firing was about four weeks. A very large manufacture was in contemplation for the construction of the fortifications. The nearest of the kilns were distant about 350 yards from the mansion-house in a south-west direction, which was that of the prevailing wind. The ground also rose towards the house. Besides the kilns already lighted, the deft. had filled and was on the point of lighting others.

On the 1st July his Honour granted an interim order, extending over the following Thursday, the 10th, to prevent the deft. lighting any other kilns, the plt. entering into the usual undertaking as to damages, with leave to serve a notice of motion for an injunction generally on that day; and directed that service at the counting-house, Fareham, should be good service on Mr. Tredwell.

The hearing of the motion stood over from the 10th to the 12th July.

Malins, Q.C. and F. O. Haynes supported the motion. [They were stopped by the court. The cases on which they relied were—*Walter v. Selfe*, 4 De G. & Sm. 315; 20 L. J. 433, Ch.; 15 Jur. 416; 17 L. T. Rep. 103; *Pollock v. Lester*, 11 Ha. 266; *Hole v. Barlow*, 4 C. B., N. S., 334; 31 L. T. Rep. 134; *Broadbent v. The Imperial Gas Company*, 7 De G. M. & G. 486; 28 L. T. Rep. 329; 34 L. T. Rep. 1; *The Attorney-General v. The Borough of Birmingham*, 4 K. & J. 528.]

Bacon, Q.C. and Bovill opposed the motion.—The deft. had entered into contracts of great value and importance to himself, and of interest to the public. The plt. was precluded from complaining of the deft.'s acts, for she herself had been willing, in November last, to let Mayling's farm, a part of her property much nearer her residence than the deft.'s land, to the deft. himself for the very purpose of brick making. The present application was made for the purpose of forcing terms upon the deft. If any damage was done the law was open. Mr. Tredwell had offered to make any reasonable pecuniary compensation that might be required. Notwithstanding the peculiar circumstances in the case of *Walter v. Selfe*, there was no authority to show that the court had any power to restrain such acts as these except after a previous trial at law. Brick burning generally was not a nuisance; it was a lawful trade, and however disagreeable to the neighbours, they had no right, by the law of the land, to complain of it. *Walter v. Selfe* might seem to support the proposition, that if a neighbour finds the brick burning injurious to his health the court will interfere; but not for the sake of injury to property only. The first authority was that of *The Attorney-General v. Cleaver*, 18

Ves. 211, in which Lord Eldon declined to restrain the annoyance before the right was tried at law. In *The Duke of Grafton v. Hilliard*, 18 Ves. 219; 4 De G. & Sm. 326, n., the court discharged the injunction, observing that "the manufacture of bricks, though near the habitation of men, if carried on for the purpose of making habitations for them, is not a public nuisance." The purpose here was for making, no doubt, fortifications; but all that the dictum amounted to was, that this thing, though an admitted nuisance, was a lawful act. [The VICE-CHANCELLOR.—Since the recent Acts of Parliament it is no longer almost a matter of course to accompany the injunction by a direction of a trial at law before a jury. The Legislature has said that in a case of private wrong the court is to have the power to ascertain and state the damages; that the court is to act on its own judgment, or is to act with the assistance of a jury; it has said also that the court is not to send cases for the opinion of a court of law, but when a proper occasion occurs, is to have the assistance of a common law judge. His Honour referred to the 2nd section of the 21 & 22 Vict. c. 27.] Admitting that the Court of Ch. has the full power of the courts of common law, the court will not grant an injunction until the legal right has been established. Until witnesses have been examined and a jury summoned before this court have found that the act is a nuisance, the court will not restrain it by injunction. The legal right to have an injunction could not be maintained on the present evidence. Wood, V. C. had held that the 21 & 22 Vict. c. 27, was not intended to operate as a transfer of jurisdiction to the Court of Ch. in every case: (*Windle v. The Bristol Railway Company*, 6 L. T. Rep. 20; 10 W. Rep. 210; see further *Wicks v. Hunt*, Johns. 380; and particularly *Hosse v. Hunt*, ante, p. 124.) In *Hole v. Barlow*, the case of *Walter v. Selfe* was referred to, and not followed.

The argument was adjourned to the 14th. (a)

July 14.—The VICE-CHANCELLOR.—There are only two questions in this case. One is, whether or not there is before the court, upon the balance of the conflicting evidence, sufficient evidence of actual injury to the plt. to justify the interference of the court. If there is, the duty of the court is to protect the rights of the plt. against what, upon evidence of such an injury, would be a wrongful act. The other is a question of law, one which has been repeatedly under the consideration of the court, and which requires in all cases the most serious consideration. In questions of nuisance, not merely as to brick burning, but as to the right to the enjoyment of light and air, and of ancient light—in all these cases the necessities of the public and the rights of individuals make it the duty of this court to exercise the jurisdiction which it has to protect rights that are clearly established, with the utmost care. Where doubts occur, sufficient, in the opinion of the court, to require further investigation, trial before a jury, further inquiry, or further evidence in any other shape, the duty of the court is to decline to interfere until its conscience is sufficiently satisfied upon the subject. In a case of ancient light, as much as in a case of brick burning, this court is bound to regard the rights and in-

(a) On the 12th July the decision of the Ex. Ch. in *Bamford v. Turnley* was delivered. At the trial of *Bamford v. Turnley*, which was an action of nuisance for brick burning, the Lord Chief Justice, in conformity with *Hole v. Barlow*, directed the jury that if they found that the spot where the bricks were burnt was a "proper and convenient" spot, and the burning of the bricks by the deft. was a reasonable use by the deft. of his land, he was entitled to a verdict. The Court of Q. B. refused to grant the plt. a rule to set aside the verdict, and that judgment was now reversed by the Court of Appeal, by which it was held, overruling *Hole v. Barlow*, that the direction of the C. J. was wrong, and that the plt. was entitled to a verdict: (see *Bamford v. Turnley*, 6 L. T. Rep. N. 8 721.)

interests of both parties. There may be a case of clear right to the enjoyment of light and air, which it shall be impossible for the court to protect, on account of some great public necessity. The expressions used by Willes, J., in the case of *Hole v. Barlow*, which have been cited by the deft., and to which I shall presently refer, are applicable to the case of public necessity only; but, it seems to me, it is taking too narrow a view to say that public necessity is the only ground upon which the court may be induced not to interfere to restrain the violation of that which was clearly, in the first instance, a private right. The court is bound to look to the evidence on both sides. In the case of *Hole v. Barlow* a circumstance occurs which does not occur here at all. In the case of *Hole v. Barlow* the deft. was burning bricks upon his own land, and there was nothing to show that if he did not burn them upon his own land, in the place where he was burning them, he could have burnt them at all. It is an extremely different thing if a man is injuring his neighbour to a very material extent, in a way which is not absolutely necessary and unavoidable, in order to the enjoyment of his own fair private right. In such cases the balance of convenience must be attended to. Now, in the case of *Hole v. Barlow*, which dealt with the law of the case, there was that material fact to which I have referred. Upon the facts of the present case, notwithstanding the contradictory evidence, my mind is satisfied that there has been an actual and positive injury to this plt.; that the comfort and enjoyment of her mansion-house have been disturbed; that the trees planted, standing and growing with a view to ornament, and with a view, in a sense, for the purposes of ornament, to exclude the appearance of unsightly objects, in some cases have been destroyed, and in many cases injured; so that, without going more minutely through the evidence upon the subject, I am satisfied, in this case, that there is evidence of an actual and positive injury to the plt.; and the only question seems to me to be, to apply the law to the facts of the case, and see whether what the deft. is doing to occasion this injury is necessarily done by him; whether it can be done with fair convenience nowhere else; or if it is necessary for any great public purpose. The deft.'s case is, that he is engaged in a contract for the erection of works for a great and important public purpose; that the immediate erection and the speedy erection of these works is a matter of great importance to the public, and to him privately. That is his case. His case, resting on that, seems to me, even upon his own statement of the facts, to bear materially in favour of the plt.'s view, namely, that what the deft. is doing might very well be done elsewhere, without any inconveniences to the plt. at all. It is a material part of the plt.'s case that the country surrounding the place where the injury is alleged to be committed is a country of brick-earth, producing earth of various kinds for the purposes of the manufacture of bricks and of pottery. It appears from the plt.'s evidence that the deft., in order to provide himself with bricks as the material for the performance of his contract, has obtained a lease of a very large tract of land. It would also appear, from the evidence, that there is no part of that land which he has obtained which may not be used by him for the purpose of the manufacture of bricks. It appears that he has already, in a part of that land nearly the most distant from the plt.'s house, engaged in burning bricks; but it appears, from the plt.'s evidence, that where he is burning bricks is in a straight line towards the south of, and in a direction nearly parallel to the boundary of the plt.'s land, at a distance of not much more than twenty yards from which there is a row of eighteen clumps, on each of which the deft. presses and

claims his right, having erected them there, to fire and burn bricks, notwithstanding the injury which to a slight degree he admits he is doing to the plt. If he can elsewhere, upon the ground that he has acquired or upon other grounds which he may acquire, produce those bricks which it is his object to obtain, without injury to the plt., then, upon the law of the case as laid down in all the authorities that I am aware of, the court is bound to interfere. In the case of *Hole v. Barlow*, which seems to be considered by the plt. as the strongest case against the deft., and by the deft. as the strongest case in his own favour, I have already noticed that the land upon which the deft. was burning bricks was his own land, and there was no evidence to show that if he did not burn them there, he could obtain the brick-earth at all, or obtain that use of his property to which by law he was entitled. Now Byles, J., before whom the case was tried, told the jury that the circumstances of the thing being done in a convenient and proper place would justify some degree of annoyance. He said: "If you are satisfied from the evidence that the enjoyment of the plt.'s house was rendered uncomfortable through the instrumentality of the deft., that is sufficient to entitle the plt. to maintain the action." That is the first proposition. The qualification is, "that it is not everybody whose enjoyment of life and property is rendered uncomfortable by the carrying on of an offensive or noxious trade in the neighbourhood that can bring an action." He says: "I apprehend the law to be this, that no action lies for the use, the reasonable use, of a lawful trade in a convenient and proper place, even though some one may suffer annoyance from its being so carried on." Now it is remarkable that Byles, J. says, charging the jury in this way upon the evidence in that case, that he expects the jury would find for the plt. His language (p. 337) is this: "There certainly was strong evidence on both sides, but I must say I rather expected that the jury would find for the plt." But the jury found for the deft. The law, I think, is laid down there with reasonable clearness, except that the words "convenient and proper" must be subject to a qualification, that I am about to notice. Nobody will doubt that to the brick burner the place may be convenient, and probable the most convenient that can be found; but yet I apprehend it is perfectly clear that the mere circumstance of the place being convenient to one party is not enough to justify the continuance of the acts, if they make the enjoyment of life and property uncomfortable to the other; or if they may be done elsewhere without these injurious consequences following. So that the words "convenient and proper" must be used with reference to the situation of both parties. On the motion for a new trial Willes, J. (p. 345) says this: "The common law right which every proprietor of a dwelling-house has to have the air uncontaminated and unpolluted is subject to this qualification, that necessities may arise for the interference with that right, *pro bono publico*, to this extent, that such interference being in respect of a matter essential to the business of life, and being conducted in a reasonable and proper manner, and in a reasonable and proper place." If there be another place where it may be conducted without injurious consequences, or with less injury, I apprehend that, according to the law, the right of a person complaining to have his air uncontaminated and unpolluted would be clear. Now, in this case, it seems to me, that no case of necessity on the part of the deft. is proved at all. There are other situations in ground which he has obtained and has at his command, on which it seems to me that the operations which he wishes to conduct may be conducted without that degree of injury to the plt. which would entitle her to complain. That being so, my opinion is that it is the duty of the court to interfere.

It is said, however, for the deft. that the plt. herself was in treaty with him; nay, that she offered to let him a piece of ground for the purposes of brick burning which was nearer her mansion than that upon which the operation is now being conducted. On looking at the map I find that must be a mistake; for Mayling's farm is certainly more distant from the mansion-house than the nearest brick-kiln that is now being constructed—certainly more distant and considerably more distant. But that is a matter of subordinate importance, because it appears from the evidence of Mr. Bates, who is a witness to the nuisance and injury to the plt. from the destruction of the reasonable comfort and enjoyment of her habitation, that he is of opinion that, under certain restrictions, and by certain modes of working which would insure her against injury, she might protect herself, and therefore it is impossible for me to consider that anything that was done with reference to Mayling's farm—such as the treaty and the willingness of the plt. to let Mayling's farm for the purposes of brick burning—is a justification for the course that is now pursued, that course being to have brick-kilns upon the nearest possible spot to the plt.'s lands in a line with the plt.'s boundary, at about 20 yards distance, and in such a situation as that the ordinary and more prevailing winds, namely, the south-west and the west winds, drive the smoke directly upon the plt.'s habitation. Therefore I can see nothing in the circumstances of the previous treaty as to Mayling's farm to deprive the plt. of her right to the protection of that which Byles, J. justly says is the common law right of every English subject, namely, to the enjoyment of unpolluted air in the neighbourhood of his residence. It is said, however, that there ought to be an action directed at law. Now I have already thrown out, in the course of the argument, the difficulty which occurs to me here. The law of this court was, till recently, that where injunctions were applied for in support and for the protection of a common law right, the court almost invariably, if the common law right had not been established by an action at law, imposed it by a term upon the party who had protection in the matter, that he should bring an action at law. The harassments and expense of litigation in that mode of dealing, which may be suitable enough in some cases, were so extreme in many instances, that the Legislature has found it necessary to interfere. The Legislature has not taken away from this court the power of directing an action at law, or the power of directing a jury to try a question of fact; but the Legislature has said that this court shall have power itself to decide questions of law without directing an action, and has said, moreover, that, upon the question of damages, which is a material question in this case, this court shall itself have the power of assessing damages. That power of assessing damages is entirely new. The Act of the 21 & 22 of Vict. c. 27, s. 2, says, that "in all cases in which the Court of Ch. has jurisdiction to entertain an application for an injunction against any breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to, or in substitution for, such injunction or specific performance, and such damages may be assessed in such manner as the court may direct." Then it goes on to say (sect. 3): "It shall be lawful for this court, if it shall think fit, to cause the amount of such damages in any case to be assessed, or any question of fact arising in any suit or proceeding to be tried by a special or common jury before the court itself." Well, now, if I had any doubt in my mind as to the fact that this deft. has at his command an immense tract of ground, which he has not yet used for the purposes

of brick burning, where he may burn his bricks without any such injury to the plt. as she is entitled to complain of—if I had any such doubt, I should either direct an action or empanel a jury; but I have no doubt at all as to the fact, nor as to the injury to the plt. The question remains only as to the propriety, convenience, and reasonableness of the place where the deft. is conducting his operations; and in my opinion it is neither proper nor reasonable that he should be allowed, in that part of the ground which is nearest the plt., to conduct those operations which may be properly conducted at a greater distance. The injunction that has been already granted on an interim order is in general terms; but I think the injunction which I propose now to grant must be confined to any clamps or kilns nearer to the plt.'s house than the lower extremity of the piece of ground marked 412, or nearer than the clamp marked No. 11 upon the plan which is in evidence in the cause. A radius to that point from the plt.'s house will define the area within which the injunction must extend. (The length of this radius was 653 yards.)

*Bacon*, Q.C. asked that the injunction might contain the same term as to damages as was imposed upon the plt. in the interim order.

The VICE-CHANCELLOR.—An action at law is as strong as any undertaking. The words of the 2nd section are very extensive. My objection is, that what is proper to be done in this case must be proper to be done in any other case. It will be exacting an undertaking to do that which the court has jurisdiction to do without an undertaking.

*Bacon*, Q.C.—It may be open to question whether the Act does not mean that the plt.'s claim for damages is alone to be considered by the court.

The VICE-CHANCELLOR.—The plt.'s legal right is established by this order, and I will not hear it said that it is not established. It is my duty to decide the law as well as the fact; to decide the legal as well as the equitable question, though it is only a question of evidence.

The terms of the injunction were to restrain the deft., &c., "from lighting or firing, or causing to be lighted or fired, such of the kilns in the plt.'s bill mentioned as were nearer to the plt.'s residence than the southern corner of the field No. 412 in the plan referred to in the affidavits of &c., or any other kilns which may be nearer to the plt.'s residence than the said corner of the said field."

July 23.—On this day *Bacon*, Q.C. and *Bovill* moved before the L. C. to discharge the above order. Amongst various other arguments, it was urged on the court that the deft. had a quantity of wet bricks on the land over which the injunction extended, which could not be removed in their present state, and if not burnt on the spot would be wasted and spoilt.

*Malins*, Q.C. and *Hynes* opposed.

The LORD CHANCELLOR suggested the following compromise: the plt. to accept compensation; the deft. to pay that and the costs of the suit; to burn out the bricks that he had there, and make no more within the limits covered by the injunction. The plt., his Lordship suggested, might, whilst the bricks were being burnt out, accept some other residence. The deft. offered, if the injunction were suspended for six weeks, to burn out all the bricks already made and then in the clamps.

On the 26th July an order was made, by consent, dissolving the injunction to the extent of allowing the following arrangement to be carried out: *quoad ultra*, the injunction to continue. The deft. to be permitted to burn out all the bricks prepared for burning within six weeks, at the rate of eight kilns per fortnight, paying the plt. 100*l.* as compensation, and also paying her for any damage done to the plantation; the amount of the

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damage to be settled by a reference to Sir Joseph Paxton, who was to be attended by the respective solicitors, and to furnish a report. If he should decline or be unable to carry out the reference, a referee to be named by the L. C.; the costs to be reserved, and the cause to be brought on again after the report was made.

Solicitors for the plt., *Parke and Pollock*; for the deft., *C. and H. Bell*.

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HERTLETT, Esqrs., Barristers-at-Law.

May 3 and June 7, 1862.

ENS. on the prosecution of the BURIAL BOARD of AMERSHAM V. THOMAS IVES AND ANOTHER (Overseers of the Hamlet of Coleshill, in the parish of Amersham).

Burial board—*United parishes*—15 & 16 Vict. c. 85; 16 & 17 Vict. c. 134; 18 & 19 Vict. c. 128, s. 11.

*The parish of Amersham and the hamlet of Coleshill constitute for all ecclesiastical purposes one parish; each place, however, separately maintains its own poor, appoints its own overseers, surveyors of highways, &c., but the ratepayers of each have been accustomed to meet in one vestry and transact all business usually transacted at a parish vestry, excepting the said matters. By an order in council the burial-ground for the said parish and hamlet was ordered to be closed, whereupon a vestry of the two places met, and resolved that a burial-ground should be provided for the said parish, and a burial board was afterwards appointed; the Secretary of State having certified his approval. Money was afterwards borrowed to provide a burial-ground, which was charged upon the parish of Amersham. The burial board having required a sum of money for paying the interest upon the money borrowed, and for a sinking fund, they made an order upon the overseers of Coleshill for the payment of a certain sum as their proportion:*

*Held, that Amersham and Coleshill were united parishes within sect. 11 of the 18 & 19 Vict. c. 128, and that the united board was well formed, and that Coleshill was bound to pay the amount required.*

This was a special case stated upon an issue upon a return to a *mandamus*. The *mandamus* was directed to Thomas Ives and Henry George, Overseers of the hamlet of Coleshill, and stated that—

"Whereas the hamlet of Coleshill is part of the parish of Amersham, in the counties of Buckingham and Hertford, and before and at the several times of the passing of the Act of the eighteenth and nineteenth years of our reign, cap. 128, and the Act of the twentieth and twenty-first years of our reign, cap. 81, and is still a place separately maintaining its own poor, and united for ecclesiastical purposes with the residue of the said parish, that is to say, with a place called Amersham, in the county of Buckingham, also a place at all times aforesaid and still separately maintaining its own poor, and that the said two places before and at the said several times had and still have a church and also a burial-ground for their joint use, and that the inhabitants of the said several places have been accustomed to meet in one vestry for purposes common to such several places; and whereas after the passing of the said Acts the vestry or meeting in the nature of a vestry of the said two places, that is to say, of the parish of Amersham, in the counties of Buckingham and Hertford, did on the 31st day of Oct. 1857, pursuant to the said Act, and other the Burial Acts in force in England,

by and with the approval of one of our principal Secretaries of State, appoint a burial board for the said two places, that is to say, for the said parish of Amersham, in the counties of Buckingham and Hertford, and thence hitherto from time to time did supply vacancies therein, and exercise the same powers of authorisation, approval and sanction in relation to such burial board, and such other powers as under those Acts are vested in the vestry of a parish or place separately maintaining its own poor, and such burial board then became and was and thence hitherto has been and still is the burial board under the said Burial Acts for the said parish of Amersham. And whereas, before the making of the certificate or order hereinafter mentioned, the said burial board, with the sanction of the vestry, or meeting in the nature of a vestry, of the said parish of Amersham, and the approval of the Commissioners of our Treasury, did borrow the money required for providing, laying out and inclosing two several burial-grounds theretofore, with the approval of one of our principal Secretaries of State, provided for the said parish or Amersham, under the said Burial Acts, to be used, the one as a consecrated and the other as an unconsecrated burial-ground, that is to say, the sum of 1600*l.*, and charge the future poor-rates of the said parish of Amersham with the payment of such money and interest thereon. And whereas we have been further informed and given to understand in our court before us, that before and at the time of the making of the said certificate or order, the said burial board did require the sum of 152*l.* for defraying expenses incurred by the said burial board in carrying the said Acts into execution, that is to say, prepaying the agreed sum, interest on the said principal money, the sum of 72*l.* and the further sum of 80*l.*, being a sum equal to or exceeding one-fiftieth part of the principal money so borrowed as aforesaid, which the said burial board did think proper to be for the then current year by them set aside out of the moneys charged as aforesaid for the purpose of providing a sinking fund for paying off the said principal money; and that the sum required by the said board in respect of the portion of such expenses to be borne by the said hamlet of Coleshill, such sum having been first ascertained by apportioning such expense among the said two places in proportion to the value of the property in such several places as rated to the relief of the poor, is the sum of 24*l.* 15*s.* 1*d.* And whereas the said burial board, for the purpose of obtaining payment according to law of the said sum of 24*l.* 15*s.* 1*d.* by a certain certificate or order under the hands of such number of the said burial board as are authorised to exercise the powers of the said board bearing date the 18th day of Oct. 1859, and addressed to you, did require and direct you, the said Thomas Ives and Henry George, as such overseers, to pay the sum of 24*l.* 15*s.* 1*d.* out of the rates for the relief of the poor of the said hamlet of Coleshill, which said order or certificate was afterwards served on and duly received by you and each of you, and that afterwards, on divers days and times, and particularly on the 3rd of Nov. 1859, you were required, on the part and behalf of the said burial board, to obey the said certificate or order; yet that you, the said Thomas Ives and Henry George, not regarding your duty as such overseers in that behalf, did absolutely neglect and refuse, and still do neglect and refuse to obey the said certificate or order," &c. &c.

The return stated, "That the said hamlet of Coleshill, in the said writ mentioned, is not part of the said parish of Amersham, in the said writ mentioned, as therein suggested, but on the contrary thereof the said hamlet of Coleshill, before and at the several times mentioned in the said writ, was and still is a parish wholly separate and distinct from the said parish of Amersham, having separate overseers of the poor and

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separately maintaining its own poor, and also having its own vestry wholly separate and distinct from the vestry of the said parish of Amersham. That the said two places, to wit, the said parish of Amersham and the said parish or hamlet of Coleshill have not before or at any of the times mentioned in the said writ, nor have they still, a church or burial-ground for their joint use, nor have the inhabitants of the said several parishes or places ever been accustomed to meet in one vestry as in the said writ is in that behalf suggested. That no vestry or meeting in the nature of a vestry of the said several parishes or places, to wit, of the said parish of Amersham and the said parish or hamlet of Coleshill, ever did appoint such burial board as in the said writ is in that behalf suggested, but that, on the contrary thereof, the said vestry or meeting in the nature of a vestry at which the supposed burial board was appointed as in the said writ mentioned was a meeting of the vestry of the said parish of Amersham only, and the said burial board so appointed at the said meeting as in the said writ mentioned was appointed by the vestry of the said parish of Amersham only, without the sanction, consent, or concurrence of the vestry or any meeting in the nature of a vestry of the said parish or hamlet of Coleshill, and that no vestry or meeting in the nature of a vestry of the said parish or hamlet of Coleshill has ever sanctioned, consented to or concurred in the said appointment, and that although the said burial board did as in the said writ is suggested charge the future poor-rates of the said parish of Amersham with the payment of the said money and interest in the said writ in that behalf mentioned, the said board did not in fact charge and have never in fact charged the future poor-rates of the said parish or hamlet of Coleshill with the payment of the said money and interest, or either of them, or any part thereof," &c., &c.

Issue having been joined upon this return, it was tried at the assizes for Buckinghamshire, whereupon it was agreed that a verdict should be entered for the Crown, subject to a special case to be stated by an arbitrator.

The following facts were accordingly stated in a case:—

1. Amersham, otherwise Agmondesham (which is for the purposes of this case, and for those purposes only, called Amersham proper) is in the county of Buckingham, and it adjoins Coleshill, which is in the county of Hertford.

2. The two constitute for all ecclesiastical purposes one, the parish of Amersham, and they have one church only; this is for their joint use, and is locally situated in Amersham proper.

3. Adjoining the said church is a churchyard, which was, up to the 1st Jan. 1860, the parish burial-ground for both parishes. There were three dissenters' chapels in Amersham proper, and there were burial-places connected with them, but there was no burial-place in Coleshill.

4. Amersham proper has about 3000 inhabitants, and a rateable value of 89664; Coleshill about 600 inhabitants, and a rateable value of 17587.

5. Each of the said places maintains separately its own poor, appoints its own overseers, surveyors of highways, assessors of taxes, and constables, and makes out its own jury-lists and lists of voters. Amersham proper returns two, and Coleshill one member to the board of guardians.

6. The ratepayers of Amersham proper and of Coleshill have been accustomed to meet in one vestry, and transact all business usually transacted at a parish vestry, excepting the said separate matters.

7. The ratepayers of Coleshill have been accustomed to meet separately for such separate matters.

8. The ratepayers of Amersham have also been accustomed to meet separately for such separate matters,

but have occasionally transacted such matters at such general vestry.

9. By orders of the Queen in Council of the 21st July and the 18th Aug. 1855 respectively, the said burial-grounds were, with exceptions not material to this case, closed from the 1st Jan. 1860.

10. The said vestry of the two places did, on the 9th Oct. 1857, on a requisition signed by more than ten ratepayers, in fact, resolve: "That a burial-ground should be provided, under the Burial Acts in force in England, for the said parish of Amersham;" and did, in fact, on the 31st Oct. 1857, appoint a burial board in pursuance of the said Acts for the said parish.

11. The approval of one of her Majesty's principal Secretaries of State was obtained, as required by the 9th section of the 20 & 21 Vict. c. 81, to the appointment of the said board.

12. Previously to the said approval, the vestry clerk had transmitted to the said Secretary of State the following resolution: "That it is inexpedient to provide a separate burial-ground for the hamlet of Coleshill, but that a burial-ground be provided for that portion of the hamlet of Coleshill which is in the parish of Amersham, in the county of Hertford, jointly with that portion of the parish of Amersham which is in the county of Bucks." And this resolution was material in inducing the said Secretary of State to give his approval.

13. The said resolution was in fact agreed to at a meeting of the ratepayers of Coleshill, held on the 19th Oct. 1857, in the usual manner of the said separate meetings, and after due and sufficient notice; the rector of Amersham was chairman thereof.

14. The said burial board did in fact charge the hamlet of Coleshill with the payment of the said money with interest in the said writ in that behalf mentioned.

15. The said requisition (sect. 10) was not signed by any ratepayer actually residing in Coleshill, and although several ratepayers of Coleshill took a part in the proceedings of the said meeting of the 9th Oct., no actual resident of Coleshill did so.

16. The minutes of the said meeting of the 9th Oct. (sect. 13) were signed by the chairman only; the ratepayers present usually sign them. The resolution was carried by twelve against ten, and two only of the majority actually resided in Coleshill. At this meeting Mr. James Christmas, a resident of Coleshill, gave the following notice: "I, James Christmas, on behalf of the hamlet of Coleshill, demand a poll of the hamlet upon the proceedings of this vestry, held the 19th Oct. 1857." And thereupon the meeting was adjourned to the 21st Oct. for taking a poll. On the next day the said James Christmas gave to the said chairman and to the overseers of Coleshill the following notice: "To the overseers of the hamlet of Coleshill in the county of Hertford and the Rev. John Tyrwhitt Drake, the chairman of the vestry meeting held in and for the said hamlet on the 19th Oct. 1857. I hereby give you notice that I abandon the demand of a poll made by me of the said vestry meeting holden in and for the said hamlet of Coleshill on the 19th day of Oct. inst., and that I do so on the following grounds:—

1. That the resolution proposed and seconded at the said vestry, and upon which I demanded a poll, was not a resolution that could be legally put and carried at such vestry under the notice in pursuance of which such vestry was holden. 2. That the owners of property within the said hamlet not being the occupiers thereof, who voted at such vestry upon the said resolution, were not duly or legally qualified to do so, inasmuch as the provisions of the Act of Parliament of the 13 & 14 Vict. c. 99, whereby the vestry of any parish may, from time to time, declare that the owners of certain tenements within the parish shall be assessed

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to the rates for the relief of the poor in respect of such tenements instead of the occupiers thereof, had not, previously to such owners being rated to the relief of the poor of the said hamlet, been complied with. 3. That, inasmuch as the said vestry meeting stands adjourned generally until Friday next, the 23rd Oct. inst., it is not lawful for a poll of the hamlet to be taken upon any resolution on a subject proposed at such vestry, until the proceedings of such vestry shall be finally closed. 4. That the poll having been commenced on Monday the 19th Oct. inst., and the further taking thereof adjourned until Wednesday the 21st Oct. inst., is illegal and bad for want of continuance in such polling." In consequence thereof, the said poll was not proceeded with. Other resident ratepayers present at the said meeting that it was illegal, and they refused to sign the minutes thereof.

17. On the election of the members of the said burial board five-twelfths in value of the ratepayers of Colehill polled; among these were two who resided in Colehill. The deft. Thomas Ives, who came to reside at Colehill on the day of the polling, and one other resident in Colehill, also voted, they having been them and there severally rated on their own claims. Of the nine members of the said board four are rated in Colehill, but all are resident in Amersham proper and none in Colehill.

18. The seal of the said board has the following inscription—"The burial board of Amersham in the counties of Buckingham and Hertford."

19. The appointment of the said vestry clerk was ordered by an order addressed "To the Churchwardens and Overseers of the poor of the parish of Amersham in the county of Buckingham." He does not interfere in any matters relating exclusively to Colehill, and his salary is paid exclusively from the rates of Amersham proper.

The pleadings appended hereto are to form part of this case. The deed of the 3rd Oct. 1850 may be referred to if necessary as part of this case. The defts. contended that by reason of the facts contained in paragraphs 15 to 19 inclusive, and otherwise, the said burial board was not legally constituted, and that the said board had no power to charge the hamlet of Colehill with the payment of the said money with interest or any part thereof.

The question for the opinion of the court is, whether the said board had power to charge the said hamlet with the payment of the said moneys, and whether it did legally do so? If the questions are answered in the affirmative, the verdict found for the prosecutors is to stand; otherwise the verdict is to be set aside and a verdict entered for the defts.

*O'Malley, Q.C. (Taylor with him)* appeared for the Crown.

*Leak, Q.C. (J. A. Russell with him)* for the defts.

The arguments and references sufficiently appear in the following judgment. *Cur. adv. vult.*

June 17.—CROMPTON, J.—In this case, which was argued in the course of the last term before the Lord Chief Justice, my brother Meller and myself, two points were made for the defts. The first was, that the burial board for the parish, as to ecclesiastical purposes, was ill constituted; and secondly, that the mode of taxation adopted was wrong. It was said, on the first head, that the hamlet of Colehill was a place maintaining its own poor, and therefore, by the interpretation clause of the 15 & 16 Vict. c. 85, was a parish within that Act for the purpose of having a burial board of its own. No doubt it was, by the provisions of that Act, in the same situation as a parish; but we think that the real question was, whether the case did not fall within the 11th section of the 18 & 19 Vict. c. 128, a statute passed to amend, and which is to be read as part of, the former Act. The object of the provision in the amending statute was to enable a

parish, consisting of different parts united together for ecclesiastical objects, to constitute a district for the purpose of appointing a burial board. The facts in the present case appear to us clearly to make out such community and connection as is defined in the beginning of the 11th section; and the latter part of the section enables the vestry, or meeting in the nature of a vestry, for the whole district to appoint a burial board, and gives the whole power of the preceding enactments for providing a burial-ground for the common use of such parishes or places so united as if such parishes or places had been a parish separately maintaining its own poor. In other words, it brings the whole district into the class or category of places as defined by 15 & 16 Vict. c. 85, and by that statute having the power to appoint a burial board for the one district by the vote of the one vestry or meeting in the nature of a vestry. Here, there was an actual vestry for ecclesiastical purposes, so that there is no occasion to resort to the provision made for the cases in which a meeting in the nature of a vestry is to have the power. The burial board in question appearing to have been regularly constituted by a vote of the vestry for the whole district, we think it was well constituted under the provisions of 18 & 19 Vict. c. 128, s. 11. It should be remembered that the object and effect of these provisions is to make the whole district one body acting by one vestry for the purpose of establishing a burial board; not to create two distinct bodies having powers by virtue of the 15 & 16 Vict. c. 85, s. 23, to concur in providing one burial board in such manner as they shall mutually agree, and to agree as to the proportion in which such parish shall be chargeable. This distinction is important with respect to the question secondly raised before us as to the mode of taxation. It was pressed upon us principally that the 11th section of the 18 & 19 Vict. c. 128, must be read with reference to the 23rd section of the 15 & 16 Vict. c. 85, and therefore that the board ought to have fixed one definite proportion in the contract for the amount to which each of the two places was to be chargeable in future, and which was never to be changed. We do not concur in this view of the enactment. The provisions in the 23d section of the 15 & 16 Vict. c. 85, are applicable, when the two parishes or places maintaining their own poor, acting by their two vestries, are to consider whether they will have a joint burial board or not, and they are therefore properly directed to consider in what manner, not inconsistent with the act of burial, any shall be provided, and in what proportions they shall each be chargeable—a most important element for their consideration of the question whether they shall have it or not. They are each to appoint a burial board, who are to act together as a joint burial board, and to be incorporated by the name of "the burial board for the parishes of," whilst the ordinary burial board is to be incorporated by the name of "the burial board for the parish of." It seems to us that the effect of the 11th section of the 18 & 19 Vict. c. 128, is to bring the case within the class of cases by which a parish, as defined by the 15 & 16 Vict. c. 85, is to form a district by itself, and not within the class referred to in the 23rd section of that Act, where two or more parishes are to agree. The powers are to be exercised by one body, not by two bodies agreeing, before the constitution of the board, on what terms and in what proportions they shall unite. The 11th section of the latter Act expressly says that the inhabitants are to act by the one vestry or meeting in the nature of a vestry, and are to be in the same situation as if the district constituted one parish "separately maintaining its own poor." In effect, that they are to fall within the class of cases in which a parish is, by the definition "every place maintaining its own poor," to be a body to con-



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stitute by one vestry one burial board, and not within the class contemplated in the 23rd section of the 15 & 16 Vict. c. 85, by which the two parishes are kept distinct, and elect two separate boards, who are to act jointly. Under the 23rd section the proportion was clearly to remain the same as between the parishes, but that does not appear to have been contemplated by the 11th section of the latter Act, which gives directions as to the apportioning the expenses with reference to the rateable value of the property. There is not to be one proportion fixed for ever, according to the agreement of the parties, but the expenses are to be borne by the several parishes or places, and shall be apportioned amongst them by the board in proportion to the value of the property in such several parishes or places, and rated to the relief of the poor. This, we think, may well be construed to mean that the proportion shall be according to the rateable value from time to time when it may become necessary to raise the rates, and this seems to us the more natural construction than to hold that the rateable value at the establishment of the board is to be binding for ever. The proportion is to depend on the value as rated to the relief of the poor, and it can hardly mean that for all future time the rates for the year of the establishing of the board are to be referred to. It certainly seems a much more reasonable provision that the burden should follow the rateable value from time to time, as the words seem to import. It appears to be more just that the places should contribute as the population varies and the rateable value falls and rises; and this is in effect the same provision that is made for the common case of one parish by the earlier clauses of the Act. The Act saying that the burial board, as we think, from time to time are to apportion the expenses to be borne by the two places in proportion to the value of the property in each as rated to the relief of the poor, the mode adopted seems to us to be right, as the board has so apportioned the necessary sum, and then the machinery of the earlier Act, as to giving the certificate and requiring the overseers to pay the money, seems to apply. It was said, indeed, by Mr. Lush, that there were to be two modes of taxation, and that the sums to meet the expenses of providing or buying a burial-ground, and of paying the mortgage-moneys, though falling upon the rates, were to be raised in a different manner from the ordinary expenses of maintaining, &c., the burial-ground. We see, however, no distinct machinery given for this purpose; and we do not see why all the expenses, whether to meet the necessary expenditure for maintaining the burial-ground, or for the purpose of meeting the interest on money borrowed, should not be raised by one tax; a much more convenient course than if two distinct taxations were to be necessary every year, the one for ordinary and the other for extraordinary expenditure, where both are alike to be paid out of the rates. Another objection was made by Mr. Lush, that the mortgage-deed was defective in charging the sum borrowed upon the future rates of the one part of the parish, and also upon the future rates of the other part of the parish. If the view we have taken be correct, that the expenses are to be defrayed from the rates of the two places in proportion to the rateable property in each from time to time, this would seem correct, as it must be construed to mean, and its legal effect would be, to charge it on the rates of the parishes in the proportion to be ascertained from time to time according to the rateable value of the property in each. Upon the whole we are disposed to think that the constitution of the board and the mode of taxation adopted in this case carry out, in the way that seems most feasible, the object of the provisions of the Act. But we cannot help observing that it is impossible to come to anything

like a decision which is perfectly satisfactory to our own minds, amidst such confusion as exists in the provisions of the different Burial Acts which have been referred to in the course of the argument. For the reasons we have given our judgment is for the Crown.  
*Judgment for the Crown.*

Monday, Nov. 3, 1862.

REG. v. BRAY.

*Vexatious Indictments Act—Consent of judge to the indictment being preferred—22 & 23 Vict. c. 17, s. 1.*  
*An application was made, a fortnight after the trial, to a judge of one of the Superior Courts, for his consent, in writing, to an indictment for perjury being preferred against a witness on a trial before him; and the only material laid before him in support of the application was a newspaper report of the trial, beneath which he wrote, "I consent to a prosecution in this case," and signed his name: Held, a sufficient consent within the 22 & 23 Vict. c. 17, s. 1.*

*Woollet* (Ingersant with him) moved for a rule nisi for a *certiorari* to remove an indictment preferred by Messrs. Waterlow and Co. against the deft. for perjury, and found at the Central Criminal Court in September last, into this court, with a view to its being quashed for want of jurisdiction. The matter had been before Mellor, J., at chambers, who had ordered a stay of proceedings, that the deft. might have an opportunity of making this application. The perjury assigned was alleged to have been committed in an action for a malicious prosecution, tried in this court before Mellor, J.; and it was now admitted that there was a *prima facie* reasonable ground for the charge of perjury, but no application was made to the learned judge at the time of the trial for any order, nor was any order then made by him to indict the deft. for perjury. A fortnight after the trial an application was made for the consent of Mellor, J. to such an indictment, in pursuance of the Vexatious Indictments Act, 22 & 23 Vict. c. 17, s. 1, and the only material in support of the application was a copy of the report of the trial of the action, cut out from the *Times* newspaper, and pasted on a piece of blank paper; and the learned judge wrote on the paper, "I consent to a prosecution in this case, J. Mellor." [MELLOR, J.—The newspaper report affixed to the paper was merely to refresh my memory; and the facts being fresh in my mind, I gave my consent to the prosecution in the form stated.] It is contended that that was not a sufficient consent to satisfy the statute 22 & 23 Vict. c. 17, s. 1, which enacts that no bill of indictment for perjury (among other offences) shall be presented to or found by any grand jury unless the prosecutor has been bound by recognisance to prosecute or give evidence against the person accused, &c., or unless such indictment for such offence be preferred by the direction, or with the consent in writing of a judge of one of the Superior Courts, &c. In this case the charge had not been made before a magistrate, nor was the prosecutor bound by recognisance to prosecute. Notice should have been given to the deft. of the application to the learned judge, which should have been supported by affidavits. [COCKBURN, C. J.—It has often happened that learned judges have taken upon themselves to direct prosecutions where perjury has been committed before them, but they have never called upon the parties accused to say why that should not be done. Then why should they give notice to parties because the consent is required to be given in writing? Where the application for such consent is made to a judge who did not try the case, I can understand why that learned judge, in the exercise of his discretion, might require notice to be given to the other side. But where the application is made to the

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judge who tried the case, and who is in possession of all the facts, I can see no difference between such a case and where the judge directs a prosecution at the time of the trial.] The learned judge could not take judicial notice of a newspaper report. After the determination of a trial, the judge who tried the case has no more judicial knowledge of the facts than a stranger, and they should be brought before him by affidavit. (*Reg. v. Allen*, 1 Best & Smith, 857, was referred to.)

COCKBURN, C. J.—We are of opinion that there are no grounds for this application. The object of the statute was to prevent an abuse, very rare at one time, of preferring indictments from vexatious and corrupt motives. In abridging the right of preferring indictments the statute imposed certain conditions, one of which is the obtaining the consent of a judge of one of the Superior Courts, but as to the circumstances under which such consent may be obtained, that is left to the discretion of the learned judge, and it is not for this court to interfere with such discretion. In this case the application for such consent was made to the learned judge who tried the case and who was in full possession of the facts, and who had exercised his discretion in the matter. The statute prescribes no form in which the consent in writing is to be made, and it is only necessary that there should be sufficient to identify the case. Here the consent was given in writing and was attached to a paper which identified the case.

WIGHTMAN, J.—I am of the same opinion.

BLACKBURN, J.—As a matter of discretion and of prudence in these cases, I have refused to interfere, directing the parties to go before a magistrate, where the depositions of the witnesses would be taken. When the parties have been before a magistrate and the evidence of the witnesses has been taken and the accused has been committed upon a specific charge and it is required to insert counts for other offences in the indictment, and I have found the evidence such as to give fair warning to the accused of the charges sought to be included in the indictment, I never doubted, when the judge was satisfied on that point, that he was not bound to grant a summons to the accused to show cause why that should not be done. But in the present case the application was made to a judge who was in full possession of the facts, and, for the reason given, I am of opinion that his consent was properly given.

MELLOR, J.—I am of the same opinion.

Rule refused.

Tuesday, Nov. 4, 1862.

REG. V. HAWKHURST.

Public highway.—Liability of parish to repair—Dedication and user.

A road led from a highway to the gates of a park, through the park there was a bridle-way, terminating at another highway, but carriages could not proceed through the park without the permission of the owner, the gates being occasionally locked. The parish had repaired this road from time immemorial, taking stones from the park for that purpose, but it did not appear that there had been any user of it by the public except for the purpose of seeking admission to the park:

Held, that the above evidence did not show a sufficient dedication to the public and user by them, and that the road was not a public highway which the parish was bound to repair.

Query, whether the old doctrine that a highway must lead from one public place to another can always be supported

This was an indictment for the nonrepair of a public highway. It appeared at the trial before Williams, J., at the Kent summer assizes 1861, that the road in

question ran from a public road which leads from Hawkhurst to Cranbrook, to Louisa-lodge at the entrance to Bedgebury-park, the property of Mr. Beresford Hope, the prosecutor. Up to Louisa-lodge there was a carriage-way, but there it ceased, there being no road through the park but a bridle-path leading to the high road which leads to Goodhurst. The park gate was sometimes locked, persons on foot and on horseback were allowed to pass through the park, but after rain, when the roads were liable to be cut up, carriages were refused admission. From the road in question there were private roads leading to two farms, but there was no actual thoroughfare beyond the lodge gates. It was admitted that since 1836 the surveyor of highways had been in the habit of taking stone from the park to repair the road, and had, after supplying other stone and materials, used the whole combined for the purposes of repair; that the parish, in conjunction with the adjoining parish, had done the repairs from time immemorial; and that the road was used by every one who thought fit to use it; but there was nothing to show that there had been any user of the road by the public, except for the purpose of going to the park to seek admission there, and that, as a carriage-way, the road was out of repair. The question then was, whether, as a carriage-way, this road was a public highway which the parish was bound to repair? The prosecutor admitted that he always exercised a right of excluding carriages from the park. On the part of the parish it was contended that there was no evidence of the dedication of the road to the public as a highway; that the carriage-road, to be a public road, should begin and end at a public place; and that there could, in fact, be no highway which terminated in a *cul de sac*. A verdict passed for the prosecution, leave being reserved to the defendants to move to enter a verdict for them, the court to have power to draw inferences of fact.

A rule having been obtained accordingly,

Bovill, Q. C. (*Barrow* with him) showed cause.—It is not necessary that to be a public road it should terminate in a public place: (*R. v. Lloyd*, 1 Camp. 260; *Bateman v. Bluck*, 18 Q. B. 870; *Campbell v. Lang*, 1 M'Q. H. of L. 451.)

Lush, Q. C. (*G. Francis* with him) contra.—If there were no bridle-road through the park, this would only be an occupation road. There cannot be a public road except the terminus is dedicated to and used by the public: (*Young v. Cuthbertson*, 1 M'Q. H. of L. 455.) This road was never used as a public road, but merely to go to this park, which is not public. Repairing the road is not alone sufficient, there must be a dedication and user as and for a highway. [COCKBURN, C. J.—The repairing is a cogent fact.] Yes, but it is to be taken in connection with all the other circumstances; and here stone for the repairs was taken from the park; there being a bridle-way through the park makes no difference; the road to be public must be public all the way through; there was no beneficial user. *Woodyer v. Hadden*, 5 Taunt. 125, was also cited.

COCKBURN, C. J.—I think this rule should be made absolute. On the question of evidence it seems to me that the evidence that this was a public highway for carriages was not conclusive. It may be questionable whether the old doctrine that a highway must be from one public place to another can be maintained in all cases; but the question is, whether there has been a dedication of the road to the public, and an adoption of it by them, so as to satisfy the allegation in the indictment that all the Queen's subjects are entitled to use it with horses and carriages at their free will and pleasure; and I quite agree that, if there had been a dedication and user, and this road had been used with the intention of using the bridle-way, it would have

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been a highway; but it is quite clear that it was used by persons who desired to obtain permission to go into or through the park, and that is insufficient to constitute it public. All the circumstances are strong to explain the facts. Originally this was an occupation road for the use of the farms, and people were in the habit of using the road to go to the park gates. The evidence, taken altogether, does not warrant us in coming to the conclusion that this was a highway dedicated to the public.

WIGHTMAN, J.—It seems to me quite clear on the evidence that this was not such a dedication as would make the road a public highway, but only a dedication to go to the park. The repair of the road by the parish is a strong fact, but that is weakened by the fact that there was a bridle-way through the park, which would require some amount of repair to the road.

MELLOR, J. concurred.

*Rule absolute.*

*Saturday, Nov. 8, 1862.*

REG. v. THE INHABITANTS OF NEWCHURCH.

*Poor law—Pauper lunatic—Irish parents without a settlement—Birth-settlement of pauper—16 & 17 Vict. c. 97, ss. 97, 98—11 & 12 Vict. c. 111, s. 1.*

*An unemancipated child, born in a parish in England of Irish parents who have obtained no settlement in this country and are not chargeable, may, if he becomes chargeable by reason of lunacy, be adjudged to be settled in the parish of his birth, upon which parish an order of maintenance may be made under sect. 97 of the 16 & 17 Vict. c. 97 (the Lunatic Asylums Act 1853).*

*A. B. was born in the parish of C., of Irish parents, who had obtained no settlement in England, and was unemancipated. Becoming lunatic and being placed in an asylum, two justices made an order pursuant to sect. 97 of the 16 & 17 Vict. c. 97, adjudging his last legal settlement to be the parish of his birth, and ordering the payment of money for his subsistence:*

*Held, that such order was good.*

This was a case stated by the quarter sessions of Lancashire upon an appeal against an order of justices adjudicating the place of settlement of one Luke Finley, a lunatic pauper, to be the parish or township of Newchurch, and ordering the payment of his past and future maintenance.]

The case, after setting out the order as above mentioned, stated that the said Luke Finley is the legitimate son of one Bernard Finley and Alice his wife; that he was born in the appa. township in 1838; that his said father, Bernard Finley, was born in the province of Leinster, in King's County, in Ireland, and is an Irishman, never having had any settlement in England or Wales; that the said Alice Finley is an Englishwoman, but is not known to have ever gained a settlement; that from July 1855 to the present time (Oct. 1861) the said Bernard and Alice Finley have resided together continuously in the resps. parish of Tottington-lower-end; that from July 1855 to the 29th July 1859 the said Luke Finley resided with his parents in the said township of Tottington-lower-end; that on the 29th July 1859 the said Luke Finley, being then a pauper lunatic chargeable to the township of Tottington-lower-end, was, under an order of a justice of the peace for the county of Lancaster, made in pursuance of the Lunatic Asylums Act 1853, removed to the lunatic asylum of Prestwick, the same being one of the lunatic asylums for the county of Lancaster; that from the said 29th July 1859 to the present time the said Luke Finley has been confined in the said asylum at Prestwick, and during the whole of that period the cost of his maintenance in the said asylum has been charged to and defrayed by the said township of Tottington-lower-end; that unless the

removal of the said Luke Finley under the circumstances hereinbefore described constituted an emancipation, the said Luke Finley never was emancipated. It was contended, on the part of the appa., that under the circumstances herein stated the said order ought not to have been made, inasmuch as the place of birth of the said Luke Finley could not be held to be "the last legal settlement" of the said Luke Finley within the meaning of the said Lunatic Asylums Act 1853. It was contended, on the part of the resps., that the said order was rightly made. The question for the opinion of the court is, whether the said order was, under the circumstances, rightly made? If this question is answered in the negative, the order is to be quashed. If in the affirmative, the order is to be confirmed.

By sect. 97 of the 16 & 17 Vict. c. 97 (the Lunatic Asylums Act 1853), it is enacted that it shall be lawful for any two justices for the county or borough in which any asylum, &c., in which any pauper lunatic is or has been confined, is situate, &c., "at any time to inquire into the last legal settlement of such pauper lunatic, and if satisfactory evidence can be obtained as to such settlement in any parish, such justices shall, by order under their hands and seals, adjudge such settlement accordingly," &c.

By sect. 98 it is enacted that if any pauper lunatic is not settled in the parish by which he is sent to any asylum, and it cannot be ascertained in what parish such pauper lunatic is settled, then provisions are made for adjudging such pauper lunatic to be chargeable to the county.

By sect. 1 of the 11 & 12 Vict. c. 111, it is enacted that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removable from any parish or place from which he or she would be removable notwithstanding any provisions of the said recited Act (9 & 10 Vict. c. 60), and should not be removable from any parish or place from which he or she would not be removable by reason of any provisions in the said recited Act.

By the 8 & 9 Vict. c. 117, s. 2, persons born in Ireland not settled in England becoming chargeable to any parish in England may be removed to Ireland.

Mellish, Q. C. and Hopwood now appeared for the resps., and argued that the order of justices was right, for that the pauper lunatic's father (who was an Irishman) not having acquired any settlement, and the pauper himself having been born in the appa. parish that was his "last legal settlement" within the meaning of sect. 97 of the 16 & 17 Vict. c. 97, and so the order was properly made upon such parish: (*Reg. v. St. Mary, Islington*, 31 L. J. 233, M. C.; *Reg. v. All Saints, Derby*, 14 Q. B. 207; *Reg. v. St. Giles's Without, Cripplegate*, 17 Q. B. 636; *Reg. v. Inhabitants of Preston*, 12 A. & E. 822; Chitty's *Burn's J.* last edit. tit. "Poor," p. 409; *Reg. v. Mile-end Old Town*, 4 A. & E. 196; *Reg. v. Inhabitants of Great Clacton*, 4 B. & Ald. 410; *Reg. v. Inhabitants of Whitehaven*, 5 B. & Ald. 72; *Reg. v. Marylebone*, 16 Q. B. 362.)

Kay, for the appa., contended that, as at the time of the making of the order the pauper was unemancipated, and his parents had obtained no settlement, so he himself had none, and that the order should therefore have been made under the 98th section, and not under the 97th of the 16 & 17 Vict. c. 97 (*R. v. Much Cowarne*); 2 Ll. & Ald. 861; *R. v. Witton*, 3 T. R. 355, that an unemancipated child can have no settlement: (*Reg. v. Mile-end Old Town*, 4 Ad. & E. 196, Patteson, J.'s judgment; *R. v. Leeds*, 4 B. & Ald. 498; *R. v. St. Giles's*, 21 L. J. 26, M. C., Lord Campbell's judgment.)

COCKBURN, C. J.—I am of opinion that the case of *Reg. v. St. Giles* is directly in point, and not to be dis-

tingished from the present case; although I cannot but say that, if this had been *res integra*, I should have had considerable doubts; but, as it is most desirable that the law should be settled upon the question, I think we should abide by the previous decisions.

WRIGHTMAN, J.—I quite agree that *Reg. v. St. Giles* is an authority in point, as following *Reg. v. Foster*.

BLACKBURN, J.—I am of the same opinion. I think the cases of *Reg. v. St. Giles* and *Reg. v. All Saints, Derby*, show that the child had at the time a birth-settlement. Every person born in England has, *prima facie*, a birth-settlement until another is shown. In ordinary cases the child would have the settlement of its parents; but here, neither parent has a settlement, therefore its birth-settlement takes effect. I take it, that, whilst the child is unemancipated, if his Irish parent becomes chargeable, he would be removable with him to Ireland; but here the father is not chargeable, and therefore the Irish Removal Act does not apply. Then, the Lunatic Asylums Act, which gives the justices power to make an order upon the parish which is the last legal settlement of such pauper, comes into effect. Then the question is, has this pauper any settlement? It seems to me that he has his birth-settlement, though it would not have been available if the Irish Removal Act had applied.

*Judgment for the resp.*

MELLOR, J. concurred.

#### REG. v. JENKINS.

*Nuisances removal—Penalty—How to be enforced—Summons—18 § 19 Vict., c. 121 (the Nuisances Removal Act for England 1855), ss. 13, 14, 20, 38. When a penalty has been imposed upon a party under sect. 14 of the 18 § 19 Vict. c. 121, for not removing a nuisance, and such penalty is unsatisfied, it is necessary, before the justices can enforce it, that the party should be summoned pursuant to sect. 20.*

This was a rule to quash a conviction and warrant of justices made and issued under the 18 & 19 Vict. c. 121 (the Nuisances Removal Act for England 1855).

It appeared that an order had been made upon the def. to abate the nuisance, under sect. 13, and that having failed to comply therewith, she was, under sect. 14, summoned, and a penalty of 10s. per day for each day's neglect was imposed. A warrant was afterwards issued to levy the amount of the penalty incurred, but no fresh summons was issued under sect. 20, which enacts that "where any costs, expenses, or penalties are due under or in consequence of any order of justices made in pursuance of this Act as aforesaid, any justice of the peace, upon the application of the local authority, shall issue a summons requiring the person from whom they are due to appear before two justices at a time and place to be named therein; and upon proof to the satisfaction of the justices present that any such costs, expenses, or penalties are so due, such justices, unless they think fit to excuse the party summoned upon the ground of poverty or other special circumstances, shall, by order in writing under their hands and seals, order him to pay the amount to the local authority at once, or by such instalments as the justices may think fit, together with the charges attending such application and the proceedings thereon; and if the amount of such order or any instalment thereof be not paid within fourteen days after the same is due, the same may, by warrant of the said or other justices, be levied by distress and sale."

The present rule was obtained upon the ground that before the justices had jurisdiction to issue the warrant in question, they should have summoned the def. pursuant to the foregoing section.

*Gifford* now appeared in support of the proceedings below, and contended that the 20th section does not apply to a penalty imposed under the 14th section, which, by sect. 38, is to be recovered under the provisions of the 11 & 12 Vict. c. 43. [COCKBURN, C. J.—It is certainly a somewhat complicated matter, but I am inclined to think there should have been a summons. WIGHTMAN, J.—It is necessary, because the justices have a power to excuse the party on the ground of poverty, or other special circumstances.] The justices, however, had jurisdiction.

COCKBURN, C. J.—They had no jurisdiction to issue a warrant except under the 20th section; but under that section it is necessary there should be a fresh summons. The conviction will stand, but the warrant must be quashed. *Warrant quashed.*

#### REG. v. THE INHABITANTS OF ST. CLEMENT DANES.

*Poor-law—Pauper lunatic—Pauper living apart from her husband—To what parish removable.*

*A woman whose husband was irremovable from the parish of A. by reason of a five years' residence, but whose parish of settlement was B., was living apart from him in the parish of C., where she became chargeable as a pauper lunatic; an order of justices was therefore made under the 16 § 17 Vict. c. 97, s. 97, adjudging her last legal place of settlement to be the parish of B.:*

*Held, that the order was valid, and rightly made upon the parish of the husband's settlement, and not upon that in which he had acquired the status of irremovability.*

By an order in due form, bearing date the 22nd Oct. 1861, under the hands and seals of J. T. Pratt and H. J. Maude, Esqrs., two of her Majesty's justices of the peace in and for the county of Middlesex, the last legal settlement of Ann Blenkarne, a pauper lunatic, then confined in the county lunatic asylum situate at Hanwell, was adjudged to be in the parish of East Retford, in the county of Notts, and the guardians of the poor of the East Retford Union were by the said order directed to pay, on account of the said parish of East Retford, to the guardians of the poor of the Strand Union 1*l.* 14s., being the amount of the expenses incurred in and about the examinations of the said lunatic, &c., and on the 21st Nov. 1861 the guardians of the poor of the said East Retford Union, and the overseers of the poor of the said parish of East Retford, duly gave notice to the guardians of the poor of the Strand Union, in the county of Middlesex, and to the overseers of the poor of the parish of St. Clement Danes, in the said union, of their intention to appeal against the said order at the then next general quarter sessions of the peace to be holden in and for the said county of Middlesex. By an order of one of the judges of her Majesty's Court of Q. B., made the 24th Jan. 1862, by and with the consent of the guardians of the poor of the said East Retford Union, and of the overseers of the parish of East Retford, and by and with the consent of the guardians of the Strand Union, and of the overseers of the said parish of St. Clement Danes, the facts touching the said order dated the 22nd Oct. 1861 and the said appeal were directed to be stated in the form of a special case for the opinion of this court, and the said facts are stated accordingly in the following

#### CASE.

The pauper lunatic Ann Blenkarne is the wife of Charles Blenkarne. He has resided for the last twelve years in the parish of Monks Coppenhall, in the Nantwich Poor-law Union, in the county of Chester, and is now residing there, and is irremovable therefrom by reason of the 9 & 10 Vict. c. 66. In 1824 he gained a settlement in the parish of East Retford by hiring and service, and it is admitted that the pauper lunatic is settled there through him. They

were married in 1825, and lived together until about the year 1836. In that year they were living with their children in a lodging in London, and in consequence of being unable to live happily together, Charles Blenkarne left his wife and went to reside in the country, and they have ever since lived apart, with the exception of one or two short periods, when he came to see his wife and family in London. There were two daughters and a son by this marriage, and they lived with their mother when the father went away. Charles Blenkarne allowed his wife money for the support of herself and his children, which was regularly paid until about Feb. 1859, when such allowance discontinued, because she had gone, some months before, to America, to take over a child of one of his daughters who had married a settler there. The said Ann Blenkarne returned to London about May 1859, and she then went to live with one of her daughters at Brompton. After staying for about ten months with this daughter, she took a room at No. 1, Craven-buildings, in the said parish of St. Clement Danes, in the said Strand Union, which she occupied for about a year previous to March 1861, when, having become insane, she was sent by the parish officers of St. Clement Danes, in due course of law under the Lunatic Act, 16 & 17 Vict. c. 97, to the said lunatic asylum. As soon as she returned from America she received a weekly allowance from her husband, as before, towards her support, and he always knew where she was residing. He is now able and willing to contribute to her support. On the 20th Oct. 1861 the order adjudicating her settlement, &c. was made under 16 & 17 Vict. c. 97. It is contended on the part of the apps. that, as the lunatic has no other settlement than that of her husband, and as he had resided for more than five years in the said parish of Monks Coppenhall, an order ought to have been made upon the guardians of the poor of the Nantwich Union, under the 16 & 17 Vict. c. 97, s. 102, who it is contended are bound to maintain the said pauper lunatic. It is contended on the part of the resps. that the order was properly made on the parish of settlement. The question for the opinion of this honourable court is, whether, upon the facts stated, the order of the 22nd Oct. 1861 is rightly made? If this court shall answer this question in the affirmative, the said order now appealed against is to be confirmed; if in the negative, the said order is to be quashed, and it is agreed that a judgment in conformity with such decision may be entered on motion by either party at the general quarter sessions for Middlesex next or next but one after such decision shall be given; and it is also agreed that no costs be taken by either party.

By the 11 & 12 Vict. c. 111, s. 1, it is enacted "that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removable from any parish or place from which he or she would be removable, notwithstanding any provisions of the said recited Act" (9 & 10 Vict. c. 66), "and should not be removable from any parish or place from which he or she would not be removable by reason of any provision in the said recited Act."

*Keane* now appeared for the resps., and contended that the order was right, the lunatic pauper not being at the time of being conveyed to the asylum exempt from removal to the parish of her settlement, for that not being at that time in the parish in which her husband had acquired his *status* of irremovability (Monks Coppenhall), she did not herself acquire that *status*: (*Reg. v. St. Ebbes, Oxford*, 18 L. J. 14, M. C.; 11 & 12 Vict. c. 111, s. 1.)

*Poland*, for the apps., argued that the order was bad, for that it ought to have been made on the parish of Monks Coppenhall, the parish in which her hus-

band had acquired his *status* of irremovability. [COCKBURN, C. J.—But she is not there, and it is not sought to remove her from that parish.] But if she were there she would be irremovable under the 11 & 12 Vict. c. 111, s. 1. [COCKBURN, C. J.—She is only entitled to the *status* of irremovability if she is in the parish where her husband has acquired that *status*.] The intention of the statute was to give the wife the same *status* as the husband, and it is immaterial where she resides, as she has that *status*: (16 & 17 Vict. c. 97, s. 102; *Reg. v. Leeds*, 13 L. J. 107, M. C.)

COCKBURN, C. J.—This is a very clear case. The order is for the removal of the lunatic pauper from the parish of St. Clement Danes, where she had acquired no settlement, to the parish of East Retford, which was that of her husband, who had acquired the *status* of irremovability in Monks Coppenhall, and the question is whether the provisions of the 11 & 12 Vict. c. 111, s. 1, relate to such a case. [His Lordship read the section.] Now, it is obviously the intention of the Legislature to prevent a wife from being removed from the head of the family to some other place. But how could the Legislature have contemplated, by such words, the case of a wife living away from her husband? I think the words are not only not ambiguous, but very plain. If the wife be not residing with her husband, the words of the section cannot apply. In that case they are not seeking to remove her from her husband's parish of irremovability, but from some other parish.

WIGHTMAN, J.—If the lunatic had been an ordinary pauper there is no doubt she would have been removable to the parish of her husband's settlement. Then, does the fact of her being a lunatic make any difference? I think it does not. She is not irremovable from St. Clement Danes, and there is no intention of removing her from Monks Coppenhall, for she is not there.

MELLOR, J. concurred. *Judgment for the resps.*

Tuesday, Nov. 11, 1862.

BURLAND AND ANOTHER V. THE LOCAL BOARD OF HEALTH OF KINGSTON-UPON-HULL.

*Public Health Act—Retrospective rate—Lapse of time—Charges—Judgment by default.*

*In an action the declaration alleged that the ptes. paid a rate in 1856, to which they had been assessed for works of a public nature executed by a local board of health; that it was admitted that the money had been received by the board erroneously, but they had no funds out of which they could repay it, and they could not levy a rate to repay it, as more than six months had elapsed; that an action was brought in Jan. 1862, and judgment recovered; that ptes. had demanded repayment and the local board had refused. The declaration concluded with demanding a *wadamus* under the C. L. P. Act: Held, that the declaration was insufficient, as it showed that more than six months had elapsed before the claim was enforced by action.*

Demurrer to the declaration.

The declaration stated, that the local board of health for Kingston-upon-Hull executed certain public works of a permanent nature in the year 1855; that a rate was made on account thereof in October of the same year, to which the ptes. were assessed in the sum of 46l. 5s. 6d., and that they paid the same in the year 1856; that they afterwards discovered that such payment was made in error, and that they applied for a return thereof; that the local board of health admitted that they had received the payment in error, but alleged that they had no funds out of which they could repay it; and that, as more than six months had elapsed since the execution of the works, they could not levy a rate for the repayment of the money;

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that the plts. brought an action against the local board in Jan. 1862 to recover the sum so paid in error, and obtained judgment therein for 46l. 5s. 6d.; that the defts. refused to pay and had no funds. The declaration then prayed for a *mandamus* commanding the defts. to levy a rate for the payment of this sum so recovered.

*Croome* in support of the demurrer.—The general rule is that a retrospective rate is bad. Then the question is, can a rate for the payment of this sum be made under the Public Health Act, 11 & 12 Vict. c. 63, s. 89? That section enacts, "that the local board of health may make and levy the said special and general district rates prospectively, in order to raise money for the payment of future charges and expenses, or retrospectively in order to raise money for the payment of charges and expenses which may have been incurred at any time within six months before the making of the rate. The charges and expenses in respect of which they have power to make rates are for public works of a permanent nature.

WIGHTMAN, J.—The rate prayed for is a rate to pay money received by mistake, a sum which the local board improperly received. Why are the ratepayers to repay that?

*Philbrick* in support of the declaration.—The judgment is a charge within the meaning of sect. 89. A judgment against the local board is virtually a judgment against the ratepayers. The ratepayers have received the benefit of the works for which this payment was made. This is a regular judgment, and it is not to be intended that the local board exceeded its functions, or committed a breach of duty. [In answer to the Court, it was stated that the erroneous assessment occurred thus: public works were executed, which were properly the subject of a general district rate; but a special district rate only was made on account thereof, to which the plts. were assessed in the sum paid.] The judgment is the charge.

BLACKBURN, J.—Ought you not to have appealed against the rate?

*Philbrick* referred to *Reg. v. Rotherham Local Board*, 8 E. & B. 906, where it was held that a judgment obtained against a local board was a charge within sect. 89, and that a rate might be made to defray it within six months of that charge.

COCKBURN, C. J.—Suppose the local board had done some wrongful act to the property of an inhabitant, and that they were sued and judgment recovered against them, could they levy the damages and costs on the ratepayers? It was their own wrongful act. Can they fix the ratepayers by suffering judgment by default twenty years afterwards?

*Philbrick* referred further to *The Southampton and Lichen Bridge Company v. Local Board of Southampton*, 8 E. & B. 801; and *Ward v. Lowndes*, 28 L. J. 265, Q. B.; 31 L. J. 41, Q. B., in error.

COCKBURN, C. J.—I am of opinion that our judgment ought to be for the defts., on the ground that this is not a charge within the meaning of sect. 89. If the action had been brought within six months, and judgment afterwards obtained, the *Rotherham* case would apply, and I should have held on the authority of that case, although it is not free from doubt, that it was a charge within sect. 89. But, inasmuch as the claim was not sought to be enforced within six months, it is now too late. The *Rotherham* case shows that when the action is brought within six months the judgment may be treated as the period from which the prescribed time begins to run. I protest against the doctrine that any judgment against the local board will give this court authority to award a *mandamus*. We must see on the face of the declaration whether this is a case within sect. 89. This might have been a charge within the section if the claim had been enforced within six months, but I

cannot think that the statute intended that the ratepayers posterior to the time when the charge was incurred were to be made liable whenever the local board might choose to suffer a judgment by default.

WIGHTMAN, J.—Unless a *mandamus* could have been granted in the first action—which it clearly could not on the ground of the six months having elapsed—I think, under the circumstances stated in the declaration, it cannot be granted now, because a different class of ratepayers will be affected now to that which existed at the time of the first action.

BLACKBURN, J.—I also think that judgment should be given for the defts. On the face of the declaration the plts. show a *bona fide* claim in 1856, and no action was commenced until 1861. The statute, in fixing the period of six months, may have intended not to throw charges and expenses on a different set of ratepayers. In the *Rotherham* case, Lord Campbell says: "I am clearly of opinion that, under sect. 89, the local board may be compelled to make a rate for the purpose of satisfying a judgment within six months after the judgment has been obtained. They may make a rate to pay for expenses within six months after they become due; if an action is brought then, but judgment cannot be obtained till six months have elapsed, it cannot be that the creditor would be deprived of his remedy by the delay. The judgment must be a charge within the meaning of sect. 89." That case is not a decision that any judgment at any time could be enforced against the ratepayers, but that it might be enforced where the action was brought within six months. If this had been an application for the prerogative writ of *mandamus*, there could be no doubt that it ought not to be granted; and although this is an action, I think we ought to see facts stated on the face of the declaration which would warrant the Court in granting a *mandamus*.

MELLOR, J. delivered a similar judgment.

*Judgment for the defts.*

Wednesday, Nov. 12, 1862.

BLISS (app.) v. LILLEY (resp.).

*Fireworks—Explosive preparations—Fog-signals—Keeping same*—23 & 24 Vict. c. 139.

By the 23 & 24 Vict. c. 139, certain provisions are enacted with reference to persons who make or keep fireworks or other preparations of an explosive nature. The resp. was charged with "unlawfully making and keeping, and causing to be made and kept, a certain quantity of fireworks, explosive preparations and compositions (to wit), 100 fog-signals in a certain place (to wit), a building there situate, wherein, by the said Act in that behalf, it was not then lawful to make and keep, or cause to be made and kept, such fireworks, explosive preparations and compositions." These fog-signals consisted of two concave pieces of tin, of nearly equal size, which when put together form a box, in shape like a watch, about 2½ inches in diameter and ¾ inch in thickness. To the inside of one of them are attached three nipples like those of a gun, on each of which is placed an ordinary percussion cap; the cavity is then filled with common gunpowder, and the two pieces are attached to each other by pressure, the edges being made to unite in nearly the same manner as a glass is fixed in a watch. The articles are made for and used by railway companies, when the fog is so thick that the ordinary signals cannot be seen; one of these fog-signals being placed on the rails, and exploding by the pressure upon the copper caps of the wheels of an engine passing over it, making a report which is heard at a considerable distance:

Held, that such "fog-signals" were within the terms of the Act:

Held, per Wightman, J., that they were "fireworks":

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*Held, per Blackburn and Mellor, JJ., that they were "explosive preparations."*

This was a case stated by the stipendiary magistrate of Birmingham, upon a dismissal of an information. The case was as follows:—

By statute 23 & 24 Vict. c. 139, s. 6, it is enacted, that "the following regulations shall be observed with regard to the manufacture of loaded percussion caps, and the manufacture and keeping of ammunition, fireworks, fulminating mercury, or any other preparation or composition of an explosive nature (that is to say), no such manufacture shall be carried on without such licence for that purpose, as hereinafter mentioned, or within the respective distances hereinafter mentioned, and set opposite to the descriptions of the respective articles (that is to say): Percussion caps, 50 yards; ammunition, 100 yards; fireworks, 50 yards; fulminating mercury or other preparation or composition of equally explosive power, 100 yards from any dwelling-house, or any building in which persons not connected with the same manufacture are employed."

By sect. 7 every person making or causing to be made percussion caps, or making or keeping, or causing to be made or kept, ammunition, fireworks, fulminating mercury, or other explosive preparation or composition contrary to this Act, shall for so doing forfeit for every such offence any sum not exceeding ten pounds.

On the 21st Jan. 1862, Simeon Lilley (herein described as the resp.) appeared before me the undersigned stipendiary magistrate for the borough of Birmingham, upon a summons issued at the instance of James Bliss (herein described as the app.), acting on behalf of the Borough Inspection Committee, charging him with "unlawfully making and keeping, and causing to be made and kept, a certain quantity of fireworks, explosive preparations and compositions (to wit), 100 fog-signals in a certain place (to wit), a building there situate, wherein by the said Act in that behalf it was not then lawful to make and keep, or cause to be made and kept, such fireworks, explosive preparations and compositions." It was admitted that the fog-signals hereafter described were manufactured and kept upon the premises of the resp.; that he had not obtained a licence for their manufacture, and that his premises were within the specified distance from other buildings. The only question for my determination was, whether fog-signals could be considered "fireworks," or such "explosive preparations or compositions" as were within the words and meaning of the Act? A fog-signal is thus constructed, and is used for the purpose after mentioned. It consists of two concave pieces of tin of nearly equal size, which, when put together, form a box in shape like a watch, about  $2\frac{1}{2}$  inches in diameter, and  $\frac{1}{4}$  inch in thickness. To the inside of one of them are attached three nipples like those of a gun, on each of which is placed an ordinary percussion cap. The cavity is then filled with common gunpowder, and the two pieces are attached to each other by pressure, the edges being made to unite in nearly the same manner as a glass is fixed in a watch. The only process carried on in the premises of the resp. is mechanical. The metallic boxes and the nipples are there made, the copper caps placed on the nipples, the gunpowder (about  $3\frac{1}{2}$  drachms in weight) inserted, and the boxes closed. The gunpowder and the copper caps are procured elsewhere. The articles in question are made for and used by railway companies. When the fog is so thick that the ordinary signals cannot easily be seen, one of these "fog-signals" is placed on the rails, and is exploded by the pressure upon the copper caps of the wheels of an engine passing over it, making a report which is heard at a considerable distance. The construction of them is undoubtedly attended with some degree of danger to the persons employed

in the manufacture, and more than one accident has occurred. The danger consists in the amount of pressure required for closing the edges of the two pieces of tin. It is necessary that they should be firmly attached to each other in order to secure the greatest amount of explosive power, and for this purpose a screw press is used. If a few grains of gunpowder are allowed to remain on the edges when they are brought together, or if the pressure is so great as to bring down the upper side of the box upon the copper cap, ignition and an explosion of the gunpowder contained within will probably take place. In support of the information it was contended that even if the fog-signals could not be considered "fireworks," the manufacture and keeping of them without a licence and within the specified distances, was prohibited by the statute, as being "preparations and compositions of an explosive nature;" whilst it was urged on behalf of the resp, first, that they could not be considered to be "fireworks," those being well-known specific articles of commerce of a wholly different description; secondly, as regards "preparations and compositions of an explosive nature," it was contended that it appeared from the context in that part of sect. 6, which specifies the distance within which the several articles shall not be manufactured, that the statute applied only to such chemical preparations and compositions as are "of equally explosive power" with fulminating mercury, *a. g.* gun-cotton, fulminating silver, &c., and not to such mechanical preparations and compositions as were carried on in the premises of the resp. I was of opinion that the latter must be considered to be the proper construction of the Act, and upon that ground I dismissed the summons. Whereupon the app. being dissatisfied with my determination as erroneous in point of law, requested me to state and sign a case setting forth the facts and the grounds of such determination, in the manner prescribed by the 20 & 21 Vict. c. 43, for the opinion thereon of the judges of her Majesty's Court of Queen's Bench, and duly entered into a recognisance as required by the said statute in that behalf. Now, therefore, I, the said magistrate, in compliance with the said application and the provisions of the said statute, having above stated the facts of the case, and the grounds of my determination, humbly crave the opinion of the court thereupon. If the court should be of opinion that the information was improperly dismissed, I humbly solicit that the case may be remitted to me with such their opinion.

T. C. SNEYD KYNNESELEY,  
Birmingham, 31st Jan. 1862.

*Spooner* appeared for the app., and contended that the magistrate was wrong in dismissing the information, for that the article manufactured was either "fireworks" or an article of "an explosive nature," in either of which cases the resp. had incurred a penalty.

No one appeared for the resp.

COCKBURN, C. J.—I must say that in this case I am by no means satisfied that the magistrate was wrong, though the matter complained of is clearly within the mischief of the Act. Now, the first part of the 6th section relates to carrying on the manufacture without a licence, and then comes the provision as to distance, and there is some difficulty in saying that the resp. is brought within the words of the section; but my learned brothers being all of opinion that there is enough to justify a conviction, I will not say that such is not the case.

WIGHTMAN, J.—The manufacture of fog-signals is certainly within the mischief of the Act. But I am of opinion that these signals are "fireworks," and of the nature of crackers, and that if on the 5th Nov. or any other like occasion a person were to let off one of these he would come within the 9th section, which provides for such matters. I presume that an ordinary

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cracker would come within what is meant as "fire-works;" therefore such a thing as this would come within the same definition.

BLACKBURN, J.—I come to the same conclusion, but not quite upon the same grounds. It appears that the magistrate thought that he was to consider "fireworks" as those of the popular kind, and I think that he was right in not considering this as fireworks. But on another ground I think that the resp. is within the Act, for I think he kept a certain quantity of explosive preparations, and by the 7th section a penalty is imposed for keeping "explosive preparations" in any place where under the Act it is not lawful to keep them. The question therefore is, whether when he made these fog-signals he was making "explosive preparations" within the Act? and this was a question of fact for the magistrate. It seems to me that this was equally of an explosive nature as percussion caps. Now, by the 6th section, if a party is making an article of an explosive nature, but of what kind is not mentioned, he must have a licence, but it may be made in any place, even next door to a house. Now here he makes such an article, and without a licence, and therefore he has committed an offence against the Act. The effect of the Act is, you shall make no explosive matters at all without a licence; but even if licensed, you shall not make them, if of the particular natures mentioned, within certain distances. Here he did make certain explosive preparations in a place not being licensed, and therefore he brought himself within the penalty of the Act.

MILLER, J.—We are all agreed that what the resp. did was within the mischief of the Act, and I agree with my brother Blackburn that all explosive preparations must be carried on in a licensed house, and that with reference to certain specified preparations the building must not be within certain distances.

*The case to be remitted to the magistrate with the opinion of the court.*

#### SHARP (app.) v. HAINSWORTH (resp.)

*Master and servant—Disputes—Wages—Jurisdiction of justices—20 Geo. 2, c. 19, s. 1.*

*Under the 20 Geo. 2, c. 19, s. 1, justices have power to determine disputes between masters and servants touching the wages of the latter; and where, therefore, a servant is paid for his work by the piece, and the defence set up against an order for wages is that the work was so badly done that it was of no value, the justice has power to determine that question, and that such defence is not a matter of set-off.*

This was a case stated upon the refusal of a magistrate to adjudicate upon an application by a servant against his master, under the 20 Geo. 2, c. 19, s. 1, for wages alleged to be due.

By the foregoing section all complaints, &c. which shall happen to arise between masters and certain servants shall be heard and determined by a justice, who is empowered to make such order for the payment of so much wages to such servant as to such justice shall seem just and reasonable.

The complainant was employed by his master to make up blankets to be paid by the piece, and his master having paid a part of his demand and refused the remainder, an order was applied for under the above section. At the hearing the master resisted the demand, upon the ground that the servant had so negligently performed his work, by making some of the blankets too long and others too short, that he sustained a very great loss, and far beyond the balance of wages claimed. The justice, considering that the defence was matter of set-off, held that he had no jurisdiction, and declined to adjudicate upon the subject.

Chiefly, Q. C. now argued that the magistrate was wrong, for that the defence set up was not a matter of

set-off, but of deduction: (*Mondel v. Steel*, 8 M. & W. 858.)

No one appeared on the other side.

COCKBURN, C. J.—The justice has simply to determine the question of wages, and he can determine nothing else. The case must go back, for him to say whether the work was so badly done as not to entitle the servant to any wages, or to a deduction of wages.

*Case to be sent back, with the opinion of the court.*

Saturday, Nov. 15, 1862.

WILLIAM ROBERTS (app.) v. JOHN ROBERTS (resp.)

*Turnpike-road—Application of highway rates to repair of—4 & 5 Vict. c. 59.*

*By a local turnpike Act, powers were given to make a road from A. to C. (a distance of about sixteen miles); such road was made, however, only from A. to B., a place about midway between A. and C., and the remainder was abandoned. Tolls were taken for the road which was completed, but being insufficient for the repairs of the said road, application was made to justices under the 4 & 5 Vict. c. 59, to order a portion of the highway rates to be applied to such turnpike-road. At the hearing, the justices dismissed the application, holding that they had no jurisdiction to make the order until the whole line of road was finished and opened to the public: Held, that the justices were wrong, and that they had such jurisdiction.*

This was a case stated by justices at petty sessions, upon a dismissal of an information.

The case stated that at a petty session holden at Abergele, in and for the division of Idulua, in the said county (Denbigh), on the 1st March 1862, an information, preferred by the said William Roberts (hereinafter called the app.) against the said John Roberts (hereinafter called the resp.) under an Act passed in the fourth and fifth years of the reign of her present Majesty, intitled "An Act to authorise for one year, and until the then next session of Parliament, the application of a portion of the highway rates to turnpike-roads in certain cases" (which said Act has been continued and is now in force), for that a certain road from Abergele to Llangerniew was made under the authority of an Act passed in the 22nd and 23rd years of the reign of her present Majesty, intitled "An Act for making a road from Llanrwst to Abergele, and a branch road thereout in the counties of Denbigh and Carnarvon," that the funds of the said turnpike-road trust were insufficient for the repairs of the turnpike-roads comprised therein, part whereof ran through and is situate within the township of Sirior aforesaid, and that the said part of the said turnpike-road so lying within the said township was then out of repair; and further, that notice in writing of the intention of the said app. to exhibit the said information had been, pursuant to the statute in that behalf, given by him as such treasurer to the said resp., that at the said special session application would be made to the justices for their examination into the state of the revenue and debts of the said turnpike trust, as also to inquire into the state and condition of the repairs of the roads within the said township, and also to ascertain the length of the roads, including turnpike-roads therein, and how much of the said road was turnpike-road as required by the Act of the 4 & 5 Vict. c. 59; and if after such examination it should appear to us necessary or expedient for the purpose of the said turnpike-road so to do, that then application would be made to us to adjudge and order that such portion as we might think necessary of the rate or assessment levied or to be levied by the Act in that behalf, for and towards the repairs of such part of the turnpike-road as was within the said township, was heard and determined by us, the said parties appearing by attorney, and upon such



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hearing we dismissed the said information. . . . Upon the hearing of the said information it was admitted as a fact that, in the year 1859, an Act was obtained for making a turnpike-road from the market-town of Llanrwst to the market-town of Abergele, a distance of sixteen miles and one furlong. Under the authority of that Act (a copy of which is sent herewith, and is to be taken to form a part of this case) a portion of the road, being the part lying between the village of Llangerniew and the market-town of Abergele, a distance of nine miles and one furlong, was on the 17th June 1861 opened to the public, and in virtue of sect. 18 of the said Act tolls have been and still are taken at the toll-bars erected at the part of the road so opened. The remaining part of the road from the village of Llangerniew to the market-town of Llanrwst, a distance of seven miles, has never been commenced. Sect. 18 of the Act, which applies to the portion of the road so completed, is as follows:—"So soon as that portion of the said road, by this Act authorised, as is situate between the town of Llanrwst and the Stag Inn, in the township of Dyafon, in the parish of Llangerniew, is completed and open to the public the trustees may demand and take at the several turnpikes which shall be erected upon or on the sides of the same, such tolls as the trustees may direct, not exceeding the tolls by this Act authorised to be taken, and so soon as that portion of the road before described as is situate between the said Stag Inn and the termination of the road in the said parish of Abergele is completed and open to the public, the trustees may in like manner demand and take at the several turnpikes which shall be erected upon or on the sides of the same such tolls as the trustees may direct, not exceeding the tolls by this Act authorised to be taken." The part of the road so opened is the portion referred to in the latter part of the above section, and runs through several townships, of which the resp. is surveyor. It was proved on oath, at the hearing of the said information, that the funds of the said trust were insufficient to keep the road in repair, that the trustees had borrowed 6700*l.* on the security of the tolls of the said trust, and that the tolls received at the gates from the month of June to the 31st Dec. 1861 only amounted to 156*l.* 4*s.* 7*d.* It was also found that there were 164 rods of the road so opened running through the resp.'s parish, and that it would cost 62*l.* to put and keep the same in effectual repair for the ensuing twelve months. It was submitted by the attorney for the app. that under the 4 & 5 Vict. c. 59, we had full power to make an order upon the resp. township to contribute to the repair of that part of the road opened within his township, and that the portion of the road from Llangerniew to Abergele having been completed and opened to the public, was to be treated in all respects (under sect. 18 of the Llanrwst and Abergele Act) as a distinct and separate road. The attorney for the resp. contended that we had no power to make an order, inasmuch as the road had not been completed from point to point, namely, from Llanrwst to Abergele, and until the whole road was opened the public could not be compelled to repair any part of it; and in support of his opinion he cited the following cases, viz.: *Rez v. Cumberworth*, 3 B. & Ad. 108, and the case there referred to; and *Rez v. Edge Lane*, 4 Ad. & E. 723; and it was urged on the part of the resp. that as the object of making the road was, according to the preamble of the Act, to have a direct line of communication between Llanrwst and Abergele (the two principal towns in the neighbourhood), "which would be of great service to the owners and occupiers of the adjoining lands," the object could not be said to have been attained, as the road had been opened little more

than half way to Llanrwst, which provided no thorough communications, but was simply a communication between a rural village and a town, and in its present incomplete state was of little or no use to the owners and occupiers of the adjoining lands or the public in general; and it was further submitted that, until the whole road was opened, the traffic could not be developed, and it would not be ascertained whether or not the tolls would be equal to the expenditure; and further, that sect. 18 of the Act merely authorised the taking of the tolls, and did not alter the general law that a turnpike-road must be completed from point to point before statute duty could be applied for. The resp. also tendered evidence to show that the part of the road so finished had never been properly made, and that the app.'s application was, in fact, more for the purpose of obtaining funds to make and complete the road than to put it in repair, and moreover that there was no evidence before us that the road had been adopted by the township. Upon the above case and Act of Parliament we came to the conclusion that, as the Act purported to be an Act for "making a road from Llanrwst to Abergele" (and not from Llangerniew to Abergele, being the part of the road so completed), we had no power to make an order on the resp., as surveyor of the highways, for a contribution towards the repairs of the part of the road so opened until the whole line of road from Llanrwst to Abergele was finished and opened to the public, and we accordingly dismissed the information. The question of law arising on the above statement for the opinion of this honourable court is, whether we were right in dismissing the said information on the above grounds? And the court is humbly solicited, according to the powers vested in the court by the said statute, 20 & 21 Vict. c. 43, to remit the case to us the said justices, with the opinion of the court thereon, or to make such other order as the court may think fit. Given under our hands this 2nd day of April A.D. 1862, at Abergele, in the county aforesaid.

B. W. WYNNE.

P. W. YORKE.

ROBERT WILLIAM WYNNE.

By the 4 & 5 Vict. c. 59, it is enacted, "That it shall be lawful for the justices, at any petty sessions for the highways . . . upon information exhibited before them by the clerk or treasurer of any turnpike trust, that the funds of the said trust are insufficient for the repairs of the turnpike-roads within any parish, notice in writing of such intended information having been previously given, . . . to examine the state of the revenue and debts of such turnpike trusts, and to inquire into the state and condition of the repairs of the roads within the same, and also to ascertain the length of the roads, including turnpike-roads, within such parish, and how much of such road is turnpike-road; and if, after such examination, it shall appear to the said justices necessary or expedient for the purposes of any turnpike-road so to do, then to adjudge and order what portion, if any, of the rate or assessment levied or to be levied by virtue of the said recited Act shall be paid by the said parish surveyor, and at what time or times, to the said commissioners or trustees, or to their treasurer . . . such money to be wholly laid out in the actual repairs of such part of such turnpike-road as lies within the parish from which it was received."

*Welsby* now appeared for the app., and contended that the justices ought to have made an order, and cited *Reg. v. Cumberworth*, 3 B. & Ad. 108; *Reg. v. Leake*, 5 B. & Ad. 469; *Reg. v. Edge Lane*, 4 Ad. & E. 723; *Reg. v. Mellor*, 1 B. & Ad. 32; *Trustees v. Sunk Island v. Pattington*, 1 Best. & Sm. 747.

*V. Williams*, for the resp., argued in support objections as taken before the justices at

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sessions. [BLACKBURN, J.—You say it is a condition precedent that the whole road should be made; but I see nothing in the Act to justify that view.] (*Blakmore v. The Glamorganshire Canal Company*, 1 Myl. & K., 162.) The landowners would not have consented to such a road being made if it was not to have been completed. *Reg. v. Edge Lane* is directly in point.

COCKBURN, C. J.—The statute is express, that where a turnpike-road is in such a state as to its funds that they are insufficient for the repairs, the justices may make inquiries and may order the deficiency to be supplied out of the rates. It is not now necessary to decide whether, under the circumstances, the justices ought to have made the order, for they simply put the question whether the whole of the road not having been made, they had jurisdiction under the Act to make it? This is certainly a turnpike-road, and the statute has made no provision for the circumstance of the non-completion of the entire length. The words are quite general. We think the magistrates had jurisdiction.

BLACKBURN, J. concurred. (a)

*The case to go back with the opinion of the court.*

HARDCASTLE (app.) v. JONES (resp.)

*Factories—Children—Print-works—Surgeon's certificates—Conviction—8 & 9 Vict. c. 29.*

*The 8 & 9 Vict. c. 29 (An Act to regulate the labour of children, young persons and women in print-works) enacts that no child shall be employed in a print-work until the occupier shall have obtained a surgeon's certificate in proof that such child has the ordinary strength and appearance of a child of at least eight years of age, and is not incapacitated, &c., and it enacts what shall be deemed a print-work, and who shall be deemed to be employed therein:*

*Hold, that a girl employed in a room finishing goods which had been previously printed in another part of the premises, but which room had an internal and direct communication with such premises, was within the Act, and that a surgeon's certificate was necessary with reference to such girl.*

This was a case stated under the 20 & 21 Vict. c. 43, upon a conviction by justices. The case stated as follows:—

"At a petty sessions held at Bolton on the 30th May 1861 an information and complaint preferred by the said David Jones, one of her Majesty's sub-inspectors of factories (hereinafter called the resp.), against James Hardcastle, of the township of Bradshaw, bleacher, finisher, and calico printer, carrying on business under the name of James Hardcastle and Co. (hereinafter called the app.), under the Print-works Act, 8 & 9 Vict. c. 29, was heard and determined by us, the said parties respectively being then present.

"The said information and complaint charged that the said James Hardcastle and Co. on the 15th Nov. 1860, at the township of Bradshaw aforesaid, being then and there the occupiers of a certain print-work within the said township of Bradshaw, the same being a print-work within the true intent and meaning of the said recited Act, did, on the said 15th Nov., at Bradshaw aforesaid, employ one Sarah Blackburn (the said Sarah Blackburn then and there being a child within the meaning of the said recited Act, and a person for whom a surgical certificate is required by the said recited Act) in the said print-work, they the said James Hardcastle and Co., not having, before or within seven working days after they the said James

Hardcastle and Co. so employed the said Sarah Blackburn as aforesaid, obtained the surgical certificate required to be given, as aforesaid, contrary to the said Act. Upon the hearing the app. was duly convicted before us of the said offence, and we adjudged him to forfeit and pay the penalty of 2*l.* under the said recited Act." The case then proceeded to state as follows:—"Upon the hearing of the said information and complaint it was proved that the app. is the occupier of works at Bradshaw, at which works bleaching, printing and finishing are carried on; that on the 15th Nov. 1860 Sarah Blackburn was employed in 'scutching' goods which had been previously printed. It was admitted that Sarah Blackburn was a 'child' within the meaning of the 2nd section of the Printworks Act, and that no surgeon's certificate had been obtained within the meaning of sect. 20 of the said Act. In the room or shed where Sarah Blackburn was so employed there were no persons whatever employed in printing figures, patterns, or designs by means of blocks or cylinders, or any other means on any fabric whatsoever. The only processes which were carried on in that room, or on which the said Sarah Blackburn ever was employed by the app., were all processes of finishing, to which, if required, goods sent to the app. were subjected, whether they had been bleached or printed by app. or were sent to him in a bleached or in a printed state, for the purpose of being finished only. The process of printing figures, patterns, or designs, by means of blocks, cylinders, or otherwise, and the preparing, dyeing, bleaching, cleaning, calendering, dressing, or finishing, incident or necessary to the completion of the chief process of printing figures, patterns, or designs upon the fabrics were not carried on in the room where Sarah Blackburn was employed, but had been previously completed in the print-works belonging to app., and having an internal and direct communication with the room in which Blackburn was so employed. 'Scutching' is the first process used in finishing woven fabrics; and, on the day in question, Sarah Blackburn was employed in 'scutching' white and grey goods, as well as printed goods, in the before-mentioned room. There are numerous works in the districts where bleaching and finishing are carried on, but no printing; and, *vice versa*, there are also many establishments where finishing alone is carried on. It was contended on the part of the app. that 'scutching' is not a process either incident or necessary to the chief process of printing. On behalf of the resp. it was contended that 'scutching' is a process of finishing incidental to the completion of the chief process of printing. The question for the opinion of the Court of Q. B. is, whether Sarah Blackburn was employed, on the day in question, in a print-work within the meaning of the Print Works Act? If the court should be of opinion that she was so employed, then the conviction is to stand. If the court should be of the contrary opinion, then the conviction is to be quashed.

"WILLIAM FRED. HUTTON.

"JOHN HICK."

By sect. 2 of the 8 & 9 Vict. c. 29 (an Act to regulate the labour of children, young persons and women in print-works), it is enacted, that the words "print-work" shall be taken to mean any building or shed, and any part thereof, within which any persons are employed to print figures, patterns, or designs by means of blocks or cylinders, . . . and the words "incidental printing process" shall be taken to mean any process of preparing, dyeing, bleaching, cleaning, calendering, dressing, or finishing, incident or necessary to the completion of the chief process of printing figures, patterns, &c. . . and any person who shall work in any print-work, whether for wages or not, or as a learner or otherwise, either in printing or in any incidental printing process, or in cleaning any part of the print-

Lightman and Mellor, JJ. were sitting in the Court  
Cases Reserved.

work, or in cleaning any block, cylinder, tool, or machine used therein, or in any other kind of work whatsoever, save in the cases hereinafter excepted, shall be deemed to be employed therein within the meaning of this Act."

By sect. 20 it is enacted: "That no child shall be employed in a print-work (save in the cases hereafter excepted) until the occupier thereof shall have obtained a surgeon's certificate according to the form and directions given in schedule (A) to this Act annexed, in proof that such child has the ordinary strength and appearance of a child of at least eight years of age, and is not incapacitated by disease or bodily infirmity from working daily in a print-work as allowed by this Act."

*Welsby* appeared in support of the conviction, and contended that the justices were right, for that the child was employed in a print-work as is explained by sect. 2, the app. not having obtained a surgeon's certificate as required by sect. 20: (*Howard v. Coles*, 13 L. J. 262 M. C.)

*Cleasby*, Q.C. (*Davison* with him) argued, that upon the facts as set out in the case, the app. was not within the Act, the girl not being employed in any process of printing, but in "finishing," which was not necessarily a branch of "printing;" and moreover, she was not employed in a "print-work" being in a room or shed where no persons were employed in "printing," and that this was not within the mischief of the Act: (*Howard v. Coles*, *supra*.)

*Welsby* in reply.

*COCKBURN*, C. J.—Although this case, from the somewhat confused language of the statute, is not altogether free from doubt, I am of opinion, upon the whole, that the conviction was right. The language of the interpretation clause is certainly somewhat ambiguous, but there can be no doubt that the case is within the mischief of the statute, that is, the employment of young girls, except upon satisfactory proof of health, in buildings where the work of printing woven fabrics is carried on, and where strong acids and other deleterious substances are used; and it is really necessary that the powers of the Act should extend not only to the rooms where the peculiar process is carried on, but to the accessory rooms where the deleterious fumes may enter. Now, in the interpretation clause, the words "print-works" are to mean any building or shed, or any part thereof, within which any persons are employed to print figures, &c. Now, the girl in this case was employed in "scutching," and the first question is, whether she was employed in any print-work? She was certainly employed in such a building. Then the next is, whether the app. is brought within the 20th section? Now, either this would come within the terms of any "incidental printing process," or the words "any other kind of work whatsoever," in the latter part of the interpretation clause. At all events, this child was employed in some room of the "print-work," and then the interpretation clause comprehends, under that designation, any part of the building devoted to the printing process.

*BLACKBURN*, J.—I am of the same opinion, and think that the conviction was right. It seems to me to be clear that the girl was employed in a room of a building in parts of which printing was carried on. Mr. *Cleasby* would have it inferred that the room was a separate building; but this is not so, as the case finds that there was an internal and direct communication between the room and that part of the building where the printing was carried on, and therefore I think it was a part of the same building. Then what is she doing there? She was finishing goods printed in the works. I gather that there may be two processes of finishing, one finishing the printing process and another finishing the goods after they have been printed. It is not quite clear whether she was employed

in an incident of bleaching or an incident of printing, and, were it necessary to ascertain this, we should send the case down to the justices to say which it was. But it is not necessary, for, whichever it was, she was employed in a building devoted to printing. The Legislature has employed words in a certain sense, and "print-work" is to mean "any building or shed, and any part thereof" within which any persons are employed to print, &c. This, then, was a room in a building for "print-work." Then, what is the meaning of the word "employed?" The interpretation clause gives the meaning. Now, the girl was not employed in printing; but was she not employed within the meaning of the words "any other kind of work whatsoever?" I should certainly doubt if a servant employed to sweep out the premises, or bring in the dinners of the workpeople, would be within the Act; but certainly being employed, as this girl was, must be taken *ejusdem generis* with the words going before, and therefore within the meaning of the Act.

Conviction affirmed.

SODEN (app.) v. CRAY (resp.)

Conviction—Drunk and riotous—23 Vict. c. 27, s. 40—21 Jac. 1, c. 7.

The app. was proceeded against before justices, upon an information under the 23 Vict. c. 27 (*Refreshment Houses Act*), for being drunk and riotous. At the hearing the charge of riotousness was not proved, and he was convicted of being drunk only, under the 21 Jac. 1, c. 7, and fined 5s.:

Held, that the conviction was bad.

This was a case stated by justices, under the 20 & 21 Vict. c. 43, upon a conviction of the app. for drunkenness. The information against the app. was laid under sect. 40 of the 23 Vict. c. 27 (*Refreshment Houses and Wine Licences Act*), for being drunk and riotous. At the hearing the charge of riotousness was not proved, and the justices convicted him of drunkenness only, under the 21 Jac. 1, c. 7, and he was fined 5s.

*Holl*, for the app., contended that the conviction was wrong; for that, as the information was under the 23 Vict. c. 27, for drunkenness and riotousness, the justices had no jurisdiction to convict under another statute for drunkenness alone: (*Martin v. Pridgeon*, 28 L. J. 179, M. C.; E. B. & Ell.)

*COCKBURN*, C. J.—We are bound by that authority.

Conviction quashed.

REG. v. THE INHABITANTS OF ST. CLEMENT DANES.  
Poor-law—Birth of pauper in a workhouse—Parish of birth.

An Irishwoman, who had resided for nine months in the parish of A., but not having acquired any settlement, finding herself about to be in labour, and being in want, applied to the relieving officer of that parish for an order of admission to the workhouse, which he declined to give, but telling her that when she was taken bad, she was to come to him for an order, or if there was not time, she was to go to the workhouse of the union and she would be admitted. On the same evening, finding labour coming on, she went to the workhouse, where she was admitted as "casual poor," and two hours after was delivered of a female child, the present pauper. She afterwards left the workhouse with her child, and after living by her labour for some time, she went into a charitable asylum, leaving her child in the care of a sister, who lived in the parish of B. This sister being unable to support such child, took it to the workhouse of B., where it was received, and afterwards, with the consent of the mother, who continued in the asylum, an order was made for its removal to the parish of A. The workhouse of the union to which the parish of A. belonged, and in which the child was born, is locally

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*situated in the parish of C., which is in another union. The parish officers of the parish of A. having appealed against this order of removal:*

*Held, that the order was well made upon such parish.*

This was a case stated for the opinion of this court by the Middlesex sessions, upon an appeal by the parish officers of St. Clement Danes against an order for the removal to their parish, from the parish of St. Giles, of one Mary O'Connor, otherwise M'Carthy. The case stated as follows:—

"On the trial of the said appeal it was proved that Ellen O'Connor, otherwise M'Carthy, the mother of the pauper child, being unmarried, was on the 26th Nov. 1856 residing, and for nine months previously had resided with her sister in Vere-street, in the parish of St. Clement Danes, in the Strand Union, earning her livelihood during the whole of such time by selling vegetables in the streets. She was an Irishwoman not having any settlement in England; she had never received relief, and, except the application and admission hereinafter stated amounts to chargeability, had never been chargeable to the said parish. That on the said 26th Nov. she, then being pregnant and destitute, walked to the office of the Strand Union, situate in the parish of St. Paul, Covent-garden, which is the proper place for poor persons residing within the union to apply for relief. She there saw Joseph Walker, one of the relieving officers of the union, and asked him for an order for her admission into the workhouse, being, as she said, in distress and expecting to be confined every day. She also told him that she lived at her sister's, in Vere-street, in the parish of St. Clement Danes. He said he would call there to ascertain the truth of what she had said. He said he would not give her an order for admission into the workhouse; but that when she was taken bad she was to come again to the office. She replied, that she expected to be put to bed that day. He then said, that she might not be taken bad so soon, and that if she was taken bad she was to come to him for an order; or, if there was not time, she might go to the workhouse of the union in Cleveland-street, and she would be admitted. She did not know before he told her where the union workhouse was. She then returned to the house in Vere-street, where she was living. On the same day the said relieving officer called there, and ascertained that the statements made by Ellen O'Connor were true, but he declined to give her an order for admission into the workhouse, and said that when she became bad she was to go to the workhouse. On the same evening, finding labour coming on, Ellen O'Connor walked from her residence to the union workhouse; when she arrived there she was in a state of prostration. She first saw the porter, who fetched the master of the workhouse; she told him that she was in labour; he asked her why she had not applied at the union office for an order of admission, to which she replied that she had done so without success; she also told him that she was living in St. Clement Danes, and had been so for nine months previously. She was then admitted into the workhouse, and was delivered of a child (the pauper) about two hours after her admission. She was suffering from pregnancy only, and after remaining for a fortnight in the workhouse, she voluntarily returned to her former residence in Vere-street, taking her child with her, where she continued to reside for about twelve months, supporting herself and her child in the same way as before. She then went with her child and her sister into St. Giles's, the removing parish, where she continued to reside for about four months. She was then taken into an asylum called the Home of Hope, situate in St. Pancras, which was a private charity establishment, for the purpose of reforming unfortunate girls and procuring them situations. Not being allowed to take her child into the asylum, she

left her with her sister in St. Giles's, who promised to take care of her during her absence. This she did for a short time, when, becoming unable to maintain the child any longer, she took it to St. Giles's workhouse, where it was at once admitted. An officer of St. Giles's parish then saw the mother, and she consented to the removal of the child under the present order, and it is found by the sessions that the removal was for the child's benefit. The relieving officer to whom application was first made, as before stated, had authority to give an order of admission to the pauper; he made no entry of the application having been made, but when she was admitted into the workhouse, the porter of the union made an entry in a book kept by him, called the Rough Admission and Discharge Book, to the effect following:—

"Wednesday, 26th Nov. 1856.—M'Carthy, Ellen, age twenty; and the master added 'Casual, C. F.' to this entry. C. F. means common fund.

"The master's admission and discharge book, kept by him in pursuance of the orders of the Poor Law Board, contained the following entries in his handwriting (the entries were here set out, showing that Ellen M'Carthy was put upon the common fund). It was proved to be the practice of the master of the union workhouse to enter persons as "casual" who were admitted by him without an order, unless he knew them to be settled in one of the parishes in the union. He stated that he would have done so in that instance if he had known that she had been living nine months in one of the parishes of the union. These entries having been laid before the guardians, the relief of Ellen O'Connor and her child while in the workhouse was charged to the common fund of the union. It was contended by the resps. that the said pauper child could under the circumstances above mentioned lawfully be removed without its mother to the place of its settlement, and that such child was settled in the app. parish by reason of its birth in the union workhouse by virtue of the provisions of the statutes 54 Geo. 3, c. 170, s. 3; and 7 & 8 Vict. c. 101, s. 56, and the other statutes in that behalf, and that the relief of the said Ellen O'Connor and her child while in the Strand Union workhouse was wrongfully and illegally charged to the common fund. On the other hand it was contended by the apps. that the said pauper child being within the age of nurture, could not be removed without the mother; that the pauper child acquired no settlement in the app. parish by reason of its birth in the workhouse of the Strand Union. If the Court of Q. B. shall be of opinion that the said pauper child could be removed without her mother, and that she acquired a settlement in the parish of St. Clement Danes, by reason of her birth in the union workhouse, then the order of removal and the order of quarter sessions are to be confirmed; but if the court shall decide either of these questions in the negative, the said orders are to be quashed, and in either event no costs are to be paid by either party to the order."

*Poland* now appeared for the resps., and argued that, under the circumstances stated in the case, the order of removal was properly made upon St. Clement Danes, as the parish of the birth of the pauper (*Reg. v. Coombe*, 5 Ell. & Bl. 892); for that its mother at the time of her admission into the workhouse was not casual poor, she having resided in the appellant parish for nine months next before the application for relief. [COCKBURN, C. J.—It is clear that the relieving officer did not send her to the workhouse as casual poor. WIGHTMAN, J.—He only declined to give an order because he thought there was no necessity for it at the time.]

*Keane* appeared for the apps., and contended that the pauper had no birth-settlement in St. Clement Danes, not having been born there, but in the parish

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[Ex.]

of St. Pancras, where the workhouse was locally situated, and in which the mother was staying at the time as casual poor: (Art. 88 of the Consolidated Orders.)

COCKBURN, C. J.—I am with Mr. Poland on both points. There is really no distinction between this case and *Reg. v. Coombs*, and it is clear that the non-removal of the child applies only where the child is living with its mother. Then with regard to the second point, it is clear that the mother was chargeable to the parish of St. Clement Danes, and therefore this point is to be determined by the 7 & 8 Vict. c. 101, s. 56, which enacts, that the workhouse is to be deemed to be in the parish to which each poor person therein relieved is, or has been, chargeable; and I take it, that the moment a party is entitled to relief, it is chargeable. Now, in this case the woman applies for an order for the workhouse, being very far advanced in pregnancy. [His Lordship stated the facts.] She was entitled, in the state in which she then was, to admission into the workhouse. Under such circumstances, the officer would properly have discharged his duty by immediately giving an order of admission. He did not in fact do so, but he directed her to go to the workhouse, and she went there at a time when, it cannot be disputed, she was a very proper object. She went there, with the officer's authority, at a time when she was chargeable, and she was chargeable, therefore, to St. Clement Danes. As the child was born under such circumstances in the workhouse, it must be deemed as born in that parish.

WIGHTMAN, J. concurred.

BLACKBURN, J.—I think that as soon as the woman was entitled to relief she was chargeable. There are some Acts which say, that before a party shall be removed he shall be actually chargeable, which is not requisite here.

MELLOB, J. concurred.

*Order confirmed.*

Monday, Nov. 17, 1862.

REG. v. FISHER.

*R. C. C. Act 8 Vict. c. 20, s. 68—"Accommodation works"—Jurisdiction of justices.*

*Drains running by the side of a line of railway are not accommodation works, requisite to keep dry mines under the surface of the line within the 68th section of the R. C. C. Act.*

In this case a rule had been granted to set aside an order made by two justices of Staffordshire, under the Railway Clauses Consolidation Act 1845. The order in question was made on the London and North-Western Railway Company, and it commanded the company to make secure certain drains by the side of the railway, treating them as accommodation works within the Act. The owner of the land over which this portion of the line ran had carried on works of mining to an extent to weaken the support of the surface, but before doing so he had given the requisite statutory notice, and the company had thereupon refused to pay for more than so much of the mines and minerals as were not necessary to the support of their line, alleging that they were not liable to pay for more, as they had already paid for such minerals as were necessary to the support of their line when they had purchased the land for the purposes of their works.

On the other hand, the owner contended that he was entitled to the full amount of the value of his mines and minerals. The Court of Ex. decided in favour of the mine-owner's claim (*Bagnal v. The London and North-Western Railway Company*, 7 Hurl. & Nor. 433), which decision was afterwards confirmed in error. The company thereupon still declined to purchase the works, preferring to let the owner work his mines. In consequence of the working the ground on which the line ran sunk, and to raise the level the company laid down quantities of shale and ashes. In consequence

of the sinking certain drains by the side of the line in the cuttings were broken, and thereupon the water percolated through the ashes and soil down into the mines. The owner then complained that his mines were flooded, and applied to the justices for an order that the drains in question should be repaired and puddled; and the justices treating them as accommodation works under the Railway Clauses Act, had thereupon made the order in question.

J. Gray now showed cause.—He referred to 8 Vict. c. 20, ss. 68, 69 and 73; and 3 & 4 Will. 4, c. 34, ss. 180 and 196. The case came within those statutes. It is said that these drains are not accommodation works, because they were constructed for the use and purposes of the railway, without regard to the owners of the underlying mine; but if they have the effect of protecting the mines from flooding, the intention with which they were originally made is immaterial; and if these drains were properly kept in repair, they would carry off the water from the mines. The word "owner" in the Act includes owners of mines as well as landowners. [MELLOR, J.—I see, Mr. Gray, that for some purposes the Act treats mines differently from lands.]

Giffard in support.—These drains are not accommodation works within the statute, and there was no evidence of that fact before the justices, who have acted without jurisdiction. The words of the 68th section are applicable to surface drainage. The Act speaks of land adjoining the railway; but these drains are actually in the railway, not by its side.

COCKBURN, C. J.—The provision in the statute does not apply to a case like the present, and in such a case as this the mine-owner must be left to his remedy by action. I think the clause refers to something on the surface, or apparent to the eye, and that when that is not so the case is not within the 68th section. Here it was not certain that these mines ever would be worked when the drains were originally made, and if the owner chose to work them, and sought prospective protection, the railway might well do that which they thought most to their own interest. *Bagnal v. The London and North-Western Railway Company* shows that the owner has his action, that is his remedy. The Legislature never intended to leave such questions to the summary jurisdiction of justices of the peace, and it would be very mischievous if it were so. I think accommodation works means works required at the time of the original construction of the railway, and at that time these mines were not in work.

*Rule absolute.*

## COURT OF EXCHEQUER.

Reported by F. BAILEY, and H. LEIGH, Esqrs., Barristers-at-Law.

Thursday, Nov. 13, 1862.

FREDERICKS (app.) v. PAYNE (resp.)

*Theatres—Act for regulating (6 & 7 Vict. c. 68)—Construction of the word "place" in sect. 11—Booth wherein a stage play is acted is such a "place."*

*A booth, consisting of two caravans or waggons, having painted on it "Olympic Theatre" (drawn from place to place by horses) and when supported by poles resting on the ground formed a temporary booth with a stage thereon, in which certain stage plays were acted, and which booth was moved from place to place for theatrical performances:*

*Held, that the acting stage plays for hire in such booth, not being a patent theatre or duly licensed as a theatre, is acting in a "place" within 6 & 7 Vict. c. 68, s. 11, and for which the manager is liable to the penalty thereby imposed.*

This was an appeal from the decision of Mr. Elliott, one of the metropolitan police magistrates at the

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Lambeth Police Court, upon the facts stated for the offence of this court, in pursuance of the statute (20 & 21 Vict. c. 43), upon the following

## CASE.

The app. was summoned at the instance of the Commissioners of Police, under the 11th section of the 6 & 7 Vict. c. 68, "The Act for regulating Theatres," for that he, the app., did, on the 27th May 1862, at Camberwell, in the county of Surrey, unlawfully for hire, cause, permit and suffer to be acted and presented a certain stage play, on a place there situate, not being a patent theatre, or duly licensed as a theatre.

On the hearing it was proved that the app. was the manager of a booth, or temporary or portable theatre hereinafter described, and the manager of the company of strolling players, and that on the day mentioned in the information he did, for hire, cause, permit and suffer to be acted and presented a stage play in the said booth, and that the said booth was not a patent theatre or licensed as a theatre.

At the time of the alleged offence the said booth was on a private piece of ground which had been rented by one Abraham Fox, for the purpose of holding thereon a pleasure fair, not legal or licensed in any way.

The booth had painted on it the words "Olympic Theatre," and consisted of two caravans or waggons, which were drawn from place to place by horses, and when the two caravans or waggons were joined together and covered with canvas, supported by poles resting on the ground, they formed a temporary booth with a stage thereon, and capable of holding about 300 persons. The said caravans or waggons rested on wheels, and could be moved away, with the poles, canvas, &c. in an hour or two without any difficulty, and it was the custom of the proprietor of the caravans or waggons to move them about frequently from place to place for the purpose of converting them into a booth.

It was contended, on behalf of the app., that he had committed no offence, because the said booth was not a "place" within the meaning of the 6 & 7 Vict. c. 68, s. 11; that the 11th section must be read in conjunction with sect. 2 of the said Act, and that as it was not an offence under sect. 2 to keep such booth for the public performance of stage plays without a licence (*Davys v. Douglas*, 28 L. J. 193, M. C.), it was not an offence to permit a stage play to be acted therein, and that "place" in sect. 11 means such a "house or place of public resort" as requires a licence under sect. 2. I was of opinion that the said booth was a "place" within the meaning of sect. 11, and therefore convicted the app. of the offence charged in the information, and adjudged him to forfeit and pay the sum of 3*l.* with 2*s.* costs. The ground of my decision was, that the word "place" in sect. 11 is used generally without any such restriction as was contended for on the part of the app.; that the only exception was that contained in sect. 23 of the Act, namely, that of "a theatrical representation or any booth or show, which by the justices of the peace or other persons having authority in that behalf shall be allowed in any lawful fair," which this was not.

The question of law submitted is, whether or not the said booth before described is a "place" within the meaning of 6 & 7 Vict. c. 68, s. 11.

If the court shall answer this question in the affirmative, the said conviction to be affirmed; if in the negative, the conviction to be quashed.

G. P. ELLIOTT (Lambeth Police Court).

The Court having decided that, in conformity with the rule, the party who supported the decision below should begin,

Field, for the resp., who supported the decision of the magistrate, began.

Resp.'s points: The resp. will contend that the app.

was properly convicted under the 11th section of the 6 & 7 Vict. c. 68, and that the booth in question was a "place" within the meaning of that section.

This conviction is quite right. The question turns on the construction of the 11th section of 6 & 7 Vict. c. 68 ("An Act for regulating theatres"), which enacts, "that any person who, for hire, shall act or present, or cause, permit, or suffer to be acted or presented, any part in any stage play in any place not being a patent theatre, or duly licensed as a theatre, shall forfeit such sum as shall be awarded by the court in which or the justices by whom he shall be convicted, not exceeding 10*l.* for every day on which he shall so offend." The title of the Act shows the primary object of it, and the preamble is to the same effect. The app. relies on *Davys v. Douglas*, 4 H. & N. 180, but that case is clearly distinguishable, and was not decided upon sect. 11, but upon sect. 2 of that Act. The decision there was, that a booth used as a theatre was not "a house or other place of public resort for the public performance of stage plays" within the meaning of the 2nd section of the 6 & 7 Vict. c. 68, nor was it found there that there had been any acting for hire. By the 11th section, under which the present complaint was laid, "every person who for hire shall act or present, or cause, &c., to be acted or presented, any part in any stage play, in any place not being a patent theatre, or duly licensed as a theatre," is liable to the penalty. The conviction therefore was proper. [BRAMWELL, B.—You read that section as if it had said "it shall not be lawful to act, or present, &c., for hire in any place otherwise than in a patent theatre."] Just so; with the exception contained in the interpretation clause, sect. 23, of a theatrical representation in a booth allowed by the justices in a lawful fair. But here a stage play was acted in a place, being a booth, such booth not being licensed by the justices for a fair. [BRAMWELL, B.—All places must come under one of two classes, those which are and those which are not within the licence. If the app. acted in a licensed place, he is safe; if in an unlicensed place, he comes within the penalty. If he says it was in no place at all, he will have to make out a curious problem in physics.] There is another case, *Fredericks v. Howie* (6 L. T. Rep. N. S. 544) in this court, in which this same person (Fredericks) was concerned, but that merely decided that a travelling theatre was not "a house or other tenement" within sect. 46 of the Metropolitan Police Act, 2 & 3 Vict. c. 47, and it is therefore not in point here.

Poland, contra, for the app.

The app.'s points were: That the booth described in the case is not a "place" within the meaning of 6 & 7 Vict. c. 68, s. 11. That the word "place" in that section means the same as "house or other places of public resort for the public performance of stage plays" in sect. 2, and which require a licence. That the said booth is not within sect. 2, and does not require to be licensed, although kept for the public performance of stage plays. That the conviction is contrary to law, and ought to be quashed.

Unless the place in which the representation takes place be a place requiring a licence, no offence has been committed. The words "house or other place," in sect. 2, mean, and must be taken to mean, "house or other place in the nature of a house;" (see *Davys v. Douglas*, 4 H. & N. 180.) It is true that in sect. 11 the words "house or other place" are not specifically mentioned, but merely the word "place," which, it is contended, must mean the same there as it does in sect. 2, viz. "a place in the nature of a house," or a place kept for the performance of stage plays, and which requires a licence; for, if it be intended to bring any place whatsoever under sect. 11, this absurdity would follow, that a private individual

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hiring a person to act in his drawing-room for the amusement of his friends, would be liable to a penalty. [BRAMWELL, B.—Does not the Act mean, in sect. 11, that the penalty is to be incurred where the spectator pays for admission? The words “present, or cause to be presented,” would seem to show that that was so.] The object of the Act was this: there may be a difficulty in finding the responsible manager; to prevent performances in any such places, a penalty was imposed on any one playing there for hire. Such a booth as this has been held in *Davys v. Douglas* (*ubi sup.*) not to be “a house or other place” under sect. 2, and it is submitted that such a booth was not contemplated by sect. 11. The booth in *Davys v. Douglas* was not in a lawful fair, and so sect. 23 does not help the resp. [BRAMWELL, B.—In *Davys v. Douglas*, the court said, *keeping it for such a purpose was not a substantive offence; he might keep it without incurring the penalty.*] There the actor playing for hire in a place which may be lawfully “kept,” is to be subject to a penalty, while the keeper of the establishment (the greater offender) is to get off scot-free. Suppose a gentleman, having a large room, lends it for a charitable purpose, and a play is acted there, and people pay to come in, that so far is a public place; but can it be said to come under the penalty? Acting in an unlicensed place which requires no licence is no offence; but otherwise, if in a place which *does* require a licence. The word “place” means the same thing all through the Act; it means “the said place.” [BRAMWELL, B.—Your construction would necessitate the interpolation in sect. 11 of the words “house or other place in the nature of a house.” But are not the words of the Act as they stand more reasonable? By sect. 2 it is one offence to *keep* an unlicensed place, &c., and by sect. 11 it is another offence to *act* in an unlicensed place.] The word “place” in the 11th section must mean the same as “place” in sect. 2, viz. a place kept for the public performance of stage plays, and which requires a licence. *Davys v. Douglas* decided that the manager of a booth of this description might “keep” it without a licence, and this absurdity would follow, that an actor might be convicted for acting for hire in a place which might be lawfully kept for performance, thus punishing the lesser criminal and letting off the greater. The Act of Parliament did not contemplate the licensing of booths, because it requires twenty-one days’ notice to be given to the justices before they could grant a licence in each district into which the booth should be moved; and if a booth were intended every change of jurisdiction would necessitate a change of licence. Unless the construction contended for by the app. be correct, it would be an offence for Mr. C. Kean to act for hire before her Majesty at Windsor, or for an actor to perform in a private drawing-room, or for Mr. C. Dickens to act once only for a charity in any place to which persons were admitted by the purchase of tickets. It cannot mean any “place” whatever—it only contemplates such a place as is required by law to be licensed; that is to say, such as is within the meaning of sect. 2, which says it shall not be lawful for any person to have or keep any house or other place of public resort in Great Britain, for the public performance of stage plays, without authority by virtue of letters patent from her Majesty, &c., &c. Sect. 5 also refers to the justices of the division within which the *property* proposed to be licensed shall be situate; and sect. 23, the interpretation clause, also favours the construction contended for; it says that the word “stage play” in that Act shall be taken to include every tragedy, comedy, farce, opera, &c., provided that nothing therein contained shall be construed to apply to any theatrical representation in any booth or show, which by the justices of the peace or other persons having authority in that behalf

shall be allowed in any lawful fair, feast, or customary meeting of the like kind,” which shows, such a booth as this was not contemplated to be licensed as a theatre. *Field* in reply (stopped).

POLLOCK, C.B.—We are all of opinion that the decision of the magistrate in this case must be supported. Looking at the 11th section of the 6 & 7 Vict. c. 68, the facts of the case bring it within the express words of that section, which provides “that every person who for hire shall act, or present, or cause, permit, or suffer to be acted or presented, any part in any stage play, in any place not being a patent theatre or duly licensed as a theatre, shall forfeit such sum as shall be awarded by the justices before whom he shall be convicted.” It would be a waste of time to go into the matter with reference to the other sections that have been referred to. I think the conviction should be affirmed.

BRAMWELL, B.—I am also of the same opinion, and think Mr. Elliott’s decision was quite right. The words of the 11th section are express. [The learned Baron read the section.] The facts in the case show that the app. did act for hire, or caused, permitted, or suffered to be acted or presented, a part in a stage play in this booth which has been described, which was not a patent theatre, or duly licensed as a theatre. The question then is, has he done it in any place? If he has not done it in a place, where has he done it? It was contended by Mr. Poland, that to give a proper meaning to that part of the 11th section, you should read it as if the words “house or other place in the nature of a house” were inserted, and then, he said, it would be very intelligible, and consistent with the 2nd section and other parts of the Act; but words never should be introduced into Acts of Parliament unless to give a meaning to or explain terms used that are repugnant, inconsistent, or unintelligible. But here no such inconsistency does exist, nor is there any necessity to imagine words as inserted that are not there. The Act by sect. 2 says, it shall not be lawful for any person to have or keep any house of public resort for the public performance of stage plays without authority, &c. If the Act stopped there the clear object and intention of the Act would be frustrated. But it does not stop there; it proceeds to enact what is to be done in certain other cases, for which penalties are imposed: if this were not so, you might have strolling players going round the country, playing for instance in a barn, or some such place, which they would say they did not *keep*, and were not liable, therefore, to any penalty under the Act. It appears to me the facts stated in the case not only bring the app. within the words of sect. 11 of the Act, but if they did not it would defeat the object of the Legislature, and the intention of those who framed the Act of Parliament. By sect. 11 all places are “places” within the meaning of that section, except those duly licensed by the Act, or excepted by it; and this is confirmed by sect. 23, which shows that, but for that exception in sect. 23, all booths at all fairs, feasts, or customary meetings of the like kind would be similarly liable, and therefore those were excepted by the proviso in sect. 23. Mr. Poland said, if the argument for the resp. prevailed, any gentleman who engages an actor to perform in his own house for hire may be liable; but even if so, the consequence would be less alarming than in the instance I have mentioned. I do not think Mr. Poland’s construction of sect. 11 is correct. The section is clumsily drawn; it says, “every person who for hire shall act, or present, or cause, permit, or suffer to be acted or presented, any part in any stage play in any place,” &c.; and I am inclined to think that the acting in any place must be for hire by the spectator. It appears to me that the magistrate was correct in his decision in this case, and that our judgment should be in favour of the resp.

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CHANNELL, B.—I agree in thinking that this conviction ought to be affirmed. It has been contended on behalf of the app. that the facts of the case do not bring it within the operation of the 11th section of this Act of Parliament. I certainly think they do, and it seems to me that they are not brought within the proviso or exception of the 23rd section. This section may, in fact, be left out of consideration altogether for the purpose of the decision of this case, though it may be useful on other occasions in order to throw light on sect. 2 and other portions of the Act. I do not agree that the term "any place," in sect. 11, should be read as has been contended for by Mr. Poland; but I think that the proper construction has been already given to it by the court, and I agree in thinking that our judgment should be for the resp., and that this conviction should be affirmed.

*Conviction affirmed.*

Attorneys for the app., Messrs. Ody and Paddison, 3, New Boswell-court.

Attorneys for resp., Messrs. Barnes and Ellis, Spring-gardens.

*Monday, Nov. 17, 1862.*

BROWN AND OTHERS v. THE LOCAL BOARD OF HEALTH OF HOLYHEAD.

*Local Government Act, 21 & 22 Vict. c. 98, ss. 34 and 35—Local board of health—Power of to make bye-laws—Trespass against for pulling down a wall—Quære, whether a wall is a "building" within sect. 35.*

*The 33rd bye-law of the Holyhead local board of health, after stating that the board should, by their order, approve or disapprove of new works or buildings, &c., and imposing a pecuniary penalty on any owner or person constructing works in contravention of the bye-laws, proceeded as follows:—"And the local board may, if they think fit, cause such works to be removed, altered, pulled down, or otherwise dealt with as the case may require." Plts., the owners of a piece of land adjoining a public street in Holyhead, had pulled down an old boundary wall belonging to them, which fenced their said land from the street, and they proposed to rebuild it further back from the street on their said land, whereby the street would be increased in width. Defts. declined to approve the plans which the plts. had submitted to them, and gave plts. notice not to proceed with the works; but they did not prescribe the line in which the plts.' wall should be erected, and they refused to compensate plts. for the land which they required them to give up to the street. Plts. rebuilt their wall according to their proposed plan, and defts. pulled it down, asserting their right to do so under the above bye-law, and relying also on sect. 35 of the Local Government Act, 21 & 22 Vict. c. 98.*

*Held, that the local board had no power to pull down the plts.' wall, and could not use the bye-law for the purpose of justifying the trespass. The 33rd bye-law was ultra vires. Sect. 34 of 21 & 22 Vict. c. 98, gave the local board power to make bye-laws with respect to pulling down any work coming under any one of four heads specifically mentioned in the section; and the wall in question did not come within either of them.*

*Persons empowered to make bye-laws have no right to invest themselves with powers which the law will not sanction.*

*To bring themselves under the authority of sect. 35 of 21 & 22 Vict. c. 98, defts. should have prescribed the line in which the plts.' wall should be erected, and they should also have paid or tendered compensation for the ground which they required plts. to give up to the street.*

*Quære, per Pollock, C. B., whether a wall is a "building" within the meaning of sect. 35.*

This was an action in trespass by plts. to recover damages by reason of defts.' having, on 7th Sept. 1861, broken and entered a close of land of the plts., and broken down and destroyed the wall or boundary fence thereof, and pulled down and damaged the railing and gates thereon, and damaged and destroyed the steps and coping and wall thereof, &c. By consent of the parties, and by order of Bramwell, B., dated 7th June 1862, according to the C. L. P. A. 1852, a case was stated for the opinion of the court without any pleadings, the material facts of which were as follows:—

In 1859 plts. became the lessees of a piece of land in Holyhead, adjoining Market-street, which is 18 feet 9 inches wide. On the other side of the street, in the angle formed by the street and the turnpike-road leading to Shrewsbury, was a narrow strip of land, also belonging to the owners of the plts.' piece of land (part of which piece of land was formerly used as a yard, and on part of which a cowhouse and stable formerly stood), and lying at the gable end of some dwelling-houses which faced the said turnpike-road on one side and Market-street on the other. The lease to plts. was for ninety-nine years, and contained covenants on their part to erect a dwelling-house and other buildings thereon, and to keep the same in repair during the term, &c.

The land on lease to plts. was four or five feet higher than the street, and was, at the time of the lease, bounded by a retaining wall, which belonged to the lessors, and was included in plts.' lease. In consequence of the different levels of the street and the land, plts., who purposed erecting a chapel, school, and house upon the land, had to set their buildings back from the street in order to leave room for placing steps on their own land to form an approach from the street to the chapel and other buildings. The chapel and house were erected in 1859 and beginning of 1860, and before the town of Holyhead was placed under the Local Government Act, and consequently before defts. had any existence as a corporation; but the steps hereinafter mentioned were built by plts. after defts. had been incorporated as a local board, and after their bye-laws hereinafter mentioned were passed. Subsequently to the town being placed under the Local Government Act (21 & 22 Vict. c. 98), which took place on the 17th Jan. 1860, plts., who had pulled down their old wall, were about to rebuild it further back from the street, and place railings thereto, and also to place steps for approaches to the doors, which were four feet above the level of the street. This was all part of one and the same plan and design under which the chapel and house had been built, according to which plan the new boundary wall was to be, as near as the ground would allow, parallel with the line of the steps and of the wall and chapel facing the street.

On the 14th June 1860 plts. were served with a notice from defts. that the contemplated steps from the chapel to the street were not approved by the board, who required such alterations to be made as should not bring the lowest step so near the centre of the street.

On the 23rd May 1861 plts.' attorneys wrote to defts. a letter stating plts.' desire, if possible, to meet the views of the defts., with which view it had been already proposed to give up to the public a strip of land in front of the chapel and house, three feet six on the side adjoining the Royal Hotel, and two feet on the other side, and to raise the wall and fence in a line with the present fence in front of the hotel, and to make certain other alterations and improvements. That the board had no power to enforce this concession, and that plts. were not aware of the board's right of interference in reference to the erection of the fence, and that plts. would place the fence either in



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the line of the old retaining wall, or on the proposed line as might best suit them. No notice beyond an acknowledgment of its receipt was taken by defts. of that letter, but on 13th July 1861 plts. received notice that "the board having reason to believe that plts. were about placing railings in front of the buildings, and allowing the steps in front of the house to project further than could be allowed by the Highway and Local Government Acts, requested plts. to refer to the minutes of the board of 14th June 1860, and subsequent dates, to avoid unpleasant proceedings which the board would have to adopt if plts. insisted on an infringement of the Acts."

Negotiations to settle the position of the steps having failed, plts. in July 1861 erected their boundary wall and fence in a line with the railings in front of the adjoining property (the Royal Hotel), and built two flights of steps to the doors of the buildings within the boundary wall, all being built and put upon their own land, and leaving between two and three feet of their own land open for widening the street at the Royal Hotel end, and building within their own boundary at the other end. Subsequently to the erection of the buildings, but before the boundary fence was put up, defts. had assented to the erection of buildings (so as to continue the line of the street) on the extremity of the boundary of the strip of land opposite plts.' land, and abutting on Market-street; but they refused to compensate plts. for the land they required them to give up to the street, or to point out the Act of Parliament or other authority under which they acted; and they asserted their absolute right to acquire the strip in front of the plts.' buildings for the use of the street without compensation.

It was necessary, in building the chapel and house, in order to avoid excavating the whole area, to pull down the old wall of the property, and to clear away the soil so as to make a portion of it (sufficient to build steps upon) level with the street in front. The ground-floor of the chapel and house was necessarily raised several feet above the level of the street, so that steps to the entrance of each were necessary. By the erection of the wall inclosing the steps, the road opposite was increased in width. Defts. drew up a set of bye-laws, which were duly sanctioned and approved by her Majesty's Secretary of State, but plts. do not admit their validity, or applicability to the present case. On the 2nd May 1861, plts.' architect submitted to defts. plans and sections of the proposed alterations, which defts. refused to pass, and resolved that no wall and rails should be built. Plts., however, built their wall, and on the 14th Aug. 1861 defts. gave them notice requiring them, in pursuance of the Local Government Act 1858, "to remove the railings, including also all the projections beyond the distance from the wall of the premises, including steps not sanctioned by the board," and that, in default of compliance, plts. would be liable to a penalty, and defts. might remove the railings and projections at plts.' expense.

On 7th Sept. 1861 defts. caused the wall and fence to be thrown down.

The question for the opinion of the court, who were to draw inferences of fact as a jury, was, whether defts., under the circumstances, were justified in removing and throwing down plts.' wall and fence. If the court should be of opinion in the negative, judgment to be entered up for plt. for 20*l.* damages and costs; if in the affirmative, judgment of *non pros.*, with costs of defence, to be entered up for defts.

The following sections of the Local Government Act, 21 & 22 Vict. c. 98, were relied on by defts., and referred to in the argument:—

Sec. 34. Every local board may make bye-laws with respect to the following matters (that is to say):—

- (1.) With respect to the level, width and construction of new streets and the provisions for the sewerage thereof.
- (2.) With respect to the structure of walls of new buildings for security, stability and the prevention of fires.
- (3.) With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings.
- (4.) With respect to the drainage of buildings, to water-closets, rivers, ash-pits and cesspools in connection with buildings, and to the closing of buildings, or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation.

And they may further provide for the observance of the same by enacting therein such provisions as they think necessary, as to the giving of notices, deposit of plans, &c.; inspection by local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws.

Sec. 35. When any house or building has been taken down in order to be rebuilt or altered, the local board may prescribe the line in which any house or building to be hereafter built shall be erected, and the same shall be erected in accordance therewith; and the local board shall pay or tender compensation to the owner or other persons immediately interested in such house or building, for any loss or damage he may sustain in consequence of his house or building being set back; the amount of such compensation, in case of dispute, to be settled in the same manner as compensation for land to be taken under the provisions of the L. C. C. Act 1845 is directed to be settled, &c.

The following is the bye-law on which defts. relied, more particularly on the latter part, which appears in italics:—

33. The local board shall, by their order, approve or disapprove of proposed new works or buildings, within the times severally specified herein for the deposit of notices thereof; but, if the owner, or person intending to construct any new street, or erect any new building, fail to give the notices herein required, or proceed to the execution of any of the works before the expiration of such notices, without the approval of the local board, or if any owner or person shall construct, or cause to be constructed, any works, or do any act, or omit to do any act, or comply with any requirement of the local board, or shall make any alteration in any works after they have been completed, whether in new or existing buildings, contrary to the provisions herein contained, he shall be liable, for each offence, to a penalty not exceeding 5*l.*; and he shall pay a further sum, not exceeding 40*s.*, for each and every day which such works shall continue or remain contrary to the said provisions; and the local board may, if they shall think fit, cause such work to be removed, altered, pulled down, or otherwise dealt with, as the case may require, and the expenses incurred by them in so doing shall be repaid by the offender, and be recoverable from him in a summary manner, as provided by the Public Health Act 1848.

*Mellish, Q.C.* for plts.—The question is, whether under any section of any statute defts. are entitled to knock down plts.' wall. It is material that the chapel and house were built before the Local Government Act, 21 & 22 Vict. c. 98, was in operation at Holyhead. [POLLOCK, C.B.—What section of the Local Government Act applies to this?] That we have never been able to find out. [*Manisty, Q.C.*—Defts. rely on sect. 35 of the Act: "Where any house or building," &c. [reads the section]. Plts. put up a wall which was not approved by the board, who knocked it down. The question is, had they a right to remove

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it? POLLOCK, C.B.—Do you mean to say that when a man has built a wall, the board may say, "We don't approve of it, and may pull it down?" I much doubt, however, whether a wall is "a building" within the Act. The Act says "a house or building," and "building" there, I think, must mean a chapel or warehouse, or an erection of that kind. *Manisty*.—Defts. rely also on the 33rd bye-law, the latter part of it giving power to the board to remove any building put up without their approval.] To carry out sect. 35, the board, when they gave their notice of 31st July 1861, should have prescribed the line they wished the plts. to adopt. [POLLOCK, C.B.—Merely saying we do not approve of your plan, and sending it back disapproved of, in my opinion goes for nothing at all. CHANNELL, B.—They should have made an offer to purchase, at a reasonable price, the strip of land which they required plts. to give up, as is done in the case of railway companies.] On the contrary, they refused compensation, and asserted an absolute right to do what they pleased. [POLLOCK, C.B.—Is there any clause which gives power to the board to make bye-laws, so as to enable us to judge of the extent of the power?] Yes, sect. 34 [reads it]; but it is contended that that has nothing to do with this case, and the bye-laws cannot go beyond the Act. In their last notice in Aug. 1861 defts. required plts. to remove what they were putting up, but did not say what they wanted to have done instead. Neither of the sections (34 & 35) under which defts. solely justify, has the least reference to the case. No "house or building has been taken down" (sect. 35). [He was here stopped by the court, who called on]

*Manisty*, Q.C. for defts.—If the court will give effect to the bye-laws, which have been sanctioned by H. M. Secretary of State, then defts. will be entitled to judgment. By the 33rd bye-law, which was authorized by sect. 34 of the Act, the board were empowered to remove the buildings in question. [POLLOCK, C.B.—Most unquestionably they have no power to do what they have done. It is broad tyranny. Persons empowered to make bye-laws have no right to invest themselves with powers which the law will not sanction. The way in which boards are inclined to use their powers makes it very desirable that they should have as little power as possible. BRANWELL, B.—It is about the same as a policeman, who thinks he is not entitled to a staff unless he breaks somebody's head with it. POLLOCK, C.B.—The 33rd bye-law, on which defts. rely, seems to me to be *ultra vires*. Sect. 34 gives them power to make bye-laws with respect to pulling down any work coming under any one of the four heads specially mentioned in that section. The wall here does not come under either of those heads. You cannot use the bye-law to justify the trespass.] I am bound to say that I do not think sect. 34 extends to enable such a bye-law as this to be made. Then as to sect. 35.

POLLOCK, C. B.—Defts. have not complied with that section; they have not prescribed the line in which the plts' wall should be erected, nor have they paid or tendered compensation for the ground which they required plts. to give up to the street. Our judgment must be for the plts.

BRANWELL and CHANNELL, BB. concurred.

*Judgment for plts.*

Attorneys for plts., *Chester and Urquhart*, Staple-  
ins, agents for *Hostage and Tallock*, Chester.

Attorneys for defts., *Hare and Whitfield*, Mitre-  
court, Temple, agents for *Roberts, Barber and Hughes*,  
Singer.

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. MAUNDER, and  
C. J. B. HESTLETT, Esqrs., Barristers-at-Law.

Friday, Nov. 14, 1862.

TRIMMER v. WALSH AND ANOTHER.

*Waste land—Commutation of tithes—Inclosure—  
Liability of hop-grounds to the extraordinary charge  
under the 42nd section of 6 & 7 Will. 4, c. 71.*

A. was the owner of waste lands in a parish, the  
tithes of which were commuted in 1841, when the  
commissioner, by his award, found that these  
lands were not subject to tithes, and no ordinary  
rentcharge was apportioned by him in respect  
thereof; but they were included with other lands in  
the apportionment and schedule as follows:—"The  
Forest of Alice Holl, 2658a. 3r. 3p.;" and under  
the heading, "Rentcharge payable to the vicar,"  
there was left a blank. In 1853 there was passed an  
Inclosure Act, under which, in June 1857, the land  
in question was allotted to A. About the year 1855  
the plt. began to cultivate this land as hop-ground,  
and had since then continued so to cultivate it:

Held (per Cockburn, C.J., Blackburn and Mellor, J.J.),  
that the tithes on these lands had been commuted  
under the Tithes Commutation Act, and that the  
lands were subject to the extraordinary rentcharge  
imposed on hop-grounds by the 42nd section of the  
Tithes Commutation Act.

Per Wightman, J., that there being no rentcharge  
payable, there could be no additional charge, and  
that therefore these lands were not so chargeable.

This was an action of replevin, brought by the plt.  
for the alleged illegal seizure by the defts. of certain  
goods under distress for extraordinary rentcharge for  
hops in lieu of tithe under the circumstances hereinafter  
stated. The following case was stated for the opinion  
of the court, without pleadings:—

The plt. was the owner and occupier of certain lands  
in the parish of Binstead, in the county of South-  
ampton, hereinafter called the plt.'s land.

The plt.'s land at the date of the award hereinafter  
mentioned was common or waste land, but has since  
been inclosed as hereinafter mentioned, and ever since  
the year 1855 has been cultivated by the plt. as hop-  
grounds.

The deft. Walsh became, in the year 1854, and  
from thence hitherto hath continued to be and still is,  
the vicar of the said parish of Binstead, and as such  
claims to be entitled to an extraordinary rentcharge,  
payable in lieu of the tithes in respect of the said cul-  
tivation of the said plt.'s lands.

In pursuance of such claim the deft. Walsh, by the  
def. Williams, his bailiff, put in the said distress on the  
25th March 1861, upon certain hop-poles on the plt.'s  
land, for 37l. 4s. 6<sup>3</sup>/<sub>4</sub>d., being the amount payable on the  
1st Oct. 1860 for such extraordinary rentcharge, if  
the plt.'s land was liable in respect thereof, ten days'  
notice in writing of the intention to make such distress  
having been first duly given by the deft. Walsh to the  
plt. on the 8th Nov. 1860.

Such distress was duly replevied by the plt., and the  
question to be decided in this case is, whether the  
plt.'s land is liable to the extraordinary rentcharge for  
hops.

The tithes payable in respect of the said parish  
have been duly commuted under the Tithes Commu-  
tation Act; and by the award of an assistant tithe com-  
missioner, dated 11th Oct. 1841, duly confirmed on the  
22nd Oct. 1841, after reciting that due notice  
had been given to him to value the tithes of lands in  
the said parish, which were cultivated as hop-grounds,  
separately, except the hop-grounds lying in a certain  
district called the Neatham Tithery, and that the said  
commissioner found that the estimated quantity in  
statute measure of all the lands of said parish which were

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subject to the payment of tithes, amounted to 4886 a. and 16 p. cultivated as therein stated (to wit), 2260 a. 3 r. and 10 p., as arable land, 136 a. as hop-grounds, not within the Neatham Tithery, 1160 a. and 3 r. as meadow or pasture, 434 a. 2 r. 22 p. as woodland, 65 a. 2 r. 34 p. as sites of homesteads, and 828 a. and 30 p. of which the plt.'s land is parcel, were used as common or waste land; and that the said commissioner also found that all the lands of the said parish were subject to the payment of all manner of tithes in kind with the exception of 1607 a. and 24 p. therein particularly described, and being lands other than the said 828 a. and 30 p., of which the plt.'s land is parcel as aforesaid; and reciting that the said commissioner had estimated the clear annual value of the said tithes in the manner directed by the said Act of Parliament, and had also taken into account the rates and assessments paid in respect of such tithes during the seven years of average prescribed by the said Act, and that the vicar of the said parish for the time being was entitled to all the small tithes arising from all the lands of the said parish, subject to tithes except from the before-mentioned lands called the Neatham Tithery.

The said commissioner did thereby award, amongst other things, that the annual sum of 209*l.*, by way of ordinary rentcharge, subject to the provisions of the said Act, and to commence from the time therein mentioned, should be paid to the vicar of the said parish for the time being, instead of all the small tithes, other than tithe of hops, arising from all the lands of the said parish subject to tithes, except the said lands called the Neatham Tithery and the glebe; and that the further sum of 1*s.* 6*d.* per acre, and a proportionable sum for any quantity less than an acre, should be paid to the vicar of the said parish for the time being, in lieu of the small tithes, other than tithes of hops, of the appropriate glebe land of the said parish, or of such parts of the said glebe lands as might at any time not be in the occupation of the dean and chapter therein mentioned, or their successors for the time being; and the said commissioner thereby assigned that part of the said parish not within the Neatham Tithery to be a district within which the

thereinunder-mentioned extraordinary charge upon hop-grounds should prevail, and did thereby further award that the lands therein, which were then or might be thereafter cultivated with hops, should be charged with and pay the additional sum of 1*l.* per imperial acre by way of extraordinary rentcharge, and a proportionate sum for any quantity of land less than an acre, so long as they should be so cultivated.

The plt.'s land is not within the Neatham Tithery. An apportionment of the sums by the said award awarded to be paid by way of ordinary rentcharge in lieu of tithes amongst the several lands of the said parish was duly made by two valuers duly appointed.

The apportionment commences as follows:—"Now, we, having been duly appointed valuers to apportion the total sum awarded to be paid by way of rentcharge in lieu of tithes amongst the several lands of the said parish of Binstead, do hereby apportion the rentcharge as follows:—Gross rentcharge payable to the tithe-owners in lieu of tithes for the parish of Binstead, in the county of Southampton, including 11*s.* 1*d.* for vicarial tithes of glebe at 1*s.* 6*d.* per acre; 126*l.* for rectorial tithe of glebe, at 3*s.* per acre; and 136*l.* for extraordinary charge on hops, at 1*l.* per acre—1243*l.* 9*s.* 4*d.*, viz.:

"To the vicar .....	£345 11 1
"Appropriators or their lessees, Richard Warner and C. Hoodley	761 2 3
"Impropiators, viz. —	
"Trustees of Algebra Lectures...	70 0 0
"James Langrish.....	57 0 0
"Daniel Inwood .....	9 16 0

1243 9 4

Value in Imperial Bushels and decimal parts of an Imperial Bushel of Wheat, Barley and Oats:—

	Price per Bushel.	Bushels and Decimal Parts.
	<i>s.</i> <i>d.</i>	
Wheat .....	7 0½	1180·73987
Barley .....	3 11½	2094·25965
Oats .....	2 9	3014·46464

Land Owners.	Occupiers.	Numbers referring to the Plan.	Names and Description of Lands and Premises.	State of Occu- pation.	Quantity in Statute Measure.	Amount of Rentcharge apportioned upon the several Lands, and to whom payable.			
					A. R. P.	Molety payable to the Trustees of the Algebra Lectures.		Molety payable to James Langrish.	
						£	<i>s.</i> <i>d.</i>	£	<i>s.</i> <i>d.</i>
Budd, William.	Andrews Henry, Executors of.	520	Neatham Tithery. Upper Twelve Acres.	Arable.	12 1 5	2	0 4	1	15 8
		521	Lower, ditto.	Ditto.	11 3 3	2	0 0	1	17 3
		522	Row.	Wood.	0 1 4				
		523	Malin's Coppice.	Ditto.	4 1 2				
		524	Row.	Ditto.	0 0 15				

And then proceeds with the names of the landowners and occupiers, with the names and description of their lands and premises, their state of occupation and quantities in statute measure, and the amount of rentcharge apportioned upon the several lands, and to whom payable. And the said apportionment in like manner gives the names and description of the lands and premises in respect of which the rentcharge of 209*l.* was payable to the vicar, and also their state of occupation and quantities in statute measure, and the amount of rentcharge apportioned upon such lands, and to whom payable.

Every piece of land, homestead, building, &c., of whatever denomination, liable to any portion of the said ordinary rentcharge of 209*l.*, is distinguished separately. No apportionment is made of

the extraordinary rentcharge payable in respect of the said 136 acres of hop-grounds, nor are they again mentioned in the said apportionment except at the end of a summary of the tithes payable to the vicar .....

Extraordinary charge on 136 acres of hops,  
at 1*l.* per acre .....

£345 11 1

The said award does not apportion any ordinary rent charge whatever upon the 828 acres and 30 perche of common or waste lands, or any part thereof, but they are included with other lands in the said apportionment and schedule under the following description:—

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Quantity.  
A. B. P.  
The Forest of Alice Holt...2658 3 3

No ordinary rentcharge, therefore, was payable, or has been paid in respect of the plt.'s land, or of the common or waste lands of which it formed part.

The said extraordinary rentcharge of 136*l.* has from time to time varied and been paid according to the quantity of acres cultivated as hop-grounds. A certified copy of the said award and apportionment formed part of the special case.

An inclosure of part of the said lands hereinbefore mentioned as the Forest of Alice Holt, including plt.'s land, took place in or about the year 1854, and the award made by the valuer appointed in the matter of that inclosure was confirmed on the 29th Jan. 1857.

There is no mention of tithes in the inclosure award.

Allotments were made by the said award to persons who brought in and proved their claims in the usual way, and the plt.'s land was allotted to no person who had no lands in Binstead parish, but who had land in an adjoining parish, and who established a claim to allotments in respect of such last-mentioned lands, by having exercised commonable rights upon and over the Binstead wastes.

Some portion of the said waste lands was sold by the said commissioners to pay the expenses of the inclosure.

In or about the year 1855 the plt. laid out and commenced cultivating his said inclosure as hop-ground, and has ever since continued so to cultivate it.

The deft. Walsh has for some time past claimed to be entitled to the said extraordinary rentcharge in respect of such cultivation. He had not tried to enforce payment thereof until the month of Nov. 1860, when he made a formal claim upon the plt. and others who had planted the said inclosed waste lands with hops, for payment of the extraordinary charge of 1*l.* per acre, and on the 8th Nov. 1860 a further formal application was made by the said last-mentioned deft. for the said rentcharge, and as it was not paid the distress which is the subject of this action was taken by the deft. upon the plt.'s land for a sum of 37*l.* 4*s.* 6*d.*, being at the rate of 1*l.* per acre for land cultivated as hop-ground for a period of two years up the 1st Oct. then last past.

The question for the opinion of the court was, whether under the circumstances stated the plt.'s land is liable to pay the said extraordinary tithe rentcharge for hops.

If the court was of opinion in the affirmative, judgment was to be entered for the defts. for 37*l.* 4*s.* 6*d.*

If the court was of opinion in the negative, judgment was to be entered for the plt. for —

The plt. contended: 1. That the plt.'s land is not subject to the extraordinary rentcharge for hops, inasmuch as it never was subject to the payment of any tithe or ordinary rentcharge, and was not included or dealt with in the tithe commutation. 2. That the fact of the plt.'s land having been allotted under the inclosure to the owner of land in another parish, and which was not chargeable in Binstead parish, would operate as another reason for exempting the land in question from the charge now sought to be imposed upon it.

The defts. contended: 1. That the plt.'s land is liable to pay to the deft. Walsh the extraordinary rentcharge of 1*l.* per acre when cultivated as hop-grounds. 2. That it is the duty of the court to award judgment in favour of the defts. and to award the said sum of 37*l.* 4*s.* 6*d.* to be paid by the plt. to the defts. and that the said sum of 37*l.* 4*s.* 6*d.* is the sum of hops of exportation and otherwise.

by the two valuers on the plt.'s land does not destroy its liability under the said award to pay the said extraordinary rentcharge when cultivated with hops.

*Coleridge*, Q. C. (*Garth* with him), for the plts., referred to 6 & 7 Will. 4, c. 71, ss. 40, 42, 43 and 67: (*Walker v. Bentley*, 9 Hare, 629.)

*Mellish*, Q. C. (*J. J. Aston* and *F. M. White* with him) for the defts.

*Coleridge*, Q. C. was heard in reply.

*COCKBURN*, C. J.—I am of opinion that our judgment should be for the defts. The case turns on the question whether the tithes on the lands of the plt. on which the additional rentcharge has been claimed have been commuted under the Tithe Commutation Act. I think they were. This was land which was waste land, and which has since been used for the cultivation of hops. Then there is the special provision for assessing hop-land and garden-ground. The Legislature made a provision applicable to the growers of hops that a portion of the commutation should be reduced. Then comes the provision of the 42nd section, dividing such charge into an ordinary and an extraordinary charge. The Legislature seems to have considered the titheable value of land very difficult to be arrived at when applied to the case of hops, as compared with land applied to the growth of other produce, and feeling that it would be a hardship to assume that land in hop cultivation would always be so cultivated, made a provision, that if there was a change of cultivation the charge should be reduced, and in carrying out their scheme for equitably charging all land, the plan of ordinary and extraordinary charges was introduced. Then comes the question whether this land comes within the second provision. The whole turns upon the word "commutation." I think the argument used by Mr. *Coleridge* is to confound the word "apportionment" with the word "commutation." In what sense are those words used in the Act? It seems to me in contradiction the one to the other. The charge was extinguished by the commutation of tithes; can it be said that the tithes have not been commuted when they have been extinguished? The true meaning of this is, that the land cultivated for the growth of hops shall now be liable to this extra charge.

*WIGHTMAN*, J.—I differ in opinion with my Lord Chief Justice. The first question is whether this land is hop-ground. Provision is made for the charge when land is in ordinary culture, and then follows a provision to make a second charge when the land is converted into hop-grounds. It really seems to me to require that in order to bring the case within the section, there must be an amount of rentcharge payable; otherwise I do not know the meaning of an additional rentcharge. As the land in question paid nothing, there could be no additional charge pertaining to it. It seems to me that the Act does not in a case like the present make the land liable to the extra charge.

*BLACKBURN*, J.—I agree with my Lord Chief Justice that our judgment ought to be for the defts. I agree that the whole turns on the 42nd section of the Act. The lands in question are in a district, and have been newly cultivated as hop-grounds. Are they liable to the extra charge? There had been no titheable produce on this land for time immemorial, and *de facto* no tithes had been paid, but the lands would not the less have been chargeable had there been any titheable produce. It occurs to me that it is impossible to say they were discharged; then can it be said these tithes were commuted? The vicar gets a rentcharge in lieu of tithe; it is said that if there is no tithe it cannot be commuted, but that is not so. I agree with my brother *Wightman* and Mr. *Coleridge* in my mind the provisions of the Act objects and intentions of the Legislature. If otherwise meant, it would have been otherwise.

wise expressed. It is then said that the expression "additional rent" shows that it must have been contemplated that some already existed. I do not think there is anything in that. He pays a sum, a sum in addition to nothing.

MELLOR, J.—I agree with the Lord Chief Justice and my brother Blackburn, that defts. should have judgment. The construction contended for by the plt would lead to singular results. It is conceded by Mr. Coleridge that the titheability of this waste land was extinguished by virtue of the commutation, and yet it is said they were not commuted. I think if they were extinguished they were commuted. It is admitted also that if the smallest sum were apportioned they would be liable, but that cannot be so; it would lead to manifest injustice. I agree with the difference between apportionment and commutation explained by the Lord Chief Justice, and think this has reference entirely to the former and not to the latter.

*Judgment for defts.*

Wednesday, Nov. 19, 1862.

MUNN (app.) v. SOUTHALL (resp.)

*Refreshment-houses and Wine Licences Act—Who entitled to a wine licence—23 Vict. c. 27, s. 7.*

*A beerhouse-keeper having obtained a refreshment-house licence, applied for a wine licence under the 23 Vict. c. 27, s. 7, when an objection was taken that he was not entitled to such licence as not coming within that section. It appeared that he provided travellers and others who came to his house with bread and cheese and other victuals as they required them:*

*Held, that he was within the 7th section, and entitled to a wine licence.*

This was a case stated under the 20 & 21 Vict. c. 43, against the decision of justices permitting the resp. to take out a wine licence under the 23 Vict. c. 27, s. 7. That section enacts that "every person who shall be licensed to keep a refreshment-house, and shall pursue therein the trade or business of a confectioner, or shall keep open such house as an eating-house for the purpose of selling, to be consumed therein, animal food, or other victuals wherewith wine or other fermented liquors are usually drunk, shall be entitled (subject to the terms and conditions of this Act, and not being expressly disqualified thereby) to take out a licence to sell foreign wine by retail in such refreshment-house, to be consumed on the premises where the same shall have been sold, without producing or having any other licence or authority than as aforesaid, &c." The resp. had obtained a beer licence, and upon application to the Excise be obtained a refreshment-house licence under the before-mentioned Act. He then applied for a wine licence, and under sect. 13 the justices were called upon to refuse him permission to obtain one, on the ground that he did not carry on the business of a confectioner, or keep open his house as an eating-house for the purpose of selling therein animal food or other victuals wherewith wine or other fermented liquors are usually drunk. It appeared that he provided travellers and others who came to his house with bread and cheese and other victuals upon their calling for the same. The justices held that he was entitled to the licence.

MELLISH, Q. C. now appeared for the app., and contended that the house kept by the resp. was not within the Act, and that the selling of bread and cheese was not the object of his business, but was merely ancillary to the sale of beer.

The COURT thought that the justices were perfectly right, and that the resp. was entitled to his licence.

*Appeal dismissed.*

CORNWELL (app.) v. SANDERS (resp.)

*Game—Trespass in pursuit of—Denial of ownership of land—Bona fides—1 & 2 Will. 4, c. 32, s. 30. Where upon an information under sect. 30 of the 1 & 2 Will. 4, c. 32 (Game Act) for trespassing in pursuit of game the deft. denies the ownership of the land, it is for the justices to judge of the bona fides of such defence, and if they are of opinion that it is not bona fide they are not ousted of their jurisdiction to determine the information. In such a case this court will not interfere with their decision if there is any evidence by which it can be supported:*

*Held (Wightman, J. dissentiente), that in this case the justices were right upon the evidence in convicting.*

This was a case stated upon a conviction of the app. by justices upon an information under sect. 30 of the 1 & 2 Will. 4, c. 30, for trespassing in pursuit of game. The case stated as follows:—

"At a petty sessions held at Bottisham, in and for the petty sessional division of Bottisham, in the county of Cambridge, the 15th Jan. 1862, Holmes Cornwell, of the parish of Bottisham aforesaid, farmer, appeared before us the Rev. John Hailstone, clerk, and Henry James Haviland, Esq., two of her Majesty's justices of the peace in and for the said division and county, to answer an information laid against him by Edward Heath Saunders, of Chesterton, in the said county, attorney's clerk, whereby the said Holmes Cornwell was charged, for that he did on the 11th Dec. 1861, at the parish of Stow-cum-Quy, in the said county, unlawfully commit a certain trespass by being in the daytime of the same day upon a certain piece of land in the occupation of Clement Francis, lord of the manor of Stow-cum-Quy, there in search of game without the licence or consent of the said lord of the said manor, or of any person having the right of killing game upon such land, or of any other person having any right to authorise the said Holmes Cornwell to enter or be upon the said land for the purpose aforesaid, contrary to the statute in such case made and provided, whereby, and by force of the said statute, the said Holmes Cornwell had forfeited a sum of money not exceeding 2*l.*, to be applied as the statutes in that behalf made or provided shall direct."

Naylor appeared as counsel for the said Edward Heath Saunders; and M'Donald as attorney for the said Holmes Cornwell.

The case then set out a large body of evidence in support of the information, in which was the inclosure award, with a plan annexed, and in the said plan the piece of land mentioned in the information is marked 56, and in the schedule to the said award it is described as being the property of "Quy Ditton and Horningsea parishes." The case then set out that Mr. M'Donald "addressed us on behalf of the deft., and submitted to us the three following points:—First, that, assuming Mr. Francis to be the lord of the manor of Stow-cum-Quy, and the land numbered 56 on the said plan to be within the bounds of the said manor, there was no evidence to show that such land was a waste or common within the Act of Parliament of the 1 & 2 Will. 4, c. 32, ss. 10 and 30, such land being (as he contended) vested in the inhabitant householders of the several parishes of Stow-cum-Quy, Fen Ditton and Horningsea, and not in Mr. Francis, as the lord of the said manor, and that under the case of *The Grand Union Canal Company v. Ashby*, 6 Hurl. & Nor. 394, the right of soil not being in the lord of the manor, the Act of Parliament did not give him the game, or make him legal occupier. Secondly, that the deft. had a prescriptive right of sporting over the said land numbered 56. Thirdly, that the justices had no jurisdiction, there being a *bona fide* question of title at issue. In support of the

Q. B.]

REG. V. THE INHABITANTS OF HASLEMERE.

[Q. B.]

first point, Mr. M'Donald relied upon the award, the schedule to which described the land in question as an old inclosure, and the proprietors as being the three parishes named, and also upon the fact of the drainage-tax being paid by the inhabitant householders, and adduced the following evidence upon the case. (The case then set out the evidence for the deft., and proceeded as follows):—"We having considered all the evidence adduced by both parties, determined that Mr. Francis was the lord of the said manor of Stow-cum-Quy; that the said land numbered 56 on the said plan, and in the evidence called Quy Fen or Common Fen, was a waste or common within such manor; that such land was not vested in the inhabitant householders of the several parishes of Stow-cum-Quy, Fen Ditton and Horningsea, but that the said lord of the said manor was the legal occupier thereof, within the meaning of the 1 & 2 Will. 4, c. 32, s. 30: that the deft. had not proved that he had a prescriptive or any other right of sporting over the said land numbered 56, and that the deft. had not any ground for believing that he had any such right; and we found that the deft. was guilty of the offence charged in the said information, and adjudged him to forfeit for the same the amount of 5s., to be applied according to law, and to pay to the said informant the sum of 1l. 8s. for his costs in that behalf, making together 1l. 13s., which sum he paid accordingly. The deft. being dissatisfied with our said determination, as being erroneous in point of law only, applied to the undersigned Henry James Haviland, Esq., within three days thereafter, to state and sign a case setting forth the facts and grounds of such determination for the opinion thereon of her Majesty's Court of Queen's Bench, and at the same time the deft., with a surety, duly entered into a recognisance before the said Henry James Haviland, in the sum of 50l., conditioned to prosecute without delay his appeal, and to submit to the judgment of the said Court of Queen's Bench, and to pay such costs as may be awarded by the same court. And in accordance with such application we have hereinbefore set forth our said determination and the facts and grounds thereof.

"Given under our hands, at Bottisham, in the said county, this 9th day of April 1862.

"JOHN HAILSTONE.

"H. J. HAVILAND."

*O'Malley*, Q.C. (*Phen* with him) appeared for the app., and contended that the evidence set out did not show that this was land belonging to Mr. Francis as lord of the manor, but, on the contrary, that it was land belonging to certain parishes, and that the defence set up was sufficient, within the meaning of the proviso in sect 30, to oust the justices of jurisdiction: (*Ashby v. The Grand Junction Railway Company*, 6 Hur. & Nor. 394; *Reg. v. Cridland*, 7 Cl. & El. 833; *Calcraft v. Gibbs*, 4 T. R. 20.)

*Welsby*, in support of the conviction, argued that it was for the justices to determine the *bona fides* of the defence set up, and they having decided that the deft. had not any ground for believing that he had any right to sport over the said land, and was therefore guilty of the trespass, this court would not interfere with their decision: (*Morden v. Porter*, 7 Scott, C. B. 547; *Leart v. Vins*, 30 L. J. 207, M. C.)

*Cockburn*, C. J.—The justices must see whether a claim which is set up such as this, is frivolous or not. Here there is a claim of right set up, which means the right of the party as against the person alleged to be owner. Where the question as to who has the right to the land is raised, without any reason for its support, the justices are not restrained from adjudicating upon the information. They must see some reasonable ground for the objection before they are required to give effect to it. Therefore, on that ground, I think their jurisdiction was not taken away. Then,

as to the question of whether or not they ought to have convicted the app.? There certainly was some evidence, and we cannot take upon ourselves to say that their decision was wrong. If ever the question should come before a jury, there may be a great deal to be said upon it.

*WIGHTMAN*, J.—I agree that the *bona fides* of the objection was for the decision of the justices, but I have great doubt upon the other question, for the proviso to the 30th section says that the deft. "shall be at liberty to prove by way of defence any matter which would have been a defence to an action at law for such trespass." Now it seems to me that the evidence was overwhelmingly strong, that this was not a common belonging to the lord of the manor. The great preponderance of the evidence shows that it was land belonging to the parishes and not to the manor, and I think that the justices ought to have decided that this was not land belonging to Mr. Francis, and therefore that they should have decided in favour of the deft.

*BLACKBURN* and *MELLOR*, JJ., thought that the justices were right upon both points.

*Appeal dismissed.*

Nov. 8 and 26, 1862.

REG. V. THE INHABITANTS OF HASLEMERE.

*Highways*—*Indictment preferred by an order of justices*—*Plea of "guilty"*—*Order for costs*—5 & 6 Will. 4, c. 50, s. 95.

*Upon an indictment for the non-repair of a highway, preferred under sect. 95 of the 5 & 6 Will. 4, c. 50 (Highway Act) by an order of justices against the inhabitants of a parish, the judge of assize has power under that section to make an order for the costs of the prosecution, although the defts. plead "guilty" and there is no actual trial of the indictment.*

This was a rule calling upon the prosecutor to show cause why the order of *Blackburn*, J., directing the costs of the prosecution to be paid out of the highway rate of the parish, should not be quashed.

This was an indictment preferred against the inhabitants of the parish of Haslemere (Sussex) pursuant to an order of justices made under the 93th section of the 5 & 6 Will. 4, c. 50 (the General Highway Act) for the non-repair of a highway, the obligation to repair having been denied by the surveyor on behalf of the parish. The indictment was accordingly preferred and found at the spring assizes 1861. Three days before the summer assizes at which the indictment was to be tried the attorney for the parish wrote to the attorney for the prosecution stating that the inhabitants would plead guilty to the indictment. The defts. accordingly, when called upon to plead, pleaded guilty. The prosecutor then applied to the learned judge for his order for his costs under the 95th section, which enacts that "the costs of such prosecution shall be directed by the judge of assize before whom the said indictment is tried, or by the justices at such quarter sessions, to be paid out of the rate made and levied in pursuance of this Act in the parish in which such highway shall be situate."

This application was opposed upon the ground that the indictment had not been tried. The learned judge however made the order, and subsequently such order having been removed by *certiorari* into this court, a rule *nisi* was obtained to quash the same, against which

*Manisty*, Q.C. and *T. W. Saunders* showed cause, and contended that the obvious meaning of the words in sect. 95, "the judge of assize before whom the said indictment is tried," was merely to point out the person who is to make the order, namely, the judge before whom the indictment is disposed of; that, as the prosecutor was bound to prefer the indictment, and this too, in consequence of the denial of liability of the

parish, there could be no reason why, when he had incurred all his costs in the matter, he should be deprived of his costs merely because the parish chooses, at the last moment, to admit their liability.

They were stopped by the court, who called upon

*M. Chambers, Q.C.* (with whom was *Beresford*) in support of the rule, who argued that, as the defts. pleaded "guilty," there was no trial, and consequently no jurisdiction in the judge to make the order. [*COCKBURN, C. J.*—Surely a criminal who pleads guilty, and is sentenced, is properly said to have taken his trial?] I contend not. There are three decisions upon that very point, in which six learned judges have given their opinions, that where the defts. plead "guilty," there is no jurisdiction to make an order for costs, viz.: *Reg. v. Vowchurch*, 2 Car. & Kir. 393; *Reg. v. Stainhall*, 1 Post. & Fin. 363; and *Reg. v. Langley*, 2 Post. & Fin. 170. *Cur. adv. vult.*

*Nov. 27.*—*MELLON, J.*—This was a case argued before my Lord Chief Justice, my brother Wightman and myself. The question in the case is, whether the provisions of the 95th section of the Highway Act, the 5 & 6 Will. 4, c. 50, that on an indictment directed by the justices, conformably to the requirements of the statute, the power is given to a "judge of assize before whom such indictment is tried" to direct the costs of the prosecution to be paid out of the rate, exists in a case in which, the indictment having been found, the deft. pleaded "guilty," so that, in the ordinary sense of the term, no trial or conviction takes place. If the question had arisen before us for the first time, we should have had no hesitation in deciding in the affirmative, but several instances having been cited in which learned judges, sitting singly at the assizes, have ruled to the contrary, in deference to the authority of those decisions, we thought it right to take time to consider our judgment. We have reason to think that considerable difference of opinion and diversity of practice have existed, and may still exist, upon this question; but it seems to us some of the decisions referred to may be accounted for from the disinclination of the judges sitting singly to depart from a precedent set by a presiding judge, and as the case now comes for the first time before the court in banc, we think that, entertaining a strong opinion upon the point, we ought to give effect to that opinion, notwithstanding individual judges in some instances may have acted upon a different view of the statute. It seems to us that the words "judge of assize before whom the indictment is tried," used in the 95th section of the Highway Act, will apply to a case where an indictment preferred under that section comes under the cognisance and jurisdiction of a judge of assize, by an indictment being preferred in his court, and deft. being called on to plead to it before him, although in consequence of the deft. pleading "guilty" the indictment may not be tried before him in the ordinary sense of the term. The Legislature having thought proper to provide that where the defts. on a summons respecting the repairs of highways deny their liability to the repairs, the costs of the prosecution which the justices are required to direct shall be paid out of the rates, it appears to us impossible to suppose that a difference can have been intended to be made between cases where the defts. plead "not guilty," and a trial thereupon takes place, and one in which, on a bill being found, the defts. desisting from further resistance plead "guilty" to the indictment. In either case the prosecutor is under the necessity of going to the assizes and incurring the expense incidental to preferring a bill of indictment, and although it is true in the present case notice was given beforehand to the prosecutor by the defts. of their intention to plead "guilty," yet the prosecutor was equally obliged

to go to the assizes to prefer and support his indictment before the grand jury; and it is obvious that the argument founded upon the language of the section, if valid, would apply equally to a case in which the prosecutor had preferred his bill in entire ignorance that the case would not be tried, and had consequently taken all his witnesses to the assizes. There can be no reason why the prosecutor should not have such costs as he had in fact incurred in such a case, as well as where the case has actually been tried; and we cannot suppose the Legislature intended to make a distinction for which no reasonable ground exists. We are satisfied that all that was meant by the language of a section which, it must be admitted, is not very happily expressed, was to point out that the judge of assize in whose court the indictment is disposed of is the authority by whom the costs of the prosecution should be directed to be paid. We are confirmed in this view by the fact that the section in question, in giving the same powers to the court of quarter sessions, omits the words "before whom the indictment is tried." It cannot be supposed that the Legislature intended to give authority to the quarter sessions to award costs where the defts. plead guilty, and not to place a judge of assize in the same position. It may be said, indeed, if we place this construction contended for by the defts. on that part of the section which relates to a judge of assize, we may consider the words "before whom the indictment was tried" as understated after the words "justices in quarter sessions." But this would be to take a startling liberty with the language of the Act of Parliament. We think the anomaly which would otherwise occur will be best avoided by giving to the words upon which the difficulty arises the larger and more reasonable construction to which we have already adverted, and for these reasons we are of opinion that the rule should be discharged.

*Rule discharged.*

## COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYN, Esqrs., Barristers-at-Law.

*Tuesday, Nov. 4, 1862.*

THE THREE TOWNS BRITISH MUTUAL DEPOSIT AND LOAN SOCIETY (LIMITED) v. DOYLE AND OTHERS.

*Bond—Condition—Construction—Loan society—Default in—Repayment of instalments—Penalty.*

*The condition in a bond required by a loan society from borrowers of money, to secure repayment, ran as follows:—"And when and so often as he (the borrower) should make default in the payment of any of the said monthly instalments, to pay to the society 1s. in the pound for each and every pound of the said instalment so left unpaid." The society claimed not only 1s. in the pound for the month in which default was made, but for all subsequent months during which it remained unpaid; and also 1s. in the pound for every fractional part of a pound:*

*Held, that they were entitled only to 1s. in the pound for the month in which default was made, and they could take nothing on the fraction of a pound.*

This was an action on a bond given to secure a sum of money advanced as a loan by the plts. to the defts.

The cause was heard on 27th Sept. last (under statute 19 & 20 Vict. c. 108, s. 26) before the judge of the County Court held at East Stonehouse, when a verdict was given for 21*l.*

*Thrupp* now moved, pursuant to leave reserved, to increase the damages to 22*l.* 7*s.* 6*d.* The money advanced was to be repaid by monthly instalments, and the question arose upon the construction of a sentence in the condition of the bond, which ran as follows:—"And when and so often as he should make

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default in the payment of any of the said monthly instalments, to pay to the society 1s. in the pound for each and every pound of the said instalment so left unpaid." The p<sup>ts</sup>. claimed, first, 1s. in the pound, not only for the month in which default was made, but also for all subsequent months during which the instalment remained unpaid; and, secondly, at the rate of 1s. in the pound for every fractional part of a pound of which the instalment might consist over and above or under a pound. The judge in the County Court decided that the p<sup>ts</sup>. were only entitled to 1s. in the pound for the month in which default was made, and not to anything on the fraction of a pound. It was now urged, on behalf of the p<sup>ts</sup>., that this clause in the condition of the bond imposed a liability on the obligors in the nature of interest, and that, therefore, the usual practice with regard to interest must prevail here also.

It was stated, that, although the amount at stake in this instance might appear trifling, the society were desirous of having the question of the extent and validity of their securities of this nature authoritatively and finally settled. If the other side should not move, the p<sup>ts</sup>. would allow the matter to drop.

ERLE, C. J.—We are all of opinion that the society is entitled to 1s. for every entire pound for the month in which default was made; but, if the instalment due be over and above or under a pound, that is, for a fractional part of a pound, they are entitled to take nothing.

*Rule refused.*

#### REGISTRATION APPEAL.

*Tuesday, Nov. 18, 1862.*

SAMUEL (app.) v. HITCHMOUGH (resp.)

*Notice of objection—Description of objector—6 Vict. c. 18, s. 17—Borough vote.*

*A notice of objection to a borough vote described the objector as being W. S., of the parish of St. Paul, Bedford, on the list of voters for the parish of St. Paul; following verbatim form No. 11, schedule B. of the Registration Act, 6 Vict. c. 18. There were two lists made out for the said parish, namely "the 10l. or new qualification list" and the "reserved right list":*

*Held, that the description of the objector was sufficient. Observations on Edsoworth v. Farrer, 1 Lutw. 517.*

*This was an appeal from the decision of the revising barrister appointed to revise the list of voters for the borough of Bedford.*

#### CASE.

At a court held on the 30th Sept. 1862, at Bedford, in the county of Bedford, before me William Cooper, Esq. the barrister appointed to revise the list of voters in the election of members for the borough of Bedford, William Samuel objected to the name of Adam Hitchmough being retained on the 10l. or new qualification list of voters for the borough of Bedford. Notice of objection was proved to have been duly served, which notice was in the form following:—

"No. 11.—Form of notice of objection to be given the parties objected to.

"To Mr. Adam Hitchmough—

"I hereby give you notice that I object to your name being retained on the list of persons entitled to vote in the election of members for the borough of Bedford.—Dated this 23rd day of August in the year 1862.

"(Signed) WILLIAM SAMUEL, of Water-lane, St. Paul, Bedford. On the list of voters for the parish of Saint Paul."

It appeared that there were two lists made out for the parish of St. Paul, namely, the Ten Pound or New Qualification List and the Reserved Right List. I decided that the vote of the said Adam Hitchmough was bad; but it was objected that half of the said Adam

Hitchmough that the notice of objection was bad inasmuch as the said William Samuel stated himself to be in the notice on the list of voters for the parish of St. Paul, whereas he should have stated himself to be on the 10l. or new qualification list of voters for the said parish.

I held the notice to be bad, and retained the name on the list. I was then applied to on the part of the said William Samuel to amend the notice by adding thereto the list of voters on which his name appeared. I held that under the 101st section, to which I was referred, I had no power to do so.

If the court shall be of opinion that the notice of objection was sufficient, in stating that William Samuel (the objector) was on the list of voters for the parish of St. Paul, in the borough of Bedford, or if the court consider I had power to amend the said notice by adding thereto that the said William Samuel was on the 10l. or new qualification list of voters for the said parish of St. Paul, the name of the said Adam Hitchmough is to be expunged from the list.

Or if the court shall be of opinion that the notice of objection is bad, for the reason assigned, and that I had not power to amend the same, the name of the said Adam Hitchmough is to be retained on the list.

At the same court the several names of Robert Graves, Horatio James Higgins, Thomas Morton and Joseph Deiner, all on the 10l. or new qualification list of voters for the parish of St. Paul, and the several names of Joseph Ewery and William Saunderson on the 10l. or new qualification list of voters for the parish of St. Mary, in the borough of Bedford, were objected to by the said William Samuel, and the said votes were decided by me to be bad, but the like objection to the form of notice of objection was made.

The validity of these objections to the votes of these several persons depends and has been decided by me on the same point of law, and I consider that the same ought to be consolidated.

(Signed)

WM. COOPER.

Grant, for the app., contended that the notice was sufficient. He referred to the Registration Act, 6 Vict. c. 18, s. 17; form No. 11, schedule B of same Act; *Wansley v. Perkins*, 1 Lutw. 235; *Edsoworth v. Farrer*, 1 Lutw. 517; 6 Vict. c. 18, ss. 13, 17, 27, 48 and 49.

A. K. Stephenson, for resp., referred to forms Nos. 10 and 11, and *Quigley's case*, 7 M. & G. 127. He contended that *Edsoworth v. Farrer* was an authority assisting the resp. rather than the other side: (*Tudball v. The Town Clerk of Bristol*, 5 M. & G. 8.)

ERLE, C. J.—I am of opinion that the revising barrister was wrong. The question is, whether an objector had given a sufficient notice according to the requirements of the 6 Vict. c. 18, and it appears that he had given notice in the words of the statute and in the form required by the statute: "I hereby give you notice that I object," and he had signed his name with his place of abode, and said he was "on the list of voters for the parish of St. Paul, Bedford." He is required by the form No. 11, schedule B of 6 Vict. to put down his name and place of abode, and add to it "on the list of voters for the parish of St. Paul, Bedford," and if this was put he has complied literally with the terms of the statute; and if there has been such a thing as departing from the terms of the statute, and so causing to the party objected to great inconvenience, which has been the line of argument here, there being two lists of voters for the parish of St. Paul, namely, the list of voters who claim for the 10l. qualification and the list of voters who claim for the reserved rights, I should think that the degree of inconvenience would not induce me to hold this notice of objection as bad in form, or that the requisites of the statute are not complied with. Then the utmost that can be said is, when



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[C. B.]

two parallel alphabetical lists are put up at the proper place for putting up the lists of voters, and the party who has run down the letter S in one of those lists and then has turned to the letter S in the other list—a matter, probably, of three or four seconds—and having examined and found that “Samuel” is either on the one or the other, he is qualified to be an objector, and so the party has a right to stand. We have been greatly troubled or pressed in the argument with the case of *Edsworth v. Farrer*. There the objector was an objector qualified to be upon the list of freemen, being a freeman for the borough of Lancaster; and he put his name at the bottom of the list and stated he was on the list of voters for the borough of Lancaster; and the court, listening to the argument of inconvenience, said, inasmuch as the statute requires he should say, “on the list of voters for the parish,” and he had put “on the list for the borough,” and there were three parishes in the borough, perhaps he might be set to search each of the parish lists, and then afterwards to search the borough list. It is not for us to say anything further with respect to that case, than that this one is different. Two lists for the parish are put up at the same place, and there *Edsworth* the objector said, “on the list of voters for the borough” of Lancaster; the statute requires him to put “on the list of voters for the parish,” or some place in the town; and there the decision went to the extent that where a person claimed as freeman, after that decision it never would be safe to object, unless you said on the list of voters as freeman for the borough, wherever it may be, while that decision stands. The case of *Tudball v. The Town Clerk of Bristol* was, where a party claimed to object because he was on the list of freemen for the city of Bristol, and on his qualification this appeared—he was on the list of voters for Clifton. The court held the compliance with the statute was not enough, and that he ought to specify the list of freemen, so that anybody examining the two heads on the lists of freemen would not be safe without stating that he is there in respect of a parish qualification, as there are two lists. I think he has done all that the statute requires, if he says “on the list of voters for the parish of St. Paul,” though it happens there are two lists for the parish, made out by the overseers.

WILLIAMS, J.—I am of the same opinion. I admit that, notwithstanding what was pointed out in the course of the argument, the 17th section does not directly legislate that the person who makes the objection shall specify upon which of the lists of voters his name is to be found. The case of *Edsworth v. Farrer* must be taken as going to this extent, that if the objector cannot comply with the form given, No. 11 in the schedule, by reason of the description clause or precedent not being true, he cannot mislead the party by telling a falsehood, nor will it be enough to substitute a general description, which would, in truth, leave it doubtful whether he claims as being on the list of freemen, or whether he claims as being on the parochial list. I admit that the case of *Edsworth v. Farrer* establishes that, and it seems to me it establishes no more; and that this does not fall within the principles upon which that case was decided, because in this case the name is to be found on the parochial list, and that manner of objecting does not put the party objected to—supposing he wishes to satisfy himself—to the trouble of looking, first, to the parochial list on the church-door, and then the list of the freemen, or whichever it may be, as there he is to look to find it or not to find it. But if he goes to the parochial list, which seems to be constituted of two subdivisions, on the church-door, he will find the name of the objector upon the parochial list. Therefore it is true that he is upon the parochial list for the parish of St. Paul's, Bedford, and his notice is not bad because the parochial list in this case happens

to consist of the subdivision of the regular 104 voters, and also of the pot-wallopers, or whoever are entitled under reserved rights.

BYLES, J.—I am of the same opinion. It has been already pointed out by my brother Williams that the section which incorporates the form simply makes the form obligatory, and says it shall be given according to the form. Now, the appropriate form in this case is No. 11, and the only one which is applicable to this case. “A. B., of — on the list of voters for the parish of St. Paul's.” Therefore, it is within the very words of the statute, which was not the case in *Edsworth v. Farrer* to begin with. It is objected there are several lists for the parish of St. Paul. There is an ambiguity in that. There are the several distinct papers, in their distinct alphabetical parts, and they relate to different qualifications. In those three respects they are distinct lists, but in the more important respects the two constitute but one list; they are the list of voters for the parish of St. Paul, Bedford, and will eventually be fused into one, and be one in form, as they are already in substance. That observation seems to show that it would have been more correct to say on one of the lists for the county of Bedford, or the list for the parish of St. Paul, or the lists, in the plural, for the parish. That the leading section of the statute would apply to such a case as this, I do not think it necessary to say, it being in the very words of the statute. With respect to *Edsworth v. Farrer*, at first sight it seems a strong decision; but when we carefully consider it I doubt whether it is not quite right in every respect. In the first place the form of notice there does not follow the words of the statute, but presumes to say on the list for the borough. Suppose it to be in the city of Norwich, containing twenty parishes, it is not in the form of the statute, as the person who has to find out who the objector is must look at the church-doors of twenty parishes in various parts of the city, and furthermore study the overseers' lists before he can discover the list he wants. It seems therefore it is not only within the words, but within the spirit of the Act. If it had been “on the list of freemen for the borough of Lancaster,” then though not within the words it would have been within the intent of the Act, and that decision is correct. It is sufficient to say this case is consistent with the decision in *Edsworth v. Farrer*, without any doubt being put upon it by the court.

KEATING, J.—I am of the same opinion for the reasons pointed out, and I think *Edsworth v. Farrer* is quite distinguishable from this case. The court there seems to have thought that injustice might have been done unless sufficient notice was given on the church-door, and that some inconvenience might be sustained, but in this case I think there was sufficient information.

*Judgment for the app.*

Saturday, Nov. 22, 1862.

STOTT AND ANOTHER v. CLEGG AND OTHERS.  
Turnpike tolls—Agreement compounding for during three years—Void or voidable under 3 of 4 Geo. 4. c. 126, ss. 55 and 141—Injunction.

This was a rule obtained by *Mellish*, on a former day, calling on the p'ts. to show cause why an order made by Bramwell, B., but signed by Mellor, J., and an injunction issued thereunder, should not be set aside, the injunction being to restrain defts. from demanding and taking toll from p'ts. and their servants in passing and repassing certain turnpike-gates on their way to and from some collieries, there existing an agreement between the parties compounding for such tolls by the payment of a gross sum annually during three years.

*Mumist* (*Holl* with him) now showed cause.

*Mellish* supported the rule.

[BAIL.]

THE ISLE OF WIGHT FERRY COMPANY v. RYDE COMMISSIONERS.

[BAIL.]

The question raised was, whether the farmer of tolls can make an agreement extending over three years, or indeed for more than a year, such as contended, being prohibited by stat. 3 Geo. 4, c. 126, ss. 55 and 141. The defts. believing the agreement to be illegal, shut the gates against pltas. and demanded toll, whereupon pltas. brought this action to recover back the moneys so paid, and for an injunction restraining them from demanding and taking toll in future. For the defts. it was contended that, as there is a penalty imposed by the statute recoverable by a common informer, the court should not grant a prohibition against the defts. compelling them to do that which is in fact illegal. The defts. were willing to try the question fairly, giving security for breaches of the contract and for costs.

ERLE, C. J.—We think the parties should try this question without prejudice. Here there is a substantial question between the parties, whether the agreement is valid? The defts. offer fairly to give security for damages in respect of breaches of the contract and for costs; the rule should therefore be absolute to dissolve the injunction on security given to the satisfaction of the master to pay in respect of breaches of the contract and for costs; the costs of the judge's order, of the injunction, and of this application to be costs in the cause.

*Rule accordingly.*

### BAIL COURT.

Reported by T. W. SAUNDERS, Esq., Barrister-at-Law.

*Monday, Nov. 24, 1862.*

(Before CROMPTON, J.)

THE ISLE OF WIGHT FERRY COMPANY (apps.) v.  
THE RYDE COMMISSIONERS (resps.)

*Appeal—Conviction affirmed, subject to a case  
—Costs.*

*The apps., having been convicted by justices for a nuisance, under the Nuisances Removal Act, 18 & 19 Vict. c. 121, they appealed to the quarter sessions, when the conviction was affirmed, subject to a case; the order of quarter sessions directing that "the costs of the appeal should abide the result of the decision of the Court of Queen's Bench." The case and order of sessions having been duly removed in the Queen's Bench, that court quashed the order of quarter sessions generally:*

*Held, that the order being quashed generally, the court of quarter sessions had no power afterwards to deal with the costs.*

In last term Russell obtained a rule calling upon the resps. to show cause why a *writ of mandamus* should not issue to the justices of Hampshire, commanding them to enter continuances in the appeal between the above-named parties, and ascertain the amount of costs due from the resps. to the apps. From the facts it appeared that in the year 1858 the apps. were convicted of a nuisance under the 18 & 19 Vict. c. 121 (the Nuisances Removal Act for England), by two justices, and that they thereupon appealed against such conviction to the quarter sessions, which appeal was finally heard at the Jan. sessions 1859, upon which occasion the order of justices was confirmed, subject to a case for the opinion of this court, the order of the quarter sessions directing in these words, "and this court further orders that the costs of this appeal shall abide the result of the decision of the Court of Q. B." Upon the argument in the court above, the Q. B. quashed the order of quarter sessions generally, and gave no directions as to costs. Application was afterwards made by the apps. to the clerk of the peace for Hants to tax their costs against the resps., and not succeeding in this, they

afterwards applied to the Easter sessions in 1862, for an order to tax, which the sessions refused upon the supposition that they had, under the circumstances, no jurisdiction.

*Poulton* appeared for the justices, and on their behalf submitted to the discretion of the court, their only object being to act correctly.

*Coleridge*, Q.C. (*Macnamara* with him) appeared for the resps. against the rule, and contended that the sessions had no jurisdiction, after their order had been quashed by this court, to deal any further with the matter, and that they were right, therefore, in refusing to direct the taxation of the apps.' costs: (*Reg. v. Long*, 1 Q. B. 748; *Selwood v. Mount*, 1 Q. B. 726; *Freeman v. Reed*, 30 L. J. 123, M. C.) [CROMPTON, J.—My difficulty certainly is this. I cannot see how the matter is now before the justices. I quite understand that when continuances have been entered in a matter there, it continues before them; but here the order is removed from them and is quashed by this court.] They can only give costs upon the final determination of the appeal (sect. 40 of the 18 & 19 Vict. c. 121); but when a case is removed, the appeal is not decided: (*Kendall v. Wilkinson*, 4 El. & Bl. 680; *Reg. v. Pembrokeshire*, 2 B. & Ad. 391; *Reg. v. Staffordshire*, 26 L. J. 181, M. C.; *Reg. v. Great Chart*, Burr. Sess. Cas. 194.)

*Karslake*, Q.C. and *Hooper* appeared in support of the rule, and contended that that part of the order which directed the payment of costs must still be deemed to be in force, especially as both parties assented to its being inserted. [CROMPTON, J.—Suppose I were to make this rule absolute, how could the sessions deal with the order, since it would no longer be in force?] The order is not gone entirely; it has provided for the event of the ultimate success of either party. [CROMPTON, J.—The judgment of this court, quashing the order generally, takes it entirely out of their hands. It may have been otherwise if the order had been only quashed in part, leaving that part untouched which relates to costs.] The order is still a judgment of the sessions: (*Reg. v. St. Peters*, 9 Q. B. 892; *Reg. v. The Justices of Suffolk*, 1 Dowl. P. C. 163; *Reg. v. Neville*, 2 B. & Ad. 299.)

CROMPTON, J.—There is no doubt that both parties to the appeal undertook to abide by the decision of the court above, and I should have been very glad to have been enabled to carry out what was really intended; but I certainly ought not to issue this *writ of mandamus* if nothing after all can come of it. If, indeed, I had any real doubt, I should let it go in order that a return might be made. But the order of the court below is entirely gone; the record is in this court, and it remains here; it is our judgment and not that of the quarter sessions. If anything more were to be done by the justices at sessions, as to levy a distress, the order would be sent down for that purpose. Now, here I do not think that anything remains to be done upon the order; it is quashed entirely, and I do not see that there is anything that the justices can do upon that judgment. The judgment given by this court quashed the whole proceedings. There is nothing therefore which can be sent back, and the case in *Burrows* is a strong authority upon the point. I think therefore that, as the order was quashed as to the whole, there is nothing that the sessions can do with reference to it. Had there been anything upon which we could call upon the sessions to act with regard to this order, they might perhaps give the costs as ancillary, but I see nothing of the kind.

*Rule discharged without costs.*

**CROWN CASES RESERVED.**

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 15, 1862.

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ., CHANNELL, B. and MELLOR, J.)

REG. v. EDMUND PEEL.

*Quarter sessions—Jurisdiction—Larceny upon the high seas.*

*A court of quarter sessions has, by the 24 & 25 Vict. c. 96, s. 115, jurisdiction over the offence of larceny when committed upon the high seas, if the offender is apprehended within the jurisdiction of the court of quarter sessions, as, e.g., where the offender and prosecutor were both fellow-passengers in a vessel, and the larceny was committed on the high seas, between Madras and Point de Galle, and the offender was apprehended at Southampton and tried at the borough quarter sessions.*

Case reserved for the opinion of this court by the Recorder of Southampton (Hants).

The prisoner was tried before me at the quarter sessions for the borough of Southampton and county of the town of Southampton, holden by me on the 20th Oct. last, on two indictments, in which he was charged with having stolen, on the 14th Sept. last, certain watches and moneys, the property of John James Tyler, and certain handkerchiefs, the property of Robert Lee.

The prisoner and the prosecutors were fellow-passengers on board a British steam-vessel, the *Candia*, which on the 14th Sept. was on the high seas between Madras and Point de Galle.

The articles alleged to have been stolen were taken by the prisoner from the cabins of the prosecutors while the *Candia* was on the high seas.

The prisoner was apprehended within the borough and county of the town of Southampton.

The prisoner pleaded guilty to both indictments, and was thereupon sentenced to three calendar months' imprisonment with hard labour on each of the charges, under which sentences he is now in custody; but as I doubted whether a court of quarter sessions could have any jurisdiction over larcenies committed on the high seas, I reserved a case for the opinion of the Court of Appeal.

It was contended, on behalf of the prosecution, that the 115th section of the 24 & 25 Vict. c. 96, gave jurisdiction to any court of quarter sessions in cases of larceny, &c., committed on the high seas, if the offender had been apprehended within the jurisdiction of that court of quarter sessions.

I request the opinion of the Court of Criminal Appeal, whether or not I had jurisdiction under the above section to try the prisoner for the offences alleged against him in the indictments, he having been apprehended within the jurisdiction of the borough and county of the town of Southampton, of which I am recorder.

MONTAGUE BERE.

The 24 & 25 Vict. c. 96 (Larceny, &c. Act), sect. 115, enacts that "All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature, and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried and determined in any county or place in which the offender shall be apprehended or be in custody, and in any indictment for any such offences, or for being an accessory to any such offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence itself shall be averred to have been committed on the high seas: provided that nothing herein contained shall alter or affect any of

the laws relating to the Government of her Majesty's land or naval forces."

No counsel appeared on either side.

POLLOCK, C. B.—In this case, in which the prisoner committed the larcenies charged while in a vessel upon the high seas, we are of opinion that the conviction was right. The statute gives the court of quarter sessions jurisdiction over the offences mentioned in the Act, which would otherwise not have been triable at quarter sessions, if the prisoner is apprehended within the jurisdiction. Here it appears that the prisoner was apprehended within the jurisdiction of the Court of quarter sessions at which he was tried.

The rest of the Court concurring,

*Conviction affirmed.*

REG. v. LOUISA ISAACS.

*Malicious injury to person—Supplying noxious thing to procure a miscarriage—Intent.*

*Under the 24 & 25 Vict. c. 100, s. 59, the thing supplied with intent to procure the miscarriage of a woman with child must be noxious in its nature. Therefore, where the thing supplied and taken was of a harmless character, but owing to the imagination of the woman being powerfully acted upon a miscarriage ensued, it was held that a conviction could not be sustained.*

The prisoner, Louisa Isaacs, was tried before me at the last quarter sessions for the county of Dorset, held on the 14th Oct. 1862, under the 24 & 25 Vict. c. 100, s. 59, for that "she unlawfully did supply to one William Broadway a large quantity of a certain noxious thing to the jurors unknown, knowing that the same was intended to be unlawfully used or employed with intent to procure the miscarriage of one Emma Wardner."

Emma Wardner, the prosecutrix, was at the time of the commission of the alleged offence a single woman in the service of Mr. William Smith of Blandford, and whilst in such service became about the month of May last in the family-way by the said William Broadway of the same place.

On or about August 1st last, the prosecutrix then being about three months gone with child, William Broadway, in consequence of what he had heard from some one, of the prisoner, went to the prisoner's house in which she lived with her husband, and asked her (her husband was not present, and did not in any way interfere) if she knew anything that would bring on the regular courses of Emma Wardner, the prosecutrix. The prisoner replied that she would try as she had done for others, and then asked Broadway how long the courses had stopped. He said for three months. The prisoner answered, "I will make that all right for her, if she will take the stuff I give you." The prisoner then gave Broadway three bottles and one half-pint bottle all full of something of a dark colour, and at the same time stated that the prosecutrix was to take a wine-glass full of the stuff in the large bottles three times a-day, and that she was to take the small bottle in two doses about two days after she had begun the first bottle. This, the prisoner added, will make it all right for her in about eight or nine days; she said, "it will not hurt her." Whereupon Broadway took away the bottles and carried them to the prosecutrix and informed her of the directions how to take the stuff contained in them as given to him by the prisoner.

The prosecutrix accordingly the same evening they were given to her opened one of the large bottles, and drank a wine-glass full of the stuff that came from it. She then went to bed; she felt dizzy in the head, and the next morning she felt stupid in the head. Be-

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coming in consequence apprehensive that the stuff in the bottles would hurt her, she took no more. The bottles, with their contents, were subsequently handed over to a Mr. Daniell, a surgeon of Blandford, to be analysed by him. On being so analysed, with the assistance of Dr. Ordington, a considerable quantity of starch of some plant, and some woody fibre, was deposited. The liquid evaporated, and the gas escaped, and the result of the analysis was, that, in Mr. Daniell's judgment, the liquid in the bottles was some vegetable decoction of a harmless character, and such as would not procure a miscarriage. He added, that if taken with the belief that it would produce a miscarriage, it might, by acting on the imagination, produce that effect, although otherwise of a perfectly harmless character.

The above facts being proved, I left the case to the jury, and in doing so said it seemed to be doubtful, upon the authorities, whether it was necessary that the thing supplied should be of a noxious character or not, and that the reported cases were conflicting on this subject. I then read to them the judgment of Vaughan, B., in *Coe's case*, 6 C. & P. 403. where, referring to words similar to those employed in the statute above cited, he said: "It is with the intention the jury have to do, and if the prisoner administered a bit of bread merely with the intent to procure abortion, it is sufficient to constitute the offence contemplated by the Act of Parliament;" and added, that a more recent case threw so much doubt on this point that I would not direct them positively on this head.

I did not give any direction as to whether the stuff above mentioned was, in my opinion, a noxious thing.

I read to the jury the words of the indictment, and told them to decide first on the intent (suggesting that the prisoner might have had no such intention, but used her reputation, such as it was, as a means of making money), and if necessary, then to consider whether the evidence satisfied them that the stuff was "noxious."

The jury found the prisoner guilty of the intent and that the thing was noxious, whereupon I forebore to pass judgment, and the prisoner was discharged upon recognisance of bail to appear and receive judgment when called upon to do so.

And I now beg to ask the opinion of the court whether, upon the facts above set out, taken in conjunction with my remarks in summing up, the prisoner was rightly convicted, and to make such order as the justice of the case may require, stating whether both questions ought to have been left to the jury.

PORTMAN, Chairman.

No counsel appeared for the prisoner.

*Fooks for the prosecution.*—This case was reserved for the opinion of this court as to whether *Rees v. Coe*, 6 C. & P. 403, is law since the recent Act.

WIGHTMAN, J.—To support this indictment it must appear in evidence that it was a noxious thing.

WILLIAMS, J.—The jury have found it was a noxious thing, but the real question is, whether there was any evidence of its being so.

WIGHTMAN, J.—Suppose it had been water merely, would that have sustained this charge?

*Fooks.*—The medical man, in reply to that question, said that even water might produce abortion, if the imagination of the female were so acted upon as in this case.

POLLOCK, C. B.—Many years ago a person was tried for witchcraft. The judge told the jury that the crime consisted in the intention, and the jury found a verdict of guilty. The Crown, however, granted a pardon.

WILLIAMS, J.—The language of the statute (a) is, "knowing that the same is intended to be used with intent to procure miscarriage."

POLLOCK, C. B.—We are all of opinion that the thing intended by the statute must be noxious in its nature. *Conviction quashed.*

REG. v. EDMUND DEER.

*Felonious receiving—Property of husband found in possession of man living with prosecutor's wife—Evidence.*

*The prisoner lodged at the prosecutor's house about a year, and then left, but at what time or in what manner did not appear. On the next day the prosecutor's wife left with a small bundle. The articles mentioned in the indictment were then missed by the prosecutor, and were of too great bulk to have been contained in the bundle taken by the wife. Two days afterwards the prisoner was apprehended in company with the prosecutor's wife on board a vessel bound for Quebec, the wife passing by the prisoner's name; and the missing articles were found part in the prisoner's cabin, and some on his person:*

*Held, that the prisoner could properly be convicted upon this evidence of feloniously receiving the articles, well knowing the same to have been feloniously stolen by a certain evil-disposed person.*

Edmund Deer was indicted and tried before me at the last Midsummer quarter sessions for the county of Glamorgan.

The following is a copy of the indictment:—

"Glamorganshire, to wit.—The jurors for our Lady the Queen upon their oath present that Edmund Deer, late of Mountain Ash, in the parish of Aberdare, in the county of Glamorgan, railway policeman, at the parish aforesaid, in the county aforesaid, on the 8th day of April 1862, feloniously did steal, take and carry away one purse and 10*l.* of money, one pair of sheets, one pair of blankets, one feather pillow, two pieces of flannel, one alpaca gown, two cashmere shawls, one cotton shirt, one stuff gown, one pair of scissors, two towels, one bolster-case, two knives, two forks, two spoons, three and a half yards of black cloth, one piece of pilot cloth, one diaper table-cloth, one clothes-brush, one razor, one pilot-cloth coat, one square, one hammer, two gimlets, one pair of compasses, one spokeshave, one gouge, one file, one chisel and one bradawl, of the goods and chattels of William Bartlett, against the peace of our Lady the Queen, her crown and dignity.

"And the jurors aforesaid upon their oath aforesaid do further present, that the said Edmund Deer, on the day and year aforesaid, feloniously did receive one purse and 10*l.* of money, one pair of sheets, one pair of blankets, one feather pillow, two pieces of flannel, one alpaca gown, two cashmere shawls, one cotton shirt, one stuff gown, one pair of scissors, two towels, one bolster-case, two knives, two forks, two spoons, three and a half yards of black cloth, one piece of pilot cloth, one diaper table-cloth, one clothes-brush, one razor, one pilot-cloth coat, one square, one hammer, two gimlets, one pair of compasses, one spokeshave, one gouge, one file, one chisel and one bradawl, of the goods and chattels of the said William Bartlett, then lately before feloniously stolen, taken and carried away by a certain evil-disposed person (he, the said Edmund Deer, then and there

(a) 24 & 25 Vict. c. 100. s. 59: "Whoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour."

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well knowing the said goods and chattels to have been feloniously stolen), against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity."

It appeared in evidence that the prisoner had lived in the house of the prosecutor William Bartlett as a lodger for about a year, up to the 8th April 1862, on which day he left. There was no evidence as to the time or manner of his leaving. On the following day Sarah Bartlett, the prosecutor's wife, left her home. Her daughter, a girl of years of age, accompanied her, and proved that she left with only a small bundle under her arm. Bartlett, on returning from his work on the same evening, missed the different articles enumerated in the indictment.

On Thursday, 10th April, a policeman was sent to Liverpool, and on Friday, 11th April, he apprehended the prisoner in company with the prosecutor's wife, who was passing under the name of Mrs. Deer, on board the *Culloden*, in the river Mersey, bound to Quebec, for which place tickets in the name of Mr. and Mrs. Deer were found on prisoner.

The whole of the property missed was found in the prisoner's cabin and on his person, and was of a bulk and weight which could not have been comprised in the wife's bundle, and consisted of one purse, 10*l.* in money, one pair of sheets, one pair of blankets, one feather pillow, two pieces of flannel, one alpaca gown, two cashmere shawls, one cotton shirt, one stuff gown, one pair of scissors, two towels, one bolster-case, two knives, two forks, two spoons, three and a half yards of black cloth, on piece of pilot cloth, one diaper table-cloth, one-clothes brush, one razor, one pilot-cloth coat, one square, one hammer, two gimlets, one pair of compasses, one spokeshave, one gouge, one file, one chisel and one bradawl.

There was no further evidence as to who had taken the articles from Bartlett's house.

The jury found him guilty of receiving knowing the goods to have been stolen, and the prisoner was thereupon sentenced to be imprisoned and kept to hard labour for six calendar months, and is now in prison.

After the jury had been discharged, upon the application of the counsel for the prisoner, I reserved for the consideration and decision of the Court of Criminal Appeal the question, being whether such verdict could be sustained.

No counsel appeared on either side.

**POLLOCK, C.B.**—The facts in this case are, that the prisoner lodged in the house of the prosecutor, and that he disappeared shortly after the prosecutor's wife left, taking with her a small bundle. Then the prisoner was found with the property of the husband, some in his possession and a part on his person. The husband's property was gone, and could not have been taken away by the wife, as her bundle could not have contained it, and the whole of it was shortly afterwards found in the prisoner's cabin and upon his person. The property was gone, and the reasonable supposition is that it was stolen. It was then found shortly after in possession of the prisoner. We think that there was evidence from which the jury might draw the inference which they have drawn, and that the conviction must be sustained. *Conviction affirmed.*

REG. V. JOHN MASSEY.

*Bankrupt—Concealing, embezzling and not disclosing goods—Indictment—Sufficiency.*

*An indictment against a bankrupt for embezzlement, &c. under the 12 & 13 Vict. c. 106, which alleges that he committed an act of bankruptcy "by being unable to meet his engagements with his creditors, and by filing his petition to the court," but omits to state that such petition was founded upon a declaration of insolvency, is bad.*

Case reserved for the opinion of this Court by Blackburn, J.

The prisoner was tried before me at the last Staffordshire Assizes, on an indictment of which the following is a copy:—

"Staffordshire to wit.—The jurors of our Lady the Queen, upon their oath present, that heretofore, and before the committing of the offence hereinafter mentioned, to wit, on the 14th day of September 1861, John Massey, being a trader within the meaning of the laws relating to bankruptcy, was indebted to John Thomas Warrington, late of Hanley, in the county of Stafford, cheesefactor, in a certain sum of money exceeding the sum of fifty pounds, to wit, in the sum of one hundred and twenty-five pounds one shilling and one penny, for the price and value of certain goods and merchandise, before then sold and delivered by the said J. T. Warrington to the said John Massey, and that the said John Massey, so being such trader, and indebted as aforesaid, afterwards, to wit, on the day and year aforesaid, did commit an act of bankruptcy by being unable to meet his engagements with his creditors, and by filing his petition in the Court of Bankruptcy for the Birmingham district, for adjudication of bankruptcy against himself. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the 16th day of Sept., in the year aforesaid, upon the said petition for an adjudication of bankruptcy against himself being so filed in the Court of Bankruptcy, the said J. Massey was thereupon declared and adjudged bankrupt; and the said J. Massey so being adjudged and declared bankrupt, afterwards, to wit, on the day and year last aforesaid, feloniously did remove, conceal and embezzle a certain part of his personal estate to the value of ten pounds and upwards, that is to say, three chests of tea, one box of tea of the weight of four hundred pounds, one hundred pounds weight of coffee, sixty boxes of cigars and thirty meerschaum pipes, and divers other valuable goods and chattels, with intent to defraud the creditors of him the said J. Massey, against the form of the statute in such case made and provided, and against the peace of our Sovereign Lady the Queen, her crown and dignity.

"Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and before the committing of the offence hereinafter mentioned, to wit, on the 16th day of September 1861 the said J. Massey, having committed the act or acts of bankruptcy aforesaid, was duly declared and adjudged a bankrupt as aforesaid, upon his own petition to the court as aforesaid, and afterwards and within the time limited by law in that behalf, to wit, on the day and year aforesaid, the said J. Massey surrendered himself to the said Court of Bankruptcy, and was then duly sworn and then submitted himself to be examined before the said court, and that the said J. Massey, upon the said examination, feloniously did not discover three chests of tea, one box of tea of the weight of four hundred pounds, one hundred pounds weight of coffee, sixty boxes of cigars, and thirty meerschaum pipes, and divers other valuable goods and chattels; and that the said J. Massey, upon his said examination, feloniously did not discover how or to whom, or upon what consideration, or at what time or times, he disposed of, assigned, or transferred the same, the same not having been really and *bond fide* before then sold or disposed of in the way of his trade, or laid out in the ordinary expenses of his family, with intent thereby to defraud the creditors of him, the said J. Massey, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity."

Mr. Waterfield, the registrar of the Court of Bankruptcy at Birmingham, produced a document under the seal of the Court of Bankruptcy, purporting to be

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a copy of a declaration of insolvency by the prisoner in the form contained in schedule D. to the Bankrupt Law Consolidation Act 1849, bearing date 14th Sept. 1861, and purporting to be attested by William Allen, attorney-at-law, and certified by Mr. Waterfield in the following form:—"I hereby certify the above to be a true copy of the declaration of insolvency, filed with the registrar of the Court of Bankruptcy for the Birmingham district, on the 14th day of September 1861."

"C. WATERFIELD, Registrar."

He also produced a petition by the prisoner also bearing date 14th Sept. 1861. This was an original document, and was also under the seal of the court, and he produced the adjudication of bankruptcy against the prisoner, dated 16th Sept. 1861. This was also both an original document and under the seal of the court. There were other documents in bankruptcy produced, not, however, material to the points reserved. The clerk to Mr. Allen (the attorney attesting the declaration of insolvency) was called as a witness, and proved that Mr. Allen acted as the attorney for the prisoner in the matter of the bankruptcy, that the witness saw the prisoner sign both the petition and the declaration of insolvency; that he, the witness, on the 14th Sept., accompanied him to the Court of Bankruptcy, Birmingham, and saw him leave the declaration of insolvency there. The registrar of the court having refreshed his memory by a memorandum on the petition, proved that the declaration of insolvency was delivered into his hands for the purpose of filing before half-past eleven o'clock in the morning of 14th Sept. He could not remember anything by independent memory as to this petition, but that he said it was his general practice to see that the declaration of insolvency was filed before receiving the petition founded on it. There was ample evidence on the merits against the prisoner. The prisoner's counsel objected that the indictment was wholly and incurably bad, as it not only did not allege that the prisoner had been adjudicated bankrupt on a valid act of bankruptcy, but averred that he had been adjudicated bankrupt on what was not an act of bankruptcy. He also contended that, independently of the objection to the form of the indictment, the evidence did not show that the prisoner was duly adjudicated bankrupt, as he said that there was not legal evidence that the declaration of insolvency was in fact filed before the petition, and, as he said, the attorney who purported to attest it ought to have been called as a witness.

No other objection was made to the formal proof of the bankruptcy, and the prosecution were not prepared to supply any additional evidence of it. I would not stop the case on these objections, but left the case to the jury on the merits, and they found the prisoner guilty.

In answer to a question from me, they said that they believed that in fact the declaration of insolvency was filed before the petition on the same day.

I reserved the points whether the prisoner was on the evidence on this indictment properly convicted. The prisoner was then tried and convicted on a charge of misdemeanor. He was sentenced on that to one year's imprisonment with hard labour, and on the present indictment to three years' penal servitude concurrently with the other sentence.

The question for the opinion of the Court was whether the conviction was proper.

COLIN BLACKBURN.

*Hebroyd* for the prisoner.—The indictment is bad. It alleges that the prisoner was adjudicated a bankrupt upon his own petition, but does not allege that the adjudication was founded upon a petition of insolvency. There are three modes of proceeding in bankruptcy:

1. Under the arrangement clauses of the Act;
2. Upon a petition presented by a creditor.
3. Upon

a petition presented by the debtor himself under the 12 & 13 Vict. c. 106, s. 70, which enacts, that if any such trader shall file, &c. a declaration in writing, &c. that he is unable to meet his engagements, every such trader shall be deemed thereby to have committed an act of bankruptcy at the time of filing such declaration, provided a petition for adjudication of bankruptcy shall be filed by or against such trader within two months from the filing of such declaration." The indictment does not set out any act of bankruptcy. (a) It should have stated that the bankrupt filed his petition of insolvency. Sect. 89 provides that the mode of procedure to obtain adjudication shall be by petition. But an adjudication in the case of the bankrupt's own petition must be founded upon the petition of insolvency. (He was then stopped by the court.)

*Rockfort Clarke* for the prosecution.—It is sufficient to state in the indictment merely that the person was adjudicated a bankrupt. [MELLOR, J.—But that you have not done. You have stated a special act of bankruptcy, "that the prisoner committed an act of bankruptcy by being unable to meet his engagements with his creditors, and by filing his petition to the Court of Bankruptcy." And you have not alleged that the prisoner filed his declaration of insolvency pursuant to sect. 70. CHANNELL, B.—It would have done if you had stated that he had filed his declaration of insolvency—that he was unable to meet his engagements with his creditors. POLLOCK, C.B.—Was it necessary to aver what the act of bankruptcy was? Would it not have been sufficient to state merely that, on his petition for adjudication being filed, he was thereupon adjudicated a bankrupt?] It would, and then the principle *omnia rite acta presumuntur* would have applied.

WIGHTMAN, J.—But here the contrary unfortunately appears.

POLLOCK, C.B.—We are all of opinion that the indictment cannot be supported. It might have done under the recent Act of 1861, but it is not sufficient under the 12 & 13 Vict. c. 106, which Act was in force at the time the offence was committed. Our judgment must therefore be for the defendant.

The rest of the Court concurring,

Conviction quashed.

REG. v. HAMILTON THOMPSON.

*False pretences—Larceny.*

*It was the duty of the prisoner, a clerk, to pay dock dues upon goods exported by his master, and upon ascertaining the amount required upon each day's export before paying it, to obtain the sum from his master's cash-keeper. The prisoner, knowing that 1l. 3s. only was due on one of those days, fraudulently represented to the cash-keeper that a larger sum was due, and having obtained that he paid the 1l. 3s. and appropriated the difference:*

*Held, that although the evidence would have been sufficient to support an indictment for false pretences, he was not guilty of larceny.*

Case reserved by the Recorder of Liverpool.

At the Court of Quarter Sessions of the peace holden in and for the borough of Liverpool, on the 14th Sept. 1862, Hamilton Thompson was tried before me upon an indictment containing three counts, charging him, that he, being servant of one Edward Evans and others, did feloniously steal three separate sums of money their property.

The prosecutors were wholesale druggists, carrying on business at Liverpool, and were in the habit of exporting drugs to customers and consignees abroad.

The prisoner was their clerk and servant. It was a portion of his duty to pay dock and town dues which might be due upon goods exported by the prosecutors.

(a) See *Reg. v. Landa*, 7 Cox Crim. Cas. 89.

Upon ascertaining the amount required for that purpose upon each day's export, it was his duty before paying it to apply for and obtain it from the prosecutor's cash-keeper, and having obtained it to pay it over.

It was proved under the first count, that on the 21st Aug. 1862 there was required to pay dock and town dues upon goods exported by the prosecutors the sum of 1*l.* 3*s.*, and no more was paid by the prisoner on behalf of the prosecutors for such dock and town dues. It was also proved that upon that day the prisoner, knowing that 1*l.* 3*s.* and no more was really due, fraudulently represented to the cash-keeper of the prosecutors that 3*l.* 10*s.* 4*d.* was really due from prosecutors for such dock and town dues, and that he fraudulently obtained the sum of 3*l.* 10*s.* 4*d.* from the said cash-keeper by such representation, intending at the time he so obtained it to appropriate the difference to his own use and defraud his masters of the same, and it was proved that he did so appropriate such difference, being the sum of 2*l.* 7*s.* 4*d.*

The second and third counts were supported by similar proof.

It was submitted by the counsel for the prisoner that the above evidence did not disclose a case of felony, and that if the prisoner had committed any offence in law it was that of obtaining money by false pretences, and in support of this view he cited *Reg. v. Joseph Barnes*, 2 Den. C. C. 59; 5 Cox C. C. 112; 20 L. J. 34, M. C.

I was of opinion that the facts in *Reg. v. Barnes* were distinguishable from the facts in this case, inasmuch as there the money was delivered to the prisoner with the intent of parting with it wholly to him in repayment of sums supposed to have been already disbursed by him on account of his employers; while here it was delivered to him to be disbursed in future on account of his employers, so that the property in the money was not parted with by the prosecutors, but the possession only, and I thought that the prisoner might be found guilty of felony.

The jury found the prisoner guilty, and I respited judgment and remanded the prisoner back to the Liverpool borough gaol, reserving the question whether the prisoner on the foregoing state of facts was properly found guilty of felony.

*Littler* for the prisoner.—The facts of this case are not distinguishable from those in *Reg. v. Barnes*. That case entirely followed *Mitchell's* case, 2 East P. C. 830, were it was held, that, although the prisoner might have been convicted for false pretences, a conviction for larceny could not be sustained. [WILLIAMS, J.—The difficulty is to lay one's finger upon any particular coin stolen by the prisoner, because he was paid in the lump, and was justly entitled to a part of what he received.] So in *Reg. v. Hassall*, 8 Cox C. C. 491, the same principle was acted upon.

*Leofric Temple* contra.—The prisoner could not have been indicted for false pretences, for the pretence was of doing something in *future*. [MELLOR, J.—The prisoner might have been indicted for pretending that more was due than really was: that's a fact.] The prisoner undertook to disburse the money for the prosecutors in *future*. [POLLOCK, C. B.—No doubt there was a misrepresentation of something to be done by-and-by, but there was also a misrepresentation of an existing fact. WIGHTMAN, J.—Then there is the question suggested by my brother Williams—how is the particular coin to be distinguished?] This is like *Reg. v. Robins*, 1 Dear C. C. 418, 6 Cox C. C. 420, where one servant was induced, by false representation, to part with goods to another servant, who appropriated them; and this was held to be larceny.

POLLOCK, C. B.—No doubt this prisoner obtained the money by false pretences, but we are of opinion it is not larceny. *Conviction quashed.*

REG. v. S. J. MEANY.

*Practice*—Verdict—Right of judge to direct jury to reconsider.

*A judge is not bound to record a verdict which he thinks does not amount to guilty or not guilty, unless the jury request him to record it.*

*Upon an indictment for false pretences, the jury found the prisoner guilty of obtaining the property by the false pretences alleged, but added, that they thought he meant to pay for it; and the judge refused to receive such verdict, and told them they must find the prisoner guilty or not guilty, and left the facts again for their consideration:*

*It was held, that a verdict of guilty which they then found was sustainable.*

Case reserved at the Middlesex Sessions.

The prisoner was tried before me on the 8th Oct. 1862, for obtaining, by false pretences, of one person, a printed book of the value of 16*s.* 6*d.*; of another person, 6*s.* in money; and of another person, 10*s.* in money and goods to the amount of 2*l.*

The false pretences consisted of the production, by the prisoner, of two forged letters, written on paper improperly obtained from the International Exhibition. The letters were alike in all respects except the date and the particular amount of money, and were represented by the prisoner to be genuine.

The earliest in date was as follows:—

The Royal Arms were in the margin, and the heading was printed, "International Exhibition 1862. Her Majesty's Commissioners, the Earl Granville, K.G., chairman."

The remainder was proved to be in the prisoner's handwriting.

"Exhibition building, South Kensington, W.

"Aug. 11, 1862."

"Sir,—I am directed by H. M. Commissioners to say that your account for 45*l.* 10*s.* (advertising in *Lancashire Free Press*) shall be laid before the audit committee at its next meeting, on the 22nd inst., and should the amount be passed, a cheque shall be at this office for you at any time after twelve o'clock on Saturday, 23rd. Meanwhile you are requested to send vouchers for the items charged as against Messrs. Kelk and Lucas.—I am, Sir, your obedient servant,

"J. H. HENDERSON, pro. J. J. MAYO.

"J. S. MEANY, Esq."

The other letter was dated 21st Aug., and mentioned 42*l.* 10*s.* for advertisements in another paper.

One of these letters was shown to each of the three prosecutors, and they all stated that they parted with their property on the faith of the prisoner's assurances that they were genuine.

Mr. Mayo, the financial officer, and Mr. Street, of the advertising department, proved that the whole was a fiction, no such claims being in existence.

The prisoner, who had no counsel, addressed the jury at considerable length, and contended that it was a simple debt on one side and a simple credit on the other. He further stated that he intended to pay for the goods, but did not suggest any means by which he could do so.

The facts having been left to the jury, after some consideration the foreman said, "We find the prisoner guilty of obtaining the property by the false representations in the two forged letters, and that the parties would not have parted with it without those letters had been used; but we think that he meant to pay for them."

I refused to receive this as a verdict, and told the jury that they must find the prisoner guilty or not guilty, and that if in their opinion he had not a fraudulent intention, they must say it by a verdict of not guilty. I put before them the leading facts of the case, and told them that in addition to the making of the false representations and the obtaining of the

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goods by means of them, they should consider whether at the time he so obtained them he had a fraudulent mind. I then read to them the words of the statute as follows, viz: "On the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud." I then specifically left it to them to say whether the prisoner did the acts charged with an intent to defraud.

After a short consultation they found the prisoner "guilty."

Upon this it was suggested to the prisoner that he should require the court to enter the first statement of the jury as a verdict of "not guilty," instead of the second of "guilty."

I declined to accede to this suggestion, and was preparing to pass sentence, when one of the magistrates who sat with me, stated that in his opinion the first finding ought to have been recorded as a verdict of "not guilty."

Under these circumstances I communicated with the assistant-judge, and it was deemed expedient to submit the matter to the judgment of the Court of Criminal Appeal.

The question for the determination of their Lordships is whether the verdict of "guilty" pronounced under these circumstances is sustainable in law or not.

The prisoner is still in custody, but an order was made by the court that he might be discharged on entering into recognisances, himself in 80*l.* and two sureties in 40*l.* each, to come up for judgment at the December sessions.

**JOSEPH PAYNE**, Deputy Assistant Judge.

*Dickie* for the prisoner.—The first verdict amounted to not guilty, and ought to have been received by the judge, and he was not at liberty to refuse receiving it.

*Kemp*, contra, was not called on.

**POLLOCK**, C. B.—If the question, as I collect from the case, is this, whether a judge may, after the jury has pronounced a verdict, require the jury to reconsider their verdict, and they do so and find a different verdict, the latter can be received, it is utterly unarguable. I recollect that, when I was a young man, a person was tried for shooting the Hammersmith ghost, before three of her Majesty's judges and the Recorder. The jury retired to consider their verdict, and after some time came back and found a verdict of manslaughter. Thereupon each of the three judges addressed the jury, and told them they were at liberty to acquit the prisoner or find him guilty, and that if he was guilty of anything he was guilty of murder. They again retired, and returned finding him guilty of murder. He was told that he would not be executed, and he was pardoned. There is no doubt that a judge, both in a civil and criminal court, has a perfect right, and sometimes it is his bounden duty, to tell the jury to reconsider their verdict. He may send them back any number of times to reconsider their finding. The judge is not bound to record the first verdict unless the jury insists upon its being recorded. If they find another verdict that is the true verdict.

**WILLIAMS**, J.—I will only add, that I do not wish it to be understood that the original verdict amounted to an acquittal.

*Conviction affirmed.*

## COURT OF ARCHES.

*Tuesday, Aug. 5, 1862.*

(Before **Dr. LUSHINGTON**.)

**BRAITHWAITE v. HOOK.**

*Intrusion—Rights of the dean and subdean.*

**Dr. TRICE**, Q. C. and **Dr. Tristram** for the prisoner.

**Dr. Phillimore**, Q. C., **Dr. Swabey** and **Wintle** for the Dean and Chapter of Chichester.

The facts are sufficiently stated in the following judgment.

**Dr. LUSHINGTON**.—This was a proceeding brought by the Rev. George Braithwaite, vicar of the parish of St. Peter's the Great, otherwise the subdeanery, in the city of Chichester, praying that the Rev. Dr. Hook, the Dean of Chichester Cathedral, might be censured for intrusion into his parish. It appeared that for centuries past there has been a standing dispute between the Cathedral and the parish as to the limits of the parish and the rights in the cathedral and precincts of the vicar, who is also styled "subdean." Matters came to a head on the occasion of the burial of the late Duke of Richmond in the family vault in the cathedral. Mr. Braithwaite had heard that the dean had engaged to perform the funeral service, and, not having received any communication asking his permission, wrote a formal protest to the dean against the dean's officiating without his consent. The bishop thereupon intervened; and at his advice, and upon the understanding that no prejudice should be occasioned to the assertion of any rights in a court of law, Mr. Braithwaite forebore to disturb any arrangements for the funeral. A previous Order in Council having forbade an opening of the vault in the interior of the cathedral, an entrance was made outside by a hole in the wall of the building, and the body of the Duke was committed to the ground by the dean standing in the High-churchyard and there reading the service. Mr. Braithwaite did not attend, refused the fee which was offered him, and made no entry of the burial in any of the registers in his custody (which were the only registers kept for burials in the cathedral, and any ground about it); the dean purchased a book and entered in it a record of the burial, and a copy of this record he afterwards gave as a correct record from the cathedral register. Mr. Braithwaite then instituted the proceedings by means of letters of request, signed by the bishop of the diocese. The bishop appended a note to his signature to the effect that the signature was made ministerially only, and did not denote his assent to the statements contained in the letters of request, or his sanction of Mr. Braithwaite's proceedings. The judge expressed his approval of the bishop's conduct, adding that a refusal to sign the letters of request would have been a denial of justice. The articles put in by Mr. Braithwaite contained two charges of intrusion into the parish. 1. That the dean, against his remonstrance, had read the funeral service in the High-churchyard, situate in the parish of St. Peter's the Great, otherwise the subdeanery, and under the ecclesiastical charge of the vicar. 2. That for the last two years the dean had usurped the parochial charge of the precincts of the close, also situate in the said parish. In fact, Mr. Braithwaite claimed the exclusive charge of the precincts, and the exclusive right to perform all the services in the cathedral (except, perhaps, in the choir), and to receive the fees for the same. In order to understand the bearings of the case some matters must be stated. First, as to the localities. The cathedral and precincts are locally within the parish, and, on the other hand, the parish church and parish burial-ground had been locally within the cathedral and precincts; for, during several centuries, up to 1852, when the new church of St. Peter's was built, the north transept of the cathedral had been used as the parish church; and so, too, for several centuries up to 1836, when St. Paul's cemetery was made, the parochial burial-ground had been exclusively the High-churchyard, which was all round the north and east of the cathedral. By Order of Council, in 1854, the High-churchyard was closed altogether, and burials within the cathedral prohibited; and by another order,



in 1856, special leave was granted for burials in the Duke of Richmond's vault, situate at the east end, under the Lady Chapel, provided an entrance was made from without the cathedral. Consequently, so far as burial was concerned, the whole matter at issue was reduced to the right of officiating upon the very rare occasions of interment in the duke's vault. Secondly, as to the office of subdean. Mr. Braithwaite claimed to hold the independent office of subdean of Chichester. But the learned judge, after stating that such an office was unknown to the law, showed, from the evidence in the cause, that the subdean was, so far back as the fourteenth century, an officer of the cathedral, and in a subordinate capacity. Indeed, until the late catastrophe to Chichester steeple he had a stall in the cathedral, but to this stall he was not inducted, nor did he sit there in his surplice. The subdean also receives a payment of 1*s.* 4*d.* annually from the dean and chapter. Then, as to the duties of the office, it appears that both by authority (of somewhat doubtful character) and by the evidence in the cause, the subdean was the assistant of the dean when present, and his substitute when absent. His duties were confined to the cathedral and precincts, and consisted of performing the church services, and the discharge of the cure of souls over the close, the dean having by the statute the cure of souls over the canons and vicars, who before the Reformation were the only residents in the close. Originally the vicar of St. Peter's had been a different person from the subdean of the cathedral, but ever since the end of the fifteenth century the two offices, with very rare exceptions—and these the subject of disputes—had been held by the same person; the parish had been called the parish of St. Peter's, otherwise the subdeanery; the north transept had been styled *Ecclesia Subdecanatus*, and the vicar, after his institution, and without any further act of appointment, had gone by the title of subdean. Thirdly, some perplexity in sifting the evidence was occasioned by the difficulty to distinguish what was done by the dean and chapter as such, what by the dean and chapter as impropiators of the living of St. Peter's, what by the dean's peculiar, for the dean had a court with ecclesiastical jurisdiction over several parishes in Chichester. Dr. Lushington then examined the articles to show that Mr. Braithwaite's claim was put forward on his title as vicar, and not as subdean, but he would deal also with the rights of the subdean. He then disposed of an objection made by the dean, on the ground that the recent statute of 8 & 9 Vict. c. 70, had extinguished Mr. Braithwaite's claim by the enactment that after the building of a new parish church the parts of the cathedral church formerly used as a parish church should be deemed a part of the cathedral church, as fully as if it had never been used as a parochial church. The Act was conclusive as to the north transept, but left the rights of the vicar as to the High-churchyard, and all the rights of subdean, untouched. He then proceeded to the consideration of the main question, which was, whether the cathedral and precincts had been, *ab initio*, as Mr. Braithwaite alleged, part and parcel of the parish. No evidence on this subject existing, the point turned upon legal presumption. If the date of the cathedral and precincts were anterior to the institution of civil parishes by the lay authorities, fixed by Lord Coke at 1189—that is, when the bounds of parishes could be moved by ecclesiastical jurisdiction, which looked only to the convenience of church administration—then, whether or not the parish of St. Peter's existed before the cathedral, it must be presumed that the cathedral and precincts were from the first extra-parochial; for the precincts containing no lay families would require no parish priest; and if any were wanted, these was the dean himself and the

priests attached to the cathedral to perform all the duties. The bishop would not hold it consistent with his dignity to place a parish priest over his own head. What, then, was the date of the cathedral? Somewhere between the years 1070 and 1075; the precincts, too—a term which he defined to be land, the legal adjunct of the cathedral itself, as distinguished from the caputular estates—were all granted before the year 1189. The legal presumption therefore was against Mr. Braithwaite's claim. But then there were alleged by Mr. Braithwaite, as against this presumption, certain special circumstances of Chichester Cathedral and the parish. These were:—1*st*, That the north transept was the parish church and the High-churchyard the parish burial-place; 2*dy*, that there had been two periods of usurpation by the dean, each of which had been closed by a sentence against the dean; 3*rdly*, that the vicar and subdean had received Easter dues from the inhabitants of the close as well as of the parish; 4*thly*, that he had also kept the registers of both close and parish; 5*thly*, that he received all the fees; 6*thly*, that modern usage was all in favour of his claim. Each of these points was decided against Mr. Braithwaite. The uses of the north transept and High-churchyard were shown by the exercise on divers occasions of authority by the dean and chapter, and by their defraying all expenses, to have been permissive only, and limited to the performance of church service and of burying parishioners. The alleged orders in favour of the subdean were held to be not conclusive, and of little weight as compared with a direct decision of the dean's peculiar in 1618; that the close was not part of the parish for spiritual purposes, and there was a compromise sanctioned by the quarter sessions in 1692, by which the close was to support its own poor, and pay a permanent rate in aid of the parish, showing that the two were distinct for civil purposes. Easter dues had certainly in some cases been paid from the inhabitants of the close to the person who was vicar of the parish and subdean; but this was not conclusive, for such payment might, considering the local position of the parish and precincts, be attributed simply to the fact of such inhabitants having communicated. Besides, at the time when such dues were paid, the dean and chapter were exercising undoubted jurisdiction over the precincts and subdeans. Then, as to registers, it was true that, up to the passing of the Register Act, the close and parish had been confounded in the registers kept by the vicar and subdean—but after the passing of the Act, the two were, except for marriages, kept distinct and in accordance with the 20*th* section, applying especially to cathedrals. With regard to fees, the vicar and subdean had received matrimonial fees for services performed in the cathedral, and also a fee for breaking the ground of the High-churchyard in the case of a non-parishioner; but these fees were modern and not shown to be by authority, and against them were to be set the more ancient fees taken by the dean and chapter. The modern usage, as deposed to by Mr. Braithwaite and his predecessor, chiefly consisted of evidence that the vicar and subdean had performed all the ministerial offices in the cathedral and precincts, or had been asked by various members of the chapter, and even by the late dean himself, to give permission for another to officiate. This evidence was outweighed by the more ancient evidence. Also, when the new church was built, it appeared that, on the advice of the bishop, the churchwardens had not allotted seats to the inhabitants of the close, though they allowed them to sit there, if there was room for the regular parishioners. This closed the case as touching Mr. Braithwaite's claim under his title of vicar. He then considered whether the subdean having originally been dependent on the dean, had in the course of time acquired any rights as against the

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dean. Against this were to be set two considerations:—1st, the principle of law that the appointment of a deputy does not deprive the principal of his right to act; 2nd, the extreme improbability of the dean having abandoned his primary duty and renounced the control over his own precincts and cathedral. The evidence, moreover, was against such a supposition. The letters of institution placed Mr. Braithwaite in possession, not of the subdeanery, but only of the vicarage of St. Peter's, otherwise the subdeanery—that is, the vicarage of the subdeanery, the vicarage, sometimes called the vicarage of the subdeanery, because the subdeanery went with it. True, there was no separate appointment to the subdeanery, but a verbal nomination would suffice. The dean and chapter were the patrons of the living, and, in nominating the vicar, would be aware that they were also choosing a subdean, for, from the precincts being within the parish, and the parish church within the precincts, it was convenient that the two offices should be held together. Moreover, the dean and chapter had not renounced their right of officiating, for they had frequently officiated; they had from time to time exercised their authority over the subdean, and had more than once appointed a person who was not vicar to be subdean. He then pronounced as his sentence, that the charges preferred by Mr. Braithwaite against the dean were not substantiated by the evidence; that the dean, by performing the burial service in the High-churchyard, when the corpse of the late Duke of Richmond was interred in the vault, did not encroach upon any right belonging to Mr. Braithwaite as vicar or subdean; also that the dean had good authority for discharging spiritual duties to the inhabitants of the close. As to costs, he said that in ordinary criminal proceedings, the prosecutor, if he failed, was condemned in costs, but that this proceeding was only in form a criminal one; that it had been instituted for the purpose of trying a civil right; that, looking to the evidence, Mr. Braithwaite had some justification in supposing himself entitled to what he claimed, and that the dean and chapter, by much they had in past times left undone and by some acts which they had done, were partly responsible for the confusion. He, therefore, declined to condemn Mr. Braithwaite in costs, adding that he trusted that the very eminent person who filled the office of dean would not on that account think that he had received any injustice.

### CONSISTORY COURT OF DURHAM.

Reported by Dr. SWABEY, Barrister-at-Law.

Nov. 7 and Dec. 2, 1862.

(Before the Right Hon. T. E. HEADLAM, Chancellor.)  
On protest to the jurisdiction of the Court.

THE CHURCHWARDENS OF BISHOPSWEARMOUTH  
v. BACKHOUSE.

*Church-rate—Quaker—Jurisdiction of Ecclesiastical Court.*

*Where a Quaker, on refusal to pay a church-rate under 50*l.*, is summoned before magistrates, and there takes bond *fide* objections to the legality of the rate, the jurisdiction of the magistrates ceases, and that of the Ecclesiastical Court attaches.*

This was a question as to the jurisdiction of the Ecclesiastical Courts over Quakers in respect of church-rates, where the amount claimed is under 50*l.*

A citation had issued, in the ordinary form, at the instance of Edwin Gray and John Hayle, churchwardens of the parish of Bishopwearmouth, calling on Edward Backhouse, of that parish, to appear and answer in a cause of subtraction of church-rates. To this citation Backhouse appeared, under protest to the jurisdiction of the court. The protest, as extended in writing, stated—

1. That by virtue of certain provisions contained in 5 & 6 Will. 4, c. 74, and 4 & 5 Vict. c. 36, no suit or proceeding can be had or instituted in any ecclesiastical court in England for or in respect of any church-rate under the value of 50*l.*, withheld by any Quaker, but all complaints touching the same shall be heard and determined before two or more justices of the peace, under the provisions contained in 7 & 8 Will. 3, c. 34, and 53 Geo. 3, c. 127.

2. That Edward Backhouse is one of the people called 'Quakers, and the amount in respect of which the suit is instituted is under 50*l.*

The answer to the protest stated in substance that Edward Backhouse had been duly summoned before justices of the peace under the provisions of 7 & 8 Will. 3, c. 34, and 53 Geo. 3, c. 127, to show cause why he had refused to pay the said rate, and that he alleged various grounds on which he contended that the rates under which he had been assessed were illegal; that thereupon the jurisdiction of the justices ceased, and the deft. became subject to that of the Consistory Court of Durham.

The question raised by the protest was argued at Durham on the 7th Nov. by *Wills*, for Mr. Backhouse.

Dr. *Swabey* for the churchwardens.

The question turned on the construction of the statutes noticed in the judgment, and the following cases were cited:—*Re Wakefield*, 1 Burr. 386; *Richards v. Dyke*, 3 Q. B. 256; *Backhouse v. The Churchwardens of Bishopwearmouth*, 9 C. B. 430; s.c. 3 L. T. Rep. N. S. 626; s.c. 30 L. J. 118, Mag. Cas.; *Pence v. Chaytor*, 5 L. T. Rep. N. S. 280; s.c. 31 L. J. 1, Mag. Cas. *Cwr. adv. vult.*

On Dec. 2, at 35, Great George-street, Westminster, The CHANCELLOR OF DURHAM delivered the following judgment:—This is a cause of subtraction of church-rates, promoted by the churchwardens of the parish of Bishopwearmouth against the deft. Edward Backhouse, for the recovery of certain sums amounting in the whole to 5*l.* 18*s.* 3*d.* The deft. denies the jurisdiction of this court, and alleges by way of protest, to the effect that he is one of the people called Quakers, and that by virtue of the provisions of the 5 & 6 Will. 4, c. 74, and 4 & 5 Vict. c. 36, no suit or proceeding can be had or instituted in any ecclesiastical court for any church-rate under the value of 50*l.*, when withheld by a Quaker, but all complaints touching the same shall be heard and determined before two or more justices of the peace under the provisions contained in 7 & 8 Will. 3, c. 34, and 53 Geo. 3, c. 127. (a) In answer to this protest the churchwardens allege that the deft. has been summoned before two justices of the peace to show cause why he refused to pay the demand, and that he then contended upon various grounds that the rates were illegal, whereupon the jurisdiction of the magistrates over the matter ceased. There is no dispute concerning the facts. It is admitted that the deft. is a Quaker, that he has been duly summoned, that he did dispute the validity of the rate, and the Court of C. B., after argument, has determined that the jurisdiction of the magistrates was at end: (*Backhouse v. Churchwardens of Bishopwearmouth*, cited above.) On these facts the simple point of law raised by the protest was recently argued before me, when it was contended on the part of the deft. that this court had no power either to determine upon the validity of the rate or to enforce its payment, but that in the case that had occurred a Quaker is wholly exempt from any proceedings whatsoever. The first observation that occurs to me after a careful perusal of the statutes is, that, from the first to the last, not the

(a) The 7 & 8 Will. 3, c. 34, was originally limited to seven years, but was continued and extended: (1 Geo. 1, c. 6.)

slightest trace is to be found of any intention on the part of the Legislature to confer an exemption upon Quakers from a burden that has to be borne by the rest of the community. At the same time it is perfectly true that the absence of intention is not conclusive, for it is quite possible that the ultimate effect of a series of statutes (some of them not very carefully drawn) may be very different to what was ever intended or anticipated. The deft. must, however, clearly establish the exemption he claims, for it is scarcely necessary for me to state that the exclusive jurisdiction, both to determine upon the validity of a church-rate and to enforce its payment was originally vested in courts of this description, and still remains in them in all cases where it has not been taken away by statute law. To establish this exemption the deft. relies on the 5 & 6 Will. 4, c. 74, and 4 & 5 Vict. c. 36. (a) The latter statute does not seem to me to be material to the argument; the former commences by carefully reciting all the provisions then in force, by which is conferred a summary jurisdiction before magistrates for the recovery of tithes or rates from the community in general; it then recites the provisions to a like effect for the recovery of tithes or rates from Quakers; there then occurs this recital of the object of the Act: "Whereas it is highly expedient, and would further tend to prevent litigation, if in the cases, and with the exceptions hereinafter named, all claimants were restricted to the respective remedies provided by the said recited Acts." From this recital it would appear that before the Act 5 & 6 Will. 4, c. 74, claimants were not restricted to the remedies conferring summary jurisdiction, but that they were also at liberty to apply to other courts. Moreover, it appears that it was not the intention of the Act to restrict the remedies of claimants, or to take away the jurisdiction of other courts, except in the particular cases provided for by the recited Acts. As it has been determined that in the case now before me of a Quaker disputing the validity of a rate there is no remedy before a magistrate under the recited Acts, the inference from this recital would be that in such a case the jurisdiction of this and other similar courts would remain. The Act then proceeds in its enacting part, first, to take away the jurisdiction of her Majesty's courts in all cases where a summary jurisdiction had been given over the community in general, and, secondly, to take away the jurisdiction in all cases where a summary jurisdiction had been given over Quakers. There is then one proviso applicable both to Quakers and to the community in general, which is as follows: "Provided always, that nothing hereinbefore contained shall extend to any case in which the actual title to any tithe, oblation, composition, modus, due, or demand, or the rate of such composition or modus, or the actual liability or exemption of the property to or from any such tithe, oblation, composition, modus, due, or demand shall be *bond fide* in question." It is observed by the deft. that the word "rate" by itself does not occur in this proviso, and that the word "title" is applicable to a right to an incorporeal hereditament, but not to a claim for payment of a church-rate. The deft. therefore contends that whilst the enacting part of the statute takes away by general terms the right of a churchwarden to institute a suit here, the proviso does not except the case where the validity of the rate is disputed. In support of his argument the deft. observes that the word "rate" was also omitted in previous statutes, and contends that the omission was intentional. If it could have been shown that the omission in the previous statutes had led to any practical conclusion,

that is to say, that in consequence of it Quakers had claimed or established an exemption from church-rates, then it might have been argued that the Legislature in continuing the omission had intended to establish the exemption. This, however, is not the case. There is no trace of any claim ever having been made to an exemption from the jurisdiction of these courts, founded upon the omission of the word "rate" in the previous statutes, and I infer that the language of these Acts having been found sufficient was repeated in the proviso of the 4 & 5 Will. 4, c. 74, without any particular intention or consideration. It may be observed that the proviso in question applies not only to Quakers, but to other members of the community with respect to whom there is no doubt that this court has power to take cognisance of suits concerning church-rates when the title or validity is disputed. On the whole, having regard to the terms of the recital I have mentioned and the obvious intention of the Act, I am not prepared to say that the words "due or demand" will not extend to a demand for a church-rate, nor can I hold that the word "title" is so exclusively applicable to real estate as that it cannot include the right of a churchwarden to sue for a church-rate. The point appears to have been raised before the Court of C. B., and the conclusion at which I have arrived seems to be in accordance with the opinion of the Lord Chief Justice. Assuming, however, that the proviso I have been considering takes this case out of the Act of Will. 4, the deft. contends that the claimant is still without a remedy in this court, on the ground that the previous law had destroyed all jurisdiction here to decide such cases as against Quakers. This argument renders it necessary for me to go back to the former statutes applicable exclusively to Quakers. The first of these is 7 & 8 Will. 3, c. 34, s. 4. This section commences by a preamble in the following words:—"Whereas, by reason of a pretended scruple of conscience, Quakers do refuse to pay tithes and church-rates." It then proceeds to enact that in cases where any Quaker refuses to pay tithes or church-rates under a certain value, the two next justices may hear and determine the case and compel payment by distress. This Act is extended and rendered permanent by 1 Geo. 1, stat. 2, c. 6. It may be observed with respect to both these Acts, that they contain no provision in express terms taking away the jurisdiction of other courts. Neither do they contain any express provision retaining the jurisdiction of other courts, but they do contain a clause to the effect that the summary proceedings they authorise shall not be removed by writ of *certiorari* unless a question of title is in dispute. On the authority of Lord Mansfield in the case of *Re Wakefield*, 1 Burr., and of the Court of C. B. in this case, 9 C. B. 430, it is clear that these Acts only conferred jurisdiction upon the magistrates when it was sought to enforce an undisputed demand, the payment of which was refused on conscientious scruples. I think it very doubtful whether the jurisdiction of these courts was in any case taken away by the last-mentioned Acts, but if such a result did arise by implication, it could only be when the magistrates were empowered to act, and not in a case like the present, where it is admitted that they have no jurisdiction. It now only remains for me to mention 53 Geo. 3, cap. 127. This Act contains clauses extending the summary jurisdiction for the recovery of tithes and church-rates, both from Quakers and from other members of the community; it also contains two provisos which from the recent cases of *Pease v. Chaytor*, in the Court of Q. B., and this case in the Court of C. B., apply to Quakers. The first of these is, that nothing therein contained shall interfere with the jurisdiction of the Ecclesiastical Courts concerning the validity of church-rates, or

(a) 4 & 5 Vict. c. 36, extends to ecclesiastical courts the prohibition enacted by 5 & 6 Will. 4, c. 74, as regards the Queen's courts.

to enforce payment of them, if the same shall exceed 10*l*. The second provides that, if the validity of the rate is disputed, and the party disputing it gives notice to the justices, they shall forbear giving judgment, and the persons demanding the same may then proceed to the recovery of their demand, according to due course of law. In this case the validity of the rate has been disputed—notice of the dispute has been given; the justices have not given judgment, and in my opinion the churchwardens are now entitled to sue in this court. In conclusion, it is very satisfactory to me to think that, in the present state of the proceeding, the debt is able, should he so think fit, to obtain, on a matter of considerable importance, the opinion of a court of common law, which is best qualified to give a decision upon the construction of the statute law.

*Overrule the protest; assign Mr. Backhouse to appear absolutely; costs to be costs in the cause.*  
*Clarke and Morrice, for R. A. Burrell, Durham,*  
*plts. attorneys.*  
*Hickson, for Robert Brown, Sunderland, dett.'s attorney.*

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 15, 1862.

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ., CHANNELL, B. and MELLOE, J.)

REG. V. GEORGE THOMPSON.

*Larceny—Intent to steal money received for a special purpose—Owner's dominion over it.*

*A lady at a railway terminus, where there was a great crowd at the pay place, seeing the prisoner within the barrier and near that place, requested him to get her a ticket, which he consented to do. She then handed him a sovereign, but instead of getting the ticket he ran away with her money. It was found by the jury that he placed himself near the pay place for the purpose of obtaining money in that way:*

*Held, that, as he took the money with intent to steal, and the lady never parted with her dominion over it, he was guilty of larceny at common law.*  
*Case reserved at the Middlesex sessions.*

The prisoner was tried on the 6th Oct. 1862 for stealing 1*l*. in money, the property of a man named Bates.

From the evidence it appeared that on the morning of the 13th Sept. an excursion train for York was about to start from the King's-cross terminus of the Great Northern Railway. There was a considerable crowd, and Mrs. Bates, the prosecutor's wife, being on the outside of the barrier, saw the prisoner near the pay place, apparently about to take a ticket for himself. She asked him if he would get one for her for York. He said, "Yes." She then handed him a sovereign, the price of the ticket being only 10*s*. The prisoner received the sovereign, but instead of applying for any ticket stooped under the rail and ran across the platform.

Mrs. Bates obtained the assistance of a constable, and in a few minutes they found the prisoner, who at first denied that he was the person, but afterwards offered Mrs. Bates a return-ticket for Doncaster. She did not at the moment observe what it was, but said, "If you have taken my ticket, where is my change?" upon which he handed her 2*s*. She said she wanted 10*s*. as her change. He said he would go and get it, but she refused to allow him to go away, and gave him into custody.

He had a sovereign in his hand when he was taken, and there were found upon him two return-tickets for Doncaster.

The prisoner's counsel submitted that there was no larceny: first, because there was no trespass, Mrs. Bates having voluntarily parted with the sovereign to the prisoner; and, secondly, because it did not come within the meaning of the Bailees Act, as that Act only applied to cases where the same property was to be returned, and not where different property was to be substituted for it. He cited *Reg. v. Garrett*, 2 Fos. & Fin. 14; and *Reg. v. Hassall*, 8 Cox C. C. 491. (a)

The counsel for the prosecution, contra, referred to *Reg. v. Wells*, 1 Fos. & Fin. 109 (b), as somewhat analogous in principle.

The prisoner's counsel having addressed the jury, the deputy assistant-judge, who tried the case, told them in summing up, that if they thought, from the prisoner's conduct, that he did not place himself where Mrs. Bates found him with the *bona fide* intention of taking a ticket for himself, and that at the time he received the sovereign from her he intended to steal it, and also that she did not intend to part with the property except for the purpose of obtaining her ticket and 10*s*. in change, then he thought they were at liberty to find the prisoner guilty.

The jury found the prisoner guilty, and said that in their opinion he placed himself near the pay place for the purpose of obtaining money in the manner described.

The questions reserved were: first, whether the verdict of guilty is, under the circumstances, sustainable by the general law as to larceny; and, if not, secondly, whether it is or is not sustainable under the particular provisions of the 24 & 25 Vict. c. 96, s. 3, relating to larceny by bailees.

Upon the first point, *Reg. v. Brown*, (c) 2 Jur. N. S. 192, may be referred to.

The prisoner remains in custody, awaiting the judgment of the court.

*Ribton* for the prisoner.—In all cases of larceny there is a trespass; but here the sovereign was voluntarily parted with by the owner without any solicitation from the prisoner. It was only a breach of trust, not larceny. In *Semple's case*, 1 Leach, 420, the chaise was obtained by a trick, and with a felonious intent originally, and the hiring was a mere pretence. [WIGHTMAN, J.—I find this passage in the usual text-book: "If the owner of goods deliver them to another, but be present all the time they are in the other's possession, and there be no intention on the part of the owner to relinquish his domain over them by such delivery, the owner still retains the possession in law, notwithstanding this delivery, and if the person to whom he has so delivered them make away with them, and convert them to his own use, he will be guilty of larceny. As, for instance, if the owner give the goods to a man to carry and accompany him at the same time, if the man runs away with the goods, he is clearly guilty of larceny." (Arch. Crim. Pl. 14th ed. 290.)] Here the prosecutrix did not expect to get back the sovereign. In *Reg. v. Thomas*, 9 C. & P. 741, A. was treating B. at a beerhouse, and A. wishing to pay, put down a sovereign, desiring the landlady to give him change; she could not do so, and B. said that he would go out and get change. A. said, "You won't come back with the change." B. replied, "Never fear." A. allowed B. to take up the sovereign, and B. never returned either with it or the

(a) In *Reg. v. Garrett*, the marginal note is, "A bailment under the Fraudulent Trustees Act (30 & 31 Vict. c. 84) means one where the same property is to be returned." The same point was decided in *Reg. v. Hassall*.

(b) In *Reg. v. Wells*, it was decided that a carrier who received money to procure goods, obtained and duly delivered the goods, but fraudulently retained the money, was guilty of larceny, under sect. 4 of the Fraudulent Trustees Act.

(c) In *Reg. v. Brown*, the prisoner obtained the money from the prosecutor by a trick, intending at the time to appropriate it to his own use, and it was held to be larceny.

change. Held no larceny, as A. having permitted the sovereign to be taken away for the purpose of being changed, he could never have expected to receive the specific coin, and had therefore divested himself of the entire possession of it. [WILLIAMS, J.—There was a case before Maule, J., in which he held that a parish clerk who took a half-crown out of the sacrament-plate was guilty of larceny, and that the property was properly laid in the members of the congregation, who put it in the plate. MELLOR, J. referred to *Re v. Atkinson*, 1 Leach, 302.]

Cooper, for the prosecution, was not called upon.

POLLOCK, C. B.—We are all agreed that the prisoner was guilty of larceny at common law. My brother Wightman has read from a text-book a paragraph which applies to this case. In this case Mrs. Bates gave the prisoner a sovereign for a particular purpose, and he took the money with the intention of stealing it. The lady never intended to part with her dominion over it at all; but merely used his hand as her own.

The rest of the COURT concurred.

— Conviction affirmed.

#### REG. v. WILLIAM FALLON.

*Pleading—Indictment—Accessory after the fact—24 & 25 Vict. c. 94, ss. 3, 4.*

*An accessory after the fact to a felony cannot be convicted upon an indictment charging the commission of the felony only; he should be indicted as an accessory after the fact.*

At the general quarter sessions of the peace, holden for the city of Manchester, before me, the assistant barrister, duly appointed by the Recorder of the said city to preside in the second court at the said general quarter sessions in August last, William Fallon was tried on the following indictment:—

“City of Manchester, in the county of Lancashire, to wit.—The jurors of our Lady the Queen, upon their oath, present that William Fallon, late of the city of Manchester, in the county of Lancashire, on the 25th day of July 1862, at the city aforesaid, in the county aforesaid, and within the jurisdiction of this court, one purse, one pencil-case, and nine pawn-tickets, the property of Charles Rogerson, from the person of the said Charles Rogerson, then and there feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.”

There was a second count in the indictment charging a previous conviction for felony against the prisoner.

At the close of the case for the prosecution, the counsel for the prisoner submitted that there was no evidence to go to the jury to prove the felony charged in the indictment.

For the prosecution it was argued that there was evidence upon which the jury might convict the prisoner of the felony charged in the indictment, and at all events there was ample evidence to prove that the prisoner was an accessory after the fact to the commission of the felony charged in the indictment, and it was alleged that the prisoner might be convicted of being such accessory after the fact upon the indictment for the felony.

I left the case to the jury to say whether the prisoner was guilty of the felony charged in the indictment, or was guilty of being an accessory after the fact to the commission of the felony charged in the indictment, or whether they acquitted him altogether.

The jury found the prisoner not guilty of the felony charged in the indictment, but guilty of being an accessory after the fact to the commission of the said felony, which finding was supported by abundant proof.

I respited the judgment, and for want of bail the prisoner remains in custody.

The question for the opinion of the Court for the Consideration of Crown Cases Reserved is, whether the prisoner was properly convicted.

W. H. HIGGIN.

By the 24 & 25 Vict. c. 94, s. 3, it is enacted that whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law, or by virtue of any Act passed or to be passed, may be indicted and convicted, either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as an accessory after the fact to the same felony, if convicted as an accessory, may be punished.

*Samuel Taylor*, for the prosecution, referred to the above enactment, and contended that he might be properly convicted as an accessory after the fact upon this indictment. [WIGHTMAN, J.—What is the substantive felony referred to by the enactment?] In this case the stealing of the purse charged in the indictment. [WIGHTMAN, J.—I should say it was the felony of being an accessory after the fact. MELLOR, J.—Sect. 4 provides for the punishment of accessories after the fact, imprisonment not exceeding two years. Upon a conviction under the court for stealing, the punishment could be more.]

No counsel appeared for the prisoner.

POLLOCK, C. B.—The prisoner ought to have been indicted for the substantive felony of being an accessory after the fact, of which offence he was found guilty. The prisoner was indicted for an offence of which he was not found guilty, and he has been found guilty of an offence for which he was not indicted.

The rest of the Court concurring,

— Conviction quashed.

Nov. 15 and 22, 1862.

#### REG. v. EDWARD GARDNER.

*Larceny—Finding—Withholding in hope of a reward. One who, in expectation of a reward, withholds from the owner, whom he knows, a lost cheque received by him from the finder, is not guilty of stealing the cheque.*

Case reserved at the Middlesex sessions.

Edward Gardner was tried on an indictment charging him in the first count with stealing one banker's cheque and valuable security for the payment of 82l. 19s., and of the value of 82l. 19s., and one piece of stamped paper of the property of James Goldsmith.

In the second count the property was stated to be the property of Thomas Boucher.

It appeared from the evidence of Thomas Boucher, a lad of fourteen, that he found the cheque in question; that having met the prisoner Gardner, in whose service he had formerly been, he showed it to him; that the prisoner (Thomas Boucher being unable to read) told him it was only an old cheque of the Royal British Bank; that he wished to show it to a friend, and so kept the cheque; that Boucher very shortly after on the same day went to prisoner's shop and asked for the cheque; that the prisoner from time to time made various excuses for not giving up the cheque, and that Boucher never again saw the cheque.

It also appeared that the prisoner had an interview with Goldsmith, in which he said that he knew the cheque was Goldsmith's, asked what reward was offered, and upon being told 5s., said he would rather light his pipe with it than take 5s.

The cheque has never been received either by Goldsmith or Boucher, though there was some evidence (not satisfactory) by prisoner's brother of its having

C. CAS. R.]

REG. v. ELIZABETH BURGESS—REG. v. M'ATHEY.

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been inclosed in an envelope and put under the door of Goldsmith's shop.

The jury found that "the prisoner took the cheque from Thomas Boucher in the hopes of getting the reward, and, if that is larceny, we find him guilty."

Thereupon the judge directed a verdict of guilty to be entered, and reserved for the opinion of this court whether upon the above finding the prisoner was properly convicted.

Nov. 15.—*Best* (with him *Beasley*), for the prisoner, argued that the finding of the jury disproved the felonious intent. In *Reg. v. York*, 3 Cox Crim. Cas. 181, a similar finding of the jury was held to amount to "not guilty." (He was then stopped.)

*Kemp* for the prosecution.—The deft. could read, and therefore must have known the owner: (*Reg. v. Christopher*, 8 Cox Crim. Cas. 91; 28 L. J. 35, M. C.; *Reg. v. Moore*, 8 Cox Crim. Cas. 416; 30 L. J. 77, M. C.) As against all the world but the true owner, the boy Boucher, was the owner, and the prisoner took the cheque from him against his will, and may be convicted on the second count.

POLLOCK, C. B.—That is the case of *Amory v. Delamirie*, 4 Str. 505, where the boy was held entitled to sue the master for a jewel which he had found and his master had taken from him. It was not supposed that the master was guilty of felony. There the jewel was not ear-marked; but every one who can read can tell to whom a cheque belongs. Properly speaking a cheque is not a chattel. We must take it that the cheque was stamped, and being stamped it was not a piece of paper—it was a cheque. *Cwr. adv. vult.*

Nov. 22.—POLLOCK, C. B.—In this case the prisoner was convicted of stealing a cheque. He took the cheque away from a boy who found it, and did not immediately give information to the owner, but withheld it in the expectation of getting a reward. The taking of the cheque from the finder was not a felonious taking, and the merely withholding it in the expectation of a reward was not larceny.

The rest of the Court concurring,

Conviction quashed.

#### REG. v. ELIZABETH BURGESS.

Quarter sessions—Jurisdiction—Attempt to commit suicide.

*Suicide is not murder within the 24 & 25 Vict. c. 100, s. 11 and 15, and therefore attempting to commit suicide is a misdemeanor triable at quarter sessions.*  
Case reserved at the Middlesex sessions.

The prisoner was tried on an indictment, which charged that she, "on the 16th Sept. 1862, unlawfully and wilfully did attempt and endeavour to commit a certain felony, that is to say, that she the said Elizabeth Burgess, on the day and year aforesaid, unlawfully and wilfully did attempt and endeavour feloniously, wilfully, and of her malice aforethought, to kill and murder herself the said Elizabeth Burgess, against the form of the statute in such case made and provided."

To this indictment she pleaded guilty.

Before passing sentence, it was suggested that courts of quarter sessions had no longer jurisdiction over the offence by reason of the passing of the statute 24 & 25 Vict. c. 100.

The 11th, 12th, 13th and 14th sections of that statute relate to attempts to commit murder by different specified methods; and the 15th section enacts that "Whoever shall, by any means other than those specified in the preceding sections, attempt to commit murder, shall be guilty of felony, and be liable to be kept in penal servitude for life."

By the 5 & 6 Vict. c. 38, s. 1, courts of quarter sessions are prohibited from dealing with any felony in respect of which sentence of transportation for life can be passed upon a person not previously convicted of felony.

By the 20 & 21 Vict. c. 3, s. 2, penal servitude is substituted for transportation.

Sentence was respited, and the prisoner was committed to the house of correction for the county.

The judgment of this court was prayed, whether the above conviction could, in point of law, be sustained.

Nov. 15.—*Beasley* for the prisoner.—An attempt to commit suicide is not a misdemeanor, but merges in the felonies included in the 15th section of 24 & 25 Vict. c. 100; the sessions, therefore, had no jurisdiction. The indictment was bad and the conviction was bad: (*Reg. v. Cross*, 1 Ld. Raym. 711.)

*Poland* for the prosecution.—This indictment charges a common law misdemeanor, triable at sessions. Sect. 15 of 24 & 25 Vict. c. 100, applies only to attempts to murder another, and not to suicidal attempts. The averment in the count, "against the form of the statute," &c., may be rejected as surplusage. It was no more than an indictment at common law for attempting to commit a felony. *Felo de se* is not treated as murder in the books: (1 Hawk. P. C. 68; 4 Bl. Com. 189; Blunt's Law Dic. (1773); Cowell's Law Dic. (1723); Jervis on Coroners; 1 Wms. Saund. 356, n. a.) *Felo de se* is not murder; within the exception of murder is a pardon: (*Reg. v. Ward*, 1 Lev. 8; *Reg. v. Russell*, 1 Moo. C. C. 367; *Tombes v. Etherington*, 1 Lev. 120.) The quarter sessions is the proper court to deal with such cases. It could not have been intended by the Legislature to impose transportation for life in such cases.

*Beasley* replied: (*Reg. v. Dyson*, R. & R. 523; *Reg. v. Alison*, 8 C. & P. 418.) *Cwr. adv. vult.*

POLLOCK, C. B.—We are of opinion that the jurisdiction of courts of quarter sessions is not taken away. To construe the statute 24 & 25 Vict. c. 100, according to the argument, would bring the matter to this, that persons attempting to commit suicide by wounding would be liable to be indicted for wounding with intent to kill. We think, therefore, that the jurisdiction in such cases is not taken away; and, as my brother Wightman desires me to say, that suicide is not murder within the meaning of the sections of the Act referred to. *Conviction affirmed.*

Saturday, Nov. 22, 1862.

(Before POLLOCK, C. B., WIGHTMAN and WILLIAMS, JJ., CHANNELL B., and MELLOR, J.)

#### REG. v. M'ATHEY.

Husband and wife—Felonious receiving.

*A husband and wife were jointly indicted for stealing and receiving, and the jury found the wife guilty of stealing without any constraint on the husband's part, and the husband guilty of receiving the stolen property, knowing at the time when the property was delivered to him that it had been stolen by his wife: Held, that the husband was properly convicted of receiving.*

Case reserved at the general quarter sessions for Northumberland.

John and Mary M'Athey were jointly indicted for stealing from the person and feloniously receiving.

The jury found that the prisoners were husband and wife, and returned a verdict of guilty upon the first count against the wife, and of guilty upon the second count against the husband for receiving the stolen property, knowing it to have been stolen.

At the request of the counsel for the prisoners the chairman asked the jury, first, whether the female prisoner acted voluntarily with respect to her husband, and they found that she did act voluntarily, and without any constraint on the part of her husband; and they were further asked whether the male prisoner received the stolen property from his wife, knowing it to have been stolen by her, and they found that he had.

Upon this it was objected by counsel for the male prisoner that the case fell within the scope of that of

*Reg. v. Wardroper*, 8 Cox C. C. 284; 29 L. J. 116, M. C., (a) and that the verdict amounted to one of acquittal of the male prisoner.

The Court granted this case, and the question was whether the male prisoner could be convicted of feloniously receiving the property from his wife stolen by her under the circumstances above.

**POLLOCK, C. B.**—In this case we desired to know if the jury had found that the husband, when the goods were delivered to him by the wife, knew that they were stolen, and in the case, as amended, it appears that the jury did so find. The conviction therefore is right.

*Conviction affirmed.*

**REG. v. THOMAS POYNTON.**

*Post-office—Secreting letter—Larceny.*

*A letter carrier, whose duty it was, in case he was unable to deliver any letter, to bring it to the post-office on his return from delivery, not having delivered a letter containing money, gave no account of it, and being asked why he had not delivered it, produced it unopened, and the coin safe within, from his trousers pocket, stating, untrue, that the house where it ought to have been delivered was closed. Upon an indictment for stealing the letter, the jury found him guilty, and that he detained it with the intention of stealing it:*

*Held, that so dealing with the letter amounted to larceny.*

Case reserved by Pollock, C. B. for the opinion of this court.

Thomas Poynton, a letter carrier, was tried before me at the last assizes for the borough of Leicester, and convicted upon an indictment charging him with having, while employed under the Post-office of the United Kingdom, feloniously stolen, taken and carried away one post letter, the property of her Majesty's Postmaster-General, containing two half-sovereigns, and addressed as follows:—

“Stephen Sullivan, dealer, Black Horse, Belgrave-gate, Leicester, care of Mrs. Swift.”

A second count charged him with embezzling, and a third with secreting the said letter; and in the fourth count he was charged with larceny of the same letter, both it and the money being laid as the property of Charles Donald Style.

On the trial it was proved that a test letter, addressed as above stated, was prepared by one of the inspectors of the Post-office, and posted at Melton on the night of the 1st May. It arrived at the post-office at Leicester in due course on the following morning, and was, among others, sorted to the prisoner for delivery.

The letter in question ought to have been delivered by the prisoner at its place of destination between half-past eight and nine in the morning. The letter, however, was not delivered, and the prisoner returned to the post-office as usual, and reported himself to the postmaster as having finished his delivery.

It was the duty of the prisoner, in case there were any letters which from any cause he was unable to deliver, to bring them back to the post-office.

On his return from delivery, he brought the pouch which contained four which he had been so unable to

deliver, but none of which contained coin. The letter in question was not returned, nor did the prisoner give any account of it.

It having been shortly afterwards ascertained that the letter in question had not been delivered, the inspector who had caused it to be posted asked why he had not delivered it. The prisoner at once produced from his right-hand trousers pocket, the letter in question, which was unopened, and the coin safe within it. Upon being asked why he had not delivered it, the prisoner stated that the house was closed. This statement, however, was proved to be untrue. The prisoner further stated that he was going to deliver it in the afternoon.

The jury found that the prisoner detained the letter, and that he did so with the intention of stealing it.

I reserved for the consideration of the court the question whether, under the circumstances, the prisoner's dealing with the letter amounted to actual stealing.

I directed the jury that, if they were satisfied that the prisoner put the letter into his pocket with the intention of stealing or secreting it, he might be convicted.

The jury found the prisoner guilty, and stated they were of opinion that the prisoner detained the letter with the intention of stealing it.

I ordered the prisoner to be discharged on giving bail.

*Moreover* for the prisoner.—It cannot be denied at one time the prisoner entertained an intention to steal, but, when asked about it he at once produced it. The letter was lawfully in the prisoner's possession, and though, when he put it in his pocket, he had the intention of stealing it, he may have changed his mind and intended to deliver it in the afternoon. It may be there was an attempt to steal, but it cannot be said that he stole it. [POLLOCK, C. B.—If a man puts a letter into his pocket with the intention of stealing it, and carries it about all day, he does not cure the matter by afterwards putting it back again. The letter was in his pocket, where it ought not to have been.] No doubt under the Post-office regulations that was an unlawful place for it to be in; but, although he began to steal it, he stopped before he had stolen it, and at the most there was only evidence of an attempt to steal, but not of the complete offence. [POLLOCK, C. B.—No one can be more lawfully in possession of another's property than a carrier's man, and yet if he removes the property from its proper place with the intention of stealing it, he is guilty of larceny.] There the act of removal with the intent determines the bailment. [POLLOCK, C. B.—So if a post-office servant breaks the Post-office regulation and puts a letter into his pocket with the intention of stealing it he determines the bailment.] In this case the *expressum* was not complete.

*Boden (Mellor with him)*, for the prosecution, was not called upon.

**POLLOCK, C. B.**—We are all of opinion that there is no doubt of the conviction being right. I reserved the case during the trial, and if there had been any opportunity for reconsidering after the finding of the jury I should have withdrawn it. *Conviction affirmed.*

Nov. 22 and 29, 1862.

(Before POLLOCK, C. B., WRIGHTMAN and WILLIAMS, JJ., CHANNELL, B. and MELLOR, J.)

**REG. v. THOMAS BARRETT.**

*Bawdy-house—Keeping—Evidence—Landlord—Weekly tenants.*

*The owner of a house proved to be a common bawdy-house, let it out to weekly tenants, but did not appear to have got any additional rent by reason of the purposes to which the house was applied. It was frequently remonstrated with as to the manner in which the house was conducted, and called upon*

(a) In that case A. B., and B.'s wife were jointly indicted for burglary and receiving; the jury found A. guilty of burglary, and B. and his wife of receiving. Part of the property was found in B.'s house, and from that fact and others, the jury were warranted in finding B. guilty of receiving. To connect the wife with the matter it was proved that some time after the burglary the wife was seen dealing with part of the stolen things, when she made a statement importing a knowledge that the things had been stolen, and that they were to be made away with. The judge at the trial declined to leave it to the jury to find whether B.'s wife received the things from her husband or in his absence, and the jury found B.'s wife guilty of receiving. Held, that the questions were proper for the consideration of the jury, and the conviction could not be supported.

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[C. B.]

to abate the nuisance, and was told that unless he did so, an indictment would be preferred against him. He, however, took no steps and allowed matters to go on as before:

*Held, that he was not guilty of keeping a common bawdy-house or of being an accessory thereto.*

Case reserved at the Middlesex sessions.

Thomas Barrett was tried before me at the Middlesex sessions, in Nov. 1862, upon an indictment which in the first and second counts charged him and two other persons with keeping a common bawdy-house and disorderly house in the parish of St. George-in-the-East, and in two other counts being charged alone with keeping another common bawdy-house and disorderly house in the same parish.

The houses in question were proved to be common bawdy-houses, and that robberies had been frequently committed in them by prostitutes and other idle and disorderly persons who frequented them by day and night.

The evidence against the other defendants who were included in the indictment was conclusive, and no question arises as respects them.

The evidence against Thomas Barrett, in addition to the proof as to the nature of the houses, was, that he Thomas Barrett was the owner of both houses, which he let to weekly tenants, and that he had been repeatedly remonstrated with as to the manner in which the houses were conducted, and called upon to interfere so as to abate the nuisance.

Of these warnings he took no notice, and some months before the prosecution was instituted he was served with a written notice, to the effect that the police and inhabitants complained of the vicious and disorderly conduct of his tenants, and that unless he took steps for removing them, and for the discontinuance of the unlawful practices, which for a long time had been carried on, and still were carried on, in his said houses, an indictment would be preferred against him and all other parties concerned in the unlawful practices complained of, and that in that case the notice then served would be given in evidence against him.

The defendant Thomas Barrett took no step with the view of complying, but continued to go to the houses and receive the rent from the occupiers every week until the present prosecution was commenced.

It was not proved that the defendant obtained any additional rent by reason of the nature of the occupation.

The prisoner's counsel contended that there was no evidence for the jury to consider, but, as I stated that I should take their opinion upon the facts, he addressed the jury.

I told the jury that if they were satisfied that the defendant well knew the purposes for which the houses were occupied, and having the power of removing the tenants by a week's notice, had continuously permitted them to remain, and to conduct them as common bawdy-houses, notwithstanding the warnings and notices given him, that they should find him guilty.

The jury found the defendant guilty, and I have to request the judgment of this honourable court whether the conviction can in point of law be sustained.

The defendant has been admitted to bail until the decision of this honourable court is pronounced.

WM. H. BODKIN, Assistant Judge of the  
Nov. 19, 1862. Middlesex Sessions.

*Notes for the prisoner Barrett.*—The conviction cannot be sustained. The prisoner was in no sense the keeper of a common bawdy-house. He was merely the landlord and received the rent, and although he could have prevented the house being used for the purpose it was, but did not, that is not sufficient to support a conviction of him under this indictment. The case of *Rick v. Basterfield* 4 O. B. 783, is in point, the marginal note of which is: "Although the owner of

property may as occupier be responsible for injuries arising from acts done upon that property by persons who are there by his permission, though not strictly his agents or servants, such liability attaches only upon parties in actual possession. Where therefore an action was brought against A. the owner of premises for a nuisance arising from smoke issuing out of a chimney to the prejudice of the plaintiff in his occupation of an adjoining messuage, on the ground that A. having erected the chimney and let the premises with the chimney so erected, had impliedly authorised the lighting of a fire therein: held, that the action would not lie; held, also, that inasmuch as the premises were in the occupation of B., a tenant at the time the fires were lighted, A. was entitled to a verdict on the plea of 'not possessed,' the allegation as to possession having reference to the time when the nuisance complained of was committed, and not to the time at which the chimney was erected." In that case, as in the present, the tenancy was a weekly one.

*Poland for the prosecution.*—The conviction was right. No doubt, if the rooms had been let, and after the possession was in the tenants they had been converted to this immoral purpose, the landlord would not have been responsible. But this is an indictment at common law, that the landlord and tenants jointly kept a common bawdy-house, and the prisoner Barrett is in the position of an accessory before the fact. Without the aid of the statute 25 Geo. 2, c. 36, the prisoner is indictable at common law if he is a party to the committing of the nuisance. In *Rick v. Basterfield* the nuisance arose from burning coals, and the landlord was no party to that. In *Pearson's case*, 2 Ld. Raym. 1197, it was held that a lodger who keeps only a single room for the use of a bawdy is indictable for keeping a bawdy-house. *Curr. adv. ult.*

Nov. 29.—POLLOCK, C.B.—We are of opinion that the indictment cannot be sustained, the defendant really being the keeper of a common bawdy-house in point of law. He was simply the owner of the house, reletting it to another person who used it for an improper purpose. The defendant had nothing to do with that, and did not participate in the profits of so using it. He had nothing to do with the immoral part of the transaction, excepting knowing the way in which the house was used. My brother Williams very shortly expressed the view we take when he said that all that the defendant did was not to give the tenants a notice to quit. *Conviction quashed.*

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYN, Esqrs.,  
Barristers-at-Law.

Wednesday, Nov. 19, 1862.

CROSS v. WATTS.

*Licence to sell beer not to be drunk on the premises.*—  
1 Will. 4, c. 64, s. 15—4 & 5 Will. 4, c. 85, ss. 1 and 17.

*The app. having a licence to sell beer not to be drunk on the premises, had a bench fixed outside his house, upon which persons who had bought beer of him were in the habit of sitting during the time they were drinking their beer:*

*Held, that this bench must be considered part of the premises within the meaning of the above-mentioned statutes, and therefore that the magistrates were right in convicting him for selling beer to be drunk on the premises without being duly licensed to do so.*

This was an appeal from the decision of magistrates under 20 & 21 Vict. c. 43.

CASE.

George Croes, of Strutford, in the county of Oxford, was summoned by one of her Majesty's justices of the peace acting in and for the Banbury and Bloxham division of the county of Oxford, under the statute



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1 Will. 4, c. 64, s. 7, and 4 & 5 Will. 4, c. 85, ss. 4 and 17, to answer an information laid by Thomas Watts, an officer of excise, alleging that he said George Cross (being a person not duly licensed to sell beer, cider and perry, as the keeper of a common inn, alehouse, or victualling house) on the 25th July 1862, at Stratford aforesaid, did sell one pint of beer by retail, to be drunk and consumed in and upon the house and premises, without having an Excise retail licence in force authorising him so to do.

The app. appeared both personally and by his attorney on answer to the summons. It was proved by the Excise officers, and admitted by the app., that he had a licence to sell beer off his premises; but he had no licence to sell on, and he was not a licensed victualler. The following facts were sworn to by Martin O'Donoghue, an Excise officer, and they were not disputed by the app. or his attorney, except as to the date of the alleged offence as mentioned below. O'Donoghue deposed that on the day in question (the 25th July) he was driving past the app.'s house, and seeing two men sitting on a form outside the house drinking beer, he (the officer) alighted from the gig, and went up to the door and asked for a pint of beer. App. and his wife were both present when he called for the beer. O'Donoghue then sat down on the form by the side of the two men. The app.'s wife brought him the pint of beer out of the house in one of her own mugs or drinking-cups, and he paid her 2½d. for the beer. O'Donoghue and the two men drank the beer between them as they sat on the form, and when they had drunk it, O'Donoghue placed the cup on the sill of app.'s window, outside, and then went away. The form stood just outside the app.'s street door, and touched the wall of his house. The eaves of the house projected some inches over the form, and app.'s son (who was called for the defence) stated that he had particularly noticed the walls of the house and the foundation extended further out into the street than the eaves, and therefore it appeared that the form stood either wholly or partially upon the app.'s property, although outside his house.

It did not appear whether the form was fixed either to the ground or to the app.'s house, but it was removed between the time of the sale of the beer to O'Donoghue, and the hearing of the summons. O'Donoghue proved that he had seen the form there for three or four months, and that it was used for people to sit and drink on.

A witness named Walker was called for the app., who confirmed the evidence of O'Donoghue, except that he stated the transaction took place on the 4th July instead of the 25th, but O'Donoghue was positive it was on the 25th.

This was the evidence adduced before us, and it appeared from the records of the petty sessions that the app. had been previously convicted before the same bench several times.

The present case it will be observed was heard on the 25th Sept. 1862.

Under these circumstances, and upon the above evidence, we the undersigned convicted the app. in the penalty of 12*l.* and costs, and we adjudged that his licence to sell beer by retail off his premises should be forfeited. The app. thereupon expressed himself dissatisfied with our determination, and applied for a case for the opinion of the Court of Common Pleas.

The opinion of the court is therefore requested whether the justices were right or wrong in convicting the app. and adjudging his licence to be forfeited as above mentioned.

T. E. Davis, for the app., contended that there was no evidence before the justices of any sale of beer by the app. to be drunk or consumed in the house and premises where sold. That the justices do not find as a fact that there was any sale of beer inconsistent with

the app.'s licence. That the facts stated in the case are quite consistent with a sale of beer authorised by the app.'s licence. That the justices could not, apart from the evidence adduced before them, take judicial notice of the records of the petty sessions and adjudge the forfeiture of the licence without proof of the previous convictions in the presence of the app., and that it does not appear that any such proof was given, and the fact was, that no such proof was given. That it appeared from the case, and the fact was, that the conviction of the app. was not founded upon the evidence adduced before the justices, but under alleged circumstances not duly proved before the justices.

Welsby, for the resp., having stated that he had conferred with the Attorney-General as to the forfeiture, who was of opinion that it was not a second offence within the meaning of the statute, contended, first, that the facts stated in the case show an offence against the provisions of the 1 Will. 4, c. 64, s. 15, and the 4 & 5 Will. 4, c. 85, ss. 1, 17. Secondly, that the case disclosed evidence on which the justices might determine that such offence had been committed by the app.

ERLE, C. J.—In my opinion this conviction was right. The statute enacts that beer may be sold on certain conditions with a certain licence, to be drunk off the premises. It is not for us to go into the purpose of the Act, or the intention of beer being carried away to a family or house. All that we are to look to is the words of the statute, and to see whether this person sold beer to be drunk on the premises. He having by his licence a right to sell beer to be drunk off the premises, the Excise officer prosecuted him for selling beer to be drunk on the premises. It appears that he had for some considerable time before the day in question a bench just outside his door, not permanently a fixture, but in some degree fastened to his house, and I think there was good evidence for the justices to decide that that form was in one sense a part of the house, that is to say, slightly fastened near the house and part of the publican's premises. When the informer came two men were drinking upon that form—it had been used for drinking—it had been outside the house for some time before, and the informer went to the house and asked for beer, sat down upon the form, and the wife brought the beer to him, which he drank whilst he was sitting on that form. I cannot say that the justices were wrong in saying that that form was part of the premises, and that the app. sold that beer to be drunk on the premises. It is very clear that if the Legislature meant that the beer should be taken away from the premises, the putting a permanent form just outside the house upon which customers could sit and drink the beer, was an evasion of the statute.

WILLIAMS, J.—I am of the same opinion. I think that this case turns upon an inquiry of fact, the only question being therefore whether there is evidence that the party informed against has incurred the penalty. It seems to me that, upon the facts brought before the justices, they might well come to the conclusion that this bench was put there by the landlord of the beershop for the express purpose of accommodating his guests at the beershop. If it was so put he had a right, if he had been so inclined, to exclude everybody else from sitting upon it except his guests. I am therefore of opinion that the bench is a part of the premises within the meaning of this particular clause of the statute, and that the justices were right in convicting upon the evidence.

BYLES, and KEATING, JJ. concurred.

*Conviction affirmed.*

Attorney for resp., *Solicitor of Inland Revenue.*

V.C. S.]

WEDMORE v. THE MAYOR, ALDERMEN, &amp;C., OF BRISTOL.

[V.C. S.]

## V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON, Esq., of Lincoln's-inn,  
Barrister-at-Law.

Tuesday, Dec. 2, 1862.

WEDMORE v. THE MAYOR, ALDERMEN AND BURGESS  
OF THE CITY AND COUNTY OF BRISTOL.*Injunction—Damages—Chancery Amendment Acts  
1848 and 1862—Lands Clauses Consolidation Act,  
c. 68.*

*Upon injunction to restrain the defts. from raising a footway, under powers contained in local Acts (which incorporated the Lands Clauses Act), in front of plts.' house, and thereby preventing access to a warehouse, and from otherwise damaging their property, it having been established that the defts. were empowered under their Acts to alter the footway, and also that the plts. had sustained and would sustain injury thereby, an injunction was refused, but it was referred to chambers to ascertain and certify the amount of injury, and what would be a proper sum to be awarded by way of damages in respect of such injury.*

This was an injunction suit.

In February last the Corporation of Bristol commenced the construction of a new foot-bridge on the east side of Bristol bridge. The bridge is formed of three arches, the centre arch being higher than the others, and the roadway accordingly rising towards the centre from either end. The plan proposed for constructing the new foot-bridge was to carry it in a line nearly horizontal with the crown of the centre arch, so that the approaches on either side would have to be raised considerably above the existing paved footways.

One of these footways passed in front of the shop and warehouse of the plts. Messrs. Boucher. This building, which was the nearest to the bridge on one side, was leased by the Messrs. Boucher from the plt. Thomas Wedmore, who was the owner in fee-simple. Roberto Messrs. Boucher's goods were conveyed to their warehouse through an opening in the basement wall of the house, descending by steps sunk in the paved footway.

The works were carried on for some time behind boardings, which concealed from view the nature of the alterations; and, on their being removed, on the 23rd Oct. last, the plts. found that the effect of the proposed plan would be to render necessary the displacement of the steps leading to the warehouse, so as to render it impossible that hogsheds of sugar could be moved into and out of the warehouse. The sill of the shop door, also, which was a step above the former footway, would now become a step below the new footway, and thus, as the plts. alleged, irreparable damage would be done to their shop.

The defts., as the bill alleged, relied upon the powers contained in the Bristol Improvement Acts of 1840 and 1847; but the plts. charged that the raising of the footway was not a widening or improvement of a road or street within the meaning of the Acts. With these Acts the Land Clauses Consolidation Act 1845 was incorporated; but the defts. had not proceeded under that Act, by agreeing or treating with the plts., or giving them notice.

The bill was filed on the 31st Oct., and prayed that the defts., &c., might be restrained from raising the paved footway in front of the plts.' messuage, or otherwise prejudicing or interfering with the entrance to the warehouse or the steps leading thereto, and from doing or permitting any act whereby the removal of bulky articles into and out of the warehouse would be prejudiced or affected, and from otherwise damaging the said messuage and the said easement belonging thereto.

An interim injunction was granted, and the cause now came on to be heard.

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Bacon, Q. C. and J. Lawrence Bird moved that the injunction be made perpetual.

Molins, Q. C. and T. Hughes, for the defts., relied upon the powers contained in the Acts above mentioned, and in the Local Health Act of 1845. The remedy of the plts. was under the Lands Clauses Consolidation Act. They cited *Frewin v. Lewis*, 4 M. & C. 251; *The East and West India Docks v. Gatlke*, 3 M. & G. 155; *The Sutton Harbour Company v. Hutchens*, 1 De G. M. & G. 166; *The Bradford Local Board of Health v. Hopwood*, 6 W. Rep. 818.

*The London and North-Western Railway v. Smith*, 1 M. & G. 216, reversed by *Gatlke's* case, and the *Sutton Harbour* case, was also referred to. See the note, 10 Jur. 71.

No reply.

The VICE-CHANCELLOR.—The plts. seek relief in respect of an injury on the part of the corporation in the exercise of their compulsory statutory powers. The Act of Parliament apparently authorises the alteration of the footway in the manner now proposed. But the Act is imperative as to this—that in exercise of their powers the corporation are to do as little damage as may be, and they are to make satisfaction in the manner mentioned in the Act for such injury as they may do to private property. This bill alleges an act which certainly, as there stated, is a wrongful act; but the Act of Parliament authorises the corporation to commit the injury, and to make reparation to the injured person in the shape of damages or compensation. The court was of opinion that the case stated by the bill and affidavits entitled the plts. to an interim injunction. It is to be regretted that the corporation, as soon as they were aware that the plts. threatened to file a bill, did not make some attempt to prevent litigation, by explanation which might have satisfied the plts. that they were doing, and intended to do, as little damage as might be; and by offering adequate compensation for the injury. Early in the discussion I endeavoured to draw the attention of counsel to the late Acts of Parliament which have extended the jurisdiction of the court. The language of these Acts is likely to raise questions of difficulty. The Act of the 21 & 22 Vict. c. 27, s. 2, is as follows: "In all cases in which the Court of Ch. has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, it shall be lawful for the same court, if it shall think fit, to award damages." It has been argued that the word "jurisdiction," in this clause, is to be confined to cases in which the right to an injunction or to a decree for specific performance is established; and that, unless the right to that mode of relief, for which damages may be substituted, is established, the power of the court is not enlarged. But, as at present advised, my impression is, that so narrow a construction would defeat the intention of the Legislature. In a case like the present, even if the court might think the nature of the act sought to be restrained and the intention of the parties was such that it might be too severe a thing to grant an injunction, and would therefore have refused it on the balance of hardship—although there might seem enough to entitle him to damages at law—in such a case this court has now jurisdiction to award damages. I cannot hold that the Act applies only to those cases in which the court is of opinion that the plt. has shown a right to an injunction upon the merits of the case; because, if he has shown such an injury as can be properly compensated for in damages, the court has power to award them under this section without granting an injunction. The language of the Act of last session, the 25 & 26 Vict. c. 42, s. 1, is this:—"In all cases in which any relief or remedy within the jurisdiction of the said Courts of

Ch. respectively is or shall be sought in any cause or matter, instituted or pending in any of the said courts, and whether the title to such relief or remedy be or be not incident to or dependent upon any legal right, every question of law or fact cognisable in a court of common law, on the determination of which the title and such relief or remedy depends, shall be determined by or before the same court." The cases decided by Lord Cottenham, Lord Truro, and the Lords Justices, cited in argument, have no application whatever to the provisions of this Act of Parliament, except to this extent that, in the case before Lord Cottenham, where the question was whether an injunction should be granted, he desired that the matter should be first decided in an action at law. If I had had any doubt in this case whether the nature of the injury was such as this Act of Parliament contemplates, there can be nothing more clear than that before the recent Act it would have been the duty of the court to direct an action at law. But the time for that course of proceeding is gone by; and it seems to me that I should not be justified in sending the plts., who have shown that an injury has been done to their property, to seek to recover damages in a court of law or elsewhere under the provisions of the Lands Clauses Consolidation Act of 1845. Therefore, although the case is one in which it is not proper to continue the injunction, it is one in which it is proper to direct the chief clerk to inquire and certify what degree of injury has been sustained by the plts., and what will be a proper sum to be awarded by way of damages in respect of such injury. Under the beneficial powers recently granted to this court, there is power, upon an inquiry in chambers, not only to direct witnesses to be examined in court or before a jury, but also to vary or add to the order now made in such manner as the purposes of justice may require.

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HENTLEY, Esqrs., Barristers-at-Law.

Thursday, Nov. 27, 1862.

GAY v. MATTHEWS.

Sessions—Appeal—Costs—Order—Form of—Distress—Replevin—Notice of action.

*An order of quarter sessions for payment of costs by the app. to the resps., directed them to be paid to the clerk of the peace, to be by him paid over to the parties entitled to the same within three weeks after service of the order or a copy thereof upon the app. pursuant to the 12 & 13 Vict. c. 45, s. 5, and 11 & 12 Vict. c. 43, s. 27.*

*Held, that the order was valid in point of form (Wightman, J. dubitante.)*

*Declaration, for that the deft. on the plt.'s land took plt.'s goods and detained them against sureties and pledges. Plea, showing that the goods were taken under a warrant issued by a justice to enforce an order of quarter sessions for payment of costs of an appeal against a poor rate.*

*Held, that this was an action of replevin, and that no notice of action or demand of perusal of the warrant was necessary.*

*Declaration.*—For that the deft. on the plt.'s land took the plt.'s goods and unjustly detained the same against sureties and pledges.

Second plea.—That the alleged trespasses were committed after the passing of the 2 & 3 Vict. c. 93, and were committed in pursuance of that statute, and that no notice of action was given.

Third plea.—That at the general quarter sessions of the peace held at Devizes, in and for the county of Wilts, on Tuesday the 1st Jan., in the twenty-fourth year of the reign of our Lady the Queen, it was by

the said court then having and exercising competent jurisdiction in that behalf, ordered as follows:—

"Wiltshire to wit.—Whereas at the general quarter sessions of the peace held at Warminster in and for the said county of Wilts, on Tuesday the 3rd of July last, Alfred Gay entered his appeal against a rate or assessment made for the relief of the poor of the parish of Whiteparish in the said county of Wilts, dated the 21st day of May then last past and allowed the 22nd day of the same month of May, the hearing and determination of which said appeal was adjourned to the then next session, at which said last-mentioned sessions held at Marlborough in and for the said county, on Tuesday the 16th of Oct. then last past, on hearing counsel on both sides and by consent of the said app. and resps., the court did further adjourn the hearing and determination of the said appeal unto the then next and now present quarter sessions, and by the like consent did order that it be referred to Mr. William Thomas Buckland, of Windsor, in the county of Berks, land surveyor, to survey the several properties in respect of which the app. and the several resps. were respectively rated, and to report to the next and now present sessions the proper rateable value at which the app. and the said resps. should be respectively rated, according to law, and relatively towards each other and the general assessments in the said parish, and that the said court of quarter sessions should thereupon make such order in the premises as it should deem fit, and should thereupon award and apportion such costs and expenses to either party or parties respectively as, having regard to the several grounds of appeal and such order so to be by them made thereupon as aforesaid, should seem fair and just; and whereas the said W. T. Buckland accepted such reference, and in pursuance of such agreement and order made such survey and valuation, and ascertained the proper rateable value of the several properties in respect of which the said app. and the said several resps. ought to be respectively rated according to law and relatively towards each other, to the best of his knowledge and judgment, and reported the same to this court upon oath. Now this court, having heard the said W. T. Buckland, and duly considered the said report, doth approve of and confirm the same, and doth find, adjudge and determine that the said app. had no grounds for appeal against the said rate or assessment, inasmuch, according to the said report, the proper rateable value of the property in respect of which the said app. is rated therein is rated at a lower rate than the same ought to have been rated, and that the proper rateable value of the several properties in respect of which the several resps. are respectively rated therein, are rated at higher sums than the same ought to have been rated according to law, and in relative proportions to each other, and doth therefore order and direct that the said rate or assessment be amended according to the report of the said W. T. Buckland, and doth award and order the sum of 21*l.* 15*s.* 2*d.* to the said resps. for their costs in and about the said appeal, and the further sum of 98*l.* 10*s.* by them paid to the said W. T. Buckland for his costs and charges in making such valuation and report and attendances thereon; and this court doth further order and direct the said app. Alfred Gay to pay the said sums of 21*l.* 15*s.* 2*d.* and 98*l.* 10*s.* for costs to the clerk of the peace of this court, to be by him paid over to the parties entitled to the same within three weeks after service of this order, or a copy thereof, upon the said Alfred Gay.

"JOHN SWATNE, Clerk of the Peace.

"By the Court."

And the deft. says that notice of the said order, by serving a copy of the same upon the plt., was given to the plt. on the 9th March 1861, and that the plt. did not pay the said sums for costs, or any part thereof; that after three weeks had elapsed from the time of the

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said service and notice, the clerk of the peace of the said county of Wilts duly certified that the said sums of 21*l.* 15*s.* 2*d.* and 98*l.* 10*s.* for costs had not, nor had any part thereof, been paid, in obedience to the said order, and the deft. says that thereupon one of the justices of the peace acting in and for the county of Wilts, on the 6th April 1861, duly issued his warrant, under his hand and seal, directed to the constable of the parish of Whiteparish, in the county of Wilts, and to all other peace officers in the said county, and by which said warrant the said constable was commanded forthwith to make distress of the goods and chattels of the plt.; and that if within six days next after the making of such distress the said two last-mentioned sums, together with the reasonable charges of taking and keeping the said distress, should not be paid, then that the said constable should sell the said goods and chattels so distrained, and pay the money arising from such sale to the clerk of the peace for the county of Wilts. And the deft. says that he is one of the peace officers in the said county to whom the said warrant was directed, and in pursuance of the said warrant and in exercise of his duty thereunder, and not otherwise, did as in the declaration mentioned and therein complained of, as he well might.

Fourth plea.—This was similar to the third in all respects as regards form, but the order of quarter sessions was made in another appeal against a poor-rate, dated the 18th June, and the amount of costs ordered to be paid by the app. in this appeal was 420*l.* 15*s.* 7*d.*

Fifth plea.—That the deft. was acting as a constable under a warrant, and that no demand of the perusal and copy of such warrant was made.

Replication to second and fifth pleas, that this is an action of replevin and not an action of trespass.

Demurrer to third and fourth pleas.

*H. James* for the plt.—This is an action of replevin, and will lie for distress for poor-rates: (19 & 20 Vict. c. 108, s. 65.; a form of avowry is given by 43 Eliz. c. 2, s. 19; see also Com. Dig. Plead. 3 A. 1, Replevin A. B.; *Dore v. Wilkinson*, 2 Stark. 287; *Shannon v. Shannon*, 1 Scho. & Lef. 324; *Fletcher v. Wilkins*, 6 East, 283; *George v. Chambers*, 11 M. & W. 149; *Wilson v. Weller*, 1 Bro. & B. 57.) The question now is, whether, under any state of circumstances, the declaration can be supported: (*Leather v. Leather*, 1 E. & B. 619; *Mennie v. Blake*, 25 L. J. 399, Q. B.) Secondly, the deft. was not entitled to notice of action or to a demand of perusal of his warrant. The 2 & 3 Vict. c. 93, s. 8, incorporates 1 & 2 Will. 4, c. 41, s. 19, and clearly applies only to personal actions, and not to actions for possession of the thing taken: (*Fletcher v. Wilkins*, 6 East, 283; *Waterhouse v. Keen*, 4 B. & C. 211.) Thirdly, the third and fourth pleas are bad, inasmuch as the orders of the justices set out therein are invalid for making the costs payable to the clerk of the peace instead of to the party entitled to the costs: (12 & 13 Vict. c. 45, s. 5; 11 & 12 Vict. c. 43, s. 27.) The statute 17 Geo. 2 c. 36, is still in force, and *Reg. v. Huntley* 3 E. & B. 172, shows that the proper course was to have made the costs payable to the party entitled to them under that statute.

*M. Smith and Milward* for the deft.—The last point is the material one, and the only one the deft. means to contest. The orders for costs set out in the third and fourth pleas are valid in point of form. The sessions have always drawn up such orders in this form. *Reg. v. Huntley* does not decide that an order for payment of costs to the clerk of the peace, as in this case, is invalid, but that an order under the 17 Geo. 2, making them payable directly to the party entitled, is valid also. As to notice of action and demand of the warrant, *Pearson v. Roberts*, Willes Rep. 616, and *Jones v. Johnson*, 6 Ex. 133, were referred to. (The Court, however, said that this was

an action of replevin, and that notice of action and demand of the warrant were not necessary.)

COCKBURN, C. J.—The only question which now requires the opinion of the court is the one as to whether the form of the order for payment of the costs is valid. We are of opinion that it is. The 12 & 13 Vict. c. 45, s. 5, enacts, that the court of quarter sessions may, if it thinks fit, order the party or parties against whom an appeal is decided to pay to the other party or parties costs, "such costs to be recoverable in the manner provided for the recovery of costs upon appeals against an order or conviction by the 11 & 12 Vict. c. 43, s. 27. It is said that the court of quarter sessions, by the 12 & 13 Vict., ought only to make an order for payment of costs to the successful party, and that there the order ought to have stopped, and that if the machinery of the 11 & 12 Vict. is required to be put in operation for enforcing payment of the costs, the court of quarter sessions ought to make a separate order for the payment of them to the clerk of the peace. That is an inconsistent mode of reasoning, for, looking at the 12 & 13 Vict., it is plain that it only gives authority to the quarter sessions to make one order for payment of costs to the successful party, and the same order is to contain the further order that they are to be paid to the clerk of the peace. The order for costs must either be made in the form in which it has been in this case, or the costs never can be recovered. It is true that *Reg. v. Huntley* decided that the 17 Geo. 2, c. 38, s. 4, empowering the quarter sessions, upon appeal against a poor-rate, to order costs to be paid to the successful party, is not abrogated by the 12 & 13 Vict. and the 11 & 12 Vict., and that an order made under it, directing the costs to be paid directly to the apps., is valid; but that does not show that the jurisdiction of the court of quarter sessions, conferred by those recent statutes, may not also be put in operation. It is equally clear that the order for payment may be made under the 12 & 13 Vict. with reference to the 11 & 12 Vict., inasmuch as the order can only be made for payment to the successful party through the intervention of the clerk of the peace. It is not imperative to hold that the 12 & 13 Vict. c. 45, s. 5, is a dead letter, but it is sufficient to say that this is a valid order.

WIGHTMAN, J.—I entertain considerable doubt upon this point. By the 11 & 12 Vict., if, upon any appeal against a conviction or order of justices, the quarter sessions shall order either party to pay costs, such order shall direct the costs to be paid to the clerk of the peace. It makes the clerk of the peace intervene between the parties; but, if any proceeding becomes necessary to enforce such order, that must be taken by the party entitled to the costs, and it is necessary for him to make an application to the clerk of the peace for a certificate that such costs have not been paid. I can well understand the reason for requiring the certificate of the clerk of the peace. Then the 12 & 13 Vict. enacts, that the quarter sessions may order the unsuccessful party to pay to the other party the costs of the appeal; and, in this case, it seems hardly necessary that there should be any certificate of the clerk of the peace that such costs have not been paid before the party entitled to them proceeds to enforce payment of them. In other respects they may well be enforced by the party under the statute. It seems to me the more reasonable construction that the order should make the costs payable to the party entitled to them. However, I only express my doubts upon the point, and my opinion is not so clear as to make me dissent from the judgment of the court.

BLACKBURN, J.—I think that the order made in this case is good. This is an action of replevin, and neither notice of action nor demand of the warrant was

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necessary. The only question arises on the third and fourth pleas, whether the orders are bad. I agree that if the former part of sect. 5 of 12 & 13 Vict. had stood alone, they would not imply a power to substitute the clerk of the peace for the party entitled to the costs, but the section goes on to enact that such costs are to be recoverable in the manner provided for the recovery of costs by the 11 & 12 Vict. c. 43. Then the 11 & 12 Vict. enacts that the order shall direct such costs to be paid to the clerk of the peace. I agree that is a mere direction as to how the order is to be made. The section then proceeds, "if such costs shall not be paid within the time limited the clerk of the peace, or his deputy, shall give to the party entitled to such costs a certificate that such costs have not been paid, and upon production of such certificate the justices may enforce payment by warrant of distress." And the schedule to the statute gives the form of such warrant: (S. 1.) To obtain this warrant it is absolutely necessary that the party should go to the justices armed with the clerk of the peace's certificate in proper form. And the forms R. and S. 1 in the schedule both recite that the order is for payment of the costs to the clerk of the peace. I agree with my brother Wightman, J., that if the costs are to be paid to the party this certificate and mode of recovering as pointed out in the schedule could not be applied. The conclusion I have come to is, that the 12 & 13 Vict. incorporates the 11 & 12 Vict., and that the order is to be made in point of form for payment to the clerk of the peace. It is sufficient to say that an order in that form is good. *Reg. v. Huntley* is not an authority against it.

MELLOR, J.—I am of the same opinion as my Lord and my brother Blackburn.

*Judgment for the deft.*

Plt.'s solicitors, *Gregory and Co.*

Def't's solicitor, *T. Westall.*

Monday Jan. 12, 1863.

REG. v. CREEKE.

*Municipal corporation—Town councillor—Qualification—Occupier of house.*

*An attorney, in conjunction with his partners, occupied an entire house, and used it exclusively as their place of business, and he did not reside within the borough:*

*Held, that this was a sufficient qualification within sect. 9 of 5 & 6 Will. 4, c. 76, to entitle him to be elected a town councillor.*

*Manisty* moved for a rule nisi for a *quo warranto*, calling on Mr. Creeke to show cause by what authority he claimed to be a town councillor of the municipal borough of Burnley, Lancashire. It was objected that he was not duly qualified on the ground that he did not "occupy any house, warehouse, counting-house, or shop" within the borough, as required by the 9th section of the Municipal Act, 5 & 6 Will. 4, c. 76. The fact was, that Mr. Creeke and his partners occupied a house in the borough, but used it exclusively for the purpose of their business as attorneys. Mr. Creeke did not reside within the borough. It was contended that the word "house" in the 9th section meant dwelling-house.

COCKBURN, C. J.—It may fall within the description of counting-house. Most attorneys act as scriveners and keep books of account.

CROMPTON, J.—The word "house" really means any place of residence or business. Mr. Welsby upon this section says (1 Wels. & Beav. Stat. 810, note d.) "The omission of the words, 'or other building,' which are in sect. 27 of the Reform Act, has got rid of a prolific source of difficulty in the revising courts. The effect, however, has been to exclude the occupiers of

large buildings, such as a range of stables, slaughter-houses, detached attorney's offices, breweries, &c., a consequence probably not contemplated by the framers of this section."

COCKBURN, C. J.—We ought not to throw any doubt upon this section, and no rule will be granted.

*Rule refused.*

Tuesday, Jan. 13, 1863.

*Ex parte* MOLINEUX.

*Poor-law—Dismissal of chaplain to workhouse.*

*The Poor Law Commissioners may order the dismissal of the chaplain of a union workhouse, he being an officer under the 46th and 48th sections of the 4 & 5 Will. 4, c. 76, as interpreted by sect. 109 of that Act.*

Coleridge, Q.C. moved for a *certiorari* to bring up an order of the Poor Law Board with a view to the same being quashed. The application was made on behalf of the Rev. J. W. H. Molineux, the vicar of Sudbury, in Suffolk; and the order in question was an order of dismissal from the office of chaplain to the union workhouse. It was now contended that such an order was not within the powers of the Poor Law Board. The order had been made under the 48th section of 4 & 5 Will. 4, c. 76, which gives the board a control over, and a power of removing the master of a workhouse, assistant overseer, or other paid officer; but although the 109th section enacts that the word "officer" shall be construed to extend to any clergyman who shall be employed in any parish or union in carrying the Act or the laws for the relief of the poor into execution, still it was never intended that the power of removal should be applicable to the chaplain of a workhouse. [CROMPTON, J.—Is he not employed in carrying the Act into execution?] No; not in the manner intended by that section. [COCKBURN, C. J.—The 109th section refers to a clergyman concerned in the administration of the poor-law; what other clergyman can be meant if not the chaplain?] *R. v. The Poor Law Commissioners, re the Cambridge Union*, 9 A. & E. 911, supports this application. [CROMPTON, J.—Was that before the *Braintree* case? (*R. v. The Guardians of the Braintree Union*, 1 Q. B. 130). That case is expressly in point, and we are bound to take the last case.] Yes; the *Braintree* case is the late case; the Prisons Act and the Lunatic Act are analogous, and those Acts were passed before the Poor-law Act. The clergyman is in his office of chaplain by the authority of the bishop, and that is the only authority he is bound to respect. He referred also to the 171st article of the consolidated rules of the Poor Law Board.

COCKBURN, C. J.—The bishop might withdraw his licence, and yet the clergyman might demand the payment of his salary; such a state of things would lead to a great inconvenience. It seems to me clear that the 46th section gives power to the Poor Law Commissioners to order the guardians of a union to appoint paid officers for parishes and unions. Then, the 48th section provides that the commissioners may, by order under their hands and seals, remove any master of any workhouse, assistant overseer, or other paid officer; and then the interpretation clause says the word "officer" shall include any clergyman employed in carrying out the laws for the relief of the poor. It seems clear to me that on the construction of those sections this application cannot be granted, besides which, there is the *Braintree* case, which is in itself an authority for refusing it.

WIGHTMAN, CROMPTON and MELLOR, JJ. concurred.

*Rule refused.*

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[Q. B.]

## REG. v. PEARCE.

*County Court—Perjury—Assignment of, on evidence on judgment-summons—Marriage after judgment.*

*A feme sole obtained a judgment in the G. County Court, and then married S. She afterwards took out a judgment-summons in her name when sole, in L. County Court, without having made her husband a party to the judgment. At the hearing of the summons the judge of the L. Court amended the summons by striking out the name of the plt., and substituting S. and wife. After the alteration the debt was sworn and examined, and committed perjury. He was then indicted and found guilty of perjury.*

*Held, that the amendment was without jurisdiction, and there being no cause in the altered name, the conviction could not be supported.*

Indictment.—The jurors of our Lady the Queen upon their oath present, that heretofore, to wit, on a certain day before the 9th day of March 1855, one Henrietta Grundy brought an action by causing to be issued a certain plaint in the County Court of Kent, holden at Gravesend, against one Benjamin Workman Pearce, and afterwards, to wit, on the 9th day of March 1855, recorded judgment against the said B. W. Pearce, the said County Court of Kent, holden at Gravesend, being then a County Court established under and by virtue of a certain Act made and passed in a session of Parliament holden in the ninth and tenth years of the reign of her present Majesty, intituled "An Act for the more easy recovery of small debts and demands in England." And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the 24th day of Jan. 1861, and after the said H. Grundy had been married to one Walter Smith, and while the said B. W. Pearce was dwelling and carrying on business in the city of London, to wit, at the "Blue Pig" in St. Mary Axe, and while the judgment hereinbefore mentioned was still unsatisfied, the said H. Grundy, otherwise Smith, obtained a summons from the Sheriffs' Court of London, under the provisions of a certain Act of Parliament made and passed in a session of Parliament holden in the fifteenth year of the reign of her present Majesty, intituled, "An Act for the more easy recovery of small debts and demands within the city of London and the Liberties thereof," by which said summons the said B. W. Pearce was required to appear personally in the said court on the 12th day of Feb. 1861. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the said 12th day of Feb. 1861, the said B. W. Pearce did personally appear in the said court; and the jurors aforesaid, upon their oath aforesaid, do further present that then and there the judge of the said court, Robert Malcolm Kerr, Esq., did amend the said summons by adding thereto the name of the said Walter Smith, the husband of the said H. Grundy, otherwise Smith. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said summons was in due form of law duly adjourned from the said 12th day of Feb. 1861 to the 14th day of Feb. 1861. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the said 14th day of Feb. 1861, the said B. W. Pearce again appeared in person, in pursuance of the said amended summons, so duly adjourned as aforesaid, and was then and there, before R. M. Kerr, Esq., then and there being the judge of the said last-mentioned court, duly and in due form of law, and according to the provisions of the said last-recited Act, examined, upon oath, touching the manner and circumstances under which he the said B. W. Pearce contracted the debt for which the said H. Grundy had recovered judgment, on the said 9th

March 1855, in the said County Court of Kent, holden at Gravesend as aforesaid; he, the said R. M. Kerr, having then and there full and sufficient power, and being competent to examine the said B. W. Pearce touching the manner and circumstances under which he contracted the said debt, and having full and sufficient power and authority to administer the said oath to the said B. W. Pearce in that behalf. And the jurors aforesaid, upon their oath aforesaid, do further present that, at and upon the said examination of the said B. W. Pearce, it became and was a material question and subject of inquiry, whether the said B. W. Pearce had slept with one Catherine Titterton, and whether the said B. W. Pearce ever gave his name as Mr. Titterton, and whether the said B. W. Pearce ever gave half-a-sovereign to one Harriet Crowhurst, and whether the said B. W. Pearce had ever given half-a-sovereign to H. Grundy, and whether the said B. W. Pearce ever took a certain bedroom of the said H. Grundy, and whether the said B. W. Pearce was with the said C. Titterton when a certain room was taken from the said H. Grundy, and whether the said B. W. Pearce ever passed more than one night in the house of the said H. Grundy. And the jurors aforesaid, upon their oath aforesaid, do further present, that at and upon the examination of the said B. W. Pearce the said B. W. Pearce was in due manner sworn and did take his corporal oath upon the Holy Gospel of God to speak the truth, the whole truth and nothing but the truth (he the said R. M. Kerr, Esq. then and there having full and competent power and authority to administer the said oath to the said B. W. Pearce in that behalf). And the jurors aforesaid, upon their oath aforesaid, do further present, that the said B. W. Pearce being so sworn as aforesaid, but contriving and intending to deceive the said R. M. Kerr touching the manner and circumstances under which the said B. W. Pearce had contracted the said debt for which the said H. Grundy had recovered judgment as aforesaid on the said 9th day of March 1855, in the said County Court of Kent, holden at Gravesend, falsely, wickedly, knowingly, wilfully and corruptly swore, deposed and gave evidence as follows, that is to say: "I (meaning himself the said B. W. Pearce) never slept with Mrs. Titterton (meaning one C. Titterton); I (meaning himself the said B. W. Pearce) never gave my (meaning his the said B. W. Pearce's) name as Mr. Titterton; I (meaning himself the said B. W. Pearce) never gave half-a-sovereign to H. Crowhurst or Mrs. Smith (meaning that he had never given half-a-sovereign to the said H. Grundy or to the said H. Crowhurst); I (meaning himself the said B. W. Pearce) never took the bedroom (meaning a certain bedroom in the house of the said H. Grundy) and sitting-room (meaning a certain sitting-room in the house of the said H. Grundy) of Mrs. Smith, then Grundy (meaning the said H. Grundy); I (meaning himself the said B. W. Pearce) do not know who took it (meaning the said last-mentioned room in the said house of the said H. Grundy); I (meaning himself the said B. W. Pearce) was not with Mrs. Titterton (meaning the said C. Titterton) when the room (meaning the said last-mentioned room in the house of the said H. Grundy) was taken; I (meaning himself the said B. W. Pearce) never passed but one night in my life in the house (meaning the said house of the said H. Grundy, at Gravesend aforesaid). Whereas, in truth and in fact, the said B. W. Pearce had slept with the said C. Titterton; and whereas, in truth and in fact, the said B. W. Pearce did give his name as Mr. Titterton; and whereas, in truth and in fact, the said B. W. Pearce did give half-a-sovereign to H. Crowhurst; and whereas, in truth and in fact, the said B. W. Pearce did take the said bedroom and sitting-room in the house of the said H. Grundy, and of and from the said

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H. Grundy; and whereas, in truth and in fact, the said B. W. Pearce did know who had taken the said last-mentioned room in the house of the said H. Grundy; and whereas, in truth and in fact, the said B. W. Pearce was with the said C. Titterton at the time the said last-mentioned room was taken in the house of the said H. Grundy; and whereas, in truth and in fact, the said B. W. Pearce did pass more than one night, to wit, three nights, in the house of the said H. Grundy, as he the said B. W. Pearce, at the time he so falsely swore, deposed and gave evidence as aforesaid, well knew. And so the jurors aforesaid, upon their oath aforesaid, do say that the said B. W. Pearce, on the 14th day of Feb. 1861, before the said R. M. Kerr, Esq., so being such judge as aforesaid, by his own act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly and corruptly did commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of our Lady the Queen and her laws, contrary to the form of the statute, to the evil and pernicious example of all others in the like case offending, and against the peace of our Lady the Queen, her crown and dignity.

Plea, not guilty.

At the trial before Cockburn, C. J., at the sittings in Middlesex after Michaelmas Term 1861 (the indictment which was found at the Central Criminal Court having been removed into this Court by *certiorari*) the facts, as set out in the indictment, were proved. A certified copy of a minute of the judgment in the Gravesend County Court was produced, in which Henrietta Grundy was plt. and Benjamin W. Pearce deft. A duplicate of the judgment summons, entitled *Henrietta Grundy v. Pearce*, and issued out of the Sheriff's Court, London, under sect. 88 of the London (City) Small Debts Extension Act 1852, was also produced. The judgment-summons came on for hearing on the 12th Feb. 1861, and in consequence of Mrs. Smith's marriage since the judgment was obtained R. M. Kerr, Esq., the judge of the Sheriff's Court, London, amended the summons by inserting thereon the name of Walter Smith and Henrietta his wife (suing as Henrietta Grundy). The further hearing of the summons was adjourned to the 14th Feb., when the deft. tendered himself as a witness on his own behalf, was sworn and examined, and committed the perjury assigned in the indictment. The judge of the Sheriff's Court ordered the deft. to be committed to prison for forty days for nonpayment of the judgment-debt and costs, and directed this prosecution to be instituted. At the close of the case for the prosecution, the deft.'s counsel, H. James, submitted that the judge of the Sheriff's Court had no power to make the amendment; that there was no valid summons or case before him; that the proceedings were *coram non judice*, and that consequently the charge of perjury fell to the ground. The learned judge reserved the point, and the case having gone to the jury, the deft. was found guilty.

A rule *nisi* was obtained to enter the verdict for the deft. pursuant to the leave reserved, or to arrest the judgment.

Sect. 88 of the London (City) Small Debts Extension Act 1852 (15 Vict. c. 77) is as follows:—

"That it shall be lawful for any party who has obtained a judgment or order in the court, either under this Act or under the said recited Act, for the payment of any debt or damages, or costs, which judgment or order shall not be satisfied, and for any party who has obtained a judgment or order in any County Court established under or by virtue of the before-mentioned Act for the more easy recovery of small debts and demands in England, which last-mentioned judgment or order shall not be satisfied, to obtain a summons from the court in case the party against whom such judgment

or order shall have been obtained shall then dwell or carry on business, or have employment within the city of London or the liberties thereof, such summons to be in such form as shall be directed by the rules made for regulating the practice of the court, and it shall be lawful for any party who has obtained any such judgment or order in the court, which said last-mentioned judgment or order shall not be satisfied, to obtain a summons from any County Court established under or by virtue of the last-mentioned Act for the more easy recovery of small debts and demands in England, within the limits of which court the party against whom such last-mentioned judgment or order shall have been obtained shall then dwell or carry on business, such last-mentioned summons to be in such form as shall be directed by the rules made for regulating the practice of the said County Court, which summonses, as the case may be, are to be respectively served personally upon the person to whom it is directed (*sic*), requiring him to appear at such time as shall be directed by the said rules, to answer such things as are named in such summons, and if he shall appear in pursuance of such summons, he may be examined upon oath touching his estate and effects, and the manner and circumstances under which he contracted the debt or incurred the damages or liability which is or are the subject of the action in which judgment has been obtained against him, and as to the means and expectations he then had, and as to the property and means he still hath of discharging the said debt or damages or liability, and as to the disposal he may have made of any property, and the person obtaining such summons as aforesaid, and all other witnesses whom the judge shall think requisite, may be examined upon oath touching the inquiries authorized to be made as aforesaid, and the costs of such summons and of all proceedings thereon, shall be deemed costs in the cause."

The following of the rules and orders for regulating the practice of the Sheriffs' Court of the city of London were referred to during the argument:—

Rule 91. Where the name or description of a plt. in the summons is insufficient or incorrect, it may at the hearing be amended at the instance of either party by order of the judge, on such terms as he shall think fit, and thereupon the cause shall proceed, as to set-off and other matters, as if the name or description had been originally such as it appears after the amendment has been made.

Rule 95. Where it appears at the hearing that a less number of persons have been made plts. than by law required, the name of the omitted person may, at the instance of either party, be added by order of the judge on such terms as he shall think fit; and thereupon the cause shall proceed as to set-off and other matters as if the proper persons had been originally made parties; and if such person shall, either at the hearing, or some adjournment thereof, personally, or by writing signed by him or his agent, consent to become a plt. in manner aforesaid, the judge shall then pronounce judgment as if such person had originally been made a plt.; but if such person shall not consent to become a plt. in manner aforesaid, either at the hearing or an adjournment thereof, judgment of nonsuit shall be entered.

Rule 158. Execution on a judgment shall not issue by or against any person not a party to the suit, without a plaint and summons upon the judgment, the proceedings in which shall be the same as in ordinary cases.

*Giffard* showed cause against the rule.—First, the proceedings were regular, and the judge had power to make the amendment. This was not a proceeding by way of execution in the sense of rule 158. [WIGGAMAN, J.—There was a judgment in the name of

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Henrietta Grundy, and the alteration in the names was made to enforce that judgment. Was that correct? Rules 91 and 95 give the power to amend the summons. [WIGHTMAN, J.—In what cause did the deft. give false evidence?] If the amendment was made without jurisdiction, the deft. was sworn in the cause of *Grundy v. Pearce*. [CROMPTON, J.—We cannot shut our eyes to the fact that this was a proceeding upon a summons in which the husband and wife were parties, and there was no judgment to support that.] The case of *Penney v. Brace*, 1 Ld. Raym. 244, was then adverted to. [WIGHTMAN, J.—The deft. was not sworn in the original cause.] Secondly, assuming the amendment to have been made erroneously, still the Sheriffs' Court had a general jurisdiction over the matter, and to enter upon the inquiry: (*Reg v. Milford*, 1 Deane. C. C. 166; 6 Cox C. C. 150.) The judgment is good at common law, and everything was regular up to the judgment-summons. [COCKBURN, C. J.—The indictment alleges that the perjury was committed under the amended summons: if so, it was *coram non judice*, and the perjury fell to the ground; if it was not so, the allegations in the indictment were not proved.]

*H. James*, in support of the rule, was not called upon.

COCKBURN, C. J.—I think that this rule should be made absolute. I regret that a man who has been found guilty upon the facts should escape punishment upon a technical point, but the Court is bound to administer the law as they find it. Now, one of the essential requisites in this offence is, that the deft. should commit perjury in a certain cause. In this case the deft. was sworn in a cause that had no existence. A judgment had been recovered by Mrs. Grundy in the Gravesend County Court, which she sought to enforce by a summons in the Sheriffs' Court, London, and in the meantime she had married and become Mrs. Smith. Instead of going to the Gravesend County Court, and making her husband a party to the judgment by a *scire facias*, she took out a summons and instituted proceedings in the Sheriffs' Court, London, in her old name. The judge of the Sheriffs' Court improperly amended the summons, and altered it by the addition of the name of "Walter Smith and wife." That alteration was made without jurisdiction. In the cause so altered in name, the deft. was sworn, and committed perjury. The perjury, therefore, was committed in a cause which had no existence, and the conviction cannot be sustained.

WIGHTMAN, CROMPTON and MELLOR, JJ. concurred.

*Judgment for the deft.*

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYD, Esqrs. Barristers-at-Law.

Wednesday, Nov. 19, 1862.

BRISTOL AND EXETER RAILWAY COMPANY  
v. TUCKER.

*Local Act—8 & 9 Vict. c. 45—Railways Clauses Act.*  
Is an appeal against the decision of magistrates convicting a railway company formed under c. 45 of 8 & 9 Vict. for not repairing a bridge, it was held, that ss. 65 and 145 of the 8 Vict. c. 20 (*Railways Clauses Act*), were incorporated in the local Act, and that the magistrates were right in convicting under those sections.

This was a special case stated for the opinion of this court under 20 & 21 Vict. c. 43.

In the session 8 & 9 Vict. an Act was passed for making (amongst other purposes) a branch railway from the Bristol and Exeter Railway at Yatton to Clevedon, in the county of Somerset, which Act received the

Royal assent on the 31st July 1845. By the 1st section of this Act it was enacted "that the Lands Clauses Consolidation Act 1845, and so much of the Railway Clauses Consolidation Act 1845 as relates to the construction of railways, the temporary use of lands during the construction of railways, to the taking of lands for additional stations, to the mode of crossing of roads and construction of bridges, to the construction of arches, &c., shall respectively, except so far as the same may be by this Act otherwise provided for, and except such of the provisions thereof as may be inconsistent with the provisions herein contained, be incorporated with and form part of this Act."

The branch railway from Yatton to Clevedon was made soon after the passing of the Act; and, in passing through the tithing of Yatton West, four highways were (amongst others) interfered with and carried over the branch railway by a bridge, the roads being altered considerably from their original level, and one, if not more of them, being diverted for some distance.

In January last, this bridge and the approaches thereto being out of repair, William Tucker and William Say, two householders of the said tithing, made application to the justices acting within and for the petty sessional division of Long Ashton, in the said county within which petty sessional division the tithing of Yatton West is situated, complaining thereof; and on the 18th Jan. the case came before the bench at Long Ashton, the railway company having been summoned for such purpose, and appearing through their solicitor, when an order was made by the magistrates then sitting, founded on the 50th and 65th sections of the Railways Clauses Consolidation Act 1845, then alleged, on the part of the complainants, to be respectively portions of the said Act so incorporated as aforesaid, and of which order the following is a copy:—

"Be it remembered that, on the 16th day of January, in the year of Lord one thousand eight hundred and sixty-one, complaint was made before Edmund Joseph Daubeny, Esq., one of her Majesty's justices of the peace in and for the said county of Somerset, by William Tucker and William Say, two householders of the tithing of Yatton West, in the parish of Yatton, in the said county, which said tithing is wholly situated within the petty sessional division of Long Ashton, in the said county; for that the Bristol and Exeter Railway Company had neglected to maintain and keep in repair a certain bridge situate in the said tithing called the Kingstone-road bridge, together with the immediate approaches and fences connected therewith, which said bridge, together with the said immediate approaches and fences, had been constructed by the said Bristol and Exeter Railway Company over the Clevedon branch of the said Bristol and Exeter Railway, for the purpose of carrying four public highways, to wit, the several roads from Kingstone Seymour to Yatton and Clevedon and *vice versa*, and a certain public highway called Young's-road, over the said Clevedon branch railway, and that the said several immediate approaches to the said bridge and the fences connected therewith were then out of repair, and that the said railway company were bound to put the same into complete repair. Now at this day, to wit, on the 18th day of January, in the year of our Lord one thousand eight hundred and sixty-one, at Long Ashton aforesaid, the parties aforesaid appeared before us, Sir Arthur Hallam Elton, Bart., and John Mor-daunt, Esq., two of her Majesty's justices of the peace in and for the said county, and the said William Tucker and William Say, being two householders of the tithing of Yatton West as aforesaid, within which said district the said bridge, with the said several immediate approaches and fences connected therewith, is situate, make application to us



the said justices, complaining that the said several immediate approaches to Kingstone-road bridge, by which the said public highways cross the said Clevedon branch railways, are foundered, full of ruts, and greatly out of repair, and that the fences on the sides of the said approaches, and being necessary works connected with the said bridge, are broken down and out of repair, which said several immediate approaches and the said fences having been so constructed and executed as aforesaid by the said Bristol and Exeter Railway Company, which said company were required by the statutes in such case made and provided to maintain and keep in repair, and it is proved on oath to us that the said William Tucker and William Say had, ten days and upwards previously to their making such complaint, to wit, on the twentieth day of December now last past, given notice to the said Bristol and Exeter Railway Company that the said several immediate approaches to the said bridge, together with the said fences, were out of repair as aforesaid; and by the said notice required the said company to put, maintain and keep in repair the said immediate approaches and fences, and informed the said company that in default of their so doing within ten days from the service of such notice, it was the intention of the said William Tucker and William Say to make application to two of her Majesty's justices of the peace for the said county, for an order commanding the said company to put the said immediate approaches and fences into complete repair. And now, having heard the matter of the said complaint, and of the said application of the said William Tucker and William Say, and the defence of the said Bristol and Exeter Railway Company, and it appearing to us that the said Bristol and Exeter Railway Company is liable to maintain and keep in repair the said bridge and the said several immediate approaches and fences connected therewith, being so as aforesaid out of repair, we do order and adjudge the said Bristol and Exeter Railway Company to put the said several immediate approaches to the said bridge, and the said fences on the respective sides thereof and connected therewith, into complete repair within a period of three weeks from the date of this order.

"Given under our hands and seals at Long Ashton, in the said county of Somerset, this eighteenth day of January in the year of our Lord one thousand eight hundred and sixty-one.

"ARTHUR H. ELTON (L. S.)

"JOHN MORDAUNT (L. S.)"

No appeal was made against this order, nor were any proceedings taken to contest its validity.

This order being disobeyed by the company, on the 26th July last the company was summoned before the justices of the said county sitting at petty sessions in and for the said petty sessional division of Long Ashton, in the said county, on the information of William Tucker and William Say, two householders of the tithing of Yatton West, in the petty sessional division of Long Ashton, for that they the said company had failed to comply with a certain order, under the hands and seals of Sir Arthur Hallam Elton, Bart., and John Mordaunt, Esq., two of her Majesty's justices of the peace for the said county, bearing date the 18th Jan. now last past, whereby, in pursuance of the statute in that case made and provided, the said justices did order and adjudge them within three weeks from the date of their said order to put into complete repair the several immediate approaches to a certain bridge situate in the said tithing for carrying certain public highways over the Clevedon branch of the said railway, and called the Kingstone-road bridge, and the fences on the side of such approaches and connected therewith.

The company were represented by their solicitor, after proof of the service of a copy of the order with

production of the original at the same time on the secretary of the company on the 14th Feb.

The magistrates, on examining witnesses, found it proved that the said approaches and fences had not been repaired in pursuance of the said order.

It was objected on the part of the apprs. the railway company, that the 65th section of the Railway Clauses Act 1845, under which, taken in connection with the 50th section of the same Act, the proceedings were taken for a penalty, did not apply to them as not being incorporated in their Act. This objection we, after hearing arguments on both sides, overruled.

It was also objected that the 145th section of the Railways Clauses Act 1845, under which the recovery of penalties is provided for, was not incorporated with and did not form part of the apprs.' Act.

This objection was also overruled, and we convicted the apprs. in the penalty of 100*l.* (for twenty days, during which the apprs. had failed to comply with the order) and costs, and we directed 50*l.* to be applied towards the repair of the approaches and fences to the said bridge, and one moiety of the residue to be paid to the informers, and the other moiety to the overseers of the poor of the parish of Yatton aforesaid, and we signed a conviction of which the following is a copy:—

"Be it remembered that on the 20th day of July, in the year of our Lord one thousand eight hundred and sixty-one, the Bristol and Exeter Railway Company is convicted before us (the aforesaid justices of the peace for the county of Somerset), for that the said Bristol and Exeter Railway Company had, for a space of twenty days and upwards, disobeyed and failed to comply with a certain order, bearing date the eighteenth day of January, in the year of our Lord 1861, under the hands and seals of Sir Arthur Hallam Elton, Bart., and John Mordaunt, Esq., two of her Majesty's justices of the peace for the said county, acting in and for the division of Long Ashton in the said county, whereby, in pursuance of the statute in that case made and provided, the said last-named justice did order and adjudge the said company within three weeks from the date of their said order to put into complete repair the several immediate approaches to a certain bridge, situate in the tithing of Yatton West, in the said division and county, for carrying certain public highways over the Clevedon branch of the said company's said railway, and called the Kingstone-road bridge, and the fences on the sides of such approaches and connected therewith, contrary to the form of the statutes in that case made and provided. And we adjudge the said Bristol and Exeter Railway Company, for their said offence and disobedience of and failure to comply with such order, to forfeit and pay forthwith the sum of 100*l.*, and the sum of ten shillings and sixpence for the costs incurred in making the order, 25*l.*, part of which said sum of 100*l.* we awarded to William Tucker and William Say, the informers, and we also awarded another sum of twenty-five pounds, further part of the said sum of one hundred pounds, to the overseers of the poor of the parish of Yatton, in the said county, in which said parish the said offence was committed, to be applied in aid of the poor-rate of such parish, and we ordered that the sum of fifty pounds, the residue of the said sum of one hundred pounds, should be applied by the said William Tucker and William Say, or one of them, in putting the said approaches and fences into repair.

"Given under our hands and seals the day and year first above written."

The company, being dissatisfied with our decision, demanded a case under the provisions of the said statute 20 & 21 Vict. c. 43.

The questions for the opinion of the court are, first, whether the local Act does by the words "the mode of crossing of roads and construction of bridges,"

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or by any other means, incorporate the 65th section of the Railways Clauses Act 1845. Secondly, whether, in the event of the court holding that the 65th section of the Railways Clauses Act 1845 is so incorporated with the local Act, the 145th and subsequent sections providing the method for recovering penalties and their application are also incorporated. If the court shall be of opinion that the 65th section of the Railways Clauses Act 1845 is so incorporated, then the conviction to be confirmed; otherwise to be quashed, the second question only relating to the mode of enforcing such conviction.

*Kinglake, Serjt. (M. Smith, Q.C. with him)* contended that the 65th and 145th and subsequent sections, by which it is enacted "that where the company are required to maintain or keep in repair any bridge, fence, approach, gate, or other work executed by them, it shall be lawful for two justices, on the application of the surveyor of roads, or of any two householders of the parish or district where such work may be situate, complaining that any such work is out of repair, after not less than ten days' notice to the company, to order the company to put such work into complete repair within a period to be limited for that purpose by such justices; and if the company fail to comply with such order, they shall forfeit 5*l.* for every day that they fail to do so; and it shall be lawful for the justices by whom any such penalty is imposed to order the whole or any part thereof to be applied, in such manner as they think fit, in putting such works in repair" (sects. 145 and subsequent ones refer to the mode of recovering the penalties), were not incorporated in the private Act, and therefore that the apps. were not liable.

*Wellsby, for the resps.*, contended that by sect. 1 of 8 & 9 Vict. c. 104, the 65th section of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, and also the 145th and subsequent sections of the same Act, providing the modes of recovering penalties, were incorporated in the first-mentioned Act, and were applicable in the present case, and so that the decision of the justices was right.

*ERLE, C. J.*—We are of opinion that the apps. in this case are in the wrong. According to their own Act they are bound to keep their bridges and approaches thereto in good repair; and by sect. 65 of the Railways Clauses Act (which I am of opinion is incorporated in the private Act) they are liable to be proceeded against, upon the application of the surveyor of roads, or any two householders of the district, before two justices, who may order them to repair the bridges and approaches complained of, and also to forfeit 5*l.* per day in the event of their not obeying such order. I also think that the 145th and subsequent sections, which point out the mode of recovering the penalties, are incorporated in the local Act, and that the justices here, in deciding the matter in the way they have done, acted rightly.

*WILLIAMS, BYLES and KEATING, J.J.* concurred.

*Appeal dismissed.*

*Attorneys for resps., Loftus and Young.*

#### REGISTRATION APPEAL.

*Tuesday, Nov. 18, 1862.*

*TROTTER (app.) v. TREVOR (resp.)*

*Election law—Borough vote—Disqualification—*

*Pauper—2 Will. 4, c. 45, s. 36.*

*By sect. 36 of the Reform Act, 2 Will. 4, c. 45, all persons are disqualified from being registered as voters, "who shall within twelve calendar months next previous to the last day of July in such year have received parochial relief, or other alms which by the law of Parliament now disqualify from voting for members of Parliament."*

*Held, that a person whose father was chargeable as a pauper on the funds of a union, and who voluntarily*

*contributed a weekly sum towards his father's maintenance, the funds of the union paying the remainder, was not disqualified by the 36th section as "a person who had received parochial relief or other alms."*

Matthew Shaw, whose name was on the list of voters for the borough in respect of property occupied in the township of Northallerton, was duly objected to, and it was then proved that his qualification as a voter for the borough was good if he was not disqualified by the provisions of the 36th section of the Reform Act, 2 Will. 4, c. 45, which is as follows: "Be it enacted, that no person shall be entitled to be registered in any year as a voter for the election of a member or members to serve in any future Parliament for any city or borough, who shall within twelve calendar months next previous to the last day of July in such year, have received parochial relief or other alms, which by the law of Parliament now disqualify from voting in the election of members to serve in Parliament."

The facts of the case were these:—From the 31st July 1861 to the 31st July 1862, Matthew Shaw was resident within the township of Northallerton. In Nov. 1861, his father being then old and destitute, and unable to work, and being chargeable as a pauper to the common fund of the Northallerton union, applied for relief to the board of guardians of the same union, and received an order from them to go into the Northallerton workhouse. He accordingly became an inmate of the said workhouse for six weeks. Whilst he was in the workhouse, his son, Matthew Shaw, the voter, upon the request of the relieving officer of the said union, came to a meeting of the board of guardians, and was then told by the board of guardians that, if he did not pay something towards the maintenance of his father, he the said Matthew Shaw would be summoned before the justices in petty sessions to show cause why he should not be ordered to maintain his father. As a matter of practice the guardians instruct the proper officer to summon before the justices in petty sessions any person liable to contribute to the maintenance of a pauper within the district of the union. Matthew Shaw thereupon made an offer to pay 1*s.* 6*d.* weekly towards the maintenance of his father, whilst he continued in the workhouse, and the guardians accepted the offer. Matthew Shaw accordingly paid the sum of 1*s.* 6*d.* for several weeks, whilst his father was in the workhouse; but the sum was insufficient to defray the expense of his father's maintenance, and the residue of the expense was paid in the usual manner out of the common fund of the union. No order was made by the justices requiring Matthew Shaw to contribute to the maintenance of his father, nor was it proved that Matthew Shaw was able to contribute thereto beyond the weekly sum of 1*s.* 6*d.*

On behalf of the objector the following statutes, 43 Eliz. c. 2, s. 7; 59 Geo. 3, c. 12, s. 26; 5 Geo. 4, c. 83, s. 3; and 4 & 5 Will. 4, c. 76, s. 56, were cited; and also Rogers on the Law and Practice of Election Committees, 5th edit. 5, 169, *et seq.*; and it was argued that Matthew Shaw was, under the circumstances, legally bound to maintain his father, and that the father having received parochial assistance during the twelve months preceding the 31st July 1862, Matthew Shaw was disqualified as a voter for the borough.

On the other side it was argued that Matthew Shaw was not disqualified by the provisions of the 36th section of the Reform Act. In this I concurred, and I have accordingly kept the name of Matthew Shaw on the list of voters settled by me, subject to the opinion of the Court of Common Pleas on this case. I have named William Dale Trotter to be the app., and Thomas Tudor Trevor to be the resp.

If the court is of opinion that in the circumstances stated by me Matthew Shaw was disqualified as a

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voter for the borough of Northallerton, the name of Matthew Shaw is to be expunged from the list of voters. If the court is of opinion that Matthew Shaw was not so disqualified his name is to stand in the list of voters as settled by me.

*Manisty* for the app.

*T. E. Chitty* for the resp.

When the case was called on, *ERLE, C.J.* intimated that it need not be argued, the learned judge having read the case, and being clearly of opinion that the decision of the revising barrister was right.

*Judgment for the resp.*

*Trotter*, attorney for the app.

*Love* (for *J. Trevor*, Gainsborough) attorney for the resp.

*Saturday, Jan. 24, 1863.*

**BROWN AND OTHERS (app.) v. TURNER (resps.).**

*New Game Act—25 & 26 Vict. c. 114, s. 2 (a)—Not necessary in order to convict under this Act that persons charged have been upon any land in pursuit of game.*

*When persons have been found by a policeman on the high road early in the morning with dead rabbits, and also implements for taking the same, in their possession; the justices, upon their being brought before them, under sect. 2 of the New Game Act, may convict without direct proof that the persons charged have gone upon any land in pursuit of game, provided that the circumstances are such as would warrant them in coming to the conclusion that they had been so doing.*

Case on appeal, under 20 & 21 Vict. c. 43. At the petty sessions holden at Bocking, in the county of Essex, on the 5th Nov. 1862, an information was preferred by Charles Turner, of Bocking, police-constable (the resp.) against John Brown, Joseph Melbourne, Henry Chapman and Walter Peters (the apps.), under 25 & 26 Vict. c. 114, s. 2, charging the apps. with having been on the 12th Oct. 1862, at the parish of Braintree, in the county of Essex, in company together in a certain highway there, and being with good cause suspected of having come from land where they had been unlawfully in search and pursuit of game, and aiding and abetting each other therein, and charging the said app. Brown with having in his possession five dead rabbits unlawfully obtained.

Upon the hearing of the said information it appeared that it was laid by the resp. in his character of a police-constable, and in pursuance of the express direction of the said statute, and that the resp. had no personal interest in the matter. It was also proved on the part of the resp. that while on duty at half-past six o'clock in the morning of the day mentioned in the information, being Sunday, he met the

apps. walking together in company along the high road from Coggeshall to Braintree, at the entrance to the town of Braintree, where they reside, and noticed that the pockets of Brown contained something bulky; that Brown at first refused to allow himself to be searched, but afterwards submitted, when five dead wild rabbits, recently killed, and an iron spud, were found upon him. Whilst Brown was being searched, the other three apps. walked away. It was also proved that, on going after Melbourne the same day he was found in bed, and on examining his clothes and shoes, they were found very wet and dirty, and in fact more so than they would have become from walking in the road. It was also proved that, on going after Chapman the same day, and searching his clothes, a net suitable for the purpose of taking rabbits, and which appeared to have been recently used, was found in one of the pockets of his coat; and on taking the net out, some rabbits' fur flew from it as well as from the pocket of his coat, and the cuffs of his coat were smeared with blood. It was also proved that about ten o'clock in the morning of the same day, Peters sold a dead wild rabbit at a beer-house for sixpence. No evidence was adduced to prove that either of the apps. had been off the Queen's highway at any time during the previous night, but it was proved that at three minutes past six the same morning the apps. were seen together on the aforesaid high road leading from Coggeshall to Braintree, near a farm called Hatches, and about a mile and a half from the latter town. No evidence was given on the one hand to show that the rabbits were unlawfully, or on the other hand to show that they were lawfully obtained.

The questions of law arising on the above statement are, whether or not it was incumbent upon the resp. to show affirmatively that the apps. had been unlawfully on any land in search or pursuit of game, and had so become unlawfully possessed of the rabbits; or whether or not there was, in point of law, evidence from which the justices might infer that the apps. had obtained such game by unlawfully going on any land in search or pursuit of game, or had used any net, gun, or engine used for the killing or taking game, or had been accessory thereto?

*Martin* appeared for the apps.

*Philbrick* for the resp.

*ERLE, C.J.*—This is an appeal against a conviction under the 2nd section of the new Game Act (25 & 26 Vict. c. 114), and I am of opinion that it should be confirmed as against all the defts. except Melbourne. These three men have, in my mind, been properly convicted, although there was no eye-witness that they had been seen on any land in search or pursuit of game. The justices have as much right to apply the ordinary rules of evidence, and to infer from the surrounding circumstances that the persons charged have committed the offence, as any other tribunal. Circumstantial evidence is an important branch of evidence, and frequently to be relied on, equally if not in a greater degree than other evidence. The circumstantial evidence here seems sufficiently strong. Four men are seen together early in the morning, one of whom, upon being searched, is found to have five dead wild rabbits upon him still warm and lately killed; another is shown to have sold a wild rabbit early that morning; and a third is found to have a net in his pocket with rabbits fur upon it, fur also being found in his pockets and fresh blood on his coat cuffs. All these are circumstances from which the justices might fairly infer that they had been unlawfully upon some land killing rabbits. If the men had no land of their own it would be puerile to suppose that they had stumbled upon these rabbits in the high-road. It has been contended that the 3 & 4 Will. 4, says, that persons found on any land, &c., may be apprehended, &c.; but here the

(a) It shall be lawful for any constable or peace officer, in any county, borough, or place, in Great Britain and Ireland, in any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of a gun, or nets, or engines used for the killing or taking game, and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game, or any such article or thing is being carried by any such person; and should there be found any game or any such article or thing as aforesaid upon such person, cart, or other conveyance, to seize and detain such game, article, or thing; and such constable or peace officer shall in such case apply to some justice of the peace for a summons, citing such person to appear before two justices of the peace assembled in petty sessions; and if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid for unlawfully killing or taking game, or shall have been accessory thereto, such person shall, on being convicted thereof, forfeit and pay, " &c

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Legislature has purposely departed from that. If it had been requisite to a conviction that the party should have been seen on the land, the former Game Act would have been quite sufficient. The mere finding of the article is, under this Act, presumptive evidence of guilt unless the party give a reasonable account of it. As to Melbourne, I do not think that the evidence against him is satisfactory. The only evidence against him is that he was seen in company with the others a few minutes after six in the morning. He might consistently with the evidence have joined them after the offence had been committed. If he had been seen going out with the prisoners before the offence it might have been otherwise.

WILLIAMS, J.—I am of the same opinion. If, instead of a summary conviction, the Act had directed that the prisoners (with the exception of Melbourne) should be tried before a jury for unlawfully obtaining the articles in question, there would have been evidence to go to the jury. Possession alone would not have been enough, but the conduct of the prisoners would be taken into consideration, and I think that conduct would supply the defect.

WILLES and KEATING, JJ. concurred.

*Conviction affirmed as to all except Melbourne.*

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law

Saturday, Nov. 29, 1862.

(Before POLLOCK, C.B., WIGHTMAN, WILLIAMS, JJ., CHANNELL, B., and MELLOR, J.)

REG. v. ISAAC MARK EVANS.

*Falsely pretending to be Partners—Money obtained by wilful misrepresentation.*

*A. having invented an improved lamp, entered into a partnership deed with B. and C. for carrying out and vending the subject of the invention. By a subsequent verbal agreement with his copartners it was agreed that he should travel about to obtain orders for the lamps upon a commission. On all orders received by him such commission (besides his travelling and personal expenses) was to be paid to him as soon as he received the orders, and to be payable out of the capital funds of the partnership before dividing any profits. By falsely representing to his copartners that he had obtained orders upon which his commission would be 12l. 10s., he obtained from them that amount:*

*Held, that, as the subject-matter of the misrepresentation would come under consideration in the partnership accounts, such misrepresentation was not sufficient to sustain an indictment for false pretences against A.*

Case reserved by the Recorder of Chester.

The prisoner Isaac Mark Evans was tried before me at the quarter sessions for the city and borough of Chester, held on the 4th July 1862, on an indictment charging him with having unlawfully obtained from David Williams and Henry Wadkin certain sums of money by falsely pretending to them that he had obtained an order from the Wynn Hall Colliery Company, near Ruabon, for the sale to them of 100 patent lamps called "miners' lamps," with intent to defraud.

It appeared in evidence that the prisoner having invented an improved lamp for the use of miners, on the 16th Nov. 1861 David Williams, Henry Wadkin and the prisoner, entered into partnership together, by a deed which, after reciting that the prisoner claimed to be the inventor of an improved miner's lamp, and had applied for letters patent granting to him the sole use, benefit and advantage of the said invention within the United Kingdom, and that the prisoner, Williams and Wadkin had agreed to become partners for the purpose of working the said patent and bringing the

said invention into use, and manufacturing and vending the said improved miners' lamp, upon the terms and under the stipulations thereafter mentioned, witnessed that it was thereby agreed, and each of them the said parties did thereby for himself, &c., covenant with the others of them, &c., in manner following (that is to say, amongst other things):

1. That the said Isaac Mark Evans, David Williams and Henry Wadkin shall be partners in the trade or business of working and carrying out the said patent and bringing the said invention into use, and manufacturing and vending the said "improved miners' lamp," from the day of the date of these presents for the term of fourteen years.

2. That the firm or style of the said partnership shall be Williams, Wadkin and Evans, and that the said trade or business shall be carried on in such place of business as the said partners shall from time to time agree upon.

3. That the said I. M. Evans shall forthwith take all necessary and proper steps for obtaining the said letters patent and for perfecting and completing the said invention.

4. That the expense of obtaining the said letters patent, and of all drawings and models, and other things which may be necessary for bringing the same and the said invention to perfection, shall be paid and borne by the said partners equally.

5. That the said letters patent, as soon as the same shall be obtained, shall be and become the property of the said partners in equal shares.

6. That the said I. M. Evans shall, when called upon by the said D. Williams and H. Wadkin so to do, and at the cost of the person or persons requiring the same, by a proper deed and assurance, or proper deeds and assurances, well and effectually assign one equal undivided third part or share of the said letters patent, and the rights and privileges thereby granted, to the said D. Williams, his executors, administrators and assigns, and one other equal undivided third part or share thereof unto the said H. Wadkin, his executors, administrators and assigns.

7. That the capital of the said partnership shall consist of the sum of 300l., and that the sum of 300l. shall be advanced and lent to the said copartnership by the said D. Williams and H. Wadkin in equal shares, in such sums as may from time to time be required for carrying on the said trade or business.

8. That the said sum of 300l., together with interest thereon at the rate of 5 per cent. per annum from the time the money is advanced until the same is repaid, shall be repaid to the said D. Williams and H. Wadkin out of the first profits to arise from the said trade or business before any profits are divided between the said copartners.

9. That the said sum of 300l. is not to include the sums expended or incurred in obtaining the said letters patent, or of the drawings, models and other things which may be necessary for bringing the said invention to perfection, but that the sums so expended and paid by the parties hereto in the shares mentioned in the fourth paragraph of these presents shall not be repaid to them, or any of them, out of the capital or profits of the said copartnership.

14. That the net profits, after the payment thereof of all costs and expenses, and after payment of the said sum of 300l., shall be received by the partners equally.

After the execution of this deed Williams and Wadkin advanced the prisoner money to pay the expenses of going to London in order to exhibit the lamp and of obtaining the patent. After he returned, he on several occasions obtained from them further advances of money, until at length, in Feb. 1862, they refused to give him any more money unless he agreed to go out as an agent to sell the lamps on commission.

A verbal agreement was thereupon made between Williams, Wadkin and the prisoner, that the prisoner should travel about the country to obtain orders for the lamps upon the said terms that Williams and Wadkin should pay him a commission of 15 per cent. on all orders received by him, that is to say, 2s. 6d. on each lamp, the price of the lamp being 15s., besides his travelling and personal expenses, such commission to be paid to him as soon as he received the orders, and to be payable out of the capital funds of the partnership before dividing any profits.

On the 14th March 1862 the prisoner came to Williams and Wadkin, and stated that he had got an order from the Wynn Hall Colliery Company, near Baabon, for 100 lamps, to be made in a month, and paid for in a month after delivery.

In the faith that this statement was true, Williams and Wadkin gave the prisoner several sums of money, amounting in all to the sum of 12l. 10s., the commission which would be due to him under the agreement above mentioned, on the sale of 100 lamps.

No such order, nor any order except for one specimen lamp, had in fact been given by the Wynn Hall Colliery Company to the prisoner.

It was objected for the prisoner that the indictment could not be sustained, on the ground that the money obtained by him from Williams and Wadkin was money in which he was interested as a partner, under the provisions of the deed of partnership; and, further, that the intent to defraud was negatived by the fact that the money payable to the prisoner for commission came out of the partnership funds.

I reserved the question for the consideration of the Court for Crown Cases Reserved, and left it to the jury to say whether the prisoner obtained the money by means of the false statement made by him with intent to defraud.

The jury found the prisoner guilty, and I respited the judgment, admitting the prisoner to bail.

The question upon which I respectfully request the decision of the Court is, whether the prisoner was entitled to be acquitted on either of the grounds above stated.

No counsel appeared on either side.

POLOCK, C. B.—The facts in this case appear to be, that the deft. entered into partnership with two other persons, and by a verbal agreement made subsequently they agreed to make him an agent for a particular purpose connected with the business of the partnership, as to which his commissioner, travelling and personal expenses were to be paid out of the partnership funds before any division of the profits took place. The indictment was for obtaining money by false pretences, in respect of charges for which there was no foundation. As, before any division of profits took place, it was specifically agreed that such charges were to be paid out of the capital funds of the partnership, it was necessarily a matter of account between them. The deft.'s misrepresentation (and it was nothing more) to his partners would come into the accounts, and therefore we think that the deft. was not guilty of obtaining money by false pretences. I, speaking for myself—and I beg to say that no other member of the court is responsible for this opinion—entertain a confident opinion that the statute was never intended to meddle with the real business of commerce, unless the falsehood really amounted to a piece of swindling; but when it was a mere fraudulent statement made in the course of a commercial transaction, it was never intended to visit it with an indictment.

The rest of the Court concurring,

*Conviction quashed.*

## CONSISTORY COURT OF ROCHESTER.

Reported by Dr. SWABY, of Doctors'-commons.

Nov. 24, 1862, Jan. 9 and 16, 1863.

(Before the Worshipful J. E. P. ROBERTSON, D.C.L., Chancellor.)

BATTISCOMBE v. EVE.

*Parish church—Consecration—Jurisdiction.*

*Where an old parish church is pulled down and rebuilt on the same site, the new building does not become a parish church without consecration, and the Ecclesiastical Court has no jurisdiction to entertain a suit with respect to the pews or seats in such a building.*

*Semble, dedication, which includes consecration, consists, first, in a gift of property to the service of God; secondly, in the acceptance of that gift by means of the bishop; thirdly, in a declaratory sentence that the property is accepted and set apart for God's service.*

This was a cause of perturbation of seat, brought by the Rev. Richard Battiscombe, a parishioner and inhabitant of the parish of Upminster, in the diocese of Rochester, against George Eve, of the said parish. The libel brought in on behalf of Mr. Battiscombe stated, amongst other things, that in the spring of the year 1861 it was arranged at a meeting of the parishioners, that the parish church should be repaired and resealed, and that a subscription was raised for that purpose; that accordingly the said parish church was (with the exception of one arch and the tower, which were thoroughly repaired), with the sanction and approval of the Lord Bishop of the diocese, pulled down, rebuilt, and wholly repewed. That no arrangement was made by the occupiers of the old pews in the parish church as to the seats to be used or occupied by them in the new church, except as regarded the seats of the lady of the manor, but that the allotment of seats in the new church was at the discretion of the churchwardens, subject to the approval of the bishop; that an allotment of a certain seat to Mr. Battiscombe, by the senior churchwarden, having been objected to by Mr. Eve, the other churchwarden, who claimed the seat himself, Mr. Battiscombe referred the matter to the bishop, who, after some correspondence, confirmed the allotment made in the first instance by the senior churchwarden. That on four Sundays in March 1862, Mr. Battiscombe and his family used without hindrance the pew so allotted, but that subsequently Mr. Eve insisted on his claim to the pew, took possession thereof, and hindered Mr. Battiscombe's occupation.

The admission of the libel was opposed, on behalf of Mr. Eve, by Dr. Deane, Q. C. and Dr. Spinks.—They objected to various details of the pleading of the libel (immaterial for the present purpose), but urged that it was altogether inadmissible on the ground that the bishop could only assign a seat by way of faculty, and that a faculty could be granted only on application to the Bishop's Consistorial Court.

The Queen's Advocates (Sir R. Phillimore) and Dr. Stoebe, in support of the libel, submitted that it was in substance admissible. That the bishop might in person control the discretionary power of the churchwardens in the allotment of seats, and confer the same possessory right as the churchwardens, who for this purpose are his officers. That this was distinct from the appropriation of a seat by faculty, which it was admitted could only be granted by the Consistorial Court.

The CHANCELLOR said that one great difficulty which he felt in respect of this libel had not been noticed; it did not plead that any faculty had been obtained for the pulling down and rebuilding of this

[CONSIST.]

BATTISCOMBE v. EVE.

[CONSIST.]

church, in which case an ecclesiastical offence had been committed; nor did it plead that the so-called church, when in fact rebuilt, was consecrated. That his jurisdiction in respect of seats depended on its being a consecrated building. That the libel must be amended in certain other particulars, but that he must call counsel's attention to what the result might be if it could not be amended by pleading the faculty and consecration. The faculty might also be important as throwing light on the claim, which it appeared from the letters annexed to the libel Mr. Eve might be expected to set up to the seat as annexed to Fox-hall, where he resided.

The amended libel, so far as regards the question of consecration, was as follows:—

That in the spring of the year 1861 it was arranged, at a meeting of the parishioners and inhabitants of the said parish of Upminster, that the said parish church should be thoroughly repaired and reposed, and that a subscription should be raised amongst the said parishioners to carry such arrangement into effect. That accordingly the said parish church was (with the exception of one arch and the tower, which was thoroughly repaired), with the sanction and approval of the Lord Bishop of the diocese, pulled down and rebuilt on the old foundations, with the exception of the north wall thereof, which was rebuilt beyond the line of the old foundations of the church, but within the limits of the consecrated churchyard belonging to the said parish. That the said church so rebuilt was, on or about the 2nd day of March 1862, formally reposed, and Divine service performed therein by the said Lord Bishop of the diocese, without any reconsecration. That no reconsecration of the said church was necessary.

On 9th Jan. 1863 the admission of the libel, as reformed, was opposed by Dr. Deane, Q.C. and Dr. Spinks.—On the point of consecration, they relied on the general doctrine laid down in Gibson's Codex, tit. ix. c. 1, pp. 186-90 of edit. 1761, and the instances there cited, especially Archbishop Abbot's inhibition on the minister, churchwardens and parishioners of South Malling; and on the recognition of this general doctrine by Dr. Lushington in *Turner v. Rector, &c. of Hamwell*, 1 Notes Cas. 360, and by Sir Herbert Jenner in *Warner v. Gates*, 2 Curt. 315. In the latter case, the learned judge stated, "If the church had been rebuilt on the same site, still it would not have been a parish church till it was consecrated." (The objections originally taken to the libel were re-argued, but the decision of the court went wholly on the question of consecration.)

The *Queen's Advocate* (Sir R. Phillimore) and Dr. Swabey, in support of the libel, admitted that, if the dictum of Sir Herbert Jenner in the last case was law, the libel was indefensible; but the point was not decided in *Warner v. Gates*, for there the church had been rebuilt on a different site, and the question was, whether a church-rate, to defray the expenses of consecration, could be enforced. Sir Herbert Jenner's dictum is entitled to all respect, but, unless supported by precedents and the reason of the thing, is not conclusive. The cases referred to in Gibson are distinguishable from the present; in all those some violent interruption of the character and use of the building as a church seems to have taken place. The church had been polluted or applied to profane uses; here the walls had been pulled down with the intention of rebuilding them at once for the old purposes and on the old site, for it can hardly be contended that the enlargement of one aisle would by itself have made reconsecration necessary, and such intention was carried into effect without delay.

The CHANCELLOR.—I cannot say that I have much doubt as to what I ought to do in this case; but, considering the importance of the subject, it will

be better that I should give my judgment on Thursday next in a more formal manner than I could if I were to deliver it off-hand. *Curr. adv. vult.*

On the 15th Jan. Dr. ROBERTSON delivered the following judgment:—The question which I have ultimately to decide is one of jurisdiction; it arises incidentally on the admission of the libel as reformed in a suit for perturbation of church seat, brought by the Rev. Richard Battiscombe, a parishioner and inhabitant of Upminster, in the county of Essex, against Mr. Eve, of the same parish, who is one of the churchwardens. The facts of the case, so far as it is necessary to set them forth on the present occasion, are pleaded in the 2nd and 4th articles of the libel; they are as follows [the learned judge here read the part of the libel hereinbefore set out]. With the fact, admitted in court, that the ancient church was illegally taken down, i.e. without a faculty obtained for the purpose, I cannot deal in the present suit; it is a ground for a criminal proceeding. On the pleadings, as I have stated them, arises the preliminary question, whether, when a building intended for a church has been or may be erected on consecrated ground, such building becomes in law a church without dedication: if it does so become, I have jurisdiction in the present suit; on the other hand, if it does not so become, I have no jurisdiction whatever, as it depends *ratione loci*. Let us see, then, in the first place, what some of the books, of no mean authority, have said on this subject. The author of "*Pupilla Oculi*" (John de Burgh), pars ix. cap. 1, "De consecratione Ecclesie vel altaris et de reconciliatione ejusdem," at fol. 146, F. says, "In tribus casibus debet Ecclesia dudum consecrata iterum consecrari." After stating two instances which do not bear on the case, he proceeds: "Tertius est si Ecclesia funditus sit disrupta vel etiam ex toto reparata, sive ex eisdem lapidibus sive ex aliis." This, I think, is precise to the point. From Van Espen the same doctrine is clearly deducible; pars ii., sect. ii., tit. i., cap. v. The chapter treats "De reconsecratione et reconciliatione Ecclesiarum," and is one far too long for me to set out. I pass over the dictum of my Lord Coke, 3 Inst. 203, as by some it may possibly be said that it is too general and not precise to the point. I turn now to Godolphin, who, in his "Repertorium," chap. vi. sect. 41, after stating some of the forms and ceremonies of consecration both in the Eastern and Western churches, correctly draws this inference: "Although the patron might choose the ground, yet the prelate was to come to consecrate it; the patron might bring the stones, but the bishop laid the foundation; the workmen might with the materials make a house, but the bishop by the consecration made it a church: it was but the dead body of a temple till it received the being of a church by the influence of the diocesan." This passage shows that the previous consecration of the ground did not supersede the dedication of the church. An instance precise to the point at issue, earlier than Justinian—to whose time the passage I have read from Godolphin partly refers—and showing by its date that Popery has nothing to do with the matter, may be found in the fourth century, in Eusebius' History (lib. x., c. iv.) The Church of Tyre was destroyed during the persecution under Diocletian, on the cessation of which a new building was erected on the same site, and dedicated with much solemnity. To approach many centuries nearer to our own time, we find in Gibson (vol. i. 190) that when the church of South Malling had not only been polluted (for which, by the laws of England, reconciliation would have been sufficient), but was also new-built and then used for Divine service, without consecration, Archbishop Abbot, who surely cannot be fairly taxed with High Church notions, placed the incumbent and the parishioners under an interdict. There is no

instance of late years, so far as I am aware, in which the question I am investigating has directly arisen. However, in *Warner v. Gates*, anno 1839, 2 Curt. 315 (which was a question of church-rate for defraying the expense of the consecration of a church rebuilt on a new site), Sir Herbert Jenner Fust, a most cautious judge in laying down law, at the close of his judgment unhesitatingly says: "If the church had been rebuilt on the same site, still it would not have been a parish church till it was consecrated, and the parish must have been charged with the expense of the consecration of such a church." Still later, in the case of *Turner v. The Rector of Hamcell and others*, anno 1842 (1 N. C. 368), it may be seen that the late judge of the Consistory of London, Dr. Lushington, made no doubt that a new building, erected on consecrated ground, would not be a church without consecration. These two *dicta* are clearly in accordance with the law and practice previously cited: and here I might without impropriety conclude this judgment. Nevertheless, as there are some persons whose notions of consecration are vague and undefined, I will hazard my view of the foundation on which the law of consecration rests, sincerely trusting that if I am in error I may be set right by a superior tribunal. To constitute consecration, or rather to adopt, according to that acute critic Ernesti, the more accurate word *dedication*—for dedication includes consecration—three things are, I humbly conceive, necessary: first, an absolute gift or surrender of property to the service of the Deity; secondly, God's acceptance of the surrender *mediately* by the hands of his minister the bishop; thirdly, a solemn declaration, called a declaratory sentence, that the property is accepted and set apart for God's service. To apply these requisites to the case of Upminster. Before the year 1861 there stood the gift or surrender not only of the ground, but also of the building itself, the church. But how stands the matter now? A part of the gift has been destroyed, the church has been taken down without legal authority. I am asked to hold that the newly-erected building, which has no one of the requisites I have pointed out, standing, as I assume it does, on consecrated ground, is a perfect substitute at this time for the original gift. This I cannot do without high authority; in fact, I have shown the authority is on the other side. According to my view, this new building is not at present God's house; it is the property of those who caused it to be built. Though it may be used for prayer, I know nothing in law to prevent its use for any profane purpose whatever. Divine service, followed by a sermon, was no doubt read, as pleaded, on a certain day in this building in the presence of the diocesan; but most certainly, according to my view, praying and preaching are not of the substance of dedication; though, when preceded by dedication, the former is a most effectual means to procure the Divine blessing on the undertaking. I pretend not to specify the very serious mischief which, if I am right in my view of the doctrine of dedication, has taken place in Upminster and in other parishes placed in the same predicament; an Act of Parliament may be requisite to remedy it. I have stated the law as I find it in books of no mean authority, and, in addition, I have ventured to offer my opinion of the ground on which the law rests. It remains for me to say only that I cannot hold the new building on consecrated ground at Upminster to be a church; and consequently that I have no jurisdiction to deal with the suit for perturbation of church-seat. Certainly, if I had jurisdiction, I would order a further reformation of the libel.

The learned CHANCELLOR, on being asked on behalf of Mr. Eve, to condemn Mr. Battiscombe in costs, said: I hold that I have no jurisdiction. I can therefore make no order whatever in the matter; moreover,

the party cited ought to have appeared under protest.

*Nicholl*, proctor for Mr. Battiscombe.

*E. W. Crosse* for Mr. Eve.

[*Note*.—The effect of this decision of the learned Chancellor is, that the law refuses to the building in question the character of a parish church. By 4 Geo. 4, c. 76, s. 2, all banns of matrimony shall be published in an audible manner in the parish church or in some public chapel, in which chapel banns of matrimony may now or may hereafter be lawfully published of or belonging to such parish or chapelry wherein the persons to be married shall dwell . . . and that in all cases where banns shall have been published, the marriage shall be solemnised in one of the parish churches or chapels where such banns shall have been published, and in no other place whatsoever. By sect. 3 the bishop, with the consent of the patron and incumbent, may authorise publication of banns in any public chapel. Sect. 12. Provided, always, that all parishes where there shall be no parish church or chapel belonging thereto, or none wherein Divine service shall be usually solemnised every Sunday, and all extra-parochial places whatever having no public chapel, &c., shall be deemed and taken to belong to any parish or chapelry next adjoining for the purposes of this Act only. . . Sect. 21 . . . if any person shall from and after the first day of November solemnise matrimony in any other place than a church or such public chapel . . . unless by special licence from the Archbishop of Canterbury, or shall solemnise matrimony without due publication of banns, unless licence be first had . . . every person knowingly and wilfully so offending and being lawfully convicted thereof shall be deemed guilty of felony, and shall be transported for the space of fourteen years, &c.22. Provided always . . . that if any person shall knowingly and wilfully intermarry in any other place than a church or such public chapel, &c., unless by licence, or shall knowingly and wilfully intermarry without due publication of banns, . . . the marriages of such persons shall be null and void to all intents and purposes whatsoever.]

## COURT OF ARCHES, CANTERBURY.

Reported by DR. SWANKY, Barrister-at-Law.

Saturday, Nov. 22, 1862.

(Before the Right Hon. S. LUSHINGTON, D.C.L.,  
Dean.)

GOUGH AND CARTWRIGHT v. JONES.

*Church-rate—Original and district parishes—58 Geo. 3, c. 45—6 § 7 Vict. c. 37—19 § 20 Vict. c. 104. Where districts of an original parish, which, under 58 Geo. 3, c. 45, sect. 71, would have been liable to be rated for the repairs of the church of the original parish, have become, under 19 § 20 Vict. c. 104, s. 14, separate and distinct parishes, the court Held, that the churchwardens of the original parish properly omitted such districts in making a rate for the repair of the original parish church.*

This was a question arising on a libel in a cause of subtraction of church-rate, viz., whether the church-rate could be enforced, having been made by the churchwardens of St. Mary, Shrewsbury, excluding the districts of certain churches formerly part of St. Mary's parish, but which were stated by the libel hereinafter given to be separate parishes for ecclesiastical purposes, and not liable to be rated for the support of the mother church. The libel, so far as necessary for the present question, pleaded:—

1. That the churchwardens of the parish of St. Mary, Shrewsbury, in the county of Salop aforesaid, exclusive of the districts of St. Michael, Leaton, Astley, Clive and Albrighton, being in want of funds

[ARCHES.]

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[ARCHES.]

did, on the 19th May 1861, cause a notice, partly printed and partly written, dated on the 18th May 1861, to be affixed on the principal doors of St. Mary's Church aforesaid, and of Berwick Chapel, within the said parish, before the commencement of morning service, "That a meeting of the inhabitants of the said parish in vestry would be held in the vestry-room of the said parish church of St. Mary, on Friday, the 24th day of the said month of May, at twelve o'clock at noon, to grant a church-rate for and towards the repairs and other expenses of the said church for the year 1861-62." And this was, &c.

3. That, in pursuance of the said notice, the minister, churchwardens and parishioners, ratepayers of the said parish of St. Mary, Shrewsbury, met, when the churchwardens aforesaid produced an estimate of the probable expenditure for the repairs of the parish church of the said parish, and of other the necessary and lawful expenses incident to their office of churchwardens of the said parish from Easter 1861 to Easter 1862, and a rate or assessment of 3d. in the pound was made on all properties in the said parish, and on all the inhabitants of the said parish, and others so rateable in respect to such properties, except the several districts aforesaid, for and towards the purport and object of the notice aforesaid. That the said rate was afterwards duly confirmed, and that in compliance therewith, and in conformity thereto, by far the greater part of the said inhabitants and others, ratepayers of the said parish, have paid and satisfied the respective sums of money to or at which they were rated or assessed in and by the said rate. And, &c.

On the 25th July the admission of this libel was opposed by

Dr. Deane, Q.C. (*C. J. Foster* with him).—The libel states no legal ground for the omission to rate the five districts. The rate on a portion of the parish is invalid.

Dr. Robertson (*Dr. Tristram* with him) in support of the libel.—These districts became five separate and distinct parishes, for ecclesiastical purposes, under 19 & 20 Vict. c. 104, ss. 14 and 15; and their inhabitants are therefore not liable to be rated for the repairs of the original parish church.

Dr. LUSHINGTON directed the libel to be reformed by pleading specifically these facts and the statutes relied on.

A 12th article accordingly pleaded that St. Michael, Leaton, Astley, Clive and Albrighton, mentioned in the first article of this libel, have each one a district assigned to it, with power to each incumbent thereof respectively to publish banns of matrimony, to solemnise marriages, churchings, baptisms and burials, and also to receive, for his own use and benefit, the entire fees arising from the performance of the said offices, without any reservation thereout, and which said powers each of such incumbents exercises; that in consequence thereof the party proponent alleges and propounds that each of the said districts became, by virtue and operation of the Act of Parliament entitled the New Parishes Act 1856, sects. 14 and 15, and is, a separate and distinct parish for all ecclesiastical purposes, and is not liable for the repairs or other expenses of St. Mary Shrewsbury, the mother church: to wit, St. Michael, on and after the 29th July 1856, in virtue of two previous orders of her Majesty in Council, published respectively in the *London Gazette* bearing date the 28th May 1852, and the 19th May 1854; and Leaton, Astley, Clive and Albrighton, in virtue of an order of her Majesty in Council published in the *London Gazette* in each case respectively bearing date, as to Leaton, on the 31st March 1860; as to Astley, on the 28th Aug. 1860; and as to Clive and Albrighton, on the 30th Oct. 1860. (a) And the party proponent

lastly alleges and propounds that all the fees aforesaid in respect of Leaton were voluntarily relinquished to the incumbent thereof immediately after its consolidated chapelry was formed, to wit, on the 31st March 1860.

The libel so reformed was again opposed, on the point that, by 58 Geo. 3, c. 45, s. 71, districts are to be deemed part of the original parish as to rates for the repair of the original parish church till twenty years should have elapsed from the date of the consecration of the district church.

On the other side it was contended that by sect. 16 of the Act last quoted the commissioners might, out of original parishes, create distinct parishes for all ecclesiastical purposes, and by sect. 21 might divide original parishes into ecclesiastical districts; that the 71st section referred to such districts; whereas, by sect. 14 of 19 & 20 Vict. c. 104, the districts in question had become separate and distinct parishes: (*Nunn v. Varty and Mopsey*, 3 Curt. 372; *Hughes and others v. Denton*, 18 L. J. 140, M. C.; and *Reg. v. Perry*, 30 L. J. 140, Q. B.; s. c. 3 L. T. Rep. N. S. 885, were cited.)

Dr. LUSHINGTON now delivered judgment.—The libel pleads that a church-rate was made for the parish of St. Mary, Shrewsbury, exclusive of the districts of St. Michael, Leaton, Astley, Clive and Albrighton. This rate being avowedly made upon a part of the original parish, it became necessary for the churchwardens, who support the validity of the rate, to show on what legal grounds the districts of the parish not assessed are legally exempt from the church-rate made in support of the church of the original parish. In order to effect this purpose the churchwardens plead that each of the places mentioned has a district assigned to it. In considering the admissibility of this plea I must assume that the matters of fact are true as pleaded. It is then contended that under such circumstances the districts were not liable to be assessed to a church-rate made for the original church, and the Act of 19 & 20 Vict. c. 104, ss. 14, 15, usually called the New Parishes Act is relied on. Reference must be had to the statute, and if I can ascertain its meaning from the statute alone, that is the most satisfactory mode of construction. I need not comment upon the obscurity of the Church Building Acts; that is a matter of public notoriety, and certainly this Act is entitled to pre-eminence for obscurity and difficulty of construction. There must be a district and a consecrated church, and service performed, and it must not be a separate and distinct parish when the Act passed. These things are clearly requisite, whether the incumbent must be entitled to the fees for his own benefit would be very doubtful if grammatical construction is to prevail. Assume it to be so. All these things being so, then the place in question is to become a separate and distinct parish for ecclesiastical purposes, but not so absolutely. Here follows what I suppose I must call a qualification—a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the 15th section of the first-recited Act. Then I must proceed to ascertain what is the first-recited Act, and I presume it to be the 6 & 7 Vict. c. 37. The 15th section constitutes new parishes for ecclesiastical purposes, and makes provision for the performance of services and the taking fees. Not a word is said in either of these Acts as to church-rates. Then are the new parishes so constituted by 6 & 7 Vict. c. 37, liable to be assessed to the church-rate of the original parish, presuming of course that all the preliminaries necessary for the constitution of a new parish shall have been previously complied with? I must consider the words of the statute alone, without reference to previous Acts. What is the meaning and effect of constituting a new parish? What is a new parish for all ecclesiastical

(a) On the further hearing the following paragraph was added by consent of counsel.



Q. B.]

REG. v. THE INHABITANTS OF ST. ALKMOND, DERBY.

[Q. B.]

tical purposes? I apprehend that if any district in a parish be constituted a new parish, without more being said, such district is taken out of the whole original parish, to all intents and purposes, civil and ecclesiastical, that the insertion of the words for ecclesiastical purposes is the insertion of a limitation; that is, leaving all things not for ecclesiastical purposes, but being for civil purposes, as they are. The question then arises, whether church-rates upon these premises are to be considered as within the term "ecclesiastical purposes," and I am of opinion that church-rates do fall within the description of ecclesiastical purposes relating to the church. But it has been argued that these are not all the provisions of the Legislature on the subject. That there exists another statute requiring that districts like these should be subject to be assessed to the rates for the original parish church for twenty years. The statute in question is 58 Geo. 3, c. 45, ss. 70, 71. It has been contended that this section is unrepealed, and applies to the present case, and that consequently some of these districts (the twenty years not having elapsed) are to be assessed to the church-rates of the original parish. So far as I know, this provision of the 58 Geo. 3 has never been expressly repealed. I believe it to be in operation now; but if subsequent enactments are inconsistent with it, it is the last Act of the Legislature which I am bound to obey. I must hold that, by virtue of this Act, called the New Parishes Act, the rate has been properly laid if all the facts alleged are proved, and that the districts mentioned have been properly omitted from the rate.

Nelson and Son, proctors for the plts.

Crosse for the defts.

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and  
C. J. B. HENTLEY, Esqrs., Barristers-at-Law.

Thursday, Jan. 15, 1863.

*Ex parte* THE CLERK OF THE PEACE FOR  
ROCHESTER.

*Summary convictions—Filing same.*

*Summary convictions before justices should, under the provisions of the 11 & 12 Vict. c. 43, s. 14, be filed, by the clerk to the justices, amongst the records of the Court of General Quarter Sessions.*

F. J. Smith moved for a rule calling upon the clerk to the justices of the city of Rochester to show cause why a *writ of mandamus* should not issue commanding him to file certain summary convictions (said to be about 1400), pursuant to the 11 & 12 Vict. c. 43, s. 14, which, after providing the course of proceeding to be pursued upon a hearing upon a summary conviction, enacts that, "if he or they" (the justices) "convict or make an order against the deft., a minute or memorandum thereof shall then be made, for which no fee shall be paid, and the conviction or order shall afterwards be drawn up by the said justice or justices in proper form, under his or their hand and seal, or hands and seals, and he or they shall cause the same to be lodged with the clerk of the peace, to be by him filed among the records of the general quarter sessions of the peace," &c. It was alleged that the clerk to the city magistrates of Rochester had neglected to file the summary convictions, and it also appeared that the clerk of the peace is entitled to a fee of 1s. for each conviction filed, the clerk to the magistrate himself receiving a fee of 2s. 6d. for making up the record in each case. It was contended that this neglect was prejudicial to the public, who had a right to have the records filed with a view to their subsequent legal use and effect. [WIGHTMAN, J.—The difficulty is in making the application against the clerk, and not against the justices. CROMPTON, J.—He is merely the servant of the jus-

tices. Can we say that he shall do a certain thing, when perhaps the justices may prohibit him?] We applied to the clerk, and he refused; we then applied to the justices themselves, and there was a division amongst them. [WIGHTMAN, J.—It can easily be discovered whether or not some particular conviction has not been filed, and then you could come for a *writ of mandamus* to compel the convicting justice to cause it to be filed. No doubt the convictions ought to be filed. CROMPTON, J.—It should be known that we are all agreed that these convictions ought to be filed; and, as the Act says they are to be filed, the parties may probably be liable to be indicted for not doing it. WIGHTMAN, J.—It certainly very much concerns the public that these convictions should be filed, and perhaps this intimation of our opinion may be sufficient for the purpose.] No rule.

Saturday, Jan. 17, 1863.

REG. v. THE INHABITANTS OF ST. ALKMOND,  
DERBY.

*Poor-law—Appeal—Application for copies of depositions—To whom to be made.*

*The application for a copy of depositions upon which an order of removal has been made should be made to the clerk to the justices who made such order, and not to the overseers of the removing parish.*

An order of removal from the parish of A. to the parish of B. was made and duly served with the other documents on the 23rd Oct. 1861. On the 6th Nov. the apps. applied to the resp. overseers for a copy of the depositions, "as (as they stated) it is intended to appeal against such order of removal." The resps. took no notice whatever of this application and on the expiration of twenty-one days they removed the paupers. On the 10th Dec. the apps. gave notice of appeal, and on the 30th they applied to the justices' clerk for copies of the depositions. At the ensuing January sessions the apps. applied to enter and respite their appeal, which was entered and respited accordingly; but upon the order of sessions for such entry and respite being brought up to be quashed, it was held, that the apps. had lost their right of appeal by not giving their notice in time, their application on the 6th Nov., for copies of the depositions, being made to the wrong parties (i.e., to the parish officers instead of to the clerk to the justices), and that such application was not of itself a notice of appeal.

This was a rule to quash an order of quarter sessions ordering an appeal to be entered and respited.

It appeared that on the 23rd Oct. 1861, an order of removal was obtained for the removal of a woman of the name of Hudson and her three children, from the parish of Crick to the parish of St. Alkmond; that a copy of such order was duly served with the other documents upon the app. parish officers; that on the 6th Nov. following the assistant overseer of the parish of Crick wrote the following letter to the parish officers of St. Alkmond:—

"Parish of Crick, Nov. 6, 1861.

"To the parish officers of St. Alkmond, Derby.

"Gentlemen,—The churchwardens and overseers of the parish of Crick have ordered me to apply to you for a copy of the depositions of the grounds of removal of George Hudson, a pauper lunatic, now charged to the parish of St. Alkmond. Also, I hereby apply for a copy of the depositions of the grounds of removal of Hannah Hudson, wife of George Hudson and Isaac George, aged six years, Elizabeth and Sarah Ann, their three children, as it is intended to appeal against such order of removal.—I am, Gentlemen, yours, &c.

"R. H. SMITH,

"Assistant Overseer of Crick."

To this application the parish officers of St. Alk-

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meed gave no reply, and took no notice whatever of it, and on the 21st Nov., not having received any notice of appeal, they removed the paupers. On the 10th Dec. the app. gave notice of appeal, and on the 20th they applied to the justices' clerk for copies of the depositions. At the ensuing January sessions the app. applied to enter and respite their appeal, which was resisted by the resp. on the ground that they had forfeited their right to appeal by not giving notice of appeal in due time. The learned recorder, however, received and respited the appeal, and the order of sessions thereon having been removed by *certiorari*, the present motion was made to quash it.

By sect. 3 of the 11 & 12 Vict. c. 31, it is enacted, "That the clerk to the justices who shall make any order of removal shall keep the depositions upon which such order was made, and shall within seven days furnish a copy of such depositions to the overseers or guardians as aforesaid of the parish to which the removal is by such order directed to be made, if such overseers or such guardians shall apply for such copy and pay for the same at the rate of 2d. for every folio of seventy-two words," &c.

By sect. 9 it is enacted, "That no appeal shall be allowed against any order of removal, if notice of such appeal be not given as required by law within the space of twenty-one days after the notice of chargeability and statement of the grounds of removal shall have been sent by the overseers or guardians of the removing parish to the overseers or guardians of the parish to which such order shall be directed, unless within such period of twenty-one days a copy of the depositions shall have been applied for as aforesaid by the last-mentioned overseers or guardians, in which case a further period of fourteen days after the sending of such copy shall be allowed for the giving of such notice of appeal; but in such case no poor person shall be removed under such order of removal until the expiration of such further period of fourteen days."

Case now appeared in support of the order of sessions, and contended that the app. were not in default in not giving their notice of appeal before they did, inasmuch as they had applied to the resp. for a copy of the depositions, which they had never furnished. [CHROMPTON, J.—You seem to have applied to the wrong party. Why should you have applied to the parties who had not got the depositions?] It gave them notice that we intended to appeal, and so they would know when they might remove the paupers. [WIGHTMAN, J.—But you applied for a copy of the depositions to the overseers, who had not got them. You must show that you are within the Act, and by the 9th section you must give your notice of appeal within twenty-one days, unless within such period you apply for a copy of the depositions. Now, here it appears you did not apply to the proper parties for a copy of the depositions.] We knew nothing of the justices' clerk; we applied to the overseers from whom we had received the order of removal. [CHROMPTON, J.—Do you mean to say that you need only go to the overseers for the copy depositions, and so escape the payment of the fees? MELLON, J.—You say that you can put it upon the overseers to go and get the copy depositions, pay for them and send them to you?] However that may be, we were led into the mistake by the other side by their taking no notice of our letter of the 6th Nov. They knew by that letter that we intended to appeal. [WIGHTMAN, J.—The letter does not state as a fact that you intended to appeal. MELLON, J.—It is not a positive notice of appeal; it is in effect a letter asking for a copy of the depositions as if you can appeal.]

WIGHTMAN, J.—It is perfectly clear that the statute requires the application for a copy of the depositions to be made to the clerk to the justices. That you did not do, and it was no part of the duty

of the other side to put you right. The letter itself is nothing like a notice of appeal, and it does not profess to be a notice of appeal.

The other Judges concurred.

*Order quashed.*

SWEENEY (app.) v. SPOONER (resp.)

*Vagrant Act—Rogue and vagabond—Running away and leaving wife chargeable—What not sufficient proof of.*

*To make a party liable as a rogue and vagabond for running away and leaving his wife chargeable to the parish, he must leave her wilfully, and reasonably believe at the time that she would become chargeable.*

This was a case stated under the 20 & 21 Vict. c. 43, upon a refusal of justices to convict a party as a rogue and vagabond in running away and leaving his wife chargeable to the parish.

The case stated, that upon the hearing of the said information it was proved on the part of the app., and found as a fact, that the wife of the resp. became chargeable to the parish of Birmingham on the 27th Nov. last, and had continued to be so chargeable until the day of hearing the said information, and that the said resp. had been for some time and was then employed as schoolmaster at Quarry-bank, Brierley Hill, near Dudley, and about twelve miles from Birmingham, at a salary not exceeding 9s. per week, with house-rent and firing found in addition thereto. But it was not proved that any communication of the fact of the wife's chargeability had ever been made by the app. to the resp. before the issuing of the warrant in this case. It was stated on behalf of the resp. and not denied by the app., that the place of legal settlement of the resp. and his wife was Swansea, in South Wales, where they had lived and cohabited for several years previously to the year 1858, when they parted by mutual consent and had had no personal communication from that time till the hearing of this information. That the said resp. was recently convicted of bigamy in the county of Stafford; and the only occasions when he saw his said wife, after their separation in 1848, was on the preliminary investigation before the magistrates, on the charge of bigamy, when his wife appeared in court for the purpose of identification; and once in Birmingham aforesaid, after the resp. was discharged from prison, after sentence on conviction for his said offence of bigamy, but without any knowledge on the part of the resp. that his said wife was then likely to become chargeable to the said parish aforesaid. It was also stated on the part of the resp., and not denied by the app., that on the separation of the resp. and his wife in 1858, at Swansea aforesaid, she was left in possession of certain mines and other property, in which she had a life-interest under the will of a former husband. I, however, being of opinion that the evidence given before me did not bring the case within the operation of the said 4th section of the Act 5 Geo. 4, c. 83, gave my determination against the app. in the manner before stated.

The app. also tendered the wife of the resp. as a witness to give evidence against her said husband in support of the information, but I refused to receive her evidence.

The questions of law arising on the above statement for the opinion of this court therefore are: 1st, Whether under the facts stated the resp. was or was not guilty of the offence of running away from the said parish of Birmingham on the day and at the time mentioned in the said information, whereby his said wife became chargeable to the said parish, and liable therefore to be deemed a rogue and vagabond within the meaning of the said stat. 5 Geo. 4, c. 83, s. 4? and 2nd, Whether the evidence of the wife of the resp. was or was not by me properly refused?

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If the court should be of opinion that under the facts and circumstances stated the resp. was liable to be deemed a rogue and vagabond within the meaning of the statute, then the court to have power to convict him of each offence, and deal therewith in such manner as the court may deem fit. And hereupon the judgment of the said Court of Q. B. is requested as to whether or not I, the said justice, was correct in point of law in my determination as aforesaid, or as to what should be done in the premises.

Given under my hand at the borough aforesaid, the 20th day of April 1862.

*Spooner*, for the app., contended that the justice ought to have convicted. The statute spoke of the offence as consisting in running away and leaving the wife chargeable or whereby she became chargeable. Now here he left the wife, and also became chargeable. [CHROMPTON, J.—Still the man knew nothing about this. Is he to be imprisoned for something he never knew of or intended to do? You cannot in general make out a man to be guilty without showing a guilty mind.] The knowledge of the man has nothing to do with the statutory offence. It is enough that he leave his wife and she becomes chargeable. Now it appeared he had committed bigamy. That alone was strong evidence of the offence of desertion.

*WIGHTMAN, J.*—The resp. was charged with running away and leaving his wife chargeable to the parish, and the statute plainly contemplated a running away of a purpose and wilfully, he at the time knowing that his wife would thereby become chargeable. Here a different state of things appears altogether. The parties had parted by mutual consent, and when he left her the wife was living on her own means. There is no evidence that he ever knew those means had become exhausted, or that she became chargeable. A man cannot become guilty by relation in this way. He seems to have had no knowledge of her condition. There is nothing, therefore, to support a conviction for this offence.

CHROMPTON and MELLOR, JJ. concurred.

— Judgment for resp.

MORLEY (app.) v. GREENHALGH (resp.)

*Cock-fighting—Assisting at, not at a place kept for the purpose.*

*By sect. 3 of the 12 & 13 Vict. c. 92, it is an offence to keep or use any place for the purpose of fighting cocks; and by the same section it is also an offence in every person who shall in any manner encourage, aid, or assist at the fighting of any cock as aforesaid:*

*Held, that under this section no legal offence is committed by a person who assists at a cock-fight at a place not kept for the purpose, e. g., in a stone quarry, and for one occasion only.*

This was a case stated under the 20 & 21 Vict. c. 43, upon a conviction for assisting in a cock-fight and acting in the management of a certain place then and there being used for the purpose of fighting cocks.

The case stated that "at the hearing of the information it was proved on the part of the resp., that on the 10th day of March last, at a stone-quarry belonging to Godfrey Wentworth, Esq., in the township of Woolley, several cocks were fought in the presence of upwards of 100 persons; that one of the cocks was taken out of the ring by one of the apps. Job Morley, and that the said Job Morley was in the ring at the time the said cocks were fought, and that on the appearance of some police officers (witnesses for the resp.) in disguise, John Peel, another of the apps., was seen running away with a cock. It was also proved that the other apps. who were there took no other part than by throwing stones at the same police officers and preventing the said police officers from

approaching the quarry at the time the said fights were going on. We were of opinion, on this evidence, that the said apps. did resort to the said quarry with the intention of causing the said cocks to fight together there, and that they did encourage, aid and assist at the fighting of the said cocks at the said place then and there being used for the purpose of fighting cocks, and did use the place for such fighting, but it was not proved before us that in any other instance cocks had been fought there. Upon the hearing of the said information, it was contended, on the part of the apps., that there was no offence committed within the intent and meaning of the 3rd section of the 12 & 13 Vict. c. 92, inasmuch as that section only applies to encouraging, aiding, or assisting at the fighting of cocks in any place regularly kept or used for that purpose as mentioned in the first clause of the said section, so as to subject the keepers of such place to the penalty fixed by the said section, and that there was no evidence to show that the said stone-quarry was a place so kept or used, and the case of *Clarke v. Hays*, reported in the L. T. Reports as having been decided in the Court of Q. B., was a case in point. It was further contended that the facts as adduced did not support the information. We were of opinion that the stone-quarry before mentioned was a place within the meaning of the 3rd section of the statute before mentioned, inasmuch as that part of the section applied to a place, and was not limited in its construction to a place specially kept for the purpose of cock-fighting, &c., and that it was used on the 10th March last by the said apps. as a place for fighting cocks, and that the evidence before us brought the case within that section, and we accordingly convicted each of the said apps. of the offence set forth in the copy conviction annexed. The question of law arising from the above statement is, whether it is an offence within the intent and meaning of the 3rd section of the said statute to assist at the fighting of cocks, and act in the management of any place then and there being used for the purpose of fighting cocks, as set forth in the summons herewith annexed, or only in a place specially kept for that purpose."

By sect. 3 of the 12 & 13 Vict. c. 92, it is enacted, "That every person who shall keep or use, or act in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature, or shall permit or suffer any place to be so used, shall be liable to a penalty not exceeding five pounds for every day he shall so keep or use, or act in the management of any such place, or permit or suffer any place to be used as aforesaid; provided always, that every person who shall receive money for the admission of any other person to any place kept or used for any of the purposes aforesaid shall be deemed to be the keeper thereof; and every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid, shall forfeit and pay a penalty not exceeding five pounds for every such offence."

*Hawkins*, Q. C. now appeared in support of the conviction. [WIGHTMAN, J.—In *Clarke v. Hays*, 29 L. J. 105, M. C., the same question arose; and the question there was asked, whether it was an offence under the statute to assist at a cock-fight, at a place not kept for the purpose? and we said that it was not.] That case is hardly decisive of the present one, as the court, in its judgment, seemed to reserve its opinion as to whether or not the offence could be committed in any other than a place regularly kept for the purpose. It is an offence to assist at a cock-fight. [WIGHTMAN, J.—Only when it is at a place kept or used for the purpose, as mentioned in the first part of the section.]

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Kane, for the resp., was not called upon.

WIGHTMAN, J.—It seems to me that this case is precisely within that of *Clarke v. Hague*, which, it will be remembered, was a considered judgment; we cannot reverse that decision.

CROMPTON and MELLOR, JJ. concurred.

*Conviction quashed.*

Monday, Jan. 19, 1863.

REG. v. THE RECORDER OF BERWICK.

*Business*—Notice of appeal—Error—Motion to enter and respite—Conditional order of deputy-recorder.

Notice of appeal against an order of removal was served in due time, but erroneously described the appeal to be to the county instead of the borough sessions; this was afterwards amended, but too late for the ensuing sessions. Application having been made to the deputy-recorder to enter and respite, he allowed it, on condition that the whole question should be brought before, and decided by, the recorder. At the next sessions the recorder held, that the notice was bad, and dismissed the appeal: Under the above circumstances, the Court refused to grant a mandamus to the recorder to hear the appeal, as there had been a conditional exercise of discretion, which had been accepted by the app.

Liddell, Q. C. (*R. Fowler* with him), showed cause against a rule for a mandamus to be directed to the Recorder of Berwick-upon-Tweed, requiring him to hear an appeal by the churchwardens and overseers of the parish of Longbenton, in the county of Northumberland, against an order of the justices of the county of the borough and town of Berwick-upon-Tweed, for the removal of Rosanna Townsley from that part of the parish of Tweedmouth which lies in the county of the said borough and town of Berwick-upon-Tweed, to the parish of Longbenton. It appeared by the affidavits that in the notice of appeal the quarter sessions for the said county of Northumberland were erroneously stated as the quarter sessions at which the appeal would be heard, whereas the order of removal having been made by two justices for the county of the borough and town of Berwick-upon-Tweed, the notice should have been given for the quarter sessions of that county. The notice of chargeability and grounds of removal were dated on 12th April 1862; copy of depositions applied for and sent 2nd May; the notice of appeal was dated the 10th May 1862, and was received by the churchwardens of Tweedmouth on the 12th. On the 18th June the apps. attorney received from the churchwardens of Tweedmouth a notice that the notice dated the 10th May was by mistake stated to be for the quarter sessions of the county of Northumberland instead of the quarter sessions of the borough of Berwick-upon-Tweed. Notice of grounds of appeal were given on the 19th June. The quarter sessions for the county of the borough and town of Berwick-upon-Tweed were held on the 27th June, and consequently fourteen days had not elapsed between the service of the notice and grounds of appeal and the sessions. Counsel for the churchwardens of Tweedmouth attended, and on a motion being made on behalf of the churchwardens of Longbenton to enter and respite the appeal, opposed the motion on the grounds that the notice was for an appeal to the wrong sessions, and that grounds of appeal had not been given fourteen days before the hearing. Mr. Scurfield Grey, who presided in the absence of the recorder, allowed the appeal to be entered and respited without deciding upon the right, leaving the whole question to be argued before the recorder at the ensuing quarter sessions, who, upon the case being brought before him at the Michaelmas quarter sessions, decided that the appeal should have been tried at the Midsummer quarter sessions, and should not have been entered and respited, and he

dismissed the appeal with costs. It was now contended that under the above circumstances the mandamus should not go: (*R. v. Justices of Sussex*, 31 L. J. 193, M. G.; *R. v. Justices of Lancashire*, Arch. Prac. 761.) [WIGHTMAN, J.—If the recorder had refused to enter and respite, could this court have compelled him? BLACKBURN, J.—There is a discretion as to entering and respiting, but it is doubtful if the recorder's deputy had power to annex a condition. CROMPTON, J.—I should be sorry under such circumstances to grant a discretionary writ.]

*Greenhow contra*.—We came to the subsequent sessions upon the faith of having the appeal tried: (*R. v. Macclesfield*.) [CROMPTON, J.—The entry was only conditional. BLACKBURN, J.—There was a point reserved for the opinion of the recorder.] This court will exercise a control in such a case. The app. must go the next practicable sessions, but only to enter and respite, he need not proceed to hearing. [CROMPTON, J.—You need not have taken a conditional decision.]

*Reg. v. Justices of Macclesfield*;

*R. v. Justices of Peterborough*, 7 E. & B. 643;

*R. v. Justices of Sevenoaks*, 7 Q. B. 136, were referred to.

WIGHTMAN, J.—It seems to me that this rule should be discharged. The app. might have insisted upon a distinct decision, instead of which, he was contented with a conditional one, subject to the opinion of the recorder, being that he approved of the discretion exercised by his deputy, we cannot review a discretion exercised.

CROMPTON, J.—I am of the same opinion. It is too much to say, after what was done, that we should under these circumstances, grant a mandamus.

BLACKBURN, J.—Here was a discretion which has been exercised. The recorder's deputy would have done better to have decided at once, and the app. no doubt might have called on him to do so. I do not know whether the recorder was bound to review his deputy's decision, perhaps not; but certainly we, in the exercise of our discretion, ought not to grant a mandamus.

*Rule discharged.*

*Willoughby*, attorney for app.

*Dunn and Gauthrop*, attorneys for resp.

LYONS AND WIFE v. KNOWLES.

*Copyright in dramatic pieces—Causing to be represented*—3 & 4 Will. 4, c. 15—5 & 6 Will. 4, c. 45.

A. furnished the actors to a theatre and selected the pieces to be performed, without the control of the deft. The deft., to whom the licences for the house was granted, furnished the use of the theatre, lights, servants, and band of music, also the printing, advertising, and payment of servants; and by his servants he received the money at the doors, and the gross receipts were divided between him and A.:

*Held*, that there was no such "causing to be represented" by the deft. as to make him liable for the representations of pieces under the *Dramatic Copyright Act*.

In this case an action had been brought by the plts. as proprietors of certain dramatic pieces, against the deft., for infringement of their copyright under 3 & 4 Will. 4, c. 15.

A verdict had been entered for the plts. and

This was a rule calling on the plts. to show cause why the verdict found for them should not be set aside, and a verdict entered for the deft., or why a non-suit should not be entered on the ground that the plts. had not the sole right of representation, for want of registration of the assignment of certain burlesque pieces, called the *Bride of Abydos* and *Fra Diavolo*. On the trial of the cause before Blackburn J., at the

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Middlesex sittings after last Michaelmas Term, the plts. obtained a verdict for 28*l.*, being at the rate of 40*s.* for each representation of fourteen representations of the said burlesques. The deft. pleaded not guilty, and that the plt. was not the proprietor of the burlesques in question, and that they had not been assigned to the plt., and they were not the assignees thereof as alleged. At the conclusion of the case it was agreed between counsel that the facts should be taken as follows: that Mr. Dillon, under whose management the deft. alleged the theatre was at the time these pieces were performed, furnished all the actors, and selected the pieces without control from Knowles (the deft.), that Mr. Knowles had furnished the use of the theatre, lights, servants, and band, the music being a necessary part of the performance, also the printing, advertising, and payment of servants, and that the gross receipts were divided between Mr. Knowles and Mr. Dillon equally, and the question was whether these facts amounted to a representation within the Act by the deft., or that he caused the pieces to be represented.

*Huddleston, Q. C. (Hawkins, Q. C. and J. O. Griffiths with him)* showed cause in support of the point as to the registry of the assignment; he referred to

3 & 4 Will. 4, c. 15;

5 & 6 Will. 4, c. 45, s. 2, 11, 20, 22, 24;

*Cumberland v. Planche*;

*Russell v. Smith*, 12 Q.B. 217.

As to the second point. The deft. says he neither represented, nor caused to be represented, these pieces, but he was the licensed proprietor, and liable for any breach of his licence. [BLACKBURN, J.—He might be said to have let the house ready furnished, including lights, music, and servants, and his servants received the money. COCKBURN, C.J.—And taking half the amount received as rent.] The Act was passed for the benefit of dramatic authors, and such an arrangement as this is an evasion of the Act. The deft. causes to be represented the pieces; if the person licensed leaves it to another, his manager, to choose the pieces, he cannot thus evade the Act: (*Russell v. Briant*, 8 C.B. 836) If this were allowed it would throw great difficulties in the way of dramatic authors protecting their property, and lead to inconvenience and hardships. [COCKBURN, C. J.—It is expressly found that the deft. had no control over the pieces.] But he was in every way the responsible person as the person to whom the licence was granted. Suppose a disturbance had taken place, he, as licensee, would have been the person answerable.

*Pigott, Serjt. (Milward with him)* contra.—Who represented, or caused to be represented? Not the deft. This amounted to nothing more than a method of paying rent; there was no partnership. The deft. had no control over the pieces, and therefore he did not cause to be represented. Can a man, by a forced construction, be made to break an Act of Parliament against his will? In *Russell v. Briant*, the payment came out of the receipts from the performance; there is no distinction if a part is apportioned. [He was stopped by the court.]

COCKBURN, C. J.—We think the second point is in the deft.'s favour; the rule will therefore be absolute. If there had been any joint action and control, then I agree with Mr. Huddleston, Knowles might have been considered to have caused to be represented; but, as I understand it, Knowles had made over to Dillon the theatre, and he was the person who was to direct the performance and employ the actors, Knowles stipulating that his servants should receive the money, and that he would supply the music, he having no control over the performance or pieces. He may have been the proprietor, but he was not, in the proper sense, the manager; there was no joint action, and nothing in common between them, except the division of the gross profits. To make a

partnership a participation must be shown; here there was nothing but the arrangement I have referred to in lieu of a settled amount of rent.

CROMPTON, J.—I am of the same opinion. It is established by the cases in the C. B. that the relation of landlord will not bring a person within the Act, and I agree with the reasons given by Cockburn, C. J. The fair result is, that this is a mode of paying the rent, and is not sufficient to make the deft. a representative and responsible as such.

BLACKBURN, J.—I think there should be a rule absolute to enter a verdict for the deft. on the plea of not guilty. The fact of a man finding servants is not sufficient. Suppose the case of a lodger in a house where the dinner was cooked by the landlord's servants, but it does not therefore follow that the landlord provides the dinner. In *Russell v. Briant* the payment was 5*l.* a-night, here it is half the gross receipts to be received by Knowles's servants, but that is not a sufficient difference to distinguish the cases. If, indeed, it were proved that the arrangement were colourable, it would be different, but Knowles did not make himself a partner, and the facts not being colourable, I think the deft. is entitled to a verdict.

*Rule absolute to enter verdict for deft. on plea of not guilty.*

E. L. Leary, plt.'s attorney.

F. Venn, deft.'s attorney.

Tuesday, Jan. 20, 1863.

WARTON (app.) v. THE GUARDIANS OF THE POOR OF THE BLYTHING UNION (resps.)

*Nuisances Removal Act 1855, ss. 2, 14, 19, 35.*

*The Nuisances Removal Act 1855 enacts, that the word "owner" shall include any person receiving the rents of property in respect of which the word is used from the occupier of such property, on his own account, or as trustee or agent for any other person. A nuisance existing on certain property, the local authority, acting under the above statute, having made an order on the owner for the abatement of it, executed the necessary works on default, and brought an action against A., who was an agent appointed, under power of attorney, to receive the rents of the said property, to recover the amount. The power of attorney under which A. acted was executed before, but received by him after, the making of the order for the execution of the works:*

*Held, that A. was not the owner at the time the order to execute the works was made, and therefore that the amount could not be recovered against him.*

Appeal against a decision of the Judge of the County Court, Suffolk, holden at Halesworth.

The action was brought by the Board of Guardians of the Blything Union, as the local authority under the Nuisances Removal Act 1855, against the deft., as owner of certain property, to recover from him 2*l.* 12*s.* 1*d.*, as money paid for his use and at his request under the following circumstances:—A nuisance existed on certain property, the owner of which was in Australia, and on the 4th Feb. 1861 the inspector reported the nuisance to the local authority. On the 19th June a summons was issued against the owner, and served by being left at the premises, and on the 26th an order was made by the justices against the owner to abate the nuisance. On the 3rd July the seven days expired for the obedience of the order. On the 16th July the works were commenced, and they were finished on the 7th Sept. On the 29th May a power of attorney had been executed by the real owner of the property, authorising the deft. to receive the rents, which was, in due course, received by him on the 22nd July, and he acted upon it by receiving the rents at Michaelmas, before which he had not acted as agent.

## Q. B.] THE CLERK OF THE PEACE FOR SOMERSETSHIRE v. OVERSEERS OF SHIPHAM. [Q. B.]

The question for the opinion of the Court was, whether under the above circumstances he was owner of the property within the meaning of the Nuisances Removal Act, 18 & 19 Vict. c. 121.

*Lush, Q. C. (Stammers with him), for the app.*—By the 2nd section of the 18 & 19 Vict. c. 121, it is enacted that “the word ‘owner’ shall include any person receiving the rents of the property in respect of which that word is used from the occupier of such property on his own account or as trustee, or agent for any other person;” but here the app. became agent after the order, and whilst the works were in course of execution. (Stopped by the court.)

*Bevill, Q. C. (F. M. White with him), for the resp., was called on.*—The Act makes these expenses a charge upon the property, and when the app. received the rent at Michaelmas he adopted the power of attorney; in fact, he received the rent from the preceding Michaelmas: (sect. 19.) [COCKBURN, C.J.—It may be that the expenses are a charge on the property, but how do you make the app. personally liable? The Act says the expenses are to be charged on the person on whom the order was made, but the order could not be considered as made on the app. for he was not then the owner.] There is no remedy given by distress, but the expenses are to be recovered as money paid for the use of the owner; the object was to make a sort of shifting ownership. [COCKBURN, C.J.—There is nothing in the Act to show such intention.] The option is given that proceedings may be taken against the owner or against the person receiving the rents, and that must mean “entitled to receive the rents.” Sects. 14, 19 and 35 were referred to.

COCKBURN, C. J.—I think it is clear that this verdict against the app. cannot stand. By the Act of Parliament, where there has been default in the abatement of a nuisance, the local authority is to do the work and charge the expenses to the owner, but that does not give the power to make an order upon a person who has not received any authority to act previous to doing the works and making the order. The app. clearly was not the owner; he had neither received the rents, nor had he received any authority to receive them at the time the order for these works was made; there was no authority to receive the rents until the power of attorney was received and assented to, accepted and acted upon. This debt was clearly not the owner at the time of making the order, and as there was no personal liability there could be no default. Therefore the County Court Judge was wrong, and his decision must be reversed.

GOODE, J.—I am of the same opinion. This party cannot be taken as receiving rent as agent till he has received the power of attorney; that instrument does not operate from the time of its execution, but from its receipt and adoption. It cannot be said he was the owner. Sect. 19 shows that it was intended to apply to the person who was the owner at the time the order was made. I do not find any provision applicable to the case of a person who is out of the county.

MILLER, J. concurred. *Judgment for app.*

Wardon and Co., attorneys for app.

White, Borrett and White, attorneys for resp.

Wednesday, Jan. 21, 1863.

THE CLERK OF THE PEACE FOR SOMERSETSHIRE

(app.) v. THE OVERSEERS OF SHIPHAM (resp.)

*Pauper lunatic—Wife of a Scotchman who had obtained no settlement in England—Order upon the county—16 & 17 Vict. c. 97, s. 98.*

*Under sect. 98 of the 16 & 17 Vict. c. 97 (Lunatic Asylum Act), a lunatic pauper who has no parish of settlement is equally chargeable to the county as*

*one who has a parish of settlement which cannot be ascertained.*

*A., the wife of R., who was born in Scotland, and had acquired no settlement in England, being a lunatic pauper, was sent to a lunatic asylum, and an order of maintenance was made upon the county under sect. 98 of the 16 & 17 Vict. c. 97, on the ground that the parish of settlement could not be ascertained:*

*Held, that the order was rightly made upon the county.*

This was a case stated under the 20 & 21 Vict. c. 43, against an order of justices adjudging a lunatic pauper to be chargeable to the county of Somerset.

The case stated that, “upon the hearing the complaint the following facts appeared, namely: that the lunatic pauper was residing with her said husband in the resp.’ parish at the time she was so found a lunatic, and was sent by the order of a magistrate to the county lunatic asylum, at Wells, in the said county, at the charge of the resp. parish, and that a cost of 4*l.* 7*s.* 4*d.* had been incurred by the said last-mentioned parish, in the apprehension and removal of her to the said asylum and in her maintenance therein; that the said Thomas Ray (the husband), was born, as he had heard and believed, in the parish of Kirkcaldy, in the county of Fife, in Scotland, and was baptized in West church, in Edinburgh, and was at the time of the said complaint about forty-six years of age; that his father and mother were both dead; that they died in Scotland, and had never lived out of Scotland within the said Thomas Ray’s recollection; that he left his father and mother, and enlisted as a soldier when about eighteen years of age; that he was never bound as an apprentice; that he had never bound himself as a servant to any person for a year, nor lived in any place of service for a year; that he never rented any house and land, or either, at the rent or of the value of 10*l.* in any one year, or was ever possessed of any estate or interest in any house or land otherwise than as a tenant, and had never done any other act whereby to gain a settlement in his own right; that in the month of Nov. 1849 he married his said wife Martha, then Martha Macbride, at the parish church of Newton Nottage, in the county of Glamorgan.

Upon the above facts it was contended on behalf of the app. that the justices were not authorised to make an order adjudicating the pauper to be chargeable to the app.’s county, and directing the county treasurer to pay the expenses incurred, and the costs of and attending the hearing of the said complaint, and the adjudication thereon under the 9th section of the statute 16 & 17 Vict. c. 97, inasmuch as the said 98th section of the said statute extended only to cases where the settlement of the pauper lunatic could not be ascertained, whereas it was ascertained by the evidence before the said justices that the pauper was born and settled in Scotland, to which place he and his wife and family were removable in pursuance of the statute 8 & 9 Vict. c. 117, s. 2; and therefore the 98th section of the first-mentioned statute did not apply to such a case. We the said justices were of opinion (notwithstanding the app.’s contention) that it was the evident intention of the Legislature to relieve individual parishes from the burthen of the maintenance of all pauper lunatics, whether Scotch born or otherwise, not having any legal settlement in the parishes respectively where found, or any ascertainable legal place of settlement elsewhere in England or Wales, and to transfer the charge of maintenance to their respective counties, that the said 98th section of the statute above referred to, taken in connection with the 97th section of the same statute, was intended to comprise all cases not provided for by the last-mentioned section. And that the expression in the said 98th section when it cannot be ascertained in what parish the pauper is settled, includes a case

in which it is ascertained that the pauper had no settlement in any parish in England or Wales (to which portions of the United Kingdom the statute is declared to apply). We therefore adjudged the said pauper lunatic, Martha Ray, to be chargeable to the app.'s county, and made an order upon the county treasurer for payment of the said sum of 4*l.* 7*s.* 4*d.*, being the amount of the expenses incurred, together with the sum of 1*l.* 7*s.* 6*d.*, being the costs of and attending the hearing of the said complaint and the adjudication thereon. The question of law for the opinion of the court is whether or not the case of this pauper is within the 98th section of the statute of 16 & 17 Vict. c. 97, and she was properly adjudged to be chargeable to the app.'s county. If properly so adjudged then the order to be confirmed, but if otherwise then the order to be quashed.

By sect. 67 of the 16 & 17 Vict. c. 97 (Lunatic Asylum's Act), provisions are enacted whereby any lunatic pauper may be sent to a lunatic asylum. Sect. 97 enacts that two justices may afterwards inquire into the last legal settlement of such pauper, and if satisfactory evidence can be obtained, as to such settlement in any parish, they shall adjudge such settlement accordingly, and order the guardians or overseers of such parish all expenses incurred and the charges of future maintenance, &c.

Sect. 98 enacts that, "If any pauper lunatic be not settled in the parish by which . . . he is sent to an asylum, registered hospital, or licensed house, and it cannot be ascertained in what parish such pauper lunatic is settled, and if a relieving officer of such first-mentioned parish . . . shall give ten days' notice to the clerk of the peace of the county in which such lunatic was found, to appear for such county before two justices thereof, at a time and place to be appointed in such notice, it shall be lawful for such two justices . . . upon the appearance of such clerk of the peace, or any one on his behalf . . . to inquire into the circumstances of the case, and to adjudge such pauper lunatic to be chargeable to such county, and to order the treasurer of such county to pay to the guardians of any union or parish, or the overseers of any parish, all expenses incurred by or on behalf of such union or parish, in or about the examination of such lunatic, and bringing him before a justice or justices, and his conveyance to the asylum, hospital, or house," and the expence of his maintenance in such asylum incurred within twelve months, and also the reasonable charges of the future maintenance of such lunatic.

By the 8 & 9 Vict. c. 117, s. 2, it is enacted, that if any person born in Scotland, not settled in England, becomes chargeable to any parish in England by reason of relief given to himself or herself, or to his wife or to any legitimate or bastard child, such person, his wife or any child so chargeable shall be liable to be removed to Scotland.

Welsby appeared in support of the order of justices, and contended that, under the circumstances, the order was rightly made upon the county under the 98th section, which has a general application to all pauper lunatics.

Kinglake, Serjt. (*Poulden* with him) argued that the 98th section does not apply to such a case where the pauper has no settlement in England, for that section clearly points to the case of a pauper who has a place of settlement in England, but which cannot be ascertained, the 8 & 9 Vict. c. 117, being still applicable in such a case as the present, where the lunatic pauper's husband is a Scotchman, and he, therefore, if chargeable by virtue of relief given to his wife, being removable to Scotland:

*R. v. Leeds*, 4 B. & Ald. 498.

*R. v. Mile End Old Town*, 4 A. & E. 1. 196.

*R. v. Great Clacton*, 3 B. & Ald. 410.

*R. v. St. Giles*, 17 Q. B. 636.

*R. v. Barnsley*, 12 Q. B. 193.

16 & 17 Vict. c. 97, ss. 67, 78, 95, 96, 97, 98, 104.

8 & 9 Vict. c. 117, ss. 2, 7.

*R. v. Newchurch*, 33 L. J., 19, M. C.

WIGHTMAN, J.—In this case the wife of a man born in Scotland, and who had acquired no settlement in England, became a lunatic, and under the provisions of the 16 & 17 Vict. c. 97, she was regularly sent to a lunatic asylum at the expense of the parish in which she was residing. The husband, at the time, was no further chargeable except by the expense of her maintenance. Now, the question is, by whom, under the circumstances, are the expenses to be paid? The justices thought that they should be chargeable to the county. By the 8 & 9 Vict. c. 117, persons born in Scotland and having no settlement in England, are to be removed to the country of their birth. That applies to paupers in general. But in the present case the provisions of the 16 & 17 Vict. c. 97, are specially applicable to pauper lunatics, and, as I before said, the question is, who is to bear the expense of the lunatic's maintenance? That seems to be provided for by the statute under which she was sent to the asylum. The statute is general in its terms. [His Lordship read sect. 67, as to the sending of a pauper lunatic to an asylum, and continued:] All that was regularly done. It is sufficient, in the first instance, to show that the lunatic is a poor person. Then, as to the expenses. Then comes the 95th section, which provides that he shall be chargeable to the parish from which he has been sent until such parish shall have established that such lunatic is settled in some other parish, or that it cannot be ascertained in what parish such lunatic is settled. Now, it seems to me that, in this case, the lunatic's settlement cannot be ascertained, because, in fact, she has no parish of settlement. The parish sending the lunatic is only to be charged until the parish of settlement is ascertained, or it is found that it cannot be ascertained. Then comes the 98th section. [His Lordship here read that section and proceeded:] It seems to me that the lunatic pauper was properly taken to the asylum, and that the reasonable construction to be put upon this statute is that she should be maintained at the expense of the county, under the terms of the 98th section; it cannot be ascertained in what parish she is settled.

CROFTON, J.—I am of the same opinion. I think the question is rightly put by Mr. Welsby, and that the pauper comes within the 98th section, as a person whose place of settlement cannot be ascertained. What is really meant by that section is, if you can establish a parish of settlement that is an alternative, if it cannot be established, that is another. The words "in what parish" cannot mean to confine the operation of the section to parties who have in fact some parish of settlement, for that construction would exclude all foreigners who may become pauper lunatics in this country. I read the section to mean that "it cannot be ascertained that the pauper is settled in any parish." If you can ascertain the parish of settlement then the expenses are to be borne by it, if you cannot ascertain it then the expenses are to be fixed upon the larger district, namely the county.

MELLOR, J.—I am of the same opinion. Unless my brother Kinglake can establish that the pauper should not have been sent at all to the lunatic asylum, his argument fails. It is clear that she was a pauper, and came within the 97th and 98th sections, and it is also clear that in the first instance the liability is on the parish sending the pauper, but the liability shifts according as the place of settlement is ascertained or not, and in this case, as that place could not be ascer-

Q. R.] JACOB v. DODGSON—REG. v. THE GUARDIANS OF THE CAMBRIDGESHIRE UNION. [Q. R.]

tained, the burthen of maintenance was thrown upon the county.

*Order affirmed.*

Attorney for the resp., J. James, Wington.

Attorneys for appa., Bishop and Son, Tudor-street.

JACOB (app.) v. DODGSON (resp.)

*Local Government Act, 21 & 22 Vict. c. 98—Legal proceedings—Limitation.*

*By the 21 & 22 Vict. c. 98 (Local Government Act) s. 62, 63, certain expenses incurred by a local board of health may be recovered summarily, and the time within which proceedings are to be taken is to be reckoned from the service of notice of demand; also where a party is so liable for expenses apportioned, such apportionment is to be binding and conclusive upon him unless within the expiration of three months from the time of notice being given by the local board of the amount he shall by written notice dispute the same:*

*Held, that the time for proceeding summarily to recover the amount begins to run from the expiration of such period of three months.*

This was a question for the consideration of this court whether or not proceedings to recover expenses under sects. 61 and 62 of the 21 & 22 Vict. c. 98 (the Local Government Act) were taken in due time.

By the 61st section it is enacted that where the local board have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable the same may be recovered in manner provided by the Public Health Act 1848 (i.e., by summons before justices), and such expenses shall be a charge on the premises in respect of which they were incurred, and shall bear interest at the rate of 5 per cent. till payment, and it is further enacted by this section that, "in all summary proceedings by a local board for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand."

By the 62nd section it is enacted that, "in all cases where, by the Public Health Act, the local board shall have incurred expenses, for the repayment whereof the owner of the premises is made liable, and such expenses have been settled and apportioned by the surveyor as payable by such owner, such apportionment shall be binding and conclusive upon such owner, unless, within the expiration of three months from the time of notice being given by the local board or their surveyor, of the amount of the proportion so settled by the said surveyor, to be due from such owner, he shall by written notice dispute the same."

By the 11 & 12 Vict. c. 43, s. 11, it is enacted that in all cases where no time is already, or shall hereafter be specially, limited for making any such complaint, or laying such information in the Act or Acts of Parliament relating to each particular case; such complaint shall be made, and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

Such expenses as are referred to in the foregoing sections, were incurred by a local board of health, and had been apportioned, and a notice of the proportion ascertained as being due from the app., was served upon him upon the 1st July 1861. After the expiration of three months from that date, demand of payment was made, and on the 12th March 1862, he was prosecuted against summarily before justices for the amount. At the hearing, he objected that the proceedings were taken too late, inasmuch as more than six months had elapsed, since the notice was served on the 1st July 1861, from which period he contended

the time ran. To this it was answered that, inasmuch as the apportionment was not binding and conclusive upon him until the expiration of three months from the time when he had written notice of such apportionment, which period of three months would not have expired until the last day of Sept. 1861, the period of six months would commence to run from such latter date. The justices were of opinion that the objection was good, and refused to make the order.

*Mauls* now appeared for the appa., and contended that the justices were wrong.

*Dowdswell* was called upon, and he argued, that notwithstanding the resp. had three months after receiving notice of the apportionment to object, yet his liability existed during that time, his property was charged with the amount, and it was only a privilege which he either might or might not exercise, and that therefore the time ran from the day when he received notice, namely, the 1st July, and which would have expired on the 31st Dec. [COCKBURN, C.J.—Is it not the meaning of the Act that the party shall have six months within which he can enforce his remedy? If he had taken proceedings during the three months he would have been met with the objection that the deft. had three months during which he had a right to consider if he would object to the apportionment. CROMPTON, J.—It may well be that there was a debt existing during the three months, though not one that could be sued for.] It is a debt still, and may be enforced unless the party steps in and claims his three months. [CROMPTON, J.—But it is not binding until the three months have elapsed.]

*Everson v. Francis*, 7 C. B., N. S., 568.

COCKBURN, C.J.—The effect of the enactment is to fix a limitation within which the remedy shall be carried into effect, and the meaning is that there shall be six months during which the remedy may be enforced. Now here there is a period of three months given after an apportionment under the Local Government Act within which the party affected may have the right to appeal, and during these three months the local board cannot enforce their remedy, and it remains in abeyance, and to suppose it to form a portion of the six months would be to place this class of cases in a different category from all others. It is clear that the party ought to have paid the claim, and it is clear also that the local authority could not enforce it until after the expiration of the three months. I think the magistrates' decision was wrong, and that they ought to have made the order.

WIGHTMAN, CROMPTON, and MELLOR, JJ., concurred.

*Judgment for the appa.*

REG. v. THE GUARDIANS OF THE CAMBRIDGESHIRE UNION.

*Poor-law—Order of settlement of a lunatic pauper—Signature of notice of grounds of appeal.*

*The 16 & 17 Vict. c. 97 (Lunatic Asylums Act) provides for an appeal against an order adjudicating the settlement of a pauper lunatic, and by sect. 111 enacts, that in every case where notice of appeal against such order is given the app. shall with such notice, or fourteen days at least before the sessions, send to the resps. a statement in writing under his hand, "or where the appa. are guardians of any union or parish, under the hands of any three or more of such guardians, of the grounds of such appeal." Under the provisions of the 1 & 2 Will. 4, c. 51 (local), the poor of the city of Norwich are managed by sixty-three guardians, elected from the various parishes, who form a corporation by the name of "The governor, deputy-governor and guardians of the poor of the city and county of Norwich and liberties of the same," and they have all the powers of churchwardens and overseers re-*



*lative to the poor, and the corporation or the governor or deputy-governor are authorised to do and perform all acts as churchwardens and overseers: Held, that the 11th section of the 16 & 17 Vict. c. 97, applies to such a union, and that the notice of grounds of appeal against an order of settlement of a lunatic pauper should have been signed by three of the guardians, and that being signed by the governor only it was bad.*

Keane and Hill now showed cause.

Tozer, Serjt., Newton, and Markby in support of the rule.

This was a rule to quash an order of sessions removed into this court by *certiorari*.

The facts and arguments are fully reported upon the rule for the writ of *certiorari*: (see 6 L. T. Rep. N. S. 332.)

COCKBURN, C. J.—I am of opinion that the order of session was wrong and must be quashed. This must be taken to have been an appeal by the guardians, and not by the overseers, and therefore by the 16 & 17 Vict. c. 97, s. 111, the grounds of appeal should have been signed by three guardians. But it is said that the union of the city of Norwich being established under a local Act of Parliament, the signature of the governor on the part of the corporation is good, notwithstanding the 16 & 17 Vict. c. 97, requires the signature of three guardians, and that argument would be very strong, but for the fact of the 16 & 17 Vict. being a later Act, I can see no reason why that statute should not apply to the guardians under the local Act. It is certainly much to be regretted that so much time and ingenuity should have been expended upon such a question; but there is the express provision of the Act of Parliament.

CROMPTON, J.—I am of the same opinion, that the sessions were wrong, and I quite agree with my brother Wightman in his judgment upon the rule for the *certiorari*.

MELLOR, J. concurred. *Rule absolute to quash.*

#### REG. V. THE INHABITANTS OF ST. MARY AND ST. ANDREW, WHITTLESEY.

*Poor-law—Permanent sickness—Appeal disputing same—9 & 10 Vict. c. 66, s. 4.*

*Where a party becomes chargeable in respect of relief made necessary by reason of sickness or accident, and an order of removal is accordingly made which states that the justices are satisfied that the sickness or accident will produce permanent disability, it is not competent to the apps. to dispute the fact of such sickness or accident being of a permanent character; and the quarter sessions have no authority to entertain a ground of appeal setting up such objection to the order of removal.*

This was a case stated by the quarter sessions for Cambridgehire, raising the question of whether or not the court of quarter sessions had power to decide whether in fact the sickness of the pauper was such as to produce permanent disability. (Another question was raised, but not seriously argued.)

By the 9 & 10 Vict. c. 66, s. 4, it is enacted, "that no warrant shall be granted for the removal of any person becoming chargeable in respect of relief made necessary by sickness or accident, unless the justices granting the warrant shall state in such warrant that they are satisfied that the sickness or accident will produce permanent disability."

The order appealed against was for the removal of one Sarah Oakenfull and her two children who had become chargeable in respect of relief made necessary by the sickness of the said Sarah Oakenfull, which sickness will produce permanent disability in the said Sarah Oakenfull.

The second ground of appeal was the following:—

"That the said sickness of the said Sarah Oakenfull is not such as will produce permanent disability."

The Court of Quarter Sessions held, upon an objection taken, that they had power to determine whether such sickness was such as would in fact produce permanent disability, notwithstanding the statement made by the justices in the order of removal, and medical evidence accordingly was produced by the resps. to prove that such illness was of a nature to produce permanent disability; but the Court of Quarter Sessions were of opinion that the sickness of the pauper was not such as to produce permanent disability, and accordingly on that ground quashed the order of removal.

Orridge now appeared in support of the order of sessions, and he contended that the sessions were right in going into the question of whether or not the sickness was such as to produce permanent disability: (*R. v. Inhabitants of Prior Hardwick*, 14 Q. B. 168, Patterson, J.'s judgment.) [CROMPTON, J.—It is, of course, only a speculative opinion of the justices, and are you to go to the sessions and question that opinion?] I see no reason to the contrary. [MELLOR, J.—Have you any case in which this has been made the subject of an appeal?] There is no decided case; but I may mention, that at the Middlesex Sessions such a ground of appeal is always heard. [COCKBURN, C. J.—This is only a power to restrain the justices from removing when it is not a permanent sickness. CROMPTON, J.—It is a restriction upon them, and they have to certify that they are satisfied that the sickness will produce permanent disability.] As the right to remove is dependent upon that, there is no reason why it should not be contested upon the appeal.

Keane and Markby, contra, was not called upon.

COCKBURN, C. J.—The justices have certified, and therefore the statute is satisfied. Before this Act came into operation the party could have been removed though the illness was not of a permanent character; but the Act has stepped in, and has imposed a restriction. There was no power of appeal upon the point before the statute, nor has any been given since. It is not a condition to the making of the order that the party shall be permanently ill, but that the justices shall certify. They have certified, and so the statute has been satisfied.

CROMPTON and MELLOR, JJ. concurred.

*Rule absolute to quash the order of sessions.*

Saturday, Jan. 24, 1863.

WILSON AND ANOTHER (apps.) V. CARTER (resp.)  
*Wreck—River Humber—Expenses of attempting to raise and blowing up a sunken vessel.*

*The Humber Conservancy Act, 15 & 16 Vict. c. 130 (local), enables certain commissioners, when any vessel is sunk in the Humber (on neglect of the owners), to appoint a person to raise or blow up the same, with powers to recover summarily the expenses from such owners. A vessel was sunk in the Humber, and on the neglect of the two owners to raise her, the commissioners appointed a person to raise or blow her up. Whilst the works were in progress, one of the part owners died, leaving two executors. The attempts to raise having failed, the vessel was blown up, and proceedings were taken against the surviving part owner and the two executors of the deceased part owner, to recover the expenses incurred in endeavouring to raise the vessel, and in blowing her up:*

*Held, first, that it was for the justices to decide whether or not these expenses were properly incurred; secondly, that the justices had no power to include the executors in such order.*

This was a case stated under the 20 & 21 Vict. c. 43, against an order of justices upon the apps. for the payment of 992l. 14s. 1d. for expenses incurred

[Q. B.]

THE COUNTY ROADS, BOARD OF; RADNOR V. EVANS.

[Q. B.]

in raising, blowing up and removing a vessel which was wrecked in the river Humber.

It appeared that, by the 15 & 16 Vict. c. 130 (local), "An Act for the conservancy of the river Humber, and for amending some of the provisions of an Act relating to the Kingston-upon-Hull Docks," a certain body of commissioners are appointed for the conservancy of the river Humber, and by sect. 23 it is enacted, that so often as any vessel shall be sunk or stranded within the limits of the Act, if the owner of such vessel, or the master or other person having the charge or command of her, shall refuse or neglect to weigh or raise the same for the space of one month then next following, any person who shall be appointed by the commissioners for the purpose, may cause such vessel to be weighed and raised, or, if the same cannot be effected, to be blown up with gunpowder or otherwise removed, and to sell the portion recovered and apply the proceeds to the expenses, rendering the surplus (if any) to the owner, &c.

By sect. 24 it is enacted, "That if in case of any sale as aforesaid the proceeds thereof be insufficient to defray the charges and expenses authorised to be defrayed thereby, or if from any cause no sale can be had, such of the charges and expenses authorised to be defrayed by sale as aforesaid, but which have not been or cannot be so defrayed thereof, may be recovered in the name of the commissioners in a summary manner from the owner, master, or other person having, or who at the time of the sinking or stranding of the vessel had, the charge or command of the same," &c.

It appeared that, on the 22nd Jan. 1860, a vessel called the *Tramby*, belonging to Catherine Wilson and John Nicholson Wilson, was sunk in the river Humber, within the jurisdiction of the said commissioners; that on the 18th Oct. following the commissioners made an order upon the owners to raise her; that the owners having neglected to raise her for the space of one month, the commissioners appointed the resp. for the purpose of removing her; that, on the 30th Oct. 1860, the work of attempting to raise her began, and continued until Aug. or Sept. 1861, when it being found impossible to effect that object, the work of blowing up commenced and concluded in Nov. 1861. On the 9th Oct. 1861 Catherine Wilson, one of the part owners died, leaving the app. John Nicholson Wilson and the other app. George Clough her executors, who proved her will on the 1st Nov. 1861. The expenses of the commissioners, in endeavouring to raise the vessel and in blowing her up, having amounted to the above-mentioned sum, the payment of which was refused by the apps., they were summoned before justices that an order for payment might be made against them.

By the Railway Clauses Consolidation Act, 1845, sect. 140 (which is incorporated in the special Act), it is enacted "that in all cases where any costs, damages, or expenses are directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount in case of dispute shall be ascertained and determined by two justices; and if the amount so ascertained be not paid by the company or other party liable to pay the same within seven days after demand, the amount may be recovered by distress of the goods of the company or other party liable as aforesaid." At the hearing two principal objections were taken—first, whether the justices had the power under the 23rd section to order the expenses of the attempts made by the complainant to raise the vessel, or whether they could only order so much thereof as was incurred in the blowing-up with gunpowder; second, whether the app. George Clough, being the executor of a deceased owner, was an owner, master, or other person within the meaning of the words of the 23rd and 24th sections of the Act?

*Mellish*, Q.C. (*P. Thompson* with him) now appeared

in support of the order, and contended that the justices were right. [*COCKBURN*, C. J.—The order being not only against one part owner, but against the executor of another part owner, how could you enforce it as against the latter?] The order would be drawn up generally, and the executors would not be liable if they have no assets.

*Shee*, Serjt. (*T. Jones* with him) argued, first, that the apps. could not be liable both for attempting to raise the vessel and also for blowing her up. Secondly, that the executors could not be liable for what was not a default of their own. [*COCKBURN*, C. J.—If there was a fair and reasonable ground for supposing that the vessel could be raised, then it would be highly proper to make the attempt; and the justices are the proper parties to determine whether this was so or not. It would have been exceedingly hard upon the owners to have blown up the vessel when she could have been saved by being raised.] The commissioners should form the best opinion they can as to whether the vessel can be raised or must be blown up, and should not saddle the owners with the expenses of both. But the executors certainly cannot be liable; they have been guilty of no default, and the liability of the deceased part owner does not survive to them.

*Mellish*, Q. C. in reply.

*COCKBURN*, C. J.—The executors of the deceased part-owner cannot be made the subject of this order. If, therefore, the order is not yet drawn up, the executors must be struck out; if otherwise, the case must go down with directions that it must be made only as to the surviving part owner, leaving him to such remedy against the executors of the deceased part owner for contribution as he may be advised he has.

The other judges concurred. *Rule accordingly.*

*Maples and Co.* for the apps.

*Gregory and Co.* for the resps.

THE COUNTY ROADS, BOARD OF; RADNOR V. EVANS.

*General Turnpike Act—Carriage not upon wheels laden with straw—3 Geo. 4, c. 126, s. 121.*

*By the 3 Geo. 4, c. 126 (General Turnpike Act), s. 121, a penalty is imposed upon any person who "shall haul or draw or cause to be hauled or drawn upon any part of such turnpike-road any timber, stone, or other thing otherwise than upon wheeled carriages:*

*Held that a carriage not upon wheels laden with straw is not within the enactment, straw not being ejusdem generis with stone or timber, and not therefore being within the meaning of the words "other thing."*

This was a case stated under the 20 & 21 Vict. c. 43, upon the refusal of justices to convict of an offence under sect. 121 of the 3 Geo. 4, c. 126 (*General Turnpike Act*). The section in question imposes a penalty for a variety of offences with reference to turnpike-roads, amongst others, upon any person who "shall haul or draw or cause to be hauled or drawn upon any part of such turnpike-road any timber, stone, or other thing otherwise than upon wheeled carriages." In this case it appeared that the resp. used a carriage which had two wheels, but which had also a projecting portion in front which when going down hill came against the road. The carriage was laden with straw. Upon an information under the foregoing section, the justices refused to convict.

*Gilmores Evans* now appeared for the resps., and contended that the justices ought to have convicted, since, first, the carriage was not a wheeled carriage in the sense meant by the section, and it was laden with straw, which would come within the meaning of the words "other things."

*COCKBURN*, C. J.—I have no doubt that this was not a carriage upon wheels within the meaning of the Act, for although it is only when going down-hill it ceases to act as upon wheels, yet when it is asked,

what is its condition at such a time? the answer would be, that it is a sort of sledge, and not a carriage upon wheels within the statute. The other question is the more difficult one, namely, as to the sort of load the statute intended? It speaks of "timber, stone, or other thing," and as the statute is a remedial one, intended to protect turnpike-roads, I should have been inclined to have given a large construction to the words "or other thing." But as my learned brothers are of a different opinion, I will not oppose my opinion to theirs. The decision, therefore, of the justices will be affirmed.

CHROMPTON, J.—It seems to me that the description given of the carriage, shows it to have been a sledge rather than a wheeled carriage. Upon the other point in the case I think that the ordinary rule of construction should be applied, and that the words "other thing" must mean other thing *ejusdem generis* with what has gone before, such as timber or stone. Probably it was not intended to prevent the use of sledges for light things such as hay and straw. I cannot think that the words "or other thing," mean "or anything whatever." I think, therefore, that the justices should have held that this was not a wheeled carriage, but that they were right in holding that this was not an article that is prohibited, and as both must concur, the judgment was right.

MELLOR, J.—I am of the same opinion. I think the words "other thing" must mean "other thing" similar to those before mentioned.

Judgment affirmed.

Saturday, Jan. 24, 1863.

**REG. v. HEAD AND THE METROPOLITAN BOARD OF WORKS.**

*Metropolitan Local Management Act—Sewers rate—Rating—Amount of benefit derived.*

*In rating property to sewers rate, the first thing to be established is benefit derived from the sewers, and when once any benefit is found, the premises are liable to be rated according to their value appearing by the poor-rate, without reference to actual amount of benefit received; therefore, where gas mains and pipes were rated by the Metropolitan Board of Works, on the default of the district, at the full value as ascertained by the rate for the relief of the poor, and the quarter sessions had, on appeal, reduced the rate one-half, as being the amount of benefit received, this court quashed the order and restored the assessment.*

*Metropolitan Board of Works v. Vauxhall Bridge Company, 26 L. J. 253, Q. B., distinguished.*

This was an appeal by the Imperial Gaslight Company against a sewers rate made by William Buxton Head, a person appointed by the Metropolitan Board of Works for the parish of Fulham, pursuant to the 18 & 19 Vict. c. 120.

The apprs. are a company, incorporated by Act of Parliament, for supplying the public with gas.

The rate in question was duly made, allowed and published.

The heading of the rate was as follows:—"An Assessment, this 21st day of May 1861, under and by virtue of an Act passed in the 19th year of the reign of Queen Victoria, intituled 'An Act for the better local management of the Metropolis,' after the rate of 4d. in the pound upon the net annual value of the property by law rateable to the relief of the poor within that part of the parish of Fulham, in the county of Middlesex, which was, at and immediately before the determination and expiration of the Metropolitan Sewers Act 1848, included in the Counter's Creek separate sewerage district, except so far as regards land in the said part of the said parish used as arable, meadow, or pasture ground only, or as woodland, orchard, market garden, hop, herb, flower,

or nursery-ground, which said last-mentioned land is, in and by this assessment, assessed in the proportion of one-fourth part only of the net annual value of such land for levying in the said part of the said parish of Fulham the sum of 340*l.* 14*s.* 6*d.*, required by the Metropolitan Board of Works for the purposes of the first-mentioned Act for the year ending 31st Dec. 1857, by me, William Buxton Head, of Notting-hill, in the county of Middlesex, being the person duly appointed by the said board, under the provisions of the said first-mentioned Act, to levy the money required by them as aforesaid, which amount the Board of Works for the Fulham District, constituted by the said first-mentioned Act, were required by a precept of the said Metropolitan Board, made on the 6th Aug. 1858, and directed to and duly served upon the said District Board of Works, pursuant to the provisions of the said first-mentioned Act, to pay within the time and in the manner therein limited, and which amount the said Board of Works for the Fulham District had, before the appointment of me as aforesaid by the said Metropolitan Board of Works, made default in paying as required by the said precept."

And the assessment against which the appeal was made was in the following form:—

THE PARISH OF FULHAM.

Name of occupier.	Description of property.	Name or situation of property.	Gross estimated rental.	Rateable annual value.	Rate of 1 <i>d.</i> in the pound.
The Imperial Gas Light and Coke Company.	Gas Works, consisting of retort-houses, with the retorts therein, purifiers, &c., purifying-houses, lime-sheds, gas-holders, offices, valve-house, the fixed machinery, various buildings, land, appurtenances, wharf and lay byes, their mains and apparatus for supplying persons with gas clerks' houses, lodge, &c. &c.	Lands End.	£ 5530	£ 3910	£ 1 <i>s.</i> 4 <i>d.</i>
			105	90	65 3 4 1 10 0
			£4000		£66 12 4

The apprs., the gas company, are occupiers of land in the parish of Fulham, by (amongst other things) their mains and pipes for supplying persons with gas, and the sum of 90*l.* appearing in the assessment, was the rateable value of such mains and pipes.

The above assessment on the gas company is made on the net annual value of the said property, and is identical with the assessment on the same property in the rate for the relief of the poor in the said parish.

The amount of 90*l.* is, for the purpose of this case, to be taken as the fair annual value of the said property, assuming that the company are to be assessed in respect of their mains and pipes on the same principle as the occupiers of houses and other rateable property in the parish.

The expenses in respect of which the rate in question was made, were incurred by the board for the formation and maintenance of the main sewers necessary for the drainage of the district in which the said parish is contained.

At the hearing of the appeal the apprs. contended that the mains and pipes being used only for the purpose of conveying gas for lighting the parish, they derived a less amount of benefit from the sewers

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REG. V. HEAD AND THE METROPOLITAN BOARD OF WORKS.

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made and maintained for the drainage of the district than house property, and that they were therefore entitled to have the rate reduced.

It was contended on behalf of the resps., that the apps. being rated in respect of property by law rateable to the relief of the poor, and being assessed upon the net annual value of such property ascertained by the rate for the time being for the relief of the poor, and not having shown that they were entitled to any exemption or reduction, or allowance by law, or by the practice of the separate Sewerage Commission within the meaning of the 164th section of the 18 & 19 Vict. c. 120, or the 76th section of the 11 & 12 Vict. c. 112, were properly rated.

The court of quarter sessions being of opinion that the apps. derived only half the benefit in respect of their mains and pipes as compared with other property in the parish, reduced the rate to one-half the amount, subject to a case for the opinion of this court.

If the court should be of opinion that the court of quarter sessions were empowered to take into consideration the amount of benefit that accrued to the apps., or to make any reduction on that ground, the order reducing the rateable value of the said mains and pipes from 90*l.* to 45*l.* is to stand; otherwise the original rateable value of 90*l.* is to be retained.

The rate in question, the poor-rate, upon which it was based, and the Acts of Parliament, 11 & 12 Vict. c. 112, and 18 & 19 Vict. c. 120, are to be referred to as forming part of this case.

*J. Clerk (Woollett and V. Richards with him)* for the Imperial Gas Company.—The court of quarter sessions having found that the apps. received but half the amount of the benefit for their pipes and mains from sewers as compared with house property, were right in reducing the amount of the rate. These sewerage works are more for sanitary purposes than for ordinary drainage, and owners of houses receive a much larger benefit than proprietors of pipes imbedded in the ground. [CROMPTON, J.—You say the rate is not to depend on the abstract value of the benefit derived, but on the immediate amount of benefit.] Yes. The 158th section of the 18 & 19 Vict. c. 120, provides for the raising of money by vestries and district boards for defraying their expenses; and then the 161st section directs how the rates are to be collected, and provides for appeal against the rate; and the 163rd section provides that land and garden and nursery ground shall be assessed to one-fourth part of the net annual value of such land, clearly recognising the amount of benefit to be derived from the sewers as the criterion for assessment; and the 164th section provides that all existing exemptions in respect of sewers rate shall continue to be allowed, and that section refers to 11 & 12 Vict. c. 112, s. 76, which latter section was referred to by Lord Campbell, C. J., in his judgment in *Metropolitan Board of Works v. The Vauxhall Bridge Company*, 26 L. J. 253, Q. B., and his Lordship there says: "This section seems clearly to intimate that in rating, the benefit derived from the sewers by the property rated shall still be regarded. Further, the powers given to the commissioners with respect to district rates seem to have a special reference to the well-known rules of law respecting rates by commissioners of sewers, whereby property is to be assessed according to the benefit which it derives from the sewers;" and his Lordship goes on to say that "the commissioners in considering whether the Vauxhall-bridge Company were liable to be rated, and to what amount, ought not to have considered merely the value of the property of the company as in making a poor-rate, but should have been guided by the benefit which they considered that this property derived from the sewers." It is true that in the present case the rate was not made by the overseer but by an assessor, under the 168th section, who is in all respects to take

the position of the overseer. *St. Botolph, Aldgate, v. The Board of Works for the Whitechapel District*, 29 L. J. 228, M. C., decided that when under the Metropolitan Local Management Act parishes have been united in a district, the expense of keeping the pavements in repair, and expenses of cleansing and lighting, ought to be charged on each parish in proportion to its rateable value; and that, if some portions of the district are not paved at all, or are insufficiently paved, the expense of putting them into as good a condition as the sufficiently paved portions ought to be borne by those parishes in which those unpaved or insufficiently paved portions are situate; and it was there decided that, if it appeared that the vestry or district board had taken into their consideration the special circumstances in raising the required money, this court would not interfere with the exercise of their discretion as to what amount they should direct the overseers of the parishes to levy. Benefit is, by law, the criterion of rateability. He referred to *Callis*, 222, 223. [CROMPTON, J.—It may be a question whether, under the old state of sewer's law, the benefit to be received did not refer to district, or locality, or area.] The Imperial Gas Company is within the 164th section. If benefit is a test of rateability, it follows that the amount of benefit is a test of the amount of rateability. It would be unjust that pipes should contribute to the sewerage of the metropolis at the same rate as houses: (*R. v. The Commissioners of Sewers for the Tower Hamlets*, 9 B. & C. 517.) [CROMPTON, J.—That, again, was a case of level, not of individual rating.] These mains and pipes are a new description of property, and there is nothing to show that they were, until recently, rated at all; it is for the Metropolitan Board of Works to show an imperative rule of law which compels the overseers to rate all property in the same proportion. It is a principle in rating to sewers that the property should contribute in proportion to the benefit derived from the works. [COCKBURN, C. J.—I find no authority for that. CROMPTON, J.—In the 163rd section of the Act certain kinds of property are named which are to be rated at a reduced rate, and then it gives the proportion. COCKBURN, C. J.—The cases in *Callis* are cases where no benefit was derived. See the endless difficulty which would arise if in every case it was necessary to apportion the amount of benefit derived; it would be impossible to assess every particular house according to the amount of benefit received.] But the same nature of property may be taken; otherwise pasture ground might, under the 163rd section, be assessable to one-fourth the value, and pipes under the very same land to the whole. All property of the same character must be rated according to the same value. [COCKBURN, C. J.—I should say it rather depends on the district. A man might desire that his cowhouse should not be drained, and therefore claim exemption. CROMPTON, J.—I do not think the *Vauxhall-bridge* case was at all directed to this particular point. I was one of the court at the time, and this certainly was not present to my mind. I think that case must be taken to have reference to the level or district as determined by the inclination of the ground. It is conceded that here there is no exemption. COCKBURN, C. J.—We are not bound by that case, and need not overrule it. The difficulty is practically to apply a differential rating.]

*The East London Waterworks Company v. The Hamlet of Mile End Old Town*, 29 L. J. 66, M. C., was also cited.

*Metcalfe (Hertslet with him)* for the Metropolitan Board of Works.—The case last referred to is not in point. There there was an exemption by practice. The *Vauxhall-bridge* case is distinguishable from the present, and that case has been qualified by subsequent decisions. In the last paragraph of the judgment in that case Lord Campbell says, "We must refrain from

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giving any opinion as to whether benefit was derived from the sewers by any or what part of the property, which the commissioners must be fully competent to determine;" showing that the question there was benefit or no benefit. And it was there stated that the bridge was drained into the Thames, and therefore derived no benefit from the sewers. [COCKBURN, C. J.—It is difficult to say if the approaches derive benefit that the bridge does not.] The old mode of rating to sewers was to ascertain whether there was any benefit, and if any, the property was rateable; but the later practice has been to rate property by districts or levels. *Masters v. Scroggs*, 3 M. & S. 447; *Soady v. Wilson*, 3 A. & E. 248, and other cases collected in Mr. Woolrych's *Metropolis Local Management Acts*, 124, show that the benefit need not be direct; but there are no cases to show that property within the rateable district is exempt. The gas company do not claim exemption; they claim only a reduction or allowance. They have shown no practice to warrant such reduction; neither can it be supported in law. If it were intended that property should be rated according to benefit, the 163rd section of the Act would be unnecessary.

*Stafford v. Hamston*, 2 Bro. & Bing. 691;

*Reg. v. Great Western Railway Company*, 1 E. B. & E. 600;

*Reg. v. Goodchild*, 27 L. J. 233, M. C.; 1 E. B. & E. 1;

11 & 12 Vict. c. 63, 388;

*Dorling v. The Epsom Board of Health*, 24 L. J. 152, M. C.;

were also referred to. [He was stopped by the Court.]

COCKBURN, C. J.—I am of opinion that this order should be quashed. In saying so, I do not in the slightest degree impugn the doctrine laid down by Callis, that property can only be assessed to sewers rates if it derive benefit. Nor do I dispute the decision in the *Vauxhall-bridge* case. I adopt all that is there said by Lord Campbell, and it is to the same effect as the law as laid down by Callis, which must be taken to mean that an abstract benefit must be derived by the property rated. Much must depend upon whether the property is drained through works of drainage; and it is not so much a question of the purpose to which property may accidentally be applied. It may be that on the land which was pasture, or on which stood a hovel, a mansion has since been erected; but as soon as benefit is established, the title to exemption is gone. It is not an accidental or temporary user, but whether benefit is derived from the works; and when once you have established that, rateability follows, and rateability does not depend on degree when that is established. The amount which the Legislature has said is to be assessed is the rateable annual value of the property. Practically there are insuperable difficulties in the way of the differential principle, and the value may vary, as I have already pointed out. It is much more safe than inquiring into the precise amount of benefit to adhere to the principle I have referred to, and which, I think, is supported by the authorities cited.

CROMPTON, J.—I am of the same opinion. The property is to be taken at the annual value as rated to the rate for the relief of the poor; then does this property come within the 164th section? I think it depends on the word "reduction;" now, we are to see whether there has been any reduction allowed here either by law or by practice of the Sewers Commissioners. It was almost admitted by Mr. Clerk that he could show none such. There may be some particular district requiring a differential rating; that would seem to be so by the case of *Rea v. The Commissioners of Sewers for the Tower Hamlets*, but that does not apply to the user of premises, and I do not think the rate can be altered from time to time according to the user.

It is said, as this company does not derive so large an amount of benefit from its pipes as other property does, that the rate ought therefore to be reduced; but the true meaning is, benefit with relation to the level in which the property is situate. I am not throwing doubt on the exemptions mentioned in Callis—they are exemptions, not reductions; neither do I dispute the *Vauxhall-bridge* case—it is clear the attention of the court in that case was called particularly to the district or level. I do not think the old cases were cases of annual rates; the benefit might vary from time to time. The meaning of Callis is with reference to the level, and not the use, and is in no way inconsistent with the *Vauxhall-bridge* case, or with the *Tower Hamlets* case.  
Order quashed.

Monday, Jan. 26, 1863.

BANKS (app.) v. GOODWIN (resp.)

*Appeal—Summary conviction—Lodging case in court—"Transmit"—20 & 21 Vict. c. 40, s. 2.*

*A case stated by justices under 20 & 21 Vict. c. 43, was sent to the app.'s attorney by the justices on 31st Dec., who forwarded it to his town agent, who received it on Jan. 2. The town agent did not lodge the case in court until the 10th:*

*Held, that it was too late.*

*Quare, as to meaning of the words "transmit within three days," in sect. 2.*

Rule nisi to strike a case stated by justices under the 20 & 21 Vict. c. 43, out of the Crown paper, on the ground that the case was not transmitted to the court within three days after receiving the same by the app.

The app. was summarily convicted under 24 & 25 Vict. c. 96, s. 24, for fishing in the resp.'s fishery. The justices stated a case and sent it to the app.'s attorney on the 31st Dec. 1862, who forwarded it immediately to his London agent, with instructions to lodge it at the Crown-office. The town agent received it on the 2nd Jan., but did not lodge it until the 10th Jan. 1863.

M'Mahon showed cause.—The only point is as to the meaning of the word "transmit," in sect. 2. It has been assumed in the decided cases that it means "lodged in court." "Transmit" means to send on: (Richardson's Dictionary.) It is contended that when the app. has sent off the case within the three days for the purpose of its being lodged in court, he has complied with the Act, although it may not actually be lodged in court until after the three days. The following cases were referred to:—

*Woodhouse v. Woods*, 29 L. J. 149, M. C.;

*Morjan v. Edwards*, 1b. 108;

*Ashdown v. Curtis*, 30 L. J. 216, M. C.;

*Pennell v. Uxbridge*, 1b. 92;

*Reg. v. North Riding of Yorkshire*, 7 Q. B. 154.

Gray in support of the rule.—The 20 & 21 Vict. c. 43, confers on persons summarily convicted a benefit they did not possess before; and sect. 2 says that the app. is to transmit the case to the court within three days after receiving the same. The word "transmit" means to put over from one place to another, and there is no transmission until the act is completed by lodging the case in court. [CROMPTON, J.—That is the sense in which the word seems to be used in sect. 6.]

COCKBURN, C. J.—We are all of opinion that this rule should be made absolute. I quite agree that the interpretation put on the word "transmit" by Mr. M'Mahon will not do, and that the mere act of sending off or starting the case on its way to the court is not enough. What the Act intended to secure was, that without any delay the case should reach the court with all possible dispatch. And I am inclined to think that so long as the case is sent off within three days, and can be said to be in the actual course of transmission

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until it reaches the court, that will satisfy the exigency of the Act. In that view of the Act, it has not been complied with in this case, because, when the case reaches the agent in London, he keeps it for eight days, and it cannot be said to have been in the course of transmission under those circumstances. The act of omission, on the part of the town agent, is one that the app. is responsible for.

CROMPTON, J.—At present I am inclined to the view that Mr. Gray has laid before us, and that the Act means that the case shall be lodged in court within the three days. Great inconvenience may arise if this is not so. But while the case is lying in the office of the attorney or agent, it can hardly be said to be in the course of transmission. It would be rather difficult to say that the Act is not to have the same meaning in town and country appeals. Perhaps "transmit" may mean "send off" in some cases; but it is clear that if the attorney keeps the case in his pocket when it is sent to him, that will not do.

BLACKBURN, J.—I am inclined to think that the condition of the Act is not complied with until the case is lodged in court, and the condition completed within three days. That, however, it is unnecessary to decide in this case. If the party has put the case into the post-office, and through some default in the post it does not arrive in three days, perhaps the party may have complied with the condition. But I do not think that the transmission is commenced by merely giving the case to an attorney or town agent to lodge in court.

Rule absolute.

Attorney for the app., *Holt*.Attorney for the resp., *D. Gray*.

Saturday, Jan. 31, 1863.

BUCKLEY v. GROSS.

*Trover—Derelict—2 & 3 Vict. c. 71—Order of magistrate for detention of goods.*

*After the fire that took place in the warehouses at London-bridge in June 1861, the plt. purchased a quantity of tallow from a man who had collected it as it floated from the sewers down the river. The plt. was taken into custody, but discharged by the magistrate, who at the same time made an order for the detention of the tallow. The tallow becoming a nuisance, was afterwards, by order of the Chief Commissioner of Police, sold, and was purchased by the deft.:*

*Held, that an action of trover would not lie by the plt. against the deft., the mere possession which he had (unaccompanied by any title) having been taken from him by the order of detention of the goods made by the magistrate.*

*Per Blackburn, J.—Under the circumstances the police had power at common law to take and detain the plt. and the property.*

Trover for tallow.

*Plaint.—1. Not guilty. 2. That the goods and chattels were not the goods and chattels of the plt. as alleged. Issues joined.*

The action was brought to recover 1 ton 2 cwt. of fat and tallow mixed together, of the value of about 25*l.*, and 14 bags of the value of 4*s.*

At the fire which happened at the wharves in Tooley-street in the month of June 1861, immense quantities of fat and tallow floated from the sewers down the river. About five o'clock in the morning of Monday the 1st of July the plt. purchased of Wm. Broughton, at Horselydown Stairs, the fat and tallow in question, paying for the same at the time 10*l.* Broughton was a waterman, and was in the employment of the Metropolitan Board of Works, and had collected in the river the fat and tallow as it had floated from the sewers. The plt. having made such purchase, the fat was placed in the plt.'s bags, and the bags were put in a cart hired by him.

Immediately after leaving the stairs at Horselydown, the cart was stopped by Sergeant Hewlett, and the cart was taken possession of and taken to the green-yard. Plt. followed to the green-yard, and afterwards he was taken into custody and conveyed to the police-station, the property then being in the green-yard. The plt. was from thence taken before a police magistrate, who, without hearing his witnesses, discharged him from custody, but ordered the tallow to be detained. Plt., on his release, went to the green-yard and demanded his goods of the keeper, who declined to give them up; and, while he was at the yard, Superintendent Blandford came there, and plt. inquired of him what he should do, to which he replied he knew nothing about it. Plt., when he went to the green-yard, saw his own bags and fat, and shortly afterwards he saw deft.'s van, drawn by one horse, come to the yard. Plt.'s fat had been emptied out of some of the bags into smaller bags of deft.'s, but some were not emptied out. The carman, who belonged to the owner of the cart, drove away with the fat and plt.'s bags. Plt. followed the van to deft.'s, and told deft.'s clerk that the fat and bags were his. He replied, that they had received orders from Superintendent Blandford to clear the green-yard, and declined to give the plt. the fat or bags. It further appeared that, the tallow becoming a nuisance, a written order was given by Sir Richard Mayne, the Metropolitan Police Commissioner, to sell it; and the deft. had thereupon purchased it of the police. At the trial, before Blackburn, J., at the sittings after Michaelmas Term 1861, the learned judge directed a verdict to be entered for the deft., with leave to the plt. to move to enter the verdict for him, if, under the circumstances, the court should be of opinion that the plt. was entitled to the property as against the police and parties claiming under them.

A rule having been obtained accordingly,

*M. Chambers, Q. C. (Barnard with him) showed cause.*—All persons collecting this tallow were bound to deliver it up. At the time of conversion by the deft. the plt. had neither the right of property or possession. The plt. never had anything but a wrongful title in the tallow:

Addison on Torts, 198;

Roscoe N. P. 609;

18 &amp; 19 Vict. c. 120, s. 135, were cited.

*Robinson (Finlaison with him) contra.*—The plt. had a right of possession of the property as against every one except the true owner. The tallow was derelict, and there was no means of ascertaining the owner. There was evidence of abandonment. The plt. was wrongfully dispossessed. Sir R. Mayne purported to act under 2 & 3 Vict. c. 71, s. 29, but he had no such authority under that section. [CROMPTON, J.—In cases of perishable goods, a magistrate may surely make an order to sell. COCKBURN, C. J.—There was here an order made by the magistrate for the detention of the goods; from that moment the plt. was dispossessed; how then can it be said he was restored into possession?] The first finder has a good title against all the world but the owner. [COCKBURN, C. J.—But here the plt. was rightfully dispossessed.] There was a clear abandonment. The tallow was floating on a navigable river; there was an absence of all claim or inquiry.

*Bridger v. Hawkesworth*, 21 L. J. 75, Q. B.;*Jeffries v. Great Western Railway Company*, 25

L. J. 107, Q. B.;

2 Bl. Com. cap. 1;

Bracton, book 1, cap. 12, pp. 8 and 120;

*Jones v. Moore*, 4 Y. & Col. 352;*Blade v. Higgs*, 30 L. J., C. P.;*Amory v. Delamere*, 1 Str. 503;*Burton v. Hughes*, 2 Bing. 173, were cited.

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COCKBURN, C. J.—I am of opinion that this rule should be discharged. This is neither a finding nor a rescue. If a thing is taken from a man by a wrong-doer, he may maintain an action against the wrong-doer; but here the plt. does not derive title from any one who himself had a good title. The case comes within the provisions of the 2 & 3 Vict. c. 71. The plt. was taken into custody, and was brought before the magistrate, who, not thinking him guilty of the charge, discharged him, but directed the tallow to be detained and given up to the police, as he clearly might do. Then the police were to sell after twelve months, and it might be a question how far they were warranted in selling at an earlier period; but that is a matter of no consequence in this case. The deft. derives his title from one who was selling under an order made by the magistrate, whether rightfully or wrongfully is immaterial. The bare naked possession which the plt. had was taken out of him by force of law, and from that moment the link was broken.

CROMPTON, J.—It does not appear to me that this person was a finder; there was a probability that he had obtained this tallow feloniously. This action is founded on possession, and when once he is divested of possession, he has no right to fall back to what he calls his title to the property. I agree with my Lord, you cannot say the plt. had any property at the time of the conversion by the deft. The right of possession was gone, wholly taken away from him, and he cannot, under those circumstances, be held to have had it reinvested in him. Here it seems to me that the possession was properly divested. If I were to draw any inference it would not be in favour of the plt. I do not see that whilst the plt. had any right in this property it was converted by the deft.

BLACKBURN, J.—I am of the same of opinion. The owners of the wharves burnt had a special property in the goods warehoused, and it might be difficult to say to whom they belonged, in consequence of the mixing; but I must pointedly protest against any such notion that the owners thereby lost any property in them: they would probably become joint tenants. This property did not, and was known not to, belong to the persons collecting it. With reference to the Police Act I hold that the constable had authority at common law to stop, take, and detain the plt. and the property in his possession: (*Lawrence v. Hedger*, 3 Taunt. 14.) This was not a case where the property was unknown. The police held it for the true owners, and their possession was the possession for the true owners and not for a wrong-doer, and from that time any rights the wrong-doer ever had, ceased. It was the case of a wrong-doer with wrongful possession rightfully divested. *Rule discharged.*

*Lewis and Lewis*, plt.'s attorneys.

*J. H. Fitch*, deft.'s attorney.

## BAIL COURT.

Reported by T. W. SAUNDERS, Esq., Barrister-at-Law.

Wednesday, Jan. 28, 1863.

REG. v. MIREHOUSE.

*Rogue and vagabond—Complaint by assistant overseer—No authority for the guardians.*

*Upon a complaint by an assistant-overseer of a parish situate in a poor law union that a party has deserted his wife and family, leaving them chargeable to such parish, it is no objection that the guardians of the union have not sanctioned the application.*

This was a rule calling upon the deft., a justice of Gloucestershire, to show cause why a rule should not issue directing him to hear the complaint of the assistant-overseer of the parish of St. George, Clifton, against one

Illes, for running away and leaving his wife and children chargeable to the parish.

It appeared that the parish of St. George is in the Clifton Union, and that the guardians of such union had not authorised the proceedings. At the hearing of the complaint before Mr. Mirehouse, he asked the assistant-overseer if he had any authority from the guardians to take the proceedings, and upon being informed he had no such authority, he refused to hear the complaint, holding that the assistant-overseer had no authority of himself to proceed. It was now contended that, as the proceeding against Illes as a rogue and vagabond under the 5 Geo. 4, c. 83, s. 4, was for leaving his family a burden upon the rates, it was for the guardians of the union, who now alone have the management of the rates, to initiate such proceedings, since they may see very good reason why they should not be taken (7 & 8 Vict. c. 101, s. 59); and that the overseers had no right to incur such costs without the consent of the guardians; and that, at all events, it was under the circumstances a question for the discretion of the magistrate.

*Pickering*, Q. C., in support of the rule, was not called upon.

MELLOB, J.—The question here is, whether or not this is a case in which I ought to interfere. Here is a complaint made by the assistant-overseer of the parish against a person who has left his wife and family chargeable, and Mr. Mirehouse no doubt had an honest belief that, as the guardians had not authorised the proceedings, they ought not to have been taken by any one else. But I think that that is not the correct view, and that in this case he ought to have proceeded.

*Rule absolute, without costs.*

*Riddale and Co.* for the deft.

*Meredith and Lucas* for the applicant.

Thursday, Jan. 29, 1863.

THE LOCAL BOARD OF HEALTH OF GLOUCESTER v. CHANDLER.

*Appeal—20 & 21 Vict. c. 43, s. 2—Case stated—Giving notice and copy case to the other side—Time for.*

*Under the 20 & 21 Vict. c. 43, s. 2, the app. must, within three days after receiving the case for the justices, transmit the same to the court, "first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding."*

*Held, that this is a condition precedent to the right to have the case set down for argument.*

This was a rule to strike this case out of the Crown paper, upon the ground that certain requisites of the 19 & 20 Vict. c. 43, had not been complied with.

It appeared that an information had been laid by the local board of health of Gloucester against Mr. Chandler, for an offence under the Public Health Act; and that, upon the hearing, the justices stated a case under the 20 & 21 Vict. c. 43. Upon the argument, the Court of Q. B. objected to the way in which the case was left to them, and sent it back to the justices to rehear it, and then, if necessary, to state a case. The information, accordingly, again came on for hearing, upon which the justices dismissed the information, subject to a case. The case having been prepared by the justices, they caused it to be delivered to the app.'s attorney on the 20th Dec.; being at the time very busy, he did not attend to it, and on the 22nd he looked at it, when he found that some words in one of the sections in the Public Health Act quoted, but which words were not material, were omitted. Upon the 29th he applied to the two justices who had stated the case for their insertion, and they inserted them; and on the same day he gave the deft. a copy of the case.

By the 20 & 21 Vict. c. 43, s. 2, after providing for

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the statement of a case, it is enacted that "such party, hereinafter called the app., shall within three days after receiving such case transmit the same to the court named in his application, first giving notice in writing of such appeal, with a copy of the case so stated and signed to the other party to the proceeding in which the determination was given, hereinafter called the resp."

*Phipps*, Q. C. appeared to show cause against the rule, and contended that, although according to the decided cases the notice and copy of the case must be given to the other side within three days after receiving the case from the justices, yet in the present instance that rule would not apply; first, because this was only a reheard case, the recognisance and conditions having been complied with when the case was originally stated; second, because, as the case was defectively stated on the second occasion, the time would not begin to run until it was made perfect, namely, on the 29th Dec.

*Macanara*, contra, was not called upon.

*Mellor*, J.—It is very clear in this case that I must hold, in conformity with previous decisions, that this is a condition precedent to the right to have the case set down for argument. When the case was received by the app., the time commenced to run, and when the three days elapsed the case was dead, and it could not be revived by referring it again to the justices and getting it altered. But even could it have been properly referred again to the justices for alteration, about which I say nothing, still it must be done within the three days. It is not, however, necessary to decide that, for it is clear that after the three days the case is dead. It may be that there are hardships in so holding, but there would be great inconveniences arising from relaxing the rule. *Rule absolute.*

Attorney for the appa., *Lovegrove*, Gloucester.

Attorneys for the repa., *Jones and Richards*, Gloucester.

Friday, Jan. 30, 1863.

(Before Mr. Justice MELLOR.)

FIELD V. MERRISON AND OTHERS.

Parish officers—Defence of parish property—Costs of action.

An action was brought to recover possession of certain premises in the occupation of A., to which the parish of B. claimed title. A vestry of such parish being held upon the subject, they resolved that the action should be defended by an attorney, who defended it accordingly, and judgment was ultimately given for the plt., but long after the parish officers who were in office at the time of the resolution had gone out of office. Upon an application for a rule calling upon such parish officers to pay the costs:

Held, that they were not liable.

This was a rule calling upon four parties who were the churchwardens and overseers of the parish of St. Andrew, Norwich, in the year 1859, to show cause why they should not pay the costs of this action.

It appeared that in May 1859 an action was brought by the plt. to recover possession of some cottages occupied by the defta. To these cottages the parish of St. Andrew, Norwich, claimed a right, the rents being paid to the parish officers. Upon the action being commenced a vestry was called at which the incumbent presided, when it was resolved that Mr. Preston, an attorney, should defend the action, and he accordingly did so. The facts being turned into a special case the Court of Q. B. ultimately gave judgment for the plt., and judgment was signed in Dec. 1861.

*Messrs.*, Q. C. showed cause, and argued that the application could not be supported—first, because the attorney was not retained by the parish officers; secondly, because being out of office they have no

parish funds out of which to pay the costs. He referred to

*Hutchinson v. Greenwood*, 4 El. & Bl. 324.

*Keane*, in support of the rule, contended that the court would see who were the parties really defending and make them responsible for the costs; that, as the defence was carried on at the instance of the parish, those officers who were in office at the time they were originated were the parties liable (*Doe dem. Masters*, 10 B. & C. 615), they being at the time the parties in whom was the legal estate. *Cwr. adv. vult.*

Jan. 30.—His LORDSHIP to-day said, he had considered the question, and was of opinion that the rule must be discharged; that he had only hesitated in order to consider the effect of the case of *Doe dem. Masters*, but he was quite clear that the churchwardens and overseers could only be liable in their corporate capacity, and if so, being no longer in office they could not be charged. The rule therefore would be discharged, but without costs.

*Rule discharged without costs.*

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Jan. 24, 1863.

(Before ERLE, C. J., KEATING and BLACKBURN, JJ., WILDE, B., and MELLOR, J.)

REG. V. JOHN HASTIE.

Embezzlement—Building society—Secretary—7 & 8 Geo. 4, c. 29, s. 47.

By the certified rules of an enrolled benefit building society, mortgages were directed to be made to the trustees, and the redemption-money to be paid to the directors; and it was no part of the secretary's duty, as prescribed by the rules, to receive subscriptions or other moneys for the society. The course of business, however, was that the management of the society was left almost entirely to the secretary, and he frequently received subscriptions. The mortgages were made to the trustees, but when redeemed the money was paid to the secretary for the trustees. The secretary having embezzled the redemption-money upon a mortgage so paid to him:

Held, upon an indictment under the 7 & 8 Geo. 4, c. 27, s. 47, that the jury were warranted upon this evidence in finding that the money was received by virtue of his employment and for his masters.

Case reserved by Keating, J.

The prisoner was indicted at the special commission at York, on the 22nd Dec. 1862, for that he, being employed as servant by the Trustees of "The Doncaster Permanent Benefit Building and Investment Society" (naming them), did, as such servant, by virtue of his employment, receive 426l. 8s. 3d., for and on account of the said trustees, and embezzled the same.

The society, which had been established some fourteen years ago under the above name, was duly enrolled and its rules certified; a copy of them is annexed for reference, and forms part of the case. Its object was to enable members to obtain from it loans by way of mortgage on their real property, each member contributing 10s. annually for fourteen years, and having credit for the amount subscribed on paying off his mortgage.

The prisoner had been secretary to the society from its commencement. He was the only paid officer, and the management of the affairs of the society was left almost entirely to him. The course of business, as prescribed by the rules of the society, had not been strictly adhered to. The subscriptions were not always received by the stewards, but frequently by the prisoner, who also made entries in the stewards' books. The mortgages were always made to the trustees; but



when redeemed, the money was paid to the prisoner as secretary, but for and upon receipts signed by the four trustees.

In Feb. 1860 the prisoner informed the solicitor of the society that John Townend, a member, was about to pay off his mortgage, 426*l.* 8*s.* 3*d.*, and brought the deeds to the solicitor, who thereupon indorsed the usual form of receipt on the mortgage-deed, and obtained the signatures to it of the four trustees named in the indictment. On the 13th Feb. 1860 Townend's solicitor attended at the office of the society's solicitor, got the deeds and receipt, and thereupon paid to the prisoner the sum of 426*l.* 8*s.* 3*d.* which he embezzled. None of the trustees were present when the money was paid.

It was objected that the prisoner could not be said to be servant to the trustees, nor to have received the money by virtue of his employment as such, inasmuch as his duties, as defined by the certified rules, did not include the receipt of the moneys embezzled.

I was of opinion that the actual course of business as proved, though not in strict accordance with the rules, was evidence for the jury that the prisoner received the money in question by virtue of his employment as servant to the trustees.

The jury found that he did so receive it, and found him guilty.

I respited the judgment for the opinion of the Court of Criminal Appeal whether the conviction was right.

H. S. KEATING.

The following rules of the society were referred to in the argument of the prisoner's counsel:—

#### V. Secretary.

1. The secretary shall attend all meetings of the society and directors at the time named for the commencement of such meetings, or if unable to attend must appoint some other shareholder to the satisfaction of the president or directors to act in his stead, and also give a satisfactory reason for his absence, or be fined 5*s.*

2. He shall enter minutes of all resolutions, transactions and business of the society in a rough minute-book, the same shall be fairly copied into another, which shall be read to the next meeting, both shall be signed by the president. He shall keep the accounts of the society in a simple and correct manner in books to be provided for the purpose, which books and also the bank-book he shall produce at each meeting of the society and directors, or pay 5*s.* for each neglect; he shall also send the circulars and notices, and conduct the correspondence of the society under the direction of the board of directors.

3. He shall call at the society's bankers for the bank-book on the second morning after each subscription meeting, and should the treasurer not have paid in the money received by him he shall immediately give information thereof to the president. He shall also inform the president of anything that may come to his knowledge which may be of advantage or disadvantage to the society.

4. He shall make out an inventory of all securities in the strong box, and, from time to time, correct copies of such inventory for each of the trustees.

5. He shall assist the auditors to examine the accounts, and shall prepare a report at each half-yearly audit and read the same to the next meeting.

#### XVIII. Redemption of Mortgages.

3 If any shareholder, having executed a mortgage to this society for money advanced, be desirous to pay off or satisfy the same, he or she shall be at liberty to do so by paying to the directors at once a fine of 10*s.* per share, together with all the subscriptions that would then become due on the share or shares so advanced up to the end of fourteen years from the date of commencement of the same, and in considera-

tion of such prompt payment, discount at the rate of 5 per cent. per annum, according to Jones's Tables, shall be allowed, and on the receipt of such future subscriptions, together with all fines and other charges due on the share or shares so paid up, the directors shall order the trustees, at the cost of the owner, to indorse a receipt or acknowledgment on the mortgage, according to 6 & 7 Will. 4, c. 32, s. 5, and therewith to deliver up to the said member all deeds and other documents in their custody relating to the property so released or discharged.

*Campbell Foster* for the prisoner.—First, the money embezzled was not received by virtue of the prisoner's employment. The offence occurred before the 24 & 25 Vict. c. 96 came into operation, and was under 7 Geo. 4, c. 29, s. 47. This was an enrolled benefit building society under the 6 & 7 Will. 4, c. 32, s. 4; and by the 10 Geo. 4, c. 56, which is incorporated into that Act, the society has power to alter and amend its rules. The amended rules were enrolled and certified in 1860. The altered rules are made binding on the society: (10 Geo. 4, c. 56, s. 8; 18 & 19 Vict. c. 63, s. 27.) The rules prescribe the duties of the officers of the society, and among them the duties of the secretary. They are in the nature of a statutory enactment. It was no part of the secretary's duty, as prescribed by the rules, to receive money; nor was any one to pay money to him under the rules. And in the present instance money to be paid on the redemption of any mortgage security is, by rule 18, to be paid to the directors whose duty it was to receive the money in question. In *Rez v. Thorley*, 1 Moo. C. C. 343, a servant of a carrier employed to look after the goods, but not intrusted with the receipt of money, was held not to be within the 7 & 8 Geo. 4, c. 29, s. 47. In that case, as in the present, the party paying handed the money to the servant, believing that he had authority to receive it. So in *Rez v. Prince*, Moo. & M. 21, where the prisoner was in the habit of discounting bills for a person, and was indicted under the 52 Geo. 3, c. 63, for unlawfully negotiating and applying to his own use a bill of exchange deposited with him as agent for the owners, it was held that he was not an agent who, in the exercise of his functions, had received a security and afterwards embezzled it within the meaning of that statute.

ERLE, C. J.—To my mind, the whole question turns on the effect of the course of business in which the prisoner was employed by the society. An employment may be inferred from the course of business as well as from an express contract. In this case it appears that the mortgages were always made to the trustees, but when redeemed the money was always paid to the prisoner in the first instance. That is the evidence.

*Foster*.—The money is paid in discharge of the security to the society.

WILDE, B.—The employment does not depend on what the prisoner's duties were, but it was a question of fact, what was he employed upon?

*Foster*.—Secondly, it is submitted that the prisoner did not receive the money on account of his masters.

BLACKBURN, J.—You would not dispute that the society might have employed the clerk to receive this money for them. Then the question still is, was the prisoner employed to receive it for them?

*Foster*.—In *Reg. v. Harris*, 23 L. J. 110, M. C.; 6 Cox C. C. 363, where a person was employed to grind corn at the mill in a county gaol, and he embezzled the money paid for some corn sent in to him improperly by his superior officer to be ground, it was held that he did not receive the money on account of his masters. So here, the trustees had no right to employ the prisoner to receive the mortgage money. *Rez v. Baty*, 2 Moo. C. C. 257, was also cited.

ERLE, C. J.—The case finds that the course of business was, that the mortgages were always made to

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the trustees, but when redeemed the money was always paid to the prisoner on their behalf. That was the course of business, and it was evidence for the jury that he was so employed by the trustees as his master to receive money on their behalf.

*Mauls (Hassany with him), for the prosecution, was not called upon.*

ERLE, C. J.—We are all of opinion that the conviction ought to be affirmed. *Conviction affirmed.*

Jan. 24 and 31, 1863.

REG. V. GEORGE WALTON AND JOSEPH OGDEN.

*Demanding property with menaces—Proof of menace—24 & 25 Vict. c. 96, s. 45.*

*Under the 24 & 25 Vict. c. 96, s. 45, which relates to demanding property, &c., with menaces or by force, the menaces must be of such nature and extent as to unsettle the mind of the person on whom it operates, and take away from his acts that element of free voluntary action which alone constitutes consent.*

*It is a question for the jury whether the evidence in a particular case comes within that principle.*

Case reserved for the opinion of this court by the Chairman of the Sessions for the West Riding of Yorkshire.

The prisoners George Walton and Joseph Ogden were indicted before me at the Intermediate Sessions for the West Riding of Yorkshire, holden at Sheffield, on the 8th Dec. 1862.

The following is a copy of the indictment:—

"West Riding of Yorkshire, to wit.—The jurors for our Lady the Queen, upon their oath present, that Joseph Ogden and George Walton, on the 2nd of Dec. in the year of our Lord 1862, with menaces did feloniously demand of James Bradshaw the money of him the said James Bradshaw, with intent the said money from the said James Bradshaw feloniously to steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Joseph Ogden and George Walton, on the said 2nd day of Dec., in the year of our Lord 1862, five shillings and sixpence in money, of the money of James Bradshaw, feloniously did steal, take and carry away, against the peace of our Lady the Queen, her crown and dignity, and against the form of the statute in such case made and provided."

The case for the prosecution was, that J. Bradshaw was indebted to Thomas Stainforth in the sum of 2l. 7s. 1d. for arrears of rent, and that on the 2nd day of Dec. last Benjamin Wilson Stocks, the agent for the said Thomas Stainforth, signed an authority to Samuel Oldfield, a bailiff, to make a distress upon Bradshaw's goods for such sum.

Between twelve and one o'clock on the same day John Parkin, clerk to Stocks, took the said authority to the Spread Eagle public-house, and there saw John Kilner, Oldfield's deputy. The prisoner Walton, who is also a self-appointed bailiff, was there, and he volunteered to go, and went with Parkin and Kilner to Bradshaw's house, and had the opportunity of seeing the authority.

No distress was made, as Walton and Parkin, who tried the door of Bradshaw's house, found it locked, Kilner being on the opposite side of the road.

The written authority was returned to Oldfield, who gave no instructions or authority to either of the prisoners to proceed in the matter of the said distress.

About half-past three the same afternoon, the prisoner Walton went with the prisoner Ogden (who is a self-appointed bailiff also) to Bradshaw's house, and demanded the money owing to Mr. Stainforth, stating, that if it was not paid, they had a warrant from a

magistrate, and would break open the door and make the distress; but that if Bradshaw would pay them 5s. 6d. for expenses, and sign an I O U for the debt, payable to Mr. Stocks at the rate of 1s. per week, they would be satisfied. One of the prisoners shook the door of the house.

The prosecutor hesitated, and Ogden then left for a minute and returned with a policeman. Nothing, however, was said as to what the policeman was to do. The policeman was not told to speak to the prosecutor, and the policeman did not speak to the prosecutor. The policeman had only been told that the prisoners had a distress to make and were afraid of a disturbance.

After the appearance of the policeman the prosecutor agreed to pay the 5s. 6d. and followed the prisoners to a neighbouring dram-shop and there paid them.

The prosecutor believed the prisoners had power and authority to distrain.

It was objected, by the counsel for the prisoners, that the evidence did not show such a menace as is contemplated by the 24 & 25 Vict. c. 96, s. 45, upon which the first count of the indictment was framed, and that the menaces must be of the same nature as if the money had been delivered in consequence of them, would have constituted the offence of robbery, and that the evidence showed that the money had been obtained, but did not prove a robbery; and the counsel for the prisoners further contended that the prisoners could not, on the indictment, be convicted of simple larceny, for if any offence was proved, it was that of obtaining money by false pretences, and that therefore the indictment was bad.

I overruled the objections, and directed the jury that the words and conduct of the prisoners, if the jury believed the facts, constituted a menace within the meaning of the statute.

The jury said they considered the statement made by the prisoners, that they had a warrant signed by a magistrate (which was untrue), supported by their procuring a policeman to give them a supposed authority to break into the house, and showing the intent by violently shaking the door was a menace within the meaning of the Act.

The jury found both prisoners guilty generally, and I sentenced the prisoners to six months' imprisonment, with hard labour, but reserved the question for the opinion of this court, whether the objections to the indictment and conviction were well founded.

WILSON OVEREND, Chairman.

Jan. 24.—*Vernon Blackburn* for the prisoner.—This conviction cannot be sustained. The point turns upon the meaning of the word "menaces," in the 24 & 25 Vict. c. 96, s. 45. There is no case reported of a conviction in which the menace has not been of violence to the person; here it is directed to a seizure of the prosecutor's property. In Roscoe upon Evidence in Criminal Cases, 928, 3rd edit., it is said: "With regard to the menaces they must be of the same nature as, if the money had been delivered in consequence of them, would have constituted the offence of robbery. In the same manner, the force used must be such as would have been sufficient to render the taking a robbery." Here the money was obtained by the prisoners saying that they had a warrant, and that if the money was not paid, they would break open the prosecutor's door and distrain; and the prosecutor believed that the prisoners had authority to distrain. This was more like obtaining money by false pretences than a demand of money with menaces or by force. It was an endeavour to give greater weight to the false pretence that they had a warrant to distrain: (Archbold's Crim. Law 361, edit. 1862.) Secondly, as to the count for larceny. [ERLE, C. J.—Secd. 49 helps you on your way in arguing this point: "It shall be immaterial whether the menaces or threats hereinbefore

mentioned be of violence, injury, or accusation, to be caused or made by the offender or by any other person.”]

*Hannay* for the prosecution.—Assuming that the menaces should be such as, if the money had been delivered in consequence, to constitute robbery, still there was sufficient evidence to support the conviction in this case. With respect to “the putting in fear,” which is an ingredient sometimes in the case of robbery, it is treated in 1 Russ. on Crimes, 879, first, with respect to those cases in which the fear excited has been of injury to the person; secondly, of injury to the property; and thirdly, of injury to the character: (*Brown’s* case, O. B. 1780, *Spencer’s* case and *Simon’s* cases referred to in 1 Russ. on Crimes, 881-2, were then read.) [WILDE, B.—All those cases are threats of the destruction of property. MELLOR, J.—In the present case, the presence of the policeman was likely to allay any fear of personal violence.] Secondly, as to the count for larceny. This was within the principle of obtaining money by a fraudulent abuse of legal process, which amounts to larceny: (2 Russ. on Crimes, 54-5.) The instances given there are where a man intending to steal a horse takes out a replevin, and having thereby got the horse from the sheriff rides away; and so also, where by fraudulently delivering an ejectment and obtaining judgment against the casual ejector, a person gets possession of a house, and takes the goods, intending to steal them. The following authorities were then referred to:—

1 Hawk. P. C., c. 33, s. 12;

2 East P. C., c. 16, s. 96;

*Rea v. Newland*, 2 Leech C. C., 721;

*Reg. Norton*, 8 Car. & P. 671.

The present case is similar to the cases where money has been obtained by ring-dropping, which amounts to larceny: (*Rea v. Watson*, 2 Leach, 640.) [BLACKBURN, J.—That class of cases turns on the point that the property has not been parted with.]

*Vernon Blackburn* in reply.—All the cases quoted in support of a conviction upon the first count are cases of threats of injury to the person or of the destruction of property. Here the threat was only of putting legal process in force, and the prosecutor parted with his property under that false pretence.

*Cwr. adv. vult.*

Jan. 31.—WILDE, B.—The question in this case turns upon the proper construction of the 24 & 25 Vict. c. 96, s. 45. The section is in these words: “Whosoever shall with menaces or by force demand any property, chattel, money, valuable security, or other valuable thing of any person, with intent to steal the same, shall be guilty of felony,” &c. There are many demands for money or property accompanied by menaces or threats, which are obviously not criminal, nor intended to be made so. Thus, in a case of disputed title to personal property, a man may threaten his opponent with personal violence if he does not relinquish the subject of dispute, and he would not be within the intention of this statute. Other instances would offer themselves upon a little consideration. Where, then, is the proper limit to the operation of this section? It is to be found in the words “with intent to steal.” Nothing is said about “violence” in conjunction with menaces, still less of violence to the person as distinct from violence to property. There is no express limit except in the words “with intent to steal.” Now a demand of money with intent to steal, if successful, must amount to stealing. It is impossible to imagine a demand for money with intent to steal, and the money obtained upon that demand, and yet no stealing. The question then arises, what are the incidents attending the procurement of money or property by menace or threats necessary to constitute stealing? It is said in 2 East, P. C., c. 26, s. 3, “the taking in all cases must be against or without the consent of the

owner to constitute larceny or robbery.” On the other hand, it is said at the same place, “a colourable gift which in truth is extorted by fear, amounts to a taking and trespass.” These two passages of the learned writer, when taken together, appear to define the offence of stealing in the case of menaces. For if a man is induced to part with property through fear or alarm, he is no longer acting as a free agent, and is no longer capable of the consent above referred to. And accordingly, in the cases cited in argument, the threatened violence, whether to person or property, was of a character to produce in a reasonable man some degree of alarm or bodily fear. The degree of such alarm may vary in different cases. The essential matter is, that it be of a nature and extent to unsettle the mind of the person on whom it operates, and take away from his acts that element of free voluntary action which alone constitutes consent. Now to apply this principle to the present case. A threat or menace to execute a distress-warrant is not necessarily of a character to excite either fear or alarm. On the other hand the menace may be made with such gesture and demeanour, or with such unnecessarily violent acts, or under such circumstances of intimidation, as to have that effect. And this should be decided by the jury. Now, in this case there was evidence very proper to be left to the jury to raise the above question. But the chairman left no such question to them, and directed them, as a matter of law, that the conduct of the prisoners (if believed) constituted a menace within the statute. Our judgment, that this conviction cannot be sustained, is founded entirely on this ground.

— Conviction quashed.

Jan. 24 and 31, 1863.

REG. v. R. J. FRANKLAND.

*Indictment—Partners—Joint-stock company—Corporation.*

*The prisoner was indicted for embezzling the money of T. B. and others, his masters; and the evidence was that T. B. was a partner in a company of more than twenty persons, and that they called themselves “The R., M. and H. Coal Company (Limited),” which name was painted over the office door; and that the shares were transferable without the consent of the other partners, and that a share-ledger was kept. There was no formal proof of the company being registered under the Joint-Stock Companies Act, or of its being a corporation:*

*Held, that the indictment properly laid the money as belonging to A. B. and others.*

The following case was reserved by the Chairman of the West Riding Intermediate Sessions, held at Sheffield, on the 8th Dec. 1862, for the opinion of this court:—

The prisoner, Richard John Frankland, was tried before me, at the Intermediate Sessions for the West Riding of Yorkshire, held at Sheffield, on the 8th Dec. 1862, upon an indictment framed on the 68th, 71st and 72nd sections of the Larceny Act (the 24 & 25 Vict. c. 96), on a charge of feloniously embezzling three several sums of 10*l.*, 6*l.* 10*s.* and 6*l.* 13*s.*, within the space of six months, while employed as a clerk, from Thomas Bolland and others, his masters.

The first witness called on behalf of the prosecution, Philip Cooper, proved, in his examination in chief, that he was the manager of the Rotherham, Masborough and Holmes Coal Company (Limited), that T. Bolland was one of the partners in that company, and that there were several other partners.

The prisoner’s counsel objected to the last question, and the answer elicited, on the ground that the names of the partners, and whether more than two, would appear from the partnership-deed of the company.

G. CAS. R.]

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[C. CAS. R.]

I overruled the objection, and the question and answer were admitted.

The prisoner's duties were, as secretary and cashier of the company, to receive all the moneys for the coals sold, and enter them in the cash-book, and account for them. In September last the witness examined his accounts, and spoke to the prisoner about them, and told him he had received moneys which he had not accounted for, and had sold coals and not given receipts. He said he was very seriously wrong in his coal accounts, and that he had received several sums which he had not accounted for, and witness recommended him to give an account of them. He then made out an account of sums which he had received, amounting to 201*l*. 5*s*. 5*d*., which he said was correct, so far as he could recollect, but there were still some other sums which he could not account for. He said he was very sorry for what he had done, and would be very glad to give every assistance in unravelling the accounts.

Ten days afterwards he handed in another account of moneys received by him and not accounted for, which, with the first account, amounted to 448*l*. 12*s*. He said he had spent a good deal in postage stamps and travelling expenses, and on the same day he handed in an account for disbursements, amounting to 189*l*. 19*s*. 1*d*.

The prisoner's cash-book did not contain a sum of 10*l*. paid by Ann Askham on the 18th June; 6*l*. 10*s*. paid by Henry Bray on the 30th June; and 6*l*. 13*s*. paid by Ann Askham on the 15th July.

On his cross-examination the witness said there were a number of shareholders in the company, and directors were appointed. Witness was appointed manager.

The directors appointed the officers of the company by resolutions, which were recorded in a minute-book of the company. After the rendering of his first account the prisoner was suspended by a resolution of the directors. He had access to the books afterwards to enable him to make out his second statement of accounts. His duties were to have charge of all accounts, to receive all moneys, to enter the transfer of shares and fill in the share certificates. The directors made an annual report to the shareholders, and the prisoner drew up the financial part of it. He had charge of the mines, and he sought for orders for coal one day every week at Sheffield. He had to pay the workmen their wages, and had to calculate their allowances, and was the only traveller the company had. He was the *factotum* of the company. His salary was 100*l*. per year, and a house and coals and candles. Since he had left the service of the company, two officers had been appointed in his place: one at a salary of 80*l*., and the other at a salary of 130*l*., and the witness now acted as secretary and clerk. The prisoner also kept the share-ledger. There was painted over the office door of the company, "The Rotherham, Masborough and Holmes Coal Company, Limited;" the word "Limited" being between inverted commas.

On this evidence the counsel for the prisoner objected that a court of quarter sessions had no jurisdiction to try the offence, and that the indictment was erroneous. The evidence in chief of Mr. Cooper established that the prisoner was cashier and secretary of the Rotherham, Masborough and Holmes Coal Company (Limited), of which Mr. Cooper was the manager; and the cross-examination had elicited that there were eighty shareholders or partners, and also directors of this company; that the officers of the company were appointed and suspended by resolution of the directors entered in their minute books; that shares in the company were transferred by certificates, and that a share-ledger was kept. This was not therefore a private partnership of which the prisoner was clerk or servant, but a corporate body or public company of which the prisoner was secretary or public officer;

in support of this view the Joint-Stock Companies Acts 1856 and 1857 were referred to; if so the offence committed by the prisoner was a misdemeanor under the 81st and 82nd sections of the Larceny Act, and by the 87th sections of the same Act it could not be tried at quarter sessions.

It was answered by the counsel for the prosecution that the assumption by a coal company of the name or style of the Rotherham, Masborough and Holmes Coal Company (Limited), proved nothing; that T. Bolland being one of several partners, the moneys embezzled were properly laid as being the moneys of him and others; that sects. 81 and 82 of the Larceny Act referred to and applied to a class of offences entirely different from that before the court, and that there was no evidence, by certificate of incorporation or otherwise, to satisfy the court that the coal company had taken advantage of, and was within the meaning of the Joint-Stock Companies Acts 1856 and 1857, and had become a body corporate or public company within the meaning of those Acts. I overruled the objection, on the ground that there was no sufficient evidence before me to establish that this was a body corporate or public company.

John Farnall Askham then proved, that on the 18th June the prisoner called at his house for an account due to the Rotherham, Masborough and Holmes Coal Company, and his wife paid him 10*l*.; he also called on the 15th July for a further account of 6*l*. 13*s*., which was paid him.

The prisoner receipted the bills, which were handed in and read. They were headed "Mr. G. F. Askham, Sheffield, debtor to the Rotherham, Masborough and Holmes Coal Company (Limited)."

Henry Bray proved, that on the 30th June he paid the prisoner 6*l*. 10*s*. for coals, and took his receipt, which was handed in, and was headed in the same manner as the last. He did not know of any firm of Thomas Bolland and others by that name, and had never dealt with them.

This was the case for the prosecution.

The prisoner's counsel objected, that the proof of the persons for and on account of whom the moneys alleged to be embezzled had been received by the prisoner, varied from the allegation in the indictment, and that unless the indictment was amended the variance was fatal, and the indictment bad. The indictment alleged the prisoner to be employed as clerk to Thomas Bolland and others, and that while so employed he received the sums proved, for and on account of the said T. Bolland and others, his masters, and embezzled the same; whereas the receipts put in, signed by the prisoner, of the sums said to be embezzled, were sums received by him, as appeared by the evidence and the heading of the receipts, for and on account of the Rotherham and Masborough Coal Company (Limited). Neither was there any proof that the prisoner was either clerk or servant to T. Bolland and others.

I put it to the counsel for the prosecution whether, on this objection, they would amend the indictment by inserting the name of the Rotherham and Masborough Coal Company (Limited) in the place of "Thomas Bolland and others," under the 14 & 15 Vict. c. 100, s. 1; but the counsel for the prosecution replied that there was nothing to amend by, or to show that the prisoner was not properly described as the clerk of Thomas Bolland and others, and the moneys embezzled laid as their moneys, and therefore declined to amend.

I then overruled the objection, and held the indictment to be sufficiently supported by the evidence subject to a case for the opinion of the Court of Criminal Appeal.

The counsel for the prisoner then addressed the jury on the facts, contending that the evidence did not support the indictment. I directed the jury that the sufficiency of the indictment was far me to decide, and

that if they found on the evidence that the prisoner had received these sums for and on account of his employers as clerk, and had appropriated them to his own use, they ought to find him guilty on this indictment; if they had any doubt, to give him the benefit of it. The jury found the prisoner guilty, with a recommendation to mercy.

The Court sentenced him to be imprisoned twelve calendar months, with hard labour, subject to the opinion of the Court of Criminal Appeal whether I was right in overruling the objections raised on behalf of the prisoner, and whether on the above facts the conviction could be sustained.

WILSON OVEREND, Chairman.

Jan. 24.—*Campbell Foster* for the prisoner.—The conviction ought not to be sustained. The sessions were wrong in receiving evidence that Thomas Bolland was one of several partners. The "limited" attached to the name of a joint-stock company is a statutable title. The proper evidence of the name of the partnership was the deed of settlement, and it would also have shown that the company was a corporation. By the Joint-Stock Companies Act, 19 & 20 Vict. c. 47, s. 113, upon compliance with the requisitions of the Act the Registrar of Joint-stock Companies is to certify that the company is incorporated, and that it is limited, and thereupon the company "shall be incorporated accordingly." By sect. 4 all trading partnerships exceeding twenty persons are to be registered under the Act, unless constituted by private Act of Parliament or charter.

MELLOR, J.—What was there to show that the prosecutors were not partners, although not invested with the privileges conferred by the Joint-Stock Companies Acts?

*Campbell Foster*.—The word "limited" was painted over the office door.

BLACKBURN, J.—That is proof that they held themselves as a company completely registered, but not that they were completely registered.

*Campbell Foster*.—Sect. 5 and 13 require such companies to insert the word "limited" at the end of the name of the company: (Taylor on Evidence, ss. 288, 289, was then referred to.) Secondly, the cross-examination showed the existence of an incorporated company.

WILDE, B.—Was it not necessary to show that it was a corporation by the certificate of registration?

The learned counsel then cited

*Count Duroure's case*, 1 East P. C. 415.

No counsel appeared for the prosecution.

*Cur. adv. vult.*

Jan. 31.—ERLE, C.J.—In this case the prisoner was convicted of embezzling the money of Thomas Bolland and others, and we think that the facts are sufficient to support the conviction, and that the objections made at the argument were then answered with one exception, viz. that there was evidence which ought to have been left to the jury to show that the Rotherham Coal Company (Limited) was a corporation. It appears that Bolland and others carried on business under the name of the Rotherham, Masborough and Holmes Coal Company (Limited). Some members of the company were called directors and others shareholders, and the number of members had far exceeded twenty. The name of the company was over the door. The shares were transferable without the consent of the other shareholders, and a minute-book for resolutions was kept. It was contended that these were compliances with the requirements of the Joint-Stock Companies Act, 8 & 9 Vict. c. 110, and so were indications on which the jury might find that the company was registered according to that Act, and so incorporated. It was contended further, that the number of shareholders and the transfer of shares were in violation of that Act if the company was not registered, and that

the presumption was against illegality, and that all this was for the jury. The answer is, that a mining company on the cost-book principle is declared to be lawful by the same statute, and that such a company might lawfully do all that was supposed to be unlawful under that statute, and we refer to the authorities and arguments in Mr. Wordsworth's book on Joint-Stock Companies, p. 193, to show that colliery companies in any county in England may lawfully be carried on without registration on the cost-book principle. A further answer is, that the prisoner alleges that registration exists. If so, it must be in writing, and as a general rule the party who claims to put the contents of a writing in evidence must produce it or account for its absence. This the prisoner does not do. If he offered testimony of a witness who said either that he had seen the register or that he had heard the prosecutors say that it existed, the evidence would be rejected, on the principle above mentioned. If the words are inadmissible, equally (as far as the application of that principle is concerned) are actions offered as secondary evidence of the same writing. It should be noted, that if the company is incorporated, it must be by a writing under the statute made within a few years past, and that a trading corporation under this statute differs from a corporation for public purposes and from a corporation by prescription, so that evidence admissible to prove the existence of such corporations as were last mentioned would not be necessarily admissible to prove a modern charter or a recent registration. In this case we see no reason for taking it out of the operation of the general principle. It should be noted, also, that a company intending to be registered may fail to fulfil some of the conditions required for a valid registration, and though they would violate the Joint Stock Companies Act by carrying on business without registration, the directors and shareholders would not lose their legal rights as owners of property, neither would they be placed out of the protection of the law because the imperfect registration failed to make them a corporation. For these reasons I am of opinion that there was no evidence which ought to have been left to the jury that the company was incorporated.

BLACKBURN, J.—In this case I yield to the authority of my four brothers, and join in their judgment; but I think it necessary to say that I do not agree in their reasoning, which I think might, in other cases, lead to conclusions which, as at present advised, I think not law. In the present case the question is, whether Thomas Bolland and others were the employers of the prisoner. There was sufficient evidence to support a verdict for the Crown, but I wish to guard against it being supposed that whenever individuals are shown to share the profits of a trading body carrying on business under a name, e. g. Peninsular and Oriental Steam-packet Company (a matter which might always be proved as to the shareholders in a corporation), I say I wish to guard against being supposed to agree that on such evidence being given in a suit between third parties, the jury should be directed, as a matter of law, that they must find that the individuals are partners in a firm of that name unless a charter under seal, or some other conclusive proof to the contrary, is produced.

*Conviction affirmed.*

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. MAUNDER, and C. J. B. HESTALET, Esqrs., Barristers-at-Law.

Friday, Feb. 13, 1863.

BUDGE v. PARSONS.

*Cock fighting—Cruelty to animals*—12 & 13 Vict. c. 92, s. 2, 3, 29.

*The 12 & 13 Vict. c. 92, s. 2, imposes a penalty on any person who shall cruelly ill-treat, abuse, or*

Q. B.]

CHURCHWARDENS OF PADDINGTON v. CHURCHWARDENS OF WILLESDEN.

[Q. B.]

*torture any animal, and sect. 29 says the word animal shall "be taken to mean any horse, mare, &c., or other domestic animal."*

*Held, that a cock is a domestic animal, and that fighting cocks with steel spurs is cruelly ill-treating within sect. 2 of the Act.*

The app. had been convicted for aiding and assisting in fighting cocks in a field, but the court held that there was on such conviction no substantial difference between this case and *Morley v. Greenhalgh*, 7 L. T. Rep. N. S. 625, and that conviction was therefore quashed.

SAME v. SAME.

Case stated by Justices under 20 & 21 Vict. c. 43, for the opinion of the court.

At a petty session holden at Jump, in the county of Devon, an information under 12 & 13 Vict. c. 92, charged that Rd. Budge did "cause and procure to be cruelly ill-treated, abused and tortured, a certain cock," whereupon the app. was convicted, against which conviction he now appealed.

*Lopez* in support of the conviction.—The cocks were put together, having steel spurs attached to their legs, and the fighting was continued after the thigh of one of them was broken. [WIGHTMAN, J.—I think you may take it that they were cruelly ill-treated.] The 12 & 13 Vict. c. 92, s. 2, enacts, that if any person shall cruelly beat, ill-treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over driven, abused, or tortured any animal, every such offender shall, for every such offence, forfeit and pay a penalty not exceeding 5*l*. A cock is an animal within that section. The interpretation clause, sect. 29, says, "the word 'animal' shall be taken to mean any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal." Then the 3rd section provides, that every person who shall keep or use any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of a domestic or wild nature, shall be liable to a penalty. A cock is a domestic animal; it is reduced into possession, and is fed by man. [WIGHTMAN, J.—You say that the interpretation clause must mean a domestic animal as distinguished from a wild animal.]

*Cole contra*.—This is an offence provided for by the 3rd section, not by the 2nd; fighting cocks is not torturing or cruelly ill-treating within that section. A cock is not a domestic animal within that section. He is a feathered biped; all the creatures referred to by that clause are quadrupeds. The 2nd section meant to refer to some active violence; there is no evidence that the debt. put on the spurs. The debt. has already been convicted for the same offence. [WIGHTMAN, J.—The first conviction is a nullity.]

WIGHTMAN, J.—The question is, whether the app. has been guilty of an offence within the 2nd section of this Act of Parliament? The facts are, that the app. set on a cock armed with steel spurs upon the cock in question, and that he did so after the cock had been disabled. Now, is a cock a domestic animal? A cock is mentioned in the 3rd, but not in the 2nd section. When referred to in the 3rd section, it is followed by these words, "whether of a domestic or wild nature." Now this case turns on the 2nd section, and there it is not mentioned whether the animal referred to is to be domestic or wild; then on referring to the interpretation clause we find creatures to be included in the term animal "or any other domestic animal." It is said a cock cannot be said to be a domestic animal. Poultry seem to me to be as much domestic as bulls and horses; it is true they are not within the house, but they are reclaimed animals, as distinguished from wild. The 3rd section includes all animals, whether wild or tame; but the 2nd is confined to domestic animals, and it might be that the

object was to exclude such wild animals as foxes and other creatures usually hunted, and which are objects of sport. Looking at the 2nd section and the interpretation clause, I think a cock is a domestic animal, and that therefore this conviction is good.

CROMPTON, J. concurred.

MELLOR, J.—It cannot be doubted that the terms of the 2nd section are large enough to include a cock. Looking at the subject-matter of the Act we are not bound to say, even if there had been an omission, that a cock is excluded; and it is clear that the intention of the Legislature will be best carried out by holding that it is included. *Conviction affirmed.*

CHURCHWARDENS OF PADDINGTON v. CHURCHWARDENS OF WILLESDEN.

*Settlement of pauper—Agreement for a year.*

*A. agrees to let, and B. to take, a cottage for three months from Dec. 29, at the yearly rent of 18*l*., the first monthly payment to be made 25th Jan., free from all taxes, &c., which are to be paid by the tenant, and allowed out of the rent. Three months notice to quit from either party to be sufficient. B. occupied for eighteen months:*

*Held, a tenancy from year to year, so as to give the tenant a settlement under 6 Geo. 4, c. 57, s. 2.*

This was a case stated under Baines' Act, the question being whether Joseph Whurr, had obtained a settlement in the parish of Willesden, under 6 Geo. 4, c. 57, which provides that no person shall acquire a settlement in any parish maintaining its own poor by renting or paying rates for any tenement, unless that tenement shall consist of a separate building, &c., rented at 10*l*. a-year for the term of one whole year. The cottage was held under the following agreement:—

"Agreement made this 2nd Dec. 1859, between John Hunter, Esq., George Meyer, Esq., and Maria Cramer, widow, executors of the late George Meyer, Esq., on the one part, and Joseph Whurr, foreman to Mr. Quarterman, on the other.

"The said J. Hunter and others aforesaid, agree to let, and the said J. Whurr agrees to take, the four-roomed cottage next to Mr. Higgs, at Willesden, for three months, from Dec. 25th 1859, at the yearly rent of 18*l*., the first monthly payment to be made 25th Jan. 1860, free from all taxes and assessments and water-rate, which are to be paid by the tenant and allowed to him out of the rent. And it is hereby agreed that three months' notice from either party to the other shall be sufficient notice to quit, and the said J. Whurr agrees upon receiving such notice to give up quiet possession of the said cottage to the said J. Hunter and others aforesaid."

Joseph Whurr, the tenant, occupied the cottage under the above agreement, for eighteen months from the 25th Dec. 1859, and paid some of the rates in respect of the same, and it was conceded by the app. that he gained a settlement in Willesden by the payment of rates, and by residing there if he *bond fide* rented such cottage for the term of one whole year under the 6 Geo. 4, c. 57, s. 2.

*Metcalfe* for the resp. parish.

*Underdown*, contra, was called on by the court.—This holding cannot be more than a six months' tenancy, viz., for three months, determinable at three months' notice. The yearly amount of rent is mentioned merely for the convenience of the parties. He cited

*Reg. v. Chawton*, 1 Q. B. 247;

*Reg. v. Herstonceaux*, 7 B. & C. 551.

[WIGHTMAN, J. referred to *Birch v. Wright*, 1 T. R. 378.]

WIGHTMAN, J.—Everything depends upon the wording of the agreement, and what was the reason—

able intention of the parties. Now this, reasonably construed, means a letting for three months certain, at a yearly rent of 18*l.*, but if the parties go on after three months, then a yearly tenancy is created, determinable at a three months' notice; here the tenant occupied for one year and a half, therefore there was a yearly tenancy.

CROMPTON, J.—There is no real difference whether the rent be payable monthly or quarterly; a notice is to be given if the tenant hold on after three months, but that does not make it a six-monthly holding. On the whole of the facts, this must be taken to be a yearly holding, with liberty to put an end to it by a three months' notice.

MELLOR, J.—It is a taking on trial for three months, with liberty to hold on; and if the tenant do so, it becomes a contract for a year, subject to be determined by three months' notice.

*Judgment for the respes.*

#### TEATHER v. TURNER.

*Exemption from toll—Rifle volunteer—24 & 25 Vict. c. 126, s. 1.*

*A rifle volunteer corps got up a rifle shooting match at their duly certified practice-ground, each man to find his own ammunition, open to all comers; entrance fee, 10*s.* 6*d.* The app., a member of a corps belonging to an adjoining county, was on his way to the match in uniform:*

*Held, that this was not such a going to or returning from a place appointed for exercise, as to exempt him from toll under 24 & 25 Vict. c. 126, s. 1.*

This was an appeal from the decision of justices, the question being the liability of volunteers to toll. The app. was a member of the 3rd Cumberland Rifle Volunteers, and a rifle shooting match having been organised by the 4th Westmoreland Rifle Volunteers, to be held at their duly certified rifle-practice ground, open to all comers, each man finding his own ammunition and paying 10*s.* 6*d.* entrance, he was on his way to the match in uniform, when the toll in question was demanded, and the justices held that, under the circumstances, he was not going to or coming from a place appointed for exercise within the Act of Parliament, 24 & 25 Vict. c. 126, s. 1, and was therefore liable to pay the toll.

*Patterson* appeared for the app.

The respes. did not appear.

WIGHTMAN, J.—I think the justices were right. The Act gives an exemption from toll to officers and men going to or coming from a place appointed for exercise, and the question is whether the app. was going to or returning from exercise; but I think the exercise upon which he was bound was a different sort of exercise from that referred to in the Act. This was a shooting-match open to all comers, each man finding his own ammunition and paying 10*s.* 6*d.* entrance fee; such a meeting is not, in my opinion, an exercise within the meaning of the Act of Parliament.

MELLOR, J.—The app. was to put in 10*s.* 6*d.* for the right of shooting, and any one doing the same might compete. The Act of Parliament does not mean that every exercise shall excuse a man from toll if he be dressed in uniform. Here the app. was going to a private match, and the justices were right in their conviction.

*Conviction affirmed.*

#### REG. v. MYOTT.

*Bastardy order—Hearing by justices—Refusal of order—Application to a different bench of justices.*

*A woman having applied for a bastardy order was twice refused by the justices of B. after a hearing of her case on its merits. She then went to N., where*

*she said she was told she would have a better chance, and the justices of N. made an order on the putative father:*

*Held, that the order was bad.*

*Kenealy* showed cause against a rule to quash a conviction against the app. finding that he was the putative father of a bastard child. It appeared that the woman lived in the petty sessional division of Burslem, in Staffordshire; that she had on the 27th Nov., and again on the 19th Dec., applied to the justices there and been refused an order; that she then went to Newcastle-under-Lyne, where she said she was told she would have a better chance (but whether this was intended to apply to the chance of getting an order, or of getting her living, did not clearly appear), and the justices of Newcastle made an order:

7 & 8 Vict. c. 101;

*R. v. Mackin*, 18 L. J. 213, M. C.;

*Saunders* on Bastardy;

*Reg. v. Hughes*, 26 L. J. 133, M. C.,

were referred to.

*Welsby*, contra, was not called on.

WIGHTMAN, J.—The case of *Reg. v. Hughes* is conclusive in this case. No doubt here the woman did go out of one division into another because she was told she would have a better chance. After a hearing of the case on the merits she goes for the express purpose of getting out of the jurisdiction of those justices who had twice decided against her. The conviction was therefore bad.

*Rule absolute to quash conviction.*

Saturday, Feb. 14, 1863.

#### REG. v. INHABITANTS OF BELFORD.

*Settlement by estate—9 Geo. 1, c. 7, s. 1—Purchase—Grant of lease in consideration of building at a cost of 85*l.* and rentcharge.*

*In 1831 A. agreed with B. to build a house according to certain specifications, on land then belonging to B., in consideration of which undertaking, and of an annual rentcharge of 25*s.*, a lease of the land for three lives was to be granted. The house was built by A. according to specification, at a cost of 85*l.*, whereupon the lease was granted:*

*Held, that this was a purchase of an estate or interest for a consideration of more than 30*l.*, and therefore conferred a settlement under 9 Geo. 1, c. 7, s. 1.*

In this case an order had been made by two justices of the county of the borough and town of Berwick-upon-Tweed, for the removal of Elizabeth Silver, widow, and her two children, from the parish of Berwick-upon-Tweed, to the parish of Belford, in the city of Northumberland, which order was confirmed on appeal.

A rule to quash such order having been obtained, it appeared that, in or about the year 1831 James Terment (the father of the pauper) agreed with one William Clark to build a house according to certain specifications, on land then belonging to the said William Clark, in the appal township, in consideration of which undertaking, and of an annual rentcharge of 25*s.*, a lease of the land for three lives was to be granted. The house was built by the said James Terment according to the specification, at a cost of 85*l.*, whereupon the lease was granted. The said facts appeared on the trial, and also, as the recorder found, that the grant of the rentcharge, and the erection of the house on the land conveyed were together of the pecuniary value to the grantor, at the time of the conveyance, of more than 30*l.* The recorder confirmed the order.

The question for the court was, whether or not, under the above circumstances, there was such a consideration *bona fide* paid as to satisfy the requirements of the 9 Geo. 1, c. 7, s. 5. If the court was of opinion that there was, then the order of sessions was to be

Q. B.]

BIRKS v. ALLISON.

[C. B.]

confirmed. If the court should be of opinion that there was not, then the order of sessions was to be quashed.

*Liddle, Q.C. (R. Fowler with him) for the resp.*—The 9 Geo. 1, c. 7, s. 5, provides that no person shall be deemed to acquire a settlement in any parish or place by virtue of any purchase of any estate or interest in such parish or place whereof the consideration for such purchase doth not amount to 30*l.* *bona fide* paid for any longer or further time than such person shall inhabit in such estate, &c. The pauper is the widow of Emanuel Silver, a Spaniard by birth, who died in Aug. 1861, without having done any act to gain a settlement in his own right. She is the daughter of James Terment, a shoemaker, who built the house in question under the arrangement before stated. The object of the Act was to prevent a pauper obtaining a settlement by means of a fraudulent conveyance, but here was a good consideration. There is nothing in the Act to make it necessary that the sum of 30*l.* should actually be paid by the vendor to the purchaser. In *Wendron v. Stithians*, 24 L. J., 1, M. C., the house did not cost 30*l.* All the cases go to show the improvements made afterwards will not do, but here was a *bona fide* expenditure. They referred to

*R. v. Tedford*, Burr. S. C. 57;

*Burn's, J. P. tit. "Poor;"*

*R. v. Stockland*, 2 Str. 1162;

*St. Paul's Warden v. Kimpton*, Fol. 238;

*R. v. Marwood*, Burr. S. C. 386;

*R. v. Ufton*, 3 T. R. 251;

*R. v. Hornchurch*, 2 B. & Ald. 189;

*R. v. St. Mary, Whitechapel*, Burr. S. C. 55;

*Chitt. Stat. tit. "Poor," 682, et seq.*

*Manisty, Q. C. (Bruce with him) was called on by the court.*—A man may become a pauper by the very act of laying out the purchase-money. The intention of the Act was that 30*l.* should be *bona fide* paid. There is nothing to show when the house was built, or when the lease was granted; it might be that a mass of old materials was put into the form of a house, in the course of several years. [MELLOR, J.—It is a house worth 85*l.*, plus a rentcharge of 25*s.* a-year. The agreement was in 1831 and the lease in 1834; probably the work was done between those periods.] The money must be paid *bona fide* at the time of conveyance; here there is no finding that any money passed or was actually expended. The words of the statute must be adhered to; an equivalent is not sufficient. [WIGHTMAN, J.—We must give all things a reasonable construction. Here was an agreement that Terment should spend 85*l.*, according to specification, and we must take it that he did spend it, and that the house cost 85*l.*] Cases cited:

*R. v. Onley*, 1 M. & S. 387;

*R. v. Lydlinch*, 4 B. & Ad. 150.

WIGHTMAN, J.—It is only putting a reasonable construction upon this transaction, that in order to carry out the agreement referred to, 85*l.* should be spent. In consideration that A. would build a house according to specification, at a cost of 85*l.*, the landlord will grant a lease. The house is built, and the lease granted; it seems then that there was a consideration of 85*l.*, and unless we are prepared to say that money's value will not be sufficient to satisfy the statute, but that there must actually pass coin, that will do. Now it seems by the case of *Wendron v. Stithians*, that natural love and affection, or what may be called an equivalent for money, would not satisfy the statute; but here we have an actual expenditure. At first there appeared some difficulty in consequence of its not being stated what was the value; but it was found that the value of the rentcharge and the erection of the house was more than 30*l.* On the whole, I think it must be taken that the consideration was more than 30*l.*

MELLOR, J.—The facts of this case are unlike any of those in the decided cases. It must be taken, I think, that if the expenditure in *Wendron v. Stithians* had been more than 30*l.*, it would have been held sufficient; that seems so from the observations of Lord Campbell. Now, on the facts of this case, we must take it that 85*l.* was the sum actually expended. We must be careful not to extend presumptions; but here I think there is sufficient to enable us to come to the conclusion that there was a consideration of more than 30*l.* *Rule discharged.*

*Aldridge and Bromley, attorneys for resp.*

## COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYD, Esqrs., Barristers-at-Law.

### REGISTRATION APPEAL.

Tuesday, Nov. 18, 1862.

BIRKS (app.) v. ALLISON (resp.)

*Election law—County vote—Qualification—Chandos clause—Reform Act, 2 & 3 Will. 4, c. 45, s. 20—Registration Act, 6 & 7 Vict. c. 18, s. 40—"Tenant." A person entitled to vote for a county by virtue of the Chandos clause in the Reform Act, stated in column 3 of the list of voters, the "nature of his qualification" as simply "tenant," and the situation of the property as "Newstead Grange." It was objected before the revising barrister that the qualification as stated was insufficient in law, and that the nature of the qualification was insufficiently described for the purpose of identification; but he held that both were sufficient; he nevertheless amended the description, so as to make it "farm, as occupying tenant."*

*Held, that the revising barrister was right, and that he had power to make the amendment under sect. 40 of the Registration Act, 6 & 7 Vict. c. 18.*

This was an appeal from the decision of the revising barrister, at his court for the North Riding of Yorkshire.

### CASE.

At a court held at Pickering, on the 3rd Oct., before me, the revising barrister appointed to revise the list of voters for the North Riding of Yorkshire, William Brisby, whose name was on the list of voters for the township of Thornton, was duly objected to by John Birks.

The name of William Brisby stood thus upon the existing register, the copy of which, duly published by the overseers of the township, was revised by me.

### THORNTON.

Christian name and surname of each voter at full length.	Place of abode.	Nature of qualification.	Street, lane, or other line passed in this parish (or township), number of house (if any), where the property is situated, or name of the property if known by any, or name of the occupying tenant, or if the qualification consist of a rentcharge, then the names of the owners of the property out of which such rent is taken, or some of them, and the situation of the property.
Brisby, William.	Thornton.	Tenant.	Newstead Grange.

It was proved that the voter occupied a farm at Newstead Grange, and that, apart from the question of sufficient registration, he had a good qualification in respect thereof.

On behalf of the objector it was contended, first, that the qualification as stated in the list was insufficient in law to entitle the said William Brisby to vote; secondly, that the nature and description of the qualification in the list were insufficiently described for the purpose of being identified; thirdly, that I had not the power to amend the third column by changing "tenant" into "farm as occupying tenant." And, there-



fore, that I was bound to expunge the name of the said William Brisby from the list of voters.

I held, first, that the word "tenant" was commonly understood as designating a tenant occupying at a rent; secondly, that the qualification as stated in the list was sufficient in law; thirdly, that the nature and description of the qualification was sufficiently described for the purpose of being identified, that is to say, that by means of the entry in the copy register, and reasonable inquiry thereon, the actual qualification of the voter could be ascertained, and the particulars would be then found to be true. The same were not sufficiently described so as to exclude every other qualification as occupying tenant in the Newstead Grange than the actual qualification of the voter. Fourthly, that at any rate, for the purpose of more clearly and accurately defining the qualification as it appeared in the list, I had power to amend the third column by changing "tenant" into "farm as occupying tenant." At request made on behalf of the voter, I amended the third column accordingly, and allowed the name of the said William Brisby to remain on the list of voters settled by me, subject to the opinion of the Court of C. P.

On the same list of voters, the rights of thirteen other voters, whose names and qualifications are set out in schedule A. annexed to this case, and on the list of voters for the township of Farmanby, revised by me at the same court, the rights of the other voters whose names and qualifications are set out in schedule B., depended on like facts and findings, and were decided by me in the same manner and on the same point of law as the case of William Brisby. In each case, at the request of the voter, I amended the third column by changing "tenant" into "farm as occupying tenant," and I allowed the name of the voter to stand in the list of voters settled by me. I ordered the appeals to be consolidated, and I duly named John Birks, of the city of York, to be the app. in the consolidated appeal, and George Allison, of Darlington, in the county of Durham, to be the resp.

If the court is of opinion that the qualification of William Brisby, as stated in the list, as above described, was sufficient in law, and that I had power, in the circumstances stated by me, to amend the third column by changing "tenant" into "farm as occupying tenant," the name of William Brisby and the thirteen names contained in the schedule A. are to continue in the list of voters for the township of Thornton as settled by me, and the ten names contained in schedule B. are to continue in the list of voters for the township of Farmanby as settled by me. If the court is of opinion that the said qualification, as stated in the list, was insufficient in law, or that I had not power to amend the column as aforesaid, the name of William Brisby and the names contained in schedules A. and B. are to be expunged from the list of voters for the townships of Thornton and Farmanby respectively.

*Welsby* for app., cited

*Howitt v. Stephens*, 28 L. J. 105, C. P.

*T. E. Chitty*, for resp., referred to

*Wood v. Willadsen*, 2 C. B. 15.

ERLE, C. J.—The question in this case is, whether the revising barrister was right in making the column relating to the nature of the qualification correct. He was on the register, and was objected to, because the nature of his qualification was not sufficiently described, and under column three, for "nature of qualification" he described himself to be "tenant;" and under the fourth column, where the property is to be described, he described it "Newstead Grange." The objection was, that "tenant" is not a description of the class of qualification within the Reform Act. Now, the 2 Will. 4, c. 45, s. 20, specifies the several classes of qualification for voters for the county in respect of

freeholds, and in respect of leaseholds for sixty years and leaseholds for twenty years; and throughout that part of the section the word "lessee" is used, and then, at the close, the franchise is given to any person who shall occupy as tenant any lands for which he shall be liable to a rent of not less than 50*l.*; and it is a very forcible argument which was put forward by counsel, that affects all the classes of voters: he is but one of them, and is described by the name of tenant; and the voter here now before us, who was objected to, is described as of the class of voters to which "tenant" belongs. Is that sufficient, without specifying whether he claimed to be the occupying as tenant of lands for which he paid not less than 50*l.* per annum? Now, the purpose of the Reform Act was, in substance, to prevent its being defeated by the requirement of forms, as far as possible; and the barrister is to take the meaning of the parties as far as it can be fairly collected from the words that are used. The revising barrister finds the man describing in the third column that he claimed to be registered as tenant of the property in respect of which he claims. Was the revising barrister right in amending the description of "tenant," and saying "tenant of land to the value of 50*l.*?" I think it was in strict accordance with the intention of the statute. The 6 Vict. c. 18, s. 40 (the Registration Act), directs the revising barrister to correct any mistake which shall be proved to have been made, and directs that he is to expunge the name of any person whose qualification may not be sufficiently described; but if a description shall be given so as to satisfy him in respect of the qualification intended—if the qualification is named sufficiently to be identified, he may complete the register, and put in the description. The revising barrister has been of opinion that the word "tenant" did specify the class under which the party claimed, and under sect. 40 he has made the amendment. I am strongly of opinion with the barrister, and that he has complied with the intention of the statute. I should think, if it was necessary to go to the general power of amendment in sect. 101 of the 6 Vict. c. 18, there the same principle, and the intention of the statute, is clearly made out: "But no misnomer or inaccurate description of anything named in any schedule to this Act annexed, or in any list or register of voters, shall in anywise prevent or abridge the operation of this Act with respect to such place, provided that such place, person, or thing, shall be denominated so as to be commonly understood." I think it an argument of great force, that in common parlance the voters who vote as 50*l.* tenants would class themselves as tenant voters, which is what was done on the present occasion; and that is the decision of the barrister. The decision in the former case in this court in *Howitt v. Stephens*, 28 L.J. 150, C.B., is a direct authority for the course we are now taking; because "occupying at 50*l.* a-year" was an amendment that clearly was required to specify the class; at least it might be said "vote as a tenant" is almost as vague a description as "occupier at 50*l.* a-year," but more nearly within the statute, because the word "tenant" is specified within the statute for the class under which the claimant claims. I think also that this was within a good deal of the province, almost entirely within the province, of the revising barrister, according to the case of *Wood v. Willadsen*. I am of opinion the description is sufficient to enable him to specify what is intended. His judgment is to be final up to the case. Many of these cases are what may be called questions of fact which are to be finally disposed of, because they are questions of fact which are often sent up for the purpose of the case, as intimating what his view of the matter is; and in my opinion the revising barrister acted according to the law in making this amendment to complete the qualification.

C. B.]

WANSTEAD LOCAL BOARD OF HEALTH v. HILL.

[C. B.]

WILLIAMS, J.—I am entirely of the same opinion as to the objection that the word "tenant" is an insufficient description of the nature of the qualification, because "tenant," in its legal acceptation, may or may not mean tenant for a year, but may mean tenant in fee-simple, or a tenant of a freehold, it is an objection completely met by the fact that the statute itself clearly uses the word tenant in the sense of a lessee for years, or yearly tenant. There is nothing in that. I admit, strictly speaking, this description omits one of the things which is essential, indeed mainly essential, to the qualification. I mean that though he says he is tenant, he does not say he is occupying tenant, and though he may be a lessee for years, occupying under a landlord, and holding under a landlord, he may fairly be understood by the description of tenant, because that is the sense in which the word is used in the statute; but he has no qualification to vote unless he is not only tenant, but a tenant who occupies. The objection is perfectly true, that the description omits that which is essential to constitute the qualification. The answer to that is this, that the statute in the form 3 to schedule H gives types, as it were, of what is a sufficient compliance with the statute, and if the description the claimant gives is a sufficient description, comparing it with the specimens or examples given in the statute, that evidently will be enough. Now, in this very qualification the description given is exactly that given in No. 2 to the schedule H of the section of the Act Will. 4: it is "50 acres of land as occupier." He may have no vote at all, though he is the occupier. So, in the example immediately given below, "lease of warehouse for years," there an essential incident is wholly omitted. It is not because a man has a lease for years that he has a qualification to vote; it must be a lease for years where the annual value amounts to 10*l.*, and it is an essential to the qualification. In this case it is essential that he should be the occupying tenant. It seems to me that this description, quite as well as the examples to which I have been just adverting, enables the barrister and everybody else interested to know at once the nature of the qualification. Then I apprehend it makes no difference whether there is an objection taken or not; it is equally the duty of the barrister, under the 40th section of the Act, to amend the description and accurately define it as far as he can before he signs the list; and I apprehend the revising barrister in practice does so—where he sees and understands what the claimant means, he corrects or enlarges the description, whether there is an objection or no objection, in the absence of an objector merely doing his duty. If I had been the revising barrister I should have had no hesitation in correcting it at my own instance into "occupying as tenant of land," which he has rightly done here, and in effect taken the proper course.

BYLES, J.—I am also of the same opinion. Perhaps the description may be well enough as it stands. It is not necessary to decide that; but at all events I cannot entertain a doubt that the learned revising barrister has done perfectly right in altering it as he has done. Now, as a general rule in the construction of an Act of Parliament, I have always understood, unless there be something in the context to show a different sense, the Act is to be expounded according to the ordinary and popular sense of the words; surely, that ought to be especially so with an Act of Parliament that was intended when it passed for the enfranchisement of the nation, still more in that part of the Act which allows illiterate and uneducated persons to describe the nature of their claims. Now, the claimant is called here a "tenant;" I would put it to anybody whether in the ordinary and popular sense of that word, when you speak of a man as a tenant,

you do not generally understand it to mean that the claimant and those who occupy fall under this according to the amendment that has been made. But I was very much struck with the quotation from Webster's Dictionary, where he gives as the legitimate sense of the word "tenant," one who has the occupation and temporary possession of land or tenements whose title is in another. According to that, what this man has said is, "I claim as having the occupation or temporary possession of lands or tenements whose title is in another." That is the same thing as saying, "I am occupying tenant," and this was clearly held to be sufficient. In addition to that there is what has been suggested by Mr. Chitty, that the word "tenant" is not only used in the statute, but is used in this very list, "qualification," with the participle "occupying;" but still in this sense, besides what my Lord has said, it is used in sect. 20 of the original Act. I am disposed to think it was right as it stood, but I have not the least doubt it is right now. As to the observation of Mr. Welby, that qualification here requires reasonable inquiry, and *ex vi termini* is included in the word identification, as my Lord has pointed out, the responsibility of identification is with the revising barrister, and we have no fault to find with his decision.

KEATING, J.—I am of opinion that the revising barrister was quite right in this case. The object of this statute is provisional, to enable a man's neighbour to inquire whether he really has the qualification which he puts forward upon the register. Now could any of this voter's neighbours doubt for a single moment what he intended to claim for? Certainly not: therefore I am not surprised that the revising barrister should have found as a fact that this description as "tenant" was commonly understood to be "occupying tenant." I think nobody can doubt that was the meaning of the word, and as to the description, I think there would not be the slightest doubt. I think the revising barrister was correct, and if any amendment was required he was quite authorised to make it under the Act of Parliament.

*Judgment for the resp.*

*Trotter, attorney for the app.*

*Johnson and Wetheralls, attorneys for resp.*

*Friday, Nov. 21, 1862.*

WANSTEAD LOCAL BOARD OF HEALTH v. HILL.

*Brickmaking—Noxious and offensive trade—Public Health Act, 12 & 13 Vict. c. 63, s. 64.*

*By sect. 64 of 12 & 13 Vict. c. 63, it is enacted that the business of a blood-boiler, bone-boiler, fellmonger, slaughterer of cattle, horses, or animals of any description, soap-boiler, tallow-melter, tripe-boiler, or other noxious or offensive business, trade, or manufacture, shall not be newly established in any building or place after this Act is applied to the district in which such building or place is situate, without the consent of the local board of health, unless the said general board shall otherwise direct:*

*Held, that brickmaking is not a noxious and offensive business, trade, or manufacture, within the meaning of the above Act.*

This was an appeal against justices in Essex, they having dismissed a summons obtained by the apps. against the resp. under sect. 64 of 12 & 13 Vict. c. 63 (the Public Health Act), which enacts "that the business of a blood-boiler, bone-boiler, fellmonger, slaughterer of cattle, horses, or animals of any description, soap-boiler, tallow-melter, tripe-boiler, or other noxious or offensive trade or manufacture, shall not be newly established in any building or place after this Act is applied to the district in which such building or place is situate, without the consent of the local board of health, unless the general board shall otherwise

Ex.]

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[Ex.]

direct. And whosoever offends against this enactment shall be liable for each offence to a penalty of fifty pounds, and a further penalty of forty shillings for each day during which the offence is continued." &c. The resp. having set up the business of brickmaking within the district over which the board of health had control, was summoned under the 64th section of that Act for so doing, the particulars of which were set out at length in the case, but for the purpose of this case are not necessary, as the only question for the opinion of this court is, whether brickmaking is a "noxious or offensive trade or manufacture" within the meaning of the Act.

*Dowdennell* appeared for the apps., and cited

*Salter v. Ditchell*, 2 Sim. 733;

*Walter v. Selfe*, 4 De G. & S. 315;

*Hole v. Barlow*, 27 L. J. 207, C. P.;

*Bamford v. Turnley*, 31 L. J. 287, Ex. Ch.;  
6 L. T. Rep. N.S. 721.

ERLE, C. J.—In this case the resp. was proceeded against under the Public Health Act, for carrying on the business of a brickmaker, and the justices came to the conclusion that that business was not a noxious trade or manufacture within the meaning of the 64th section of that Act. The question left for us is, whether brickmaking was to be prohibited within the district of a board of health unless the leave of the local board of health has been given. I am of opinion that it was not. The statute has prohibited certain trades and manufactures connected with animal matter, and the question is, is brickmaking analogous to any of the trades specified? I am of opinion that it is not. It can be carried on so as to be no annoyance to any one, and is a proper use of land having clay, and therefore it is not within the statute.

WILLIAMS, J.—The question which we have to consider is not as to the manner in which this particular business was carried on, but whether the trade of brickmaking is in the abstract a trade which can be called noxious or offensive within the meaning of the Act, and I am of opinion that it is not.

WILLES, J.—I am of the same opinion. In *Hole v. Barlow* it was said that the reasonableness of the place where the business was carried on was to be taken into consideration; and the supreme court of judicature can still decide whether a person can be guilty of a nuisance who carries on a necessary trade under reasonable circumstances. In *Bamford v. Turnley* the opinions of the judges were conflicting. With regard to the present case it appears to me easy to hold that this business of brickmaking does not come within the words of the Act, for not only do all those trades mentioned in the Act deal in animal matter, but they are substances which in their nature without doing anything to them, must in process of time by putrefaction turn out to be a nuisance to the neighbourhood, and I need hardly say that brickmaking is not of that nature.

*Judgment for the resp.*

#### COURT OF EXCHEQUER.

Reported by F. BAILEY, and H. LEIGH, Esqrs., Barristers-at-Law.

May 28, 1862, and Jan. 29, 1863.

WELLOCK v. CONSTANTINE.

*Action for assault—Evidence proving rape—Action merged in the felony.*

*A person is not allowed to make, in the first instance, a felony the foundation of a civil action.*

*In an action for an assault, the evidence proved that the def. had committed a rape on the plt. The judge at the trial then considered the ground of complaint involved a charge of felony, and nonsuited the plt.: Held, that the nonsuit was rightly directed (Martin, B. dissentiente).*

This was an action for an assault, very aggravated in its kind, in which the plt., a young woman, complained of great violence being used towards her by the deft.

The declaration (dated 15th June 1861) stated that the deft. assaulted and beat the plt., and forcibly violated her person and debauched and carnally knew her, whereby the plt. became pregnant and has become ill, and has been delivered of a child, and has been prevented from earning her livelihood, and has become liable to maintain the said child; and the plt. claims 500*l*.

The cause was tried at York, before Willes, J., when the evidence proved, in the opinion of that learned judge, that a rape had been committed upon the plt. by the deft. The learned judge was of opinion that the wrong complained of, for which the civil remedy was now sought, involved a charge of felony, and the case ought to be tried as a criminal offence; he accordingly directed a nonsuit. A rule nisi was afterwards obtained to set aside the nonsuit, and for a new trial on the ground that there was evidence to be left to the jury of a cause of action, and also on the ground of misdirection in the learned judge's directing the jury that there was no cause of action.

PRICE, Q. C. showed cause.—The declaration in substance charged the deft. with rape, and it was proved; the learned judge at the trial said the plt. could only recover by proving a rape. The counsel for the plt. contended that the plt. was entitled to recover as for the preliminary assault before the rape was committed, but the judge said, if the plt. has proved anything, she has proved a rape; as the fact was. The wrong complained of in this action becomes merged, therefore, in the criminal charge; it is, in fact, compounding a felony, and "the action is merged in the felony." In *Stone v. Marsh*, 6 B. & C. 551, Lord Tenterden said, "There is a rule of law in England, viz. that a man shall not be allowed to make a felony the foundation of a civil action; he shall not sue the felon." In *Higgins's case*, cited by Hale, C. J. in *Dawkes v. Coveleigh*, Styles 347, trespass was brought by the husband for beating his wife, whereof she died, it was held that the action did not lie, because it was felony. Lord Hale's *Treatise on the Pleas of the Crown*, 546, and a *dictum* of Buller, J., in *Master v. Miller*, all show that the rule against maintaining a civil action for an act which amounts to a felony is founded upon principles of public policy. In *Crosby v. Leag*, 12 East, 413, Lord Ellenborough said: "The policy of the law requires that before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect to the public offence." [MARTIN, B.—Suppose the girl had said, "The man badly used me; he treated me very roughly," and avoided that part as to the violence against her will to prove the rape; is the judge not bound to try it?] A rape is here charged and proved. The following authorities and cases were referred to:—

Vin. Abr. tit. "Trespass," Y. 3, "In what cases and at what time trespass lies where the matter is felony;"

*Re Thompson*, 30 L. J. 19, M. C.;

2 Hawkins's Pleas of the Crown, heading "Indictment;"

Com. Dig. tit. "Action on the Case," and "Trespass" D.;

Noy's Maxims, last edit. 205;

*R v. Clarke*, 3 Cox's Crim. Cas. 481.

Occerend, Q. C. and T. Jones, contra, in support of the rule.—This case has been treated as one of rape, but it is not rape. It was not opened to the jury as one of rape; it was considered and treated as a violent

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aggravated assault, and it seemed clear to every one it was not a case of rape; the question then is, was there not some evidence to be left to the jury of an assault? The learned judge heard it and tried it; there was no felonious charge in the declaration. [POLLOCK, C. B.—There is no evidence showing it was not one entire thing. MARTIN, B.—Every allegation in the declaration being proved, can the judge then say, "That is a rape, and I direct a verdict for the deft.?"] If the judge had directed a verdict for the deft. instead of the nonsuit being assented in the ordinary way, the plt. would have been for ever barred. If the deft. had been indicted and a conviction or acquittal obtained on the criminal charge, no action would afterwards lie. The deft. might have pleaded in abatement or suspension that there had been no criminal prosecution first. [MARTIN, B.—Is there any such plea?] Hale's P. C. mentioned. Supposing there was a subsequent consent on the part of the plt. to the more serious charge, would the jury net be at liberty to say the deft. was guilty of an assault?

Cur. adv. vult.

Jan. 29.—POLLOCK, C. B. delivered judgment.—In this case there was a rule nisi to set aside a nonsuit, and for a new trial. The cause was tried at York, before my brother Willes, and upon evidence coming out from the plt., who was a young woman, complaining of personal violence to herself, and it appearing to the learned judge that there was evidence that a rape had been committed, he stopped the case and nonsuited the plt. The majority of the court are of opinion that the rule should be discharged. The ground upon which the nonsuit proceeded was, that after it appeared that the civil right, or rather the wrong complained of, and for which a civil remedy was sought by the action, involved a charge of felony, the proper course to take was not to go on with that inquiry, but to leave the matter to be tried as a criminal offence. My brother Martin differs so far as to enable the parties, if they think fit, to take the case to a court of error. In speaking of the decision of the court, I am stating what is the opinion I entertain, together with my brother Bramwell. My brothers Channell and Wilde, did not hear the case argued, and therefore take no part in the decision of the case.

Rule discharged.

Attorney for the plt., Mr. Henry T. Naters, 10, Clifford's-inn, for Henry Robinson.

Attorney for deft., Mr. H. B. Clark, 14, Serjeants'-inn, Fleet-street.

Monday, Jan. 19, 1863.

MOUNSEY v. ISMAY.

Custom—Horse-racing—Entry on land for purposes of horse-racing on Ascension-day.

A custom for the freemen or citizens of Carlisle to enter on Ascension-day upon certain land in an extra-parochial hamlet, near to the city of Carlisle, for the purpose of horse-racing, is a good custom.

Trespass.—Pleas: 1. Not guilty. 2. That from time whereof the memory of man runneth not to the contrary, on a certain day, to wit, on Holy Thursday, or Ascension-day, horse-races had been held, and of right ought to be held on the close in question, being a certain extra-parochial hamlet of Kingsmoor, near to the city of Carlisle, &c., and that there was a custom for freemen of the city of Carlisle to enter in and upon the close in question for the purpose of horse-racing, and that the deft. was a freeman of the city of Carlisle, and so justified the alleged trespass. 3. A justification by deft. as a citizen of Carlisle. 4. Custom for freemen (deft. being one) to enter on the land at reasonable times before the races to prepare, &c.

E. Temple, Q. C. (Crompton Hutton with him) for the plt. in support of the demurrer.

The plt.'s points were—that the 1st, 2nd, 3rd and

4th pleas are bad respectively, on the grounds—  
1. That the customs alleged in those pleas are unreasonable and bad. 2. That such customs being customs for the freemen or citizens of one place to do something in another place, are bad. 3. That the freemen and citizens being a collective body and members of a corporation, cannot claim otherwise than in right and in the name of the corporation. 4. That such customs, in order to be good, should be claimed for inhabitants only of the said city of Carlisle, and that as persons who are not inhabitants of the said city may be and are freemen and citizens of the said city, the customs as claimed are bad. 5. That the purposes for which such customs are claimed are not reasonable, nor for the necessary recreation of the inhabitants of the said city.

This alleged custom pleaded is bad; because such a custom, to be good, must be alleged to be at a seasonable time of the year, or shown to be so by dates; here it is the contrary, as the races are stated to take place on Holy Thursday, or Ascension-day, which must be at a time when crops are growing; a fact of which this court would take judicial notice. *Bell v. Wardell*, Willes Rep. 202, is a clear authority for the plt. See also *Millechamp v. Johnson and others*, in a note to *Bell v. Wardell*. [CHANNELL, B. referred to *Cocksedge v. Fanshaw*, 1 Doug. 132.] Another objection is, it is alleged to be in the freemen, without showing what freemen are intended. Again, "neighbourhood" is too general: (*Gateward's case*, 6 Rep. 374; *Chafin v. Betsworth*, 3 Lev. 190.) *Abbot v. Weely*, 1 Lev. 176, was a custom set up to dance every day on the plt.'s close, and was held good, but that was after verdict; and *Fitch v. Rawling*, 2 H. Bl. 394, was a custom for all inhabitants to play at cricket; but there it was alleged to be at seasonable times; both these latter cases are therefore distinguishable.

Mellish, Q. C. (*J. B. Mawle* with him), for deft., was not called upon, the Court intimating that should it be necessary to hear him, he would be required to argue it hereafter.

The deft.'s points were:—1. That the customs set out are good and reasonable. 2. That the fact of the customs being for the freemen or the citizens of one place to do something in a neighbouring place, makes no difference in the validity of the custom.

Cur. adv. vult.

Jan. 20.—POLLOCK, C. B. delivered judgment.—In this case in the special paper which was argued yesterday we stopped Mr. Mellish that we might hear him if we thought it necessary to do so, but we do not think it necessary to hear him. It was an action of trespass, and the plea in substance was, that there was a custom in Carlisle for freemen of Carlisle to exercise certain sports on Ascension-day, commonly called Holy Thursday, at a place named in the neighbourhood of Carlisle. The question was whether it was a good custom or not? On the part of the plt. the custom was demurred to, and Mr. Temple argued for the plt. that the custom was bad, and seemed to think the case of *Bell v. Wardell* coupled with the explanation given in another case clearly proved that the custom was bad; but the court upon the whole is of opinion that the custom as pleaded is good, and that the deft. is entitled to judgment. The custom alleged in the plea was a custom confined to a particular day. It was argued that the allegation of such a custom was bad on demurrer, unless the plea showed, which this plea did not show, that the particular day was a seasonable day. The case of *Millechamp v. Johnson* referred to in a note to the case of *Bell v. Wardell*, in Willes' Rep. 205, was cited as an authority against this plea. It was there held that a custom alleged to enjoy rural sports and so on at all times, must be intended after verdict to have been good; that it must be taken to mean legal and reasonable at all times,

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thereby implying, it was argued, that the description of the period "legal and reasonable" was necessary to make the custom good. There were other cases cited in *Bell v. Wardell*, and *Fitch v. Rawling* is alluded to, which is in the 2 H. Bl. 393. The custom was alleged as for all seasonable times; the word "seasonable" occurred in the plea, and therefore that does not decide anything as to the necessity of such an allegation. But the case of *Abbot v. Weely*, in 1 Lev. 176, was cited, in which the allegation of the custom to dance, &c. was alleged at all times without any qualification, and this was distinctly held to be good, although not restrained by a seasonable time. No authority is cited for the proposition, that in the case of a custom like the present, which was alleged for a day certain, it was necessary to allege further that the day was a seasonable day; our opinion is, therefore, that the plea is good, and that our judgment should be for the deft.

MARTIN, B.—The only addition I have to make to the case is, that it is perfectly clear the case in Willes' Rep. has been misunderstood, and that this usage, or any usage or custom similar, is a good custom. In 2 Bl. Com. 293, in the text, it is expressly stated that that case in Levinz was good law, and it is also stated that such a custom is lawful; therefore there can be no doubt, assuming the case in Willes was contradictory to this, that the case in Levinz, followed by the case of *Fitch v. Rawling*, 2 H. Bl. 393, shows it to be good. I think a good deal might be said to show that the judgment in the case in Willes was given under an error; for, to be a good custom at all, it must be a custom which existed from the time of Richard I., and the circumstance of the land for which the custom was to be used being pasture or arable was a thing impossible to ascertain. I think it follows that the custom must be decided by the state of things at the time, and the circumstance of it being in pasture must be very immaterial, whether the custom was good or not.

*Judgment for deft.*

Attorney for plt., *G. Capes*, Gray's-inn.

Attorneys for deft., *Mounsey and Gray*, 9, Staple-inn.

### EXCHEQUER CHAMBER.

Reported by W. MAYN, Esq., Barrister-at-Law.

Wednesday, Feb. 4, 1863.

(Before POLLOCK, C.B., MARTIN and WILDE, BB., and CROMPTON, BLACKBURN, and MELLOR, JJ.)

BLADES v. HIGGS.

*Game—Animals fera natura—Right of property in after killed.*

*The plt. brought an action of trover for certain dead rabbits, which he had bought from poachers, who had taken them on the land of E., and which rabbits were subsequently retaken by E.'s servants: Held, that, according to the authority of Lord Lonsdale v. Rigg, the rabbits were the property of the person upon whose land they were started and killed.*

This was an appeal from the decision of the Court of C. B.

The declaration stated that the defts. converted to their own use, and wrongfully deprived the plt. of the use and possession of the plt.'s goods, that is to say, rabbits and dead rabbits.

Second count, that the defts. assaulted, and beat, and pushed about the plt., and took from the plt. the plt.'s goods, that is to say, rabbits and dead rabbits.

Pleas:—1. Not guilty. 2. That the goods were not the plt.'s as alleged. 3. As to the assaulting, beating, and pushing the plt., that the plt. at the said time when, &c. had wrongfully in his possession certain

dead rabbits of and belonging to the Marquis of Exeter, and the said rabbits were then in the possession of the plt. without leave and license and against the will of the said Marquis, and the plt. was about wrongfully and unlawfully to take and carry away the said rabbits and convert the same to his own use, whereupon the defts. as the servants of the said Marquis, and by his command, requested the plt. to refrain from carrying away and converting the said rabbits, and to quit possession thereof to the defts., as such servants, which the plt. refused to do, and thereupon the defts. as servants of the said Marquis of Exeter and by his command, gently laid their hands upon the plt. and took the said rabbits from him, using no more force than necessary, which were the alleged trespasses.

The cause was tried at Leicester before Willes, J.

The action was brought by a fishmonger and licensed dealer in game, residing at Stamford, against two servants of the Marquis of Exeter to recover damages for taking out of his possession ninety dead rabbits.

On the 16th Oct. 1860, two men left at the Ketton station of the Peterborough branch of the Midland Railway, a couple of bags addressed to the plt. The deft. Percival saw the bags there, and on examining them found that they contained a number of rabbits, recently killed. The bags were directed by the men who left them to be sent to Stamford, by the first train, and having obtained this information Percival went to the deft. Higgs, and having fetched a police constable, all three went to the Stamford railway station, where they found the plt. waiting for the train, which shortly afterwards arrived from Ketton. The luggage-van being opened the plt. went up and claimed the bags. The defts. also claimed the bags in the name of the Marquis of Exeter, and after some altercation they emptied the bags and took the ninety dead rabbits.

Upon investigation it was found that the men had been on the land of the Marquis of Exeter during the night, and had netted the rabbits.

The defts. did not deny the taking the rabbits; but relied upon the fact that the rabbits were taken from the Marquis of Exeter, and, therefore, that they were his property. The learned judge, however, in summing up, told the jury that the captor of wild animals had a right of property in them wheresoever they were taken; and that the plt. was entitled to the rabbits. The jury therefore found a verdict for the plt. A rule was obtained calling on the plt. to show cause why this verdict should not be set aside and a new trial had on the ground of misdirection. The court made the rule absolute, Williams, J. saying, "we are bound by the authority of *Lord Lonsdale v. Rigg*, 1 H. & W. 923, and 26 L. J., Ex. Ch. 196. The Court of Ex. Ch. considered and decided this precise point, and decided against the argument the plt. is now making. It is true that in the Court of Ex. Ch. this point was not argued; but that is because ever since the case of *Sutton v. Moodey*, 1 Lord Raym. 251, nobody has treated it as one that was disputable."

Hayes, Serjt. (*Beasley* with him) for the plt.—[BLACKBURN, J.—How do you distinguish this case from that of *Lord Lonsdale v. Rigg*?] It is distinguishable. The point was not argued there, the question in dispute was as to the right of sporting. [POLLOCK, C.B.—You had better go to the H. of L.] *Sutton v. Moodey* is a *dictum* only. It is laid down in all the old authorities that game is not the property of the owner of the land. In *Lord Lonsdale v. Rigg* the substantial question was as to who was the owner of the land, and the question of game was only an incident in the case, and the ownership of the grouse as distinct from that of the land was not argued by counsel. [By the COURT.—That is not so. The question as to

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whom the game belonged was determined in that case.] No authority was cited by Mr. Hill to show that the property in the grouse was in Lord Lonsdale. [BLACKBURN, J.—I apprehend the apples when severed from my tree are mine; so also is coal, &c. The severed thing is the property of the owner of the soil, and it is no argument to say that larceny cannot be supported.] Larceny cannot be committed of animals *feræ naturæ*: (Hall's P. of C. 510; 7 C. Rep. 156, p. 18.) If the rabbit was killed by the person who took it I contend that the property was in him: (*Holstan's case*, 5 Rep. 211.) [BLACKBURN, J.—What was the property according to Lord Coke in the young hawks?] As long as they could not get off the land they were in the same state as if they were reclaimed, *ratione impotentia*. He also referred to

Com. Dig. 3, tit. Chase, II. Warren;  
*Hanman v. Mockett*, 2 B. & Cr. 894;  
 Cro. Cas. 553;  
 43 Edw. 3, Pla. 24;  
 4 Bl. Com. 44.

POLLOCK, C. B.—I believe we are all of opinion that the judgment of the court below must be affirmed. Whatever we may privately think upon the subject, it is not competent to us to do anything but affirm the judgment. There is a case directly in point in this court—it may be it was not argued at great length when the matter was before the court, but it was taken for granted, not because the two parties to the action agreed that that should be the law, but it was decided upon the ground of a decision to that effect in 1 Ld. Raym. Rep., where the express point was decided, and the court is disposed to stand upon that authority, and in the case of *Lord Lonsdale v. Rigg* the Court of Error came to the same conclusion. If, therefore, this matter is to be any longer discussed, it must be discussed in some other court than the Court of Ex. Ch. For these reasons we think the judgment of the court below ought to be affirmed.

MARTIN, B.—I can assure my brother Hayes he is in error in supposing this matter was not considered in the case of *Lord Lonsdale v. Rigg*. I can speak personally of it, and I could not have investigated the matter more than I did; and it seems to me that the judgment in that case was in conformity to all reason and good sense, and one which, if it had been acted upon by persons who are desirous of preserving their game, would afford much better protection than is given to them by the Acts of Parliament. I am quite satisfied with the judgment given by Lord Holt, which, in my opinion, would afford much better protection to individuals so situated than looking to any crude expressions that are so often to be found in the Acts of Parliament.

BLACKBURN, J.—I am of the same opinion. I will only just point out this. It appears to me in the case of *Lord Lonsdale v. Rigg*, that my brother Hayes is mistaken in assuming that the point was not carefully considered in that case, and brought forward. My brother Martin, in the judgment he gave in the court below, says: "The second count is trover for dead grouse of the plt. The third is for disturbance of the plt.'s exclusive right of shooting and killing grouse on Bretherdale-bank. The pleas are—1. Not guilty to the whole declaration. 2. To the first count, land not the plt.'s; 3. *Liberum tenementum* in deft. 4. To the third count, traverse of the plt.'s exclusive right. It was observed in the argument that there was no plea denying the plt.'s property in the grouse mentioned in the second count. This was clearly an oversight in the deft.'s pleader, and it was stated by the learned counsel for the plt. that it was his object to obtain a judgment upon the right, and that the property in the dead grouse might be considered as traversed by the plea of not guilty." So that the

point was there put in the beginning of the judgment delivered by the judges. Then Platt, B. (who gives the next judgment in the case) cites the case of *Sutton v. Moody*, and says at the conclusion of his judgment: "Here, the grouse being pursued and killed within the Bretherdale-bank, if I am right in saying it was the lord's soil, the possessory right was in Lord Lonsdale in that grouse, and when it was shot and fell to the ground the property was complete in him." It is not, as my brother Hayes says, a dictum of Platt, B.; it was the judgment he gives on the second point in question—the point now in issue. Then Alderson, B. says: "As to the second point, I do not believe that we entertain any difference of opinion. There is no claim of free warren set up by the plt. The property in the grouse shot by the deft. is not, therefore, by anything stated in this case shown to be in the plt., which is the point in issue; that is, I mean of grouse separate from the land, unless the plt. is himself solely entitled to the right in the land." Alderson, B. therefore clearly made it a part of his judgment that the right to the property in the grouse depended on the title to the land; and the Chief Baron, who did not deliver any judgment separately, is said to have concurred in Alderson, B.'s judgment. So that all four judges in the Court of Ex. considered the point taken at the bar, and delivered a direct judgment upon it. Then, as to its not being decided upon appeal to the Court of Error, my brother Hayes is mistaken; for that court did not pass it by in silence, but distinctly decided that, according to all the authorities, the property in this grouse was in the plt., and therefore that the second count was sustained.

WILDE, B.—I wish to add a few words to the judgment already delivered, as I think the doctrine of animals *feræ naturæ* has, in these days, been sometimes pushed too far. It has been argued in this case that an animal *feræ naturæ* could not be the subject of independent property; but this is not so, for the common law has affirmed a right of property in animals even though they were *feræ naturæ*, if they were restrained, either by habit or inclosure, within the bounds of the owner. We have the authority of Lord Coke's report for this right in respect of wild animals, such as hawks, deer and game reclaimed, as swans or fish, if kept in a private moat or pond, or doves in a dove-cot, &c. But the right of property is not absolute, for if such deer, fowls, &c. attain their wild condition again, the property in them is said to be lost. In the old times, the cases of property in game would be few, but inclosures and the habits of modern times make a great change in the character of game in respect of its wildness and wandering nature. And there is a vast quantity of game in this country which never stirs from the inclosed property of the proprietors, by whose care it is raised and on whose land it is sustained. It is, I think, too late now for the courts of law to meet this change of circumstances by declaring property in live game; but if the Legislature should interfere, as was suggested in argument, by giving to the owner of the land property in game, either absolute or qualified, so long as it remained on his land, it would be a decision in the spirit of justice and policy of the common law.

*Judgment of the court below affirmed.*

Attorney for the deft., R. Peacock, for Thompson and Phillips, Stamford.

Q. B.]

REG. V. JUSTICES OF SURREY AND R. MAY.

[Q. B.]

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HERTSLET, Esqrs., Barristers-at-Law.

Friday, Jan. 30.

REG. V. JUSTICES OF SURREY AND R. MAY.

*Church-rate—Local Act—New parish created under Lord Blandford's Act—Vestry meeting—Poll on motion for church-rate and amendment.*

By the 53 Geo. 3, c. clxii., the parish of St. Giles, Camberwell, is empowered to make a church-rate, and sect. 51 gives an appeal to persons aggrieved to the quarter sessions. Since that time certain districts of the parish have become separate and distinct parishes for all ecclesiastical purposes under the 6 & 7 Vict. c. 37, and are not now included in the church-rates for the parish of St. Giles, Camberwell:

Held, that the 53 Geo. 3 still continued in force, and regulated church-rates for the part of the parish of St. Giles, Camberwell, not within such districts and new parishes.

A vestry meeting was summoned to make a church-rate, and all propositions and amendments were desired, by the notice, to be made at that meeting, that the poll (which was to take place at an adjourned meeting) might be taken on all at the same time. At the meeting a church-rate of 2d. in the pound was proposed, and the only amendment proposed was, "That no rate be granted." At the adjourned meeting for taking the poll those in favour of the rate were to vote at one place, and those in favour of the amendment at another place, and there being a majority in favour of the rate the chairman declared the rate carried and refused to entertain any further amendment about to be proposed:

Held, that the poll was properly taken under the circumstances.

Rule nisi calling on certain justices of the county of Surrey and R. May to show cause why a distress-warrant should not issue for levying 1l. 6s. 8d. due by him on account of a church-rate made for the parish of St. Giles, Camberwell, on the 4th July 1861.

In the notice for summoning the vestry to make a church-rate, it was stated "a show of hands will be taken on each proposition or amendment which may then be submitted to the meeting, and if a poll should be demanded it will extend to the whole parish (except certain districts named, including Peckham) and the meeting will be adjourned to the 8th July, for the purpose of taking the poll, and the polling will then be taken on all the propositions and amendments made at such meeting, at one and the same time, and the results thereof shall be final and conclusive."

At the meeting on the 4th July, held in pursuance of that notice, a resolution was duly moved, and seconded, "That a rate of 2d. in the pound be and is hereby made for the purpose of repairing the fabric of the parish church." It was thereupon duly moved and seconded as an amendment to the motion, "That no rate be granted." The chairman then called for a show of hands, when there appeared,

For the amendment ..... 192  
For the motion ..... 93

Majority for the amendment ..... 99

A poll of the parish (except the districts mentioned) was duly demanded, and the vestry was adjourned to the 8th July. No other motion or amendment than those above specified was proposed to the vestry or mentioned to the chairman. On the 8th July the adjourned vestry was held to take the poll on the motion and on the amendment, when the numbers taken were,

For the motion ..... 981  
For the amendment ..... 873

Majority for the motion ..... 108  
and therefore the then chairman declared the motion carried.

The rate in question was made in pursuance of this resolution upon the inhabitants and occupiers of the parish except the districts above mentioned.

Mr. May was assessed upon the rate at the sum of 1l. 6s. 8d., which, having been demanded, he was summoned to pay. At the hearing his attorney proposed to prove that one or more ratepayers after the poll had been taken were prepared to move a further amendment, but were unable to do so by reason of the churchwarden immediately leaving the chair. The justices, however, decided that, as the rate was good on its face, they ought not to receive the proposed evidence.

The attorney then demanded a case under the 20 & 21 Vict. c. 43, but this the justices declined to sign, on the ground that they had no power to do so, and a rule having been applied for to compel them to do so, this Court refused such rule: (*Ex parte May*, 31 L. J. 161, M. C.)

The justices were again applied to to issue their warrant of distress, but declined to do so. In Michaelmas Term last this rule was obtained. There were contradictory affidavits as to the precise form in which the question had been put, but it appeared it had been put thus: "Those who were for the motion vote here; those who are for the amendment vote there."

Mellish and Dr. Foster showed cause.—The rate was under the local Act, 53 Geo. 3, c. clxii. That related to the whole parish of Camberwell. Since that time several parishes have been carved out of the old parish of Camberwell under Lord Blandford's Act for ecclesiastical purposes. Those parishes are not included in this church-rate. The first question is, whether under these circumstances the local Act continues to apply. It is contended that that Act only applies to rates made over the entire area of the parish of Camberwell as it existed at the time of its passing. Secondly, it is objected that the poll was improperly taken. The inhabitants had only an opportunity of voting for the rate or against it. There might have been many who would have preferred a penny rate. Again, the original proposition ought to have been put *simpliciter* after the amendment had been negatived, and in that case a smaller rate might have been proposed and carried: (*Ell v. The Burial Board of Islington*, 1 Kay, 449.) It did not follow because the amendment was negatived that there should be a two-penny rate. The cases of

*Ex parte May*, 31 L. J. 161, M. C. ;

*Gosling v. Veley*, H. of L. Cas.

*Lush* (Foot with him) in support of the rule.—The mode adopted of taking the poll was the only practicable one. The parish officers invited all the amendments to be made at the meeting, that the poll might be taken on all at the same time. By the mode suggested on the other side successive amendments might be made one after another *ad infinitum*, so that practically no rate could ever be made. The course pursued was sanctioned by this Court in *Ex parte Stevens*, 16 J. P. 632 (Easter Term 1852). Secondly, the local Act still exists and applies to this rate. To hold that it is repealed because a part of the parish is taken away and formed into a new parish under Lord Blandford's Act, would be entirely contrary to the spirit and intention of that Act.

COCKBURN, C. J.—I am of opinion that the rule should be made absolute in this case. Two questions have arisen. First, whether, since the local Act, portions of the parish having been separated from it and formed into separate parishes for ecclesiastical pur-

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OVERSEERS OF SALFORD v. OVERSEERS OF MANCHESTER.

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poses under Lord Blandford's Act, the local Act remains in force for the main body of the parish? Upon that I entertain no doubt that the previous existing law continues as to the part of the parish which is left. The second question was, as to the mode in which the sense of the parishioners was taken on the question of a rate? There was no objection on the part of any of the parishioners as to the mode in which it was taken with a view to the intermediate question. This was an afterthought, when the parties were before the justices. A proposition for a twopenny rate was made to the vestry meeting, and an objection was then made and proposed to there being any church-rate at all. There was no need for any amount at all, and it was competent to the objectors to meet the proposition for a rate by a direct negative. The meeting was adjourned for taking a poll on that proposition and the amount. The only questions before the meeting were, a twopenny rate or no rate at all. Upon those questions a majority was in favour of the rate. Convenience prescribes that before the poll is taken all the propositions should be before the meeting. If, when the poll was taken, another amount might have been proposed instead of 2d., the proceedings might have gone on *ad infinitum*. I can see no substantial objection to this proceeding, and I think the correct rule was laid down in *Ex parte May*.

WIGHTMAN, J.—I am of the same opinion. The only doubt I had was as to the mode of taking the poll; but the whole course of proceeding shows that, at the time, the only question was, whether any rate at all should be made, and that the amount was not the matter in dispute. After the time had gone by for proposing a rate of a different amount, some one asked that this intermediate course should be pursued. Such a mode of proceeding would be interminable.

CROMPTON and BLACKBURN, JJ. concurred.

*Rule absolute.*

Friday, Feb. 13, 1863.

OVERSEERS OF SALFORD v. OVERSEERS OF MANCHESTER.

*Removal of pauper—Order—Irremovability*—9 & 10 Vict. c. 66—24 & 25 Vict. c. 55.

The 24 & 25 Vict. c. 55, was passed on the 1st Aug. 1861: it provides that after the 25th March next the period of three years shall be substituted for five years, specified in the 1st section of 9 & 10 Vict. c. 66, which enacted that no person should be removed, nor should any warrant be granted for the removal, of any person from any parish in which such person shall have resided for five years next before the application for the warrant. An order of removal of a pauper to his place of settlement was made on the 12th March 1862, but he was not removed until after the 25th March, and he had resided more than three years in the parish which obtained the order:

Held, that the parish obtaining the order was not entitled to an order against the parish of settlement under the 4 & 5 Will. 4, c. 76, s. 84, for the costs of maintaining the pauper from the time of the notice of chargeability.

This was a case on appeal from a decision of the stipendiary magistrate at Manchester, refusing to make an order on the resp. for the costs of the maintenance of a pauper under 4 & 5 Will. 4, c. 76, s. 84, and the question was, how far the Irremovable Poor Act, 24 & 25 Vict. c. 55, had a prospective or a retrospective effect. The Act in question was passed on the 1st Aug. 1861, and by the 1st section it provides, "that after the 25th day of March next, the period of three years shall be substituted for that of five years, specified in the 1st section of the statute 9 & 10 Vict. c. 66," which statute enacted, "that no person shall be removed, nor shall any warrant be

granted for the removal of any person from any parish in which such person shall have resided for five years next before the application for the warrant."

An order of removal was made on the 12th March 1862, after the passing of the 24 & 25 Vict. c. 55, but before it came into operation, and the removal of the pauper from the app. to the resp. parish did not take place until after the Act had come into operation, and he had then resided for more than three years in the app. parish. The question therefore arose, whether, as the order of removal was valid at the time it was made, the app. parish was entitled to an order under the 4 & 5 Will. 4, c. 76, s. 84, as against the resp. parish, for the costs of the relief and maintenance of the pauper from the time that notice of chargeability was given.

*Welsby* for the apps.

*Monk*, Q. C., contra, cited:

*Reg. v. Middlesex*, 16 L. J. 135, M. C.;

*Reg. v. St. Mary, Whitechapel*, 17 L. J. 172, M. C.;

*Reg. v. Glossop*, 12 Q. B. 117; 17 L. J. 171, M. C.

*Welsby* replied.

WIGHTMAN, J.—The *Whitechapel* case seems very much in point; it is substantially the same question: the authorities appear to me conclusive.

MELLOR, J. concurred. *Judgment for resp.*

REG. v. BARTON-UPON-IRWELL.

*Settlement—Apprenticeship.*

An apprentice was bound for five years by indenture dated 29th Sept. 1845, the master to pay him wages and his father to find him board and lodging. The master's works closed at two o'clock on Saturday afternoon; the apprentice during the whole of the term sleeping at lodgings in A., except Saturdays and occasionally Sundays, when he slept at his father's in B.; but having married a year before the expiration of his apprenticeship, he afterwards went to sleep at his father-in-law's, also in B. For the last eighteen months or two years of the term of his apprenticeship he occupied a lodging in A. upon the understanding that he should not sleep there on Saturday nights, and there he slept on the night of Friday, the 27th Sept. 1850, and on the following afternoon as usual he went to B., and on the Monday he returned to his work, at which he continued for a week, when he left:

Held, that the sleeping at B. on the Saturday nights was a matter of necessity and not one of recreation or enjoyment, and that he therefore gained a settlement there.

CASE.

Charles Kay, the husband of Sarah Kay, was, by indenture, bearing date 29th Sept. 1845, bound apprentice to Messrs. Nasmyth and Co., of Patricroft, in the township of Barton-upon-Irwell, engineers and ironfounders, for the term of five years from the day of the indenture. The indenture contained a covenant on the part of the masters to pay the apprentice certain weekly wages, and a covenant by the apprentice's father to provide him with board and lodging during the continuance of the apprenticeship. Kay entered the service of Messrs. Nasmyth immediately after the execution of the indenture, and continued in their service for the full term of five years, in manner hereinafter mentioned.

On each Saturday during the whole of the term of the apprenticeship Messrs. Nasmyth's works closed at two in the afternoon. This is the hour at which it is usual for works of a similar description in the neighbourhood of Barton-upon-Irwell to close on the Saturday. Throughout the term of the apprenticeship Kay resided and slept every night, except Saturday and



occasionally Sunday, at lodgings in Barton-upon-Irwell, first at a house in King-street, next at a house in Vicar-street, and lastly at the house of a woman named Nancy Chadwick, hereinafter mentioned. On each Saturday, after leaving work, as aforesaid, he regularly went, until shortly after his marriage, to the house of his father, who lived in Manchester, about six miles from Patricroft; here he slept on the Saturday night regularly, and occasionally on the Sunday night also, and returned to his work, at Patricroft, on the Monday morning.

Shortly after Kay's marriage, which took place about a year before the expiration of the term of his apprenticeship, he used to sleep at his father-in-law's house instead of his own father's on the Saturday nights and occasionally on the Sunday nights also. The father-in-law, however, lived in Manchester, as well as the father. For the last eighteen months or two years of the term, Kay lodged at the said Nancy Chadwick's. The lodgings were taken by Kay himself at 2s per week; but at the time of the arrangement Nancy Chadwick stipulated that Kay should not sleep at her house on the Saturday nights, as members of her own family came over to see her on that day, and she required the room he occupied for them that night. This arrangement suiting both parties, was agreed to by Charles Kay.

Charles Kay slept at his lodgings in Patricroft on the night of Friday, 27th Sept. 1850, and about two in the afternoon of the following Saturday he left off work and went to Manchester to sleep, and slept there that night and also on the following Sunday night.

On the following Monday morning Kay returned to Messrs. Nasmyth's, and worked one week at the same rate of wages, and then left. Altogether Kay slept more than forty nights in Patricroft, and more than forty nights in Manchester.

In the month of August last Kay deserted his wife Sarah Ann Kay and his family, and left them chargeable to the township of Hulme, where they were residing at the time of his desertion.

The overseers of Hulme then took out an order for the removal of Sarah Ann Kay and her children to Barton-upon-Irwell. This order was appealed against, and the appeal came on to be tried before me, sitting as deputy for the recorder of Manchester, at the quarter sessions for that city in April last.

On behalf of the apps. it was contended that the night of the 28th Sept. 1850 was the night of the last day of the apprenticeship, and that, as the pauper's husband slept in the township of Manchester on that night, he consequently gained a settlement there.

On the part of the resp. it was denied that the apprenticeship was subsisting on the night of the 28th Sept. 1850, and (if it was subsisting) that though in fact the pauper's husband did sleep in Manchester on the night of each Saturday, and on the night of the Saturday which was the last day of the apprenticeship, such residence had no reference to and was not in furtherance of his apprenticeship, and that therefore no settlement in Manchester was gained.

I entertained the view taken by the resps. and confirmed the order, subject to the above case, which I now state for the opinion of this court.

If the court should be of opinion that the view taken by the resps. was the correct one, then the orders of justices and the order of sessions are to stand; otherwise they are respectively to be quashed.

(Signed) J. MONK.

*Hopwood*, for the resps., showed cause against a rule to quash the order of sessions for the removal of Ann Kay and her five children from Hulme to Manchester. The apprenticeship expired, and the relationship of master and apprentice was at an end when Kay left his work at two o'clock on Saturday, the 28th Sept. 1850. It is true that he came on the following

Monday, but not as an apprentice. His residence out of the parish was an indulgence, and was in no way referable to his apprenticeship, for binding and inhabitation are both requisite to give a settlement:

3 Will. & M. c. 11, s. 8;

*R. v. Ribchester*, 2 M. & S. 135;

*R. v. Banbury*, 3 B. & Ad. 706;

*R. v. Ilkeston*, 4 B. & C. 64.

The last-named case is a direct authority; the two last cases were not cited in *R. v. Elswick*, J. P. 1860, and that case is distinguishable. If the master knows of and consents to the absence of the apprentice, then it is considered as having reference to the apprenticeship.

*Crompton Hutton*, contra, for the apps.—This is not to be taken as either an indulgence or as a necessity; his lodging at Nancy Chadwick's was a necessity.

WIGHTMAN, J.—The question in this case is, which of these two parishes is the place of settlement, and that depends upon where he slept the last night of his apprenticeship. Now, he certainly slept the last night in Manchester, but it is contended that his work ceased at two o'clock on Saturday, and that that was the termination of his apprenticeship. This case is clearly distinguishable from *R. v. Ribchester*; there was a breach of the articles of apprenticeship. The present case is different, but the main question is, whether the sleeping on the night of the 28th Sept. in Manchester was a residing in Manchester in furtherance of the apprenticeship, or whether it was merely a sleeping there for recreation, without any occasion, necessity, or requirement. The case is within the principle of *R. v. Ilkeston*, 4 B. & C. 64, and that case is not inconsistent with the other cases referred to; there the apprentice lived and worked with his master in the parish of Ilkeston, and he went home to his father's, in the parish of Radford, every Saturday, and slept there on Sunday nights (with the master's leave), and returned to work on Monday morning; and having returned and worked as usual on a Monday, the apprentice left his master in the evening and never returned: and it was held that the sleeping in Radford being merely by way of indulgence, and not for the purposes of the apprenticeship, was not sufficient to confer a settlement. Abbott, C.J. there said: "There may, indeed, be cases, and some such have arisen, where an inhabitation in a parish different from that in which the master resides may be in furtherance of the service; for instance, where a master cannot take an apprentice into his own house, and appoints or allows him to choose a residence in another parish, so that he may return to work every morning." Now, in the present case, for five nights the apprentice slept at Nancy Chadwick's, and on the other two nights he was obliged to find lodgings elsewhere; that was not a matter of recreation or mere indulgence, it was a matter of necessity. The master did not lodge him or care where he lodged, so that he came to his work; and Bayley, J., in 4 B. & C. p. 68, says: "Where the master appoints no place for the pauper to sleep, or appoints a place out of the parish where the service is performed, a settlement is gained in the parish where the apprentice sleeps. . . But if an apprentice in general resides with his master, and is allowed once a week as an indulgence to visit his parents in another parish, he does not lodge there as an apprentice." That seems to me exactly applicable to this case. The apps. therefore are entitled to our judgment.

MILLOU, J.—It seems to me that this case is to be distinguished from *R. v. Elswick*, and that it is in fact determined by *R. v. Ilkeston*.

*Judgment for apps.*

*Johnson and Weatheralls*, attorneys for resps.

V.C. S.]

BIDDULPH v. VESTRY OF ST. GEORGE, HANOVER-SQUARE.

[V.C. S.]

## V. O. STUART'S COURT.

Reported by JAMES B. DAVIDSON, Esq., of Lincoln's-inn,  
Barrister-at-Law.

Thursday, March 12, 1863.

BIDDULPH v. THE VESTRY OF ST. GEORGE,  
HANOVER SQUARE.*Injunction—Erection of urinal—Metropolis Local  
Management Act—Powers of vestry—Nuisance.**By the 88th section of the Metropolis Local Manage-  
ment Act it is enacted that "it shall be lawful" for  
vestries to provide and maintain urinals, &c., "in  
situations where they deem such accommodation to be  
required."**Defts., a metropolitan vestry, having resolved to  
erect a urinal in a place where the plt. and other  
occupiers of houses in the neighbourhood objected to  
it as a private nuisance, the defts. contended that  
every urinal is a public nuisance, and that under  
the above clause they were empowered to establish  
such an erection at their own absolute discretion for  
the accommodation of the public:**Held, that the Act confers no power for the erection  
of that which shall be a nuisance to any one.**Defts. further contended that they were suppressing  
rather than creating a nuisance by the work in  
question:**Held, that the Act gives vestries no power to suppress  
nuisances; hence it became unnecessary to consider  
whether or not, as the plt. contended, this was the  
substitution of a greater nuisance for an existing  
one:**Held, further, that the clause confers no arbitrary  
power upon vestries; and inasmuch as this appeared  
to be an arbitrary exercise of power, an injunction  
was granted to restrain the construction of the work  
in question.*

This bill was filed by Col. Robert Myddelton Bid-  
dolph, for the purpose of restraining the defts. the  
vestry of St. George's, Hanover-square, from erecting  
a urinal in Grosvenor-place, at the retiring angle  
nearly opposite the end of Charles-street, adjacent  
to the wall of Buckingham-palace gardens, immedi-  
ately opposite to No. 36, Grosvenor-place, and nearly  
opposite No. 35, which was the plt.'s residence.

It was stated that the average rental of the houses  
opposite to the spot in question was 500*l.* a-year, ex-  
cept the houses Nos. 1, 2, 3, Grosvenor-place, which  
were much more valuable.

On the 7th Aug. 1862 the vestry came to a reso-  
lution that the work in question should be erected at  
the above-mentioned spot; and within a short time  
afterwards the occupiers of eighteen houses in the  
immediate neighbourhood signed a memorial addressed  
to the vestry, objecting to the execution of the proposed  
work on the following grounds:—1. That the estab-  
lishment of a public urinal, as proposed, would in-  
juriouly affect the memorialists as owners of houses  
in Grosvenor-place, to the extent of 25 per cent. at  
least in the value of the property. 2. That the offence  
to the memorialists, as occupiers, by such a work could  
not be measured by any pecuniary compensation what-  
ever. 3. That no reason founded on public accommo-  
dation could be alleged for establishing such a resort  
in front of Grosvenor-place, which might not be alleged  
for a similar establishment in front of Buckingham  
Place. 4. That various situations in the neighbourhood  
might be found where such a place instead of creating  
offence would diminish offence, as, for example, at a  
cab-stand. 5. That amongst the objects of 18 & 19  
Vic. c. 120, is the suppression of nuisances; whereas,  
in such a situation as Grosvenor-place, such a re-  
sort as it was proposed to establish would be a nuisance,  
and the statute referred to did not legalise the  
creating of a nuisance. 6. That the board had no

right to establish such a place without the  
consent of the person or persons interested in  
the soil on which it stood; whereas the right  
of soil on the vacant ground between the high-  
way and the Palace-garden wall, as well as in the  
highway itself to the centre, was vested in the  
Crown, and the Commissioners of Her Majesty's  
Works and Public Buildings were not consenting.  
7. That the memorialists were advised by counsel  
that the selection of such a site would not be deemed  
a proper exercise of the discretion given by the statute  
to the vestry, and that they were entitled to an in-  
junction to restrain the execution of the work.

On the 20th Aug. 1862 the surveyor of the vestry  
wrote to the plt.'s solicitors to say that the committee  
of works had that day resolved that a screen wall,  
twenty-eight feet in length, should be erected, to cor-  
respond with the wall of Buckingham-garden, and  
that the proposed urinal should be placed behind the  
same.

The distance of the proposed urinal from the plt.'s  
house would be about thirty-five yards.

The bill was filed on the 11th Sept. last. It was  
alleged that the erection of the work in question  
would be a private nuisance on various grounds; that  
the Marquis of Westminster, the freeholder of the  
houses, was opposed to the scheme, and had suggested,  
through his solicitor, that his surveyor and the sur-  
veyor of the vestry should go over the whole of the  
estate, and arrange together where places of this  
description might be placed with as little inconvenience  
as possible to the tenants, and as great advantage as  
possible to the public; that the resolution of the  
vestry was passed at a time when many of the vestry-  
men who had country residences were out of town, and  
that the sanction of the Crown, as owner of the soil,  
had not been obtained.

Evidence was brought forward, on behalf of the  
defts., to show that the wall of Buckingham-gardens  
was already extensively used as a place of accommo-  
dation for the public, and that the work in question  
would tend to abate rather than to create a nuisance;  
to which the plt. replied, that the proposed erection  
would be a concentration of a nuisance not at present  
perceptible in the daytime, or, at any rate, not com-  
plained of.

The motion for injunction came on upon the 25th  
Nov. last, and was ordered to stand over until the first  
seal after Hilary Term, when it was again adjourned  
to this day.

By the 88th section of the Metropolis Local Manage-  
ment Act (18 & 19 Vic. c. 170), it is enacted, that  
"it shall be lawful for every vestry and district  
board to provide and maintain urinals, water-closets,  
privies and like conveniences, in situations where  
they deem such accommodation to be required, and to  
supply the same with water, and to defray the ex-  
pense thereof, and any damage occasioned to any  
person by the erection thereof, and the expense of  
keeping the same in good order, as expenses of  
sewerage, are to be defrayed under this Act."

By the 96th section it is enacted that "every vestry  
and district board shall, within their parish or district  
(exclusively of any other persons whatsoever), execute  
the office of and be surveyor of highways, and have all  
such powers, authorities and duties, and be subject to  
all such liabilities, as any surveyor of highways in  
England is now or may hereafter be invested with or  
liable to by virtue of his office, under the laws for the  
time being in force, so far as such powers, authorities,  
duties and liabilities are not inconsistent with this  
Act; and all streets being highways, and the pave-  
ments, stones, and other materials thereof, and all  
other things provided for the purposes thereof, by any  
surveyor of highways, or by any person serving the  
office of surveyor of highways, or by any vestry or

district board under this Act, shall vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situate."

*Malins, Q.C. (Martindale and Haynes with him),* now moved for the injunction. He cited or referred to the following authorities:

*Soltan v. De Held*, 2 Sim. N. S. 133;

*The Attorney-General v. Sheffield Gas Company*, 3 De G. M. & G. 304;

*Coats v. The Clarence Railway*, 1 R. & M. 181;

*Stainton v. Woolrych*, 23 Beav. 225;

*Tinkler v. The Wandsworth Board of Works*, 1 Giff. 412; 2 De G. & J. 261.

*Martindale*, upon the sections of the Act, the 88th and others, contended that there was nothing in the Act which authorised a vestry to deprive a man of his common law rights, or which empowered them to inflict a nuisance upon any one.

*Haynes* referred to sects. 69, 86, 135 and 225 of the Local Management Act, for the purpose of showing that there was no compulsory power in the vestry to act, in a case of this kind, in a manner contrary to the wishes of the inhabitants. Where the Act gave the vestry compulsory powers, as in the 67th section, it also gave compensation to the injured parties. There was no compensation directed with regard to works to be erected under the 88th section.

*Schomberg (Bacon, Q.C. with him)*, for the defendants, argued that the seal of the highway was, under the 96th section, absolutely vested in the vestry, hence that they could act as they pleased, and that the consent of the Crown was unnecessary.

The VICE-CHANCELLOR intimated an opinion that this view could not be sustained.

*Schomberg* further argued that the 150th section to which reference had been made, applied to property which was not already vested in the vestry. The case of

*Austin v. The Lambeth Vestry*, 4 Jur. N. S. 274, 1032, was also referred to.

*Bacon, Q.C.* said the question was, whether the court had power to repeal the Act of Parliament. The 88th section conferred this power on the vestry to be exercised at their discretion. It was too late to say that they had not exercised it properly. The 96th section vested the soil in the vestry for certain purposes and amongst others for this. The vestry having determined to make the erection on this spot, the court had no power to interfere. The case of *Tinkler v. The Board of Works* had no application. [The V.C. assented to this.] The case of *Coats v. Clarence Railway Company* had just as little to do with the present. [The V.C.—What that case decided was, that where there are two modes of exercising statutory powers, one of which will inflict private injury, the other not, the court will interfere to prevent the former.] Every urinal must be a nuisance—the Legislature must be taken to have known that; hence the legality of establishing that which must inevitably be a nuisance has been established by statute. If the court restrained the erection here, it must do so at every other spot in the district. The same objections might be brought by the poorest inhabitant. The vestry must be presumed to have taken everything into consideration, and to have consulted everybody's interests. They had decided; and it would be monstrous to attribute caprice to them. The evidence showed that the Marquis of Westminster was originally of the defendants' opinion, but afterwards changed his mind. None of the objections in the memorial could be allowed to weigh with a court of equity; besides, the vestry were abating a greater nuisance by creating a less. Why should the vestry do the plaintiffs' bidding instead of their public duty?

The VICE-CHANCELLOR.—This bill is filed com-

plaining of a nuisance, and asking for the injunction of the court to restrain it. The defendants are the vestry of the parish of St. George's Hanover-square, and they insist upon their statutory power to erect that work which the plaintiffs complain of as a nuisance, and as a serious injury and damage to the rights of property of himself and his neighbours. The defendants have taken very high ground. They have insisted upon their statutory power to do that which is sought to be restrained, and have argued that, in exercise of that power, it is enough that they have resolved that this particular work shall be erected. They have argued also, to my surprise, that every work of the kind which they propose to erect is necessarily a nuisance. The first question is, whether or not the Act of Parliament authorises the defendants to erect anything which shall be a nuisance to anybody. The 88th section, upon which the question mainly turns, is that to which they refer as giving them the enormous powers which they insist upon exercising. It is remarkable that the preceding section does give them a power in clear and distinct language—language in a marked degree different from that of the 88th section, which refers to works of the kind now in question. The 87th section, which relates to the filling up of ditches by the side of roads, says: "It shall be lawful for any vestry or district board, *where they think fit*, to cause the ditches at the sides of or across public roads to be filled up," &c. The language of the 88th section, which authorises the construction of urinals, is not in such absolute terms. The words are these: "It shall be lawful," &c. [His Honour read the clause as set out above.] There is not one word that points out a nuisance to be prevented or to be created. There is not one word in this section which says that works of this kind are to be constructed in order to prevent nuisances. The purpose is accommodation. I make that observation for this reason. In this case there being no answer from the defendants, the defence is to be found in the affidavits which have been filed for the purpose of resisting the present application. In the evidence of the principal witness, Mr. Richard Englefield, who is a vestryman, the case is put entirely upon its being one in which it is necessary to erect the work in question in order to prevent a nuisance. Now I can understand that, if public accommodation is to be consulted; but the prevention of a nuisance is not a purpose defined in the Act of Parliament. This gentleman says in the fourth paragraph of his affidavit: "The spot selected by the vestry is in an angle of the wall dividing Buckingham Palace-gardens from Grosvenor-place aforesaid, nearly opposite Chester-street, where there is ample room for such accommodation, and appears to me to be a proper and fitting place for such an urinal to be erected for the accommodation of the public and to relieve the neighbourhood of the nuisances constantly occurring there." The purpose of relieving the neighbourhood from nuisances is met by the neighbourhood insisting that what is proposed as to relieving them from a nuisance would expose them to one much greater, more offensive and more injurious to their property. Still, if the Act of Parliament gives the power, the only question would be whether it has been discreetly and properly exercised. It has been argued, however, for the plaintiffs, that none of the clauses of this Act of Parliament, and particularly not the 88th section, contain words which authorise a vestry to deprive a man of his common law rights, or authorise them to inflict a nuisance upon anybody; unless, indeed, the argument that every urinal is a common nuisance is to prevail. But that is an argument which cannot be admitted. Such a work may be constructed in such a place and in such a manner as not to be a nuisance at all. At any rate those who may be entitled to complain of the

C. B.]

WILSON v. COOKSON. FISHER v. JONES.

[C. B.]

nuisance may make a representation that it should be erected in a more suitable place, where it would be less a nuisance to others and less a nuisance to themselves. But that was not the opinion of the vestry of St. George's. Instead of meeting to consider the question, they say, that having made this election, they are resolved to abide by it. Mr. Bacon, indeed, argued that the application having been made, and remaining unanswered, it is to be assumed that the vestry came to a conclusion without thinking it necessary to consider the application at all. But is that a reasonable course to take? Is there to be no discretionary power? If the power is so absolute, as the defts. say—if this place is to be erected for the public accommodation—is there to be no regard to the balance of inconvenience, to the balance of the loss to individuals, to all which ought to be considered by men invested with an authority of this kind with a view to its discreet exercise? It seems to me that the vestry have failed in assuming the existence of an arbitrary power, in the exercise of which they will consider nothing as to choice of situation or balance of inconvenience; that everything is to be done in accordance with their inflexible decision; in which the only question to be considered is, whether their resolution is to be acted on or not. It has been argued, with great force, on behalf of the plt., that there is nothing in this section which points to anything compulsory upon a man to yield either his private rights or his personal enjoyment of the property of which he is absolute owner. There is nothing in the section which points to an invasion of property, or to the compulsory taking of a man's property, and injuriously affects the enjoyment of his rights. There is an absolute silence as to any such power as the defts. claim. The case has been very ably argued with reference to the various clauses of the Act. Mr. Martindale referred to the clauses as to sewerage and to the other clauses as to compensation, which show there is not provided, by this Act of Parliament, any means of compensation for damage, which the Legislature always takes care shall be given when compulsory powers are given to any public body to interfere with the property of the subject. Finding no compulsory powers in the Act, and seeing that this will be a very arbitrary exercise of power, and one that will be accompanied by serious injury, what I have to consider is, whether I shall permit this work to be constructed, or whether the court shall interfere by injunction to restrain it; and upon this interlocutory proceeding, I do not feel myself at liberty to say, either upon the construction of the Act, or upon the conduct of the vestry, that I shall be justified in saying that this great injury and almost intolerable nuisance shall be permitted in the spot proposed. I shall grant the injunction until further order, according to the terms of the notice of motion.

Solicitors: for the plt., *Hunter, Gwatkin and Hunter*; for the defts., *Boodle and Partington*.

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYN, Esqrs.,  
Barristers-at-Law.

SITTINGS AFTER HILARY TERM 1863.

Thursday, Feb. 12, 1863.

(Before WILLIAMS, WILLES and KEATING, JJ.)

WILSON (app.) v. COOKSON (resp.)

FISHER (app.) v. JONES (resp.)

Truck Act—Construction—1 & 2 Will. 4, c. 37,  
ss. 9 and 10.

*An artificer employed by an ironmaster (which is one of the trades enumerated in sect. 19 of the Truck Act, 1 & 2 Will. 4, c. 37), was paid to the extent of 15s., being part of wages due to him, in goods at*

*the "tommy shop," under an order furnished by the ironmaster or his agent. The artificer afterwards applied to two justices under the statute for an order to be paid the said sum in coin, and the justices made an order upon the ironmaster for such payment, which was complied with. A common informer then brought an information under the statute against the ironmaster for violating the provisions of the Act by making a payment in goods. The justices on hearing the evidence came to the conclusion that, as the whole of the wages had now been paid to the artificer by his employers in current money, the original offence of paying part in goods was purged, and they dismissed the information: Held, on appeal, that they were wrong, and ought to have convicted.*

These were cases stated by way of appeal from the decisions of justices under stat. 20 & 21 Vict. c. 43.

The two cases were heard together. They were cases where informations were laid under sects. 9 and 10 of the Truck Act, 1 & 2 Will. 4, c. 37, and in both the justices had dismissed the informations. In the first case the workman had been paid to the amount of 15s. in goods. The magistrates refused to convict herein on the ground that there was no contract to pay in goods within the prohibition of the 1st section, and also on proof that he would have been paid in coin if he had requested to be so paid.

The second case set out the following facts:—One Blakemore was employed by Jones, the resp., in his business and trade of an ironmaster (being one of the trades enumerated in sect. 19 of the Truck Act, 1 & 2 Will. 4, c. 37) for wages, and there being some arrears of such wages due, he had been paid to the value of 15s., part of the said arrears, by an order from Jones or his agent, on what is called in the manufacturing districts a "tommy shop," at which goods were furnished to him of the value of 15s., under and by virtue of the said order. Blakemore afterwards applied to two justices, under the statute, for an order to obtain cash to the amount of 15s.; and the justices finding that Blakemore was an "artificer" within the meaning of the statute, made an order upon Jones to pay him the 15s. paid in coin of the realm. This order was complied with, and the 15s. paid in cash by Jones; and at this time there were left no wages in arrear or owing from Jones to Blakemore. But then Fisher (the app.), acting under the statute, brings an information (as a common informer) before two justices, to enforce the penalty which the statute imposes, for a first offence, on any one violating its provisions by paying wages otherwise than in the current coin, leaving to the discretion of the judges before whom the information is brought to say what the penalty shall be between the limits of 5*l.* and 10*l.* The justices, on hearing the evidence, came to the conclusion that, as the whole of his wages had now been paid to the artificer by his employer in current money, the original offence of paying a part of them in goods was purged, and that there was, therefore, no longer any ground for the information; and they dismissed the information, but stated the special case, embodying the above facts and findings, for the opinion of this court.

*Phipson* for the apps. in both cases.

*Grant* for the resp. in the second case.

WILLIAMS, J.—I am of opinion, in both these cases, that the decisions of the magistrates were wrong; and therefore our judgment must be for the apps. The first case arises on the occasion of an information having been laid before the magistrates under the 1 & 2 Will. 4, c. 37, and the gist of the information is what the magistrates seem to have supposed, the entering into a contract to pay in goods instead of paying in wages; that is, that the party informed against, one Cookson, did unlawfully pay in goods and not in the current coin of the realm, in lieu of a sum for certain wages

due from him to one Joseph Fisher. Now, the question is, whether that information is sustained by the evidence? It is clear that it was. The information is framed under the 9th section of the statute, and that 9th section enacts, "that any employer of any artificer in any of the trades hereafter enumerated" (of which the trade of the informant is clearly one), "who shall by himself or by the agency of any other person or persons, directly or indirectly enter into any contract." Now, that is not the subject of the information. Now comes the subject of the information: "or make any payment hereby declared illegal, shall for such offence forfeit the sum of 10*l*," and so on. Now, the question is, whether the facts of this case show that the deft. did make a payment that is declared illegal by the Act? It is clear that he did, upon the evidence, pay and satisfy part of the wages by delivering goods to the workman to whom those wages were due. The question is, whether that is declared illegal by the Act? Now, the 3rd section says, "the entire amount of wages earned by any artificer in any of the trades hereafter enumerated, in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to any such artificer by his employer, of or in respect of any such wages, by the delivering to him of goods, or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be, and is, hereby declared illegal, null and void." Therefore, the 3rd section expressly declaring such payment so made by the deft. in this case is illegal, the case comes directly within the operation of the 9th section; the information is fully sustained, and there ought to have been a conviction. With respect to the second case the information is in the same terms; and there seems to be no doubt, upon the facts stated, taking the evidence of the wife in conjunction with the evidence of the husband, that in this case, as well as in the last, there was a violation of the Act of Parliament, by delivering to the workman goods instead of the current coin of the realm; and the justices do not appear to entertain any doubt of the case being fully sustained by the evidence to that extent; but they appear to have been of opinion that there was an ultimate payment in money, because the workman, having proceeded against the employer, under the Act of Parliament, for wages, delivered an account of wages, which included the sum for which goods had been delivered in satisfaction; and therefore the justices were of opinion that ultimately he did not pay in goods by delivering them, but he paid in money; and, the payment having been made under the order of the magistrates, the question is, whether he was guilty of the offence? Upon the facts there is no doubt he was guilty, nor is he less so because afterwards he makes a payment in respect of the very same wages which are the subject of his offence. It seems to me quite clear that there is nothing in the Act of Parliament or the nature of the case to lead to the conclusion that the party who has committed the offence under the Act of Parliament by delivering goods instead of money in satisfaction of wages purged the offence he has committed by saying the wages and money altogether satisfied the goods. It appears to me also this decision was erroneous, and our judgment must be for the app.

WILKES, J.—I am of the same opinion. The intention of the statute is clear. The 1st section makes null any compact by which a payment is to be made to an artificer otherwise than in money. The 3rd section is to the same effect, that, whether there shall have been any such compact or not between the artificer and the employer, any payment made otherwise than by actually handing to the artificer the amount of his wages in coin of the realm shall be illegal and void. The 4th section enacts that the

artificer shall recover his wages notwithstanding any indirect payment. The 5th section enacts that there shall be no set-off in respect of any goods given instead of money. The 6th section enacts that there shall be no recovery by the master in respect of goods supplied to the artificer at the shop of the master, whether those goods be given on account of wages, or whether merely sold at a shop kept by the master to the artificer, so that he has the opportunity of indirectly forcing the goods instead of the money upon the person whom he employs. Then comes the 9th section, which enacts that any payment which is rendered illegal, amongst others, by the 3rd section of the statute shall subject the employer to the penalties imposed by the Act. That being so, it is quite obvious that in the first case the magistrates have misunderstood the intention of the Legislature, because they have held that the case was not within the statute with respect to the penalty, but the person employed might have had money had he thought proper; that is, if there was no such contract. That is provided for by the 3rd section. But, as has been already sufficiently pointed out, the 3rd section applies to payments whether there shall be any such compact or not. In the first case, therefore, the magistrates were wrong in dismissing the information. Whether the goods supplied in the first case were, in fact, for wages in the way pointed out, or whether the money might not be considered as having been merely the price of goods bought by the person employed at the shop, so as to constitute a set-off rather than a payment—a thing that might take place innocently enough—is a question that might arise; but the answer is obvious, that upon a settlement of accounts the result would have been that there would have been a payment but for the statute, and therefore there was an indirect payment contrary to the 3rd section, which subjected the employer to the penalty imposed by the statute. With regard to the second case, a consideration of the statute clearly shows that the magistrates were wrong in dismissing the information upon the ground that payment had taken place in money, because the provisions of the statute are cumulative. The master shall not pay otherwise than in money; he shall be bound to pay money notwithstanding he has paid otherwise; and he shall be subject to a penalty in respect of having paid otherwise. That clearly involves that he is to forfeit that which he has given in value other than in money; that he shall pay in money notwithstanding he has given at least such value; and further, he is to pay the penalty provided by the 9th section. The two former results are not, properly speaking, penalties; they are certainly necessary to show that there has been that illegal act for which there are penalties, and there is a fixed amount for the illegal conduct of the master. The two cases are within the mischief of the Act. The proper course will be, not for us to impose the penalty, but to direct the justices that there ought to have been a conviction, leaving it to them to impose the penalties or remit them under the statute.

KRATING, J.—I am entirely of the same opinion. It is clear that the intention of the statute is, that, under no pretence whatever, shall a master give in exchange for the labour of workmen anything but the current coin of the realm; and so express is the provision in this Act of Parliament that even (by the 8th section) a payment in bank-notes, without the consent of the workmen, is deemed to be illegal. Therefore, upon the first case it is perfectly clear the offence was committed within the Act, even though there was no understanding that there should be a payment partly in notes. Of course, in both these cases the payment was by goods delivered under circumstances which exclude them from the operation of either the 23rd or 24th sections of the statute, which allow of goods

[Ex.]

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[Ex.]

under certain specified circumstances. In this case the transactions do not come within those sections, but they do come within the section which renders the parties liable to the penalties. I am entirely of opinion that in both cases the magistrates were wrong and ought to have convicted, however stringent the Act may appear to have been. *Judgment for the appeal.*

### COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LUSH, Esqrs., Barristers-at-Law.

Tuesday, Jan. 20, 1863.

ATTORNEY-GENERAL v. McLEAN.

*Revenue—Assessed Taxes Act (43 Geo. 3, c. 161)—Residence in one parish and places of business in others—Where returns of taxable articles to be made under sect. 27—Meaning of “reside and be” in same section—Penalty, under sect. 37, for several violations of the Act.*

*Deft., with his family, resided and slept in the parish of C. from 5th April 1859 to Feb. 1860, when he left C., and it was not known where he or his family resided or slept subsequently. At C. he had kept and used a male servant, a carriage, a horse, and three dogs, of which he had omitted to make the return required by sect. 27 of 43 Geo. 3, c. 161. In the exercise of his trade he also occupied, both prior to and on 5th April 1860, and during six weeks subsequently thereto, two shops, one in the parish of St. M., and the other in the parish of St. B., for which premises he was assessed to the house duty, and he was in the habit of attending to his business daily at one or other of the said shops. The proper notices required by sect. 25 of the Act were affixed to the church-doors of St. M. and St. B., requiring persons “resident or being” in the said parishes, &c., to make the return of taxable articles used by them, as required by sect. 27. Deft. made no return in either of these parishes, nor in any other, of the articles in question, but it appeared that he had made a return at St. B. for two gardeners kept by him at C.*

*The Crown sued for eight penalties of 50l. each, alleged to have been incurred by deft. in neglecting to deliver to the assessors of each of the said parishes of St. M. and St. B., within six weeks after 5th April 1860, lists for assessment for the year 1860, of the duties payable in respect of the articles in question kept, used and employed by him at C. as aforesaid:*

*Held, first, that deft. “resided or was” at his shop in the parish of St. B., within the meaning and for the purposes of sect. 27 of 43 Geo. 3, c. 161, and was bound to make a return in that parish of the articles kept and used by him at his residence in the parish of C., and, consequently, that he was liable to a penalty under sect. 37 for having omitted to make such return:*

*Secondly, that under sect. 37 he was liable to one penalty of 50l. only, for omitting to make the returns of the several articles in each of the said parishes of St. M. and St. B.*

This was a prosecution instituted by the Crown, to recover eight penalties of 50l. each, alleged to have been incurred by deft. under the Assessed Tax Act, through his neglecting to deliver lists for assessment for the year 1860, to the assessors of the parishes of St. Marylebone and St. Bride's respectively, of the duties payable under the respective schedules of the said Act in respect of a male servant, a two-wheeled carriage, a horse, and three dogs employed, used and kept by him at Fargrove, in the parish of Chertsey, in the preceding year, and which lists ought to have been delivered by deft. within six weeks of the 5th April 1860.

The 1st count of the information stated that deft. C. McLean, at the time appointed by the statute in such case made for delivering the several lists in this and the three several counts next following mentioned, resided and was in the parish of St. Marylebone in the county of Middlesex, and the said C. McLean was then liable to a certain duty of assessed taxes payable by him to her Majesty in and for the year ending 5th April 1861, in respect whereof a list and declaration ought to have been delivered by him, according to the form and directions of the said statute, to the assessors of the said duty for the said parish of St. Marylebone, to wit, in respect of certain male servants employed by him, at the parish of Chertsey, in the county of Surrey, during the year preceding which ended on the 5th April 1860, and although all times and things and conditions necessary for enabling the said C. McLean to deliver such list and declaration accordingly have elapsed and taken place, yet the said C. McLean neglected to deliver and did not deliver such a list or declaration to the said assessor, according to the directions of the said statute, contrary to the form of the said statute, whereby the said C. McLean has forfeited for his offence the sum of 50l.

The 2nd, 3rd, and 4th counts applicable to the said parish of St. Marylebone, were similar to the first count, and were for not delivering a list or declaration in respect of a certain carriage, in respect of a certain horse, and in respect of three dogs respectively, kept by the said C. McLean at Chertsey, during the same year.

The 5th, 6th, 7th, and 8th counts were similar in all respects to the before-mentioned counts, but were applicable to the parish of St. Bride's in the city of London. Wherefore the Attorney-General prayed judgment for 400l. Deft. pleaded not guilty, whereupon issue was joined.

At the trial before Wilde, B. and a special jury, at the Middlesex sittings after Trinity Term last, the following facts were proved or admitted:—Deft. was a carver and gilder and looking-glass manufacturer and seller. His family had resided, and he himself slept, at a house called Fargrove, in the parish of Chertsey, from the 5th April 1859 up to Feb. 1860. After that date he ceased to live there, and no evidence was offered of, nor was the Crown able to prove the place where his family dwelt, or where he himself was accustomed to sleep after he quitted Fargrove, and at the period when the return should have been made. He had kept and employed at Fargrove between the 5th April 1859 and 5th April 1860, the male servant, carriage, horses and dogs mentioned in the information, and for the not returning lists of which the penalties sought to be recovered were claimed by the Crown. In the exercise of his above-mentioned trade or business, he occupied both prior to and on the 5th April 1860, and during six weeks subsequent thereto, two shops, one at No. 144A, Oxford-street, in the parish of St. Marylebone, and the other at No. 73, Fleet-street, in the parish of St. Bride's. He was assessed to the house duty for those premises, and he was in the habit of attending daily at one or the other of the shops. The proper notices as required by the 25th section of 43 Geo. 3, c. 161, were duly affixed to the doors of the churches of St. Marylebone and St. Bride's, requiring persons “resident or being” in the respective parishes, within six weeks after the 5th April 1860, to make returns to the assessors of the articles liable to taxation, which they were using. The deft. made no return to the assessor of either of those parishes, nor indeed to any other assessor, of the articles in question; but it was proved or admitted at the trial, that deft. had made a return in the parish of St. Bride's for two gardeners kept by him at Fargrove, and for nothing else.

A verdict was taken for the Crown for four penal-

ties of 50*l.* each, with leave reserved to move the court on the following points of law: viz., first, whether, under sect. 27 of 43 Geo. 3, c. 161, requiring every person to deliver lists of taxable articles to the assessor of the parish where he shall "reside or be," it was incumbent on deft. to deliver lists of the articles kept by him at Fangrove, in the parishes where he carried on business in London; secondly, whether, under sect. 37 of the same Act, the deft. incurred a separate penalty of 50*l.* for each of the several lists which he ought to have delivered under sect. 27 of the various subjects of charge, or one penalty of 50*l.* only for neglecting to deliver lists generally of all such articles. A rule was accordingly obtained in Michaelmas Term last to set aside the verdict for the Crown and enter it for deft., or to reduce the amount of penalty to 50*l.*: first, on the ground as to entering the verdict, that deft., not *residing* either in the parish of St. Marylebone or St. Bride's, was not liable to the penalty for not sending in a list there; secondly, as to reducing the verdict, that under the facts, deft. was only liable to one penalty under sect. 37 of the statute 43 Geo. 3. c. 161. (a)

The *Attorney-General*, *Locke*, Q. C. and *E. Bevan* showed cause on the part of the Crown.—It not being disputed that the articles in question were kept during the year 1859-1860 at Chertsey, the question of the obligation upon deft. to make a return of them in the parish of St. Marylebone or St. Bride's, or in both, depended on the proper construction of the 27th section of the Act, and on the meaning of the words "reside or be" therein. Deft. had ceased to live at Chertsey in Feb. 1860, and it was not known where he was living, in the sense of sleeping, at the time when the return ought to have been made; but he had two large trade establishments, one in the parish of St. Marylebone and the other in St. Bride's, at each of which it was proved he was in the habit of attending daily. Notices were duly affixed to the church doors of those parishes under sect. 25; and it was contended that deft. was at the time in question "residing or being" in each of those parishes within the meaning of sect. 27. Those words were not to be restricted in their meaning to the place where a person slept, but were applicable to the place where he carried on his business. There was nothing contrary to the scope or intention of the Act to hold that such place

was a person's residence for the purposes of the Act. In *Blackwell v. England*, 8 Q. B. 541; 27 L. J. 124, Q. B., the Court of Q. B. held that a person's usual place of business, though he neither took his meals nor slept there, answered the description of his "residence" under the Bills of Sale Act (17 & 18 Vict. c. 36, s. 1). To the same effect were *Abdell v. Basham*, 5 E. & B. 1019; 25 L. J. 239, Q. B.; and *Attomborough v. Thompson*, 2 H. & N. 559; 27 L. J. 23, Ex. These cases showed that no certain unvarying meaning was to be attached to the word "residing," but that it may mean different things according to the purpose, object and requirements of the statute. The affixing the notice to the church door of the parish, &c. (sect. 25) being the only condition precedent to the party making the return, surely the affixing it in Marylebone and St. Bride's was as reasonable and free from hardship, and as good for purposes of notice to deft., as if it had been put upon the church door of some distant village where he might happen to be sleeping. It was a person's duty to make the return in the parish where he should "reside or be" during the period of six weeks next after the 5th April, independently of the fact whether or not a notice had been left for him under sect. 26, which was not obligatory; and if resident in more than one parish, then he was bound to make a return for each parish under sect. 34. [WILDER, B.—He did make a return for some things at St. Bride's.] Yes, for two gardeners only, and he was no more resident there then, than he was at the time when the omitted return ought to have been made. But supposing the word "reside" not to be satisfied by the proof, in this case there was the larger word "be." Was it possible to give a reasonable interpretation to the word for the purposes and requirements of this statute? [WILDER, B.—What possible meaning can you give to the word "be" that would not be included in a man carrying on business? POLLOCK, C.B.—Where he carries it on not by agents, deputies, and servants, but where he is actually present himself. MARTIN, B.—The fact of his making a return at St. Bride's is conclusive against him.] Then as to the second point. In construing sect. 37, which imposes the penalty, it would be convenient to recur to sect. 27. In that section a distinct and separate list was to be made of each article of tax; although it might be on one paper as far

(a) The following are the sections of the statute 43 Geo. 3, c. 161, which were referred to in the argument as bearing on the case:—

Sect. 23 provides that every assessment shall be in force for one whole year from the 5th April in the year in which it is made to the 5th April next following, and be payable by instalments as therein mentioned.

Sect. 25 directs the assessors for the time being, "within twenty-one days after the commencement of the respective duties for each year, to cause general notices to be affixed on the doors of the church, or chapel, or market-house, or cross (if any), of the city, town, parish, or place for which such assessor shall act," &c., "requiring all persons resident in the said city," &c., who by the Act are required so to do, "to make out and deliver to the respective assessors, within fourteen days after the date of such notice, such lists or declarations as are herein required; and such general notices shall, from time to time, when the same shall be affixed, be deemed sufficient notice of the time within which such returns shall be required to be made in each year, to all persons residing or being in such city; and the affixing the same as aforesaid shall be deemed good service of such notice to all persons within the limits of such city," &c.

Sect. 26 provides that, besides such general notices, the assessors shall, within the like period, "give or leave at every dwelling-house, where any person liable, or supposed to be liable to the duties, &c., shall usually reside, one notice for the occupier thereof; and, where such dwelling-house shall be occupied distinctly by different persons or families, a like notice for the occupier of each distinct story or apartment, provided any person liable, &c., shall reside there; and also a like notice to and for every person so liable then residing in such dwelling-house as a lodger or inmate, requiring such persons respectively to prepare and produce, within twenty-one days, a list or lists, &c., in writing, in the forms and manner hereinafter required.

Sect. 27. Every person who shall have retained or em-

ployed, kept, used, exercised, or worn any of the various taxable articles therein specified in the course of the year ending on the day next before the 5th April 1864, shall before the end of six weeks thereafter, whether any previous notice for that purpose shall have been delivered or not, cause to be prepared true and particular lists in writing, signed by such person, &c., which shall contain the parish or place, and the parishes or places where such person shall then or usually reside, and one of such lists shall contain the greatest number of male servants retained or employed, &c., in the course of the year ending as aforesaid, and another of the said lists shall contain the greatest number of carriages, &c. (and so on with each subject of tax comprised in the different schedules); and every such person shall deliver, or cause such lists to be delivered, to the assessor or assessors of the said duties for the district, parish, or place where such person shall reside or be, &c., at or before the expiration of the time appointed for the delivery thereof, &c.

Sect. 28 provides for the delivery of lists in like manner in every subsequent year.

Sect. 30 enacts the assessor, when any person refuses or neglects to make a list, to assess such person and charge the duties to which he is liable, and every such assessment shall be conclusive upon the person thereby charged, who shall not be at liberty to appeal therefrom, unless such person shall prove that he or she was not at his or her dwelling-house or place of abode at the time of delivery of such notice.

Sect. 34 provides that persons having divers places of residence shall deliver all such lists at each and every such place.

Sect. 37 enacts that if any person liable to the said duties, &c. shall neglect to deliver a list or lists, &c., in every parish or place where the same ought to be delivered, or shall omit any person, or any description, article, matter, or thing which ought to be contained therein, &c., as or she so offending shall forfeit and pay the sum of 50*l.* over and above any duty chargeable as aforesaid.

[Ex.]

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[Ex.]

as the return was concerned, it was separate with respect to penalties. Here four articles were omitted and four penalties were incurred. [POLLOCK, C. B.—Can more than one penalty be inflicted unless the Act expressly provides that he shall be liable for each and every such offence? Take the case of an offence under the game laws, is a man liable to punishment for each and every head of game found in his possession?] By sect. 34 he was bound to make a return at each place, which would, at any rate, involve two penalties. [WILDE, B.—The obligation is *one* to make a return for every place, and the penalty is not for each failure, but, if he fails to return for every place, he is liable to *one* penalty.]

Heyes, Serjt. and H. Matthews, contra, for deft., in support of the rule.—The allegation in the information was, that deft. at the time when, &c., "resided and was in the parish of M., &c." in the conjunctive, but sect. 27 was disjunctive, "reside or be." It was now submitted, as it was at the trial, that there was no proof of residence in its ordinary sense, assuming that, for the purpose of this Act, it meant *dwelling*. He kept a shop at two places, but he could not reside at both, and there was no proof of residence at one more than the other. Throughout this Act the word "residence" meant "*dwelling, place of abode*," which was its natural and *prima facie* meaning. No doubt, in some Acts, it might have a larger meaning; but here the Crown gave up "residence" and fell back on the word "be," which applied to a casual or temporary residence, as at an hotel. Taxation and representation were closely connected. Sect. 27 of 2 Will. 4, c. 45 (Reform Act), which gave a right of voting to every owner or occupier of a house, shop, building, &c. subject to the proviso that he shall have *resided* during a certain time, draws a distinction between renting a shop and residence, which was practically conceded by the Attorney-General here. It was clear, from the various sections of the Act, that the liability to a penalty was only at the residence. A liability to surcharge for duties was not disputed, but there were many cases of liability to duty and not to penalty, e.g., where a person was abroad, and had no opportunity of making a return. The duty was imposed, and the return was to be made only at the residence, or where the taxable articles were kept, but not at the shop. [WILDE, B.—The return must be made at every place where he *resides* or *is*.] With regard to sect. 25, the general notice clause, the probability of a person's seeing the notice on a Sunday at the church of the village or parish where he slept, was greater than at the parish where he carried on business. The Act required (sect. 25) all persons "resident" in the parish to make a return, but the word "being" or "be" was not found in that part of the section, and that afforded a clue to the meaning of the Act. The occasional use here and there in the Act of the vague term "being," had no separate and distinctive meaning, and was not intended to extend the preceding term "residence." [POLLOCK, C. B.—Your argument fails in this, that persons are here required to make returns of articles which have nothing to do with residence. An hotel keeper may not reside at his hotel, but he must make a return of the waiters he employs in the place where he keeps the hotel.] Whether a party was liable for keeping taxable articles was one question, and it was another where he was bound to make a return. It was a positive duty to make the return in the parish where he dwelt. The words "shall reside or be" in the latter part of sect. 27 were relied on by the Crown. But the word "be" there meant temporary or casual visits, as at an hotel. Could an information for penalties omitting the word "reside" be good? [CHANNELL, B.—That has been passing through my mind, and I think, if the Attorney-General's argument as to the effect of the word "be" is right, this information would not be bad if the word "reside"

were struck out, because it would not be that the deft. was simply there, but that he was there *liable to a certain duty*. Putting the two together it would make the allegation, that he was so there as to be liable to make a return and to be taxed.] The provision being alternative, if there was any separate meaning in the word "be," the information to be good should have averred breaches of both branches of the alternative, that was to say, nondelivery at the residence and nondelivery where deft. was. But apart from the word "residence" it was contended there was no meaning in the word "be." There was no count for simply omitting the return; the allegation that he resided at St. Bride's was material and was not proved. [MARTIN, B.—He himself sent in a return for St. Bride's, and if a man be or is in a place and does the act imposed by the statute, that is strong, almost conclusive, evidence that he did reside and was in that parish.] But assuming the Crown to be right, and that "be" meant something beyond a temporary residence, then that would be satisfied by one delivery, and there should have been proof by the Crown that there was no delivery at either place. They should have negatived both. [CHANNELL, B.—That seems to have been admitted at the trial. WILDE, B.—The Crown conceded they could not prove where the deft. slept, and the deft. conceded that he made no return at the place where he did sleep, or any other return than the one which he made at St. Bride's.] That admission could not cure the information, which charged an absolute duty to deliver a return at St. Marylebone, but it was an alternative duty. Only one delivery was required, and if a man had one residence and several places of business the Act would be satisfied by a return at one of the latter and none at the residence, if the Crown's view were established, which would be contrary to the meaning of the statute, which intended the return to be at the residence, or where the articles were kept. The Crown had gone on residence, and that had failed. No count had been framed on sect. 39. [CHANNELL, B.—The Attorney-General says, sect. 39 may apply where taxable articles are kept, and where there is no residence, but that all the facts here shown to enable you to contend that you are within sect. 39 are these, that while he kept he resided, and while he resided he kept. MARTIN, B.—Sect. 39 fails you altogether, because no place of residence was proved. A man is not to escape taxation altogether by concealing his place of residence.] This was a case of penalties and not of duty. No doubt he was bound to pay duty.

Sects. 9, 26, 30, 32, and 39 of 43 Geo. 3, c. 161, were also referred to.

POLLOCK, C. B.—It appears to me that the form in all the legislative enactments for penalties, where it is intended that there shall be a penalty for each and every violation of an Act of Parliament, is to be found in the cases of which the Excise Acts present a very familiar example; where, for instance, a penalty is directed for "each and every room" that is not entered, and for "each and every tub," and so on. In those cases the words "for each and every offence" are always to be found, as far as I can recollect, in every Act of Parliament where cumulative penalties can be claimed for every violation of the law. And I think I very early, in the course of his argument, asked the learned Attorney-General whether he recollected any instance where a penalty might be claimed and recovered for distinct offences committed at the same time, unless those words were to be found in the clause imposing the penalty; but he was unable to cite such a case. We are therefore all of opinion that so much of the rule as prays that the verdict may be reduced to 50*l*. in respect of penalty should be made absolute; but with regard to entering a verdict for the deft. on the ground that he is not liable under the Act of Parliament, the rule must



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be discharged. The words in the Act, when referred to, are, "residing or being;" and I have no doubt that the word "being" was purposely introduced in order that the ambiguous character of the word "residing" might never be set up so as to prevent the recovery and the collection of the tax. The word "be" unquestionably is of very large import, and in one sense a man may no doubt be said to "be" wherever he is; and therefore a commercial traveller may be in every county and in every parish through which he may have occasion to travel for the purpose of performing his duty. But I have no doubt that word was selected on the consideration that the judges would put upon it what they are bound to put, namely, a reasonable construction; and what my brother Channell in the course of the argument threw out, seems to me to be the true interpretation of the word "be," namely, where the man shall be or abide so as to be liable to duty. Now here is a man who takes not merely a shop, as far as I can learn, but a house in Fleet-street—distinctly a house—an ordinary place of residence; it may be that he does not sleep there; it may be that he sleeps altogether somewhere else, and lets out the upper part of the house in lodgings to other persons; but apparently he is there occupying a house, and using the lower part as a shop for his particular line of business. Well, certainly he is there—about that there can be no doubt—that I think was proved; and he is charged with not having delivered lists to the assessor under the Act of Parliament, and that is the very thing that the 27th section says he shall do. The 25th section says that both in the parish of St. Bride's and in St. Marylebone the notice stuck up on the church doors is notice to him, because he is "residing or being" there; and then the 27th section says that these lists are to be delivered to the assessor by every person where such person shall "reside or be." There can be no doubt that in Fleet-street, where he occupied that house, the lower part of it was his shop—that there he was—there he was abiding; and I do not know that I can do more than repeat the expression which was used by the Attorney-General in the course of his argument, that is, that the word "be," if it is to mean anything, must mean at least that sort of abiding which belonged to the occupation of his shop by the deft. for the purposes of his business. It is very true there may be other sections in the Act of Parliament that point to particular cases, such as making returns where the articles are used, or making returns where you have no fixed residence; but that does not prevent the application of the 27th section in the very terms of it, that this person having received notice, which he had, is to return the lists to the assessor of the district where he "shall reside or be." I am clearly of opinion that for the purposes of this Act the word "residing" here does not necessarily mean dwell, for when they come to speak of a place where people live and sleep, they call it a dwelling-house, as will be observed in the 32nd section: "and be it further enacted that every occupier as aforesaid, in whose dwelling-house or apartment any person liable to the duties shall," &c. For these reasons it appears to me that it is within the meaning of the expression of the Act of Parliament, to say that it was made a duty incumbent upon him to return to the assessor of St. Bride's the articles that he used, and having failed to do so, he is liable to the penalty, but I think he is liable but to one. The rule, therefore, will be made absolute to reduce the verdict in that respect, and be discharged as to so much of it as relates to entering a verdict for the deft.

MARTIN, B.—I am also of opinion that there was evidence to go to the jury that Mr. McLean *resided or was* in the parish of St. Bride's within the true meaning of the 27th section, and that is the only point

which we have to discuss upon the present occasion. Now, the evidence was, that he had a shop which he kept as a tradesman, trading in the parish of St. Bride's, that he was there during the course of the day for such time as he thought convenient, that he made a return to this parish in respect of other matters in which he admitted he was liable to duty. He gave no evidence as to where he lived in the sense of sleeping during the night, there was no evidence whatever of that. That was the evidence upon which my brother Wilde had to decide whether or not there was evidence to go to the jury. But this is a question of fact, and not a question of law. Now, if we are called upon to give judgment on what was the meaning of the word "reside" alone, without the words "or be," it seems to me that according to the case of *Blackwell v. England*, which was cited by the Attorney-General, there would be very strong grounds indeed for contending that, inasmuch as for the purpose of making this return it is an entirely immaterial circumstance where any man lives (for all persons in England are to be assessed to those duties where they are liable, and the object of the Act of Parliament is to obtain the duties from all persons who are liable to pay), so it is their duty to make a return, and it is an utterly immaterial circumstance whether he makes the return from the place where he sleeps, or the place where he spends the day when attending to his business. I cannot conceive any reason in the world why a return from the former is preferable to one from the latter place. The only way in which it can possibly be of importance, is with respect to the commission which the assessor will get upon it; but as far as the Crown is concerned, whether the return be made in the one district or the other it is utterly immaterial; it may make a difference to the collector, but none to any one else. The words are "reside or be." I should say, upon the authority of that case which I have referred to, that the word "reside" alone may mean—for instance, in the case where a man spends the day in the parish of St. Bride's, attending to his business, and is to be found there by any person who wishes to see him, and who does not think proper to be communicated with elsewhere, or at the place where he sleeps at night—he is a man much more residing at the place where he is to be seen on matters of business and conversed with, than at a place where he wishes no one to call upon him, and where, if they do call, they cannot see him during the day. Again, the word "be" seems to me to be conclusive upon the matter. A man is not in Fleet-street, within the meaning of this Act, simply because he walks from Temple-bar to St. Paul's; but a man who is staying, abiding, and to be found there, so that if any person wanted to see him on business he would go there to see him, must be said to be there. If a man had to present a bill of exchange and he wanted payment, he would go there to present it; so that that appears to me to be the place where he "*resided and was*," within common and ordinary good sense, and the meaning of the section of this Act of Parliament. Therefore I think that the averment of that was evidence to go to the jury, upon which the jury ought to have acted, that he "*resided and was*" in the parish of St. Bride's, in the city of London. It appears to me, upon looking at the 27th section of the Act, that it is plain that it imposes upon persons who are subject to this tax the duty to make this return; it is for them to look out and make it. If they do not make it at all, the circumstance of the place where they are is very immaterial. So that, in substance, there really can be no doubt that Mr. McLean is liable to this penalty; and I perfectly agree that there is only one penalty, for the reasons stated by the Lord Chief Baron.

CHANNELL, B.—I concur with the Lord Chief Baron and my brother Martin in thinking that so much

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[Ex.]

of the rule as seeks to reduce the penalty from 200*l.* to 50*l.* should be made absolute for the reasons given, and that the rest of the rule should be discharged.

WILDS, B.—I am of the same opinion. I will only observe, that this is purely a technical question. The deft. was found by the jury to be liable to pay a duty in respect of a certain carriage and horse, &c. He resisted the liability and refused to pay. The jury found against him, because no doubt by law he was liable to pay it, and he had incurred the penalty for not doing so. But the point he sets up is (having made no return anywhere of the carriage and horse, &c., which he ought to have returned) that he is not liable under this information, because the return was only one that ought to have been made at the place where he slept; that he was not bound to make it at the place where he carried on his business. For the reasons given by the Lord Chief Baron, which have exhausted the question, I am clearly of opinion that he was bound to make the return, not only at the place where he slept, but at the place where he carried on his business; therefore, I think that the rule ought to be made absolute to that extent.

*Rule discharged as to so much of it as relates to entering a verdict for deft., but absolute to reduce the verdict to one penalty of 50*l.**

Attorney for the Crown, Solicitor of Inland Revenue.  
Attorney for deft., Taylor.

Wednesday, April 22, 1863.

WILLIAMS v. BLACKWALL.

Salmon Fishery Act 1861 (24 & 25 Vict. c. 109)

—Sects. 11, 33, 36—Destruction of stake-nets under sect. 11 by authority of conservator—Right of public to destroy nets—Appointment of conservator under sect. 33—Extent of his authority—Jurisdiction of justices under sect. 36—Demurrer.

Trespass for seizing and destroying plt.'s fishing-nets and poles, and converting the same to deft.'s use. Plea, that before and at, &c., deft. had placed and used and was using in a certain tidal water, to wit, the river C., certain fixed engines for catching salmon, in contravention of the provisions of the Salmon Fishery Act 1861, and that the said nets, &c. were the said fixed engines, &c., and that deft. took possession of and destroyed the said nets by the order and under the direction of E. S. the conservator of the said river, duly appointed in that behalf, as he lawfully might. Replication, that E. S. was appointed by the justices of the peace in and for the county of D., assembled at the general or quarter sessions of the peace in and for the said county, conservator or overseer for the preservation of salmon, and for enforcing, for that purpose, the provisions of the said Act within the limits of the jurisdiction of such justices, and was not otherwise the conservator of the said river, which was partly in and bounded by the said county of D.; but the place where the said trespasses, &c., were committed, and where the said nets, &c., were placed, &c., was without the said county of D., to wit, in the county of C., and not within the limits of the jurisdiction of the said justices:

Held (on demurrer to the said replication), that deft. had a right to do the act complained of, either as conservator of the river, or (under sect. 11 of the Act) as one of the public, and therefore the replication was bad and the demurrer must be allowed. Demurrer.

This was an action of trespass, for seizing, cutting to pieces and destroying the plt.'s fishing-nets and poles, and converting the same to deft.'s use, and wrongfully depriving plt. of the use and possession thereof; and plt. claims 200*l.*

Plea (3).—That before and at the time, &c., plt. had placed, and had been and was using in a certain tidal water, to wit, the river Conway, certain fixed engines for catching salmon, in contravention of the provisions of the Salmon Fishery Act 1861, and that the fishing-nets and poles mentioned in the declaration are the said fixed engines so placed and used by the plt. in the river Conway as aforesaid; and the deft. says that he took possession of and destroyed the said fishing-nets and poles by the order and under the direction of one Edmund Sharpe, as and then being the conservator of the said river, duly appointed on that behalf, as he lawfully might, under the provisions of the said Act of Parliament, for the cause aforesaid, which are the grievances complained of.

Replication (2).—That the said E. Sharpe was appointed by the justices of the peace in and for the county of Denbigh, assembled at the general or quarter sessions of the peace in and for the said county, conservator or overseer for the preservation of salmon, and for enforcing, for that purpose, the provisions of the said Act within the limits of the jurisdiction of such justices, and was not otherwise the conservator of the said river, which was partly in and bounded by the said county of Denbigh; but the place where the said trespasses and grievances were committed, and where the said fishing-nets and poles were placed and fixed and used was without the said county of Denbigh, to wit, in the county of Carnarvon, and not within the limits of the jurisdiction of the said justices.

Demurrer to the second replication to the third plea, as bad in substance, and joinder in demurrer.

Deft.'s points:—1. That the replication is a traverse of an immaterial averment in the plea, for that, consistently with the allegations of the replication, the deft. may have had, and had, under the provisions of the 11th section of the Salmon Fishery Act 1861, a legal right to do the acts complained of in the declaration. 2. That, assuming the said stake-nets to have been illegally placed and left in the river, the deft., as one of the public, and even though not acting under the authority of the conservator, had a right to remove them. 3. That the said E. Sharpe being duly appointed conservator for the Denbighshire side of the river, had authority to direct the removal of stake-nets illegally placed and kept in the river on the Carnarvonshire side, whereby the fish were prevented from passing freely up and down the river.

Plt.'s points:—1. As the deft. justifies under the authority of the conservator, it is an answer to the plea that he acted beyond the jurisdiction of the conservator's district. 2. The conservator being appointed by the justices of Denbighshire, had no authority out of Denbighshire. 3. The deft. by his plea sets up no justification except as servant of the conservator.

The following are the material parts of the Salmon Fishery Act 1861 (24 & 25 Vict. c. 109) referred to in the argument.

By sect. 4 (interpretation clause) "fixed engine" shall include stake-nets, bag-nets, putts, putchers, and all fixed implements or engines for catching or for facilitating the catching of fish.

Sect. 11. No fixed engine of any description shall be placed or used in any inland or tidal water, and any engine placed or used in contravention of this section may be taken possession of or destroyed, and any salmon taken by such shall be forfeited, &c.

Sect. 33. It shall be lawful for the justices of the peace assembled at any general or quarter sessions of the peace from time to time to appoint conservators or overseers for the preservation of salmon, and enforcing for that purpose the provisions of this Act within the limits of the jurisdiction of such justices.

Sect. 36. Where any offence under this Act is committed in or upon any waters forming the boundary between any two counties, districts of quarter sessions

[Ex.]

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[Rolls.]

or petty sessions, such offence may be prosecuted before any justice or justices of the peace in either of such counties or districts.

*Welsby* (with him *J. H. Lloyd*) for deft.—The demurrer raises the question under the Salmon Fishery Act 1861. I shall contend on the deft.'s behalf, first, that that part of the plea which sets up the authority of the conservators is unnecessary, as any one under the 11th section of the Act might destroy nets or engines of any description placed or used for catching salmon in contravention of the Act; and secondly, if necessary, that the office of conservator is a protection, and that he had authority under which deft. might act. The prohibition in sect. 11 against the use of these engines is positive [reads the section], and all such engines so used are to be taken possession of or destroyed; and it then imposes a pecuniary penalty, in addition to the destruction of the engines, on the person so using them. The 33rd section, in enabling terms, says it shall be lawful for the justices to appoint a conservator. It is merely for convenience that particular persons are appointed; it is not incumbent on the justices to make the appointment, and, indeed, the appointment is not made in every county—not, for instance, in the county of Carnarvon. It is a merely cumulative provision, and, being discretionary with the justices, does not, I apprehend, work any limitation on the positive powers of the 11th section, and the general right of all the Queen's subjects under that section to destroy these engines. The plt. is in this dilemma: he says the justices had no power to appoint a conservator in Carnarvonshire—then, if so, and if the conservator might not take nets in that county, still there was no prohibition to the general public so to do. But the river Conway flows between the two counties, the shore on one side being in Denbighshire, and on the other in Carnarvonshire, and I contend that the conservator of the river there, being appointed the preserver of all the fish which would and ought to come into Denbighshire by that river, would have authority to remove these stake-nets, whether they were on the one or the other side of the river.

*Appland*, contra, for plt.—The replication is good, and the demurrer bad. [MARTIN, B.—Take the first point. Why has not every one a right to do what the deft. has done?] That, it is submitted, would be a very dangerous construction of the Act, and a most mischievous doctrine to hold, that any man would have a right not only to seize, but to destroy valuable property; not only to abate a nuisance, but to take possession; and not only to destroy, but even for his own particular purpose to appropriate the nets and implements of another to his own use. The Legislature cannot have contemplated such a construction of the Act, which would be a great temptation to breaches of the peace, and lead to the wanton destruction of valuable property. The cases show that the existence of a nuisance will not enable any one to abate it, save in so far as may be necessary to the preservation of his own rights. Before deft. could do what he has done under pretext of abating a nuisance, it is contended that he should have suffered some special damage or inconvenience by its existence. The case of *The Mayor, &c., of Colchester v. Brooke*, 7 Q.B., N.S., 339; 15 L.J., N.S., 59, Q.B., and the judgment of the court there delivered by Lord Denman, C.J., shows that this is so. [MARTIN, B.—What construction do you give to sect. 11?] It must be construed in connection with sect. 33; a "conservator" having been appointed under the Act, he alone was authorised. [MARTIN, B.—That would render necessary the inserting after the word "destroyed" in the 11th section, the words "by the conservator," which is an unreasonable construction.] Then the jurisdiction of the justices appointing him was confined to Denbighshire, and he

could have no authority in Carnarvonshire. [MARTIN, B. refers to sect. 36: His Lordship reads it.] The plea sets up the authority of the conservator, and justifies the act done under the authority. Then if we displace the conservator we answer the plea; and it would be a departure for deft. then to fall back on his right as one of the public. He cannot do it. [MARTIN, B.—Dft. might say the conservator stood by and directed the act to be done.]

POLLOCK, C. B.—Either as conservator, or, under the 11th section of the Act of Parliament, as one of the general public, the deft. had a clear right to do the act complained of. The replication, therefore, is bad, and this demurrer must be allowed.

MARTIN and BRAMWELL, BB. concurred.

WILDE, B. had gone to chambers.

*Judgment for deft.; demurrer to the replication allowed.*

Attorneys for plt., *Elsdale and Byrne*, 3, Whitehall-pl. Attorneys for deft., *Gregory and Rowcliffe*, 1, Bedford-row, agents for *J. R. Griffith, Llanrwst.*

### ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Friday, Jan. 16, 1863.

ABBSALUM v. GETHIN.

*Friendly Societies Act, 18 & 19 Vict. c. 63, s. 23—Assignment by treasurer for the benefit of his creditors—Priority of society—Notice in writing.*

*The treasurer of a friendly society having money belonging to it in his hands, assigned all his property to trustees for the benefit of his creditors. The society had not required from the treasurer any security until some years after his appointment, and had not audited their accounts:*

*Held, that the statutory priority given by the above stated Act and section to the society against the treasurer's estate was nevertheless unaffected:*

*Held, also, that the filing and service of the bill in this suit upon the trustees of the deed of assignment was a sufficient notice within the Act and section.*

The female benefit society of *Lover Croesy Cellog*, Monmouthshire, was established in 1840, pursuant to the provisions of the 10 Geo. 4, c. 56, and the 4 & 5 Will. 4, c. 40, for the purpose of providing funds for the support during sickness of members of the society, and for the payment of the funeral expenses of persons being such members at their decease.

By the rules of the society it was provided, *inter alia*, that the treasurer, when duly appointed, should continue in his office during the pleasure of the society, he giving to the clerk of the peace for the county, pursuant to the provisions of 10 Geo. 4, c. 56, security for double the amount which might from time to time be placed by the society in his hands, or which might come to him as the treasurer thereof. In 1840 William Conway James was duly appointed treasurer of the society, which, however, did not call upon him to give the requisite security until Jan. 1853, when he executed a bond as requested.

By the 18 & 19 Vict. c. 63, entitled "An Act to consolidate and amend the law relating to friendly societies," it was by the 23rd section enacted that if any person already appointed or employed, or thereafter to be appointed or employed to or in any office in any friendly society established under that Act, or any of the Acts thereby repealed, whether such appointment or employment were before or after the legal establishment of such society, and having in his hands or possession by virtue of his office any moneys or property whatsoever of such society, or any deeds or other securities belonging to such society, should, among other acts specified in the section, make any assignment, disposition, assignation, or other conveyance

[ROLLS.]

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[ROLLS.]

for the benefit of his creditors, the heirs, executors, administrators, or assignees of every such officer and every other person having or claiming right to the property of such officer, should, upon demand in writing made by the treasurer, or by the trustees, or by any two of the trustees of such society, or any person appointed at some meeting of the society to make such demand, deliver and pay over all such moneys, property, deeds and securities belonging to such society, to such person as such treasurer or trustee should appoint, and should pay out of the estate, assets, or effects heritable or moveable of such officer, all sums of money due which such officer should have received, before any other of his debts were paid; and before any other claims upon him should be satisfied; and before the money directed to be levied, or which might be recovered or recoverable under the provisions of that section, was paid over to the party issuing such process or using such diligence as in that section also mentioned; and all such assets, lands, goods, chattels, property, estate, and effects should be bound to the payment, discharge, and satisfaction of such claims. The 10 Geo. 4, c. 56, and the 4 & 5 Will. 4, c. 40, were among the statutes wholly repealed by the 18 & 19 Vict. c. 63.

On the 31st May 1861 William Conway James, the then treasurer of the society, had in his hands the sum of 400*l.* belonging to it; and he, on that day, and so having possession of that money, by a deed, dated the 31st May 1861, assigned to the defts. all his property upon trust for the benefit of his creditors. On the 19th June 1861 the plts., as two of the trustees of the society, gave a written notice to the defts. that the sum of 400*l.* was in the hands of James at the time aforesaid; and that it then was, and still remained, due and owing and unpaid to the society from him as the treasurer of it; and they demanded payment of the same in priority to all the other debts of James. At the time when their notice was given the plts. were not duly constituted trustees of the society; but, on the 13th May 1862, a few days before the bill in this suit was filed, they were appointed such trustees, in accordance with the rules of the society. The resolution appointing them trustees was sent to the Registrar of Friendly Societies, pursuant to the 18 & 19 Vict. c. 63, and was duly registered under that Act.

The bill prayed payment of the 400*l.*; but that, if the defts. should not admit assets sufficient to answer that amount, then an account might be taken of the estate and effects of William Conway James, possessed by the defts.; and that the same might be applied, so far as they would extend, in payment of the 400*l.*

The defts. admitted, by their answer, that, when James executed the deed of the 31st May 1861, the sum of 400*l.* was due from him to the society, as its treasurer.

*Hobhouse, Q. C. and Jessel* appeared for the plts.

*Baggallay Q. C. and Whitbread*, for the defts., contended that the 18 & 19 Vict. c. 63, s. 23, must be construed strictly; that when the plts. gave the written notice in June 1861, they were not duly constituted trustees of the society, wherefore no proper notice as required by the above stated Act of Parliament had been given; that the society having neglected to require James to enter into any security until Jan. 1853, he was not in fact a treasurer of it within the meaning of the Acts. It was further insisted that the society had neglected to audit the accounts, and had thus enabled the treasurer to retain the sum in question in his hands. That being so, the money must be regarded as having been in James's hands with the sanction of the society; and was to be considered as a loan made by the society to him; and not therefore now a debt due from him as treasurer of it. They cited

*Ex parte Ross*, 6 Ves. 803;

*Ex parte Fleet*, 4 De G. & Sm. 53.

The MASTER of the ROLLS.—I am of opinion that the plts. in this case are entitled to the decree they ask. The defts. answer admits that there was a sum of 400*l.* due from the treasurer when he executed the deed of assignment in May 1861 for the benefit of his creditors. The contention on the part of the defts. is, that the plts. were not entitled to the benefit of the 23rd section of the 18 & 19 Vict. c. 63, because, when they gave the written notice in June 1861, they were not trustees of the society, and there had therefore been no proper demand in writing. A document, however, was produced, appointing the plts. trustees, before the bill in this suit was filed, and, in my opinion, the bill itself was a demand in writing. The Act does not specify any time within which the notice is to be given. It was also argued that the treasurer gave no security until 1853, and that the society having till then neglected to take the security, could not have claimed the benefit of the Act. But in 1853 James did execute a bond, and from that time till the date of the assignment he was treasurer of the society. It was also urged that he did not hold the money as treasurer, but as a borrower from the society. The evidence, however, as to that fails altogether. In my opinion there is nothing in the Act to show that any misconduct of the treasurer deprives the trustees of the society of the remedies given to them by the 23rd section against the estate of the treasurer. The clause, in fact, assumes that the treasurer has acted improperly, and has been guilty of some impropriety in retaining the funds in his hands instead of depositing them in the society's bank. It was admitted that there was something due from him; and the Legislature has thought fit, in cases where a number of poor persons are concerned, to say that they shall have a priority over other creditors of the society's officer. All persons dealing with the treasurer knew, or must be taken to have known, and to know, that such was and is the law; and that the treasurer's estate might have been mortgaged to the full (or any) amount due from him to the society, in priority to all other claims. It was also said that the society had been neglectful in not having audited the accounts; but even assuming that much against them, and assuming that the statute is to be construed strictly, I do not think that because they trusted their treasurer they lost the statutory claim against his estate. The result is, that his estate must be charged with the amount due from him when he executed the assignment in May 1861; and the plts. must be declared entitled to recover the same, with the costs of the suit. The costs of the defts. must come out of their trust-estate.

Solicitors for plts., *Smith and Shepherd*.  
Solicitor for defts., *B. Hunt*.

April 15 and 16, 1863.

SELLAR v. GRIFFIN.

*Overseers—Collector of rates—Liability to account—Settled accounts—Leave to surcharge and falsify—Costs.*

*The predecessors of the plts. (who were overseers) duly appointed the deft. collector of the rates in their parish, but he afterwards resigned his office. The plts. were then appointed to be the overseers, and they filed a bill against the deft. for an account of the rates received by him during his tenure of office. He resisted the suit, on the grounds that he was not employed by the plts., and that he had accounted to his own employers, to whom alone, he was, in fact, responsible:*

*Held, that he was bound to account to the plts., but that settled accounts between him and their predecessors must not be disturbed; the plts. having*

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Ex parte MELLISH.

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*leave to surcharge and falsify those accounts, but making him also proper allowances; and that he must pay the costs of the suit.*

This was a suit by the overseers and churchwardens of the parish of St. Mary, Battersea, against the deft. James Griffin the younger, who had been employed by the plts.' predecessors in office as a collector of rates, praying an account of the moneys received by the deft. from the inhabitants of the parish in respect of the rates payable to them; and also the delivery up of certain rate-books in the possession of the deft.

By the 18 & 19 Vict. c. 120 (the Metropolis Local Management Act), the Wandsworth district board, which includes the parish of St. Mary, Battersea, was empowered to require, and did require, the then overseers of the parish to levy the rates; and those overseers employed the deft. to collect them.

In 1858 the then overseers continued to employ the deft. as their agent to collect the rates; and he continued in that office till Feb. 1862, when he resigned. The present plts. did not come into office till after the deft.'s retirement. On the occasion of his appointment, the deft. entered into the usual bond with the then overseers (by name), their executors and administrators; the condition of which was that he should duly account in respect of the rates collected with the then overseers of the parish, and with their successors in office, or the majority of such successors. It did not appear that any rates had been levied since the accession to office of the present plts. The deft. resisted this suit on the grounds that he was not the agent of the plts., having been appointed by their predecessors in office, and that he was only responsible to the persons who appointed him; and that he had duly accounted to those persons. Some accounts had been settled between the deft. and the plts.' predecessors in office, and the deft. claimed by his answer to be entitled to a large sum of money from those who appointed him their agent on the footing of such accounts; but he denied that he had ever received any moneys on account of the plts.

Hobhouse, Q. C. and Nalder appeared for the plts., and cited

*Lady Beresford v. Driver*, 14 Beav. 387; s. c. 16 Beav. 134;

*Coleyer v. Dudley*, 1 T. & R. 422; *Anon.* 4 Madd. 273;

*Schoyn*, Q. C. and A. E. Millar, for the deft., cited

7 & 8 Vict. c. 101, s. 61;

19 & 20 Vict. c. 120, s. 161;

25 & 26 Vict. c. 102, s. 14;

Dyer 48 a., pl. 15;

Co. Litt. 9 a., note 1;

*Farr v. Hollis*, 4 M. & Ry. 230;

*Attorney-General v. Earl of Chesterfield*, 18 Beav. 596;

*Lockwood v. Abdy*, 14 Sim. 437;

*Maw v. Pearson*, 28 Beav. 196;

*Robertson v. Armstrong*, Ib. 133.

THE MASTER OF THE ROLLS.—I am of opinion that the deft. in this case cannot succeed. He has put forward as his grounds of defence to the suit, first, that he was not liable to account to the present plts. at all, because he had never been their agent; and secondly, that he had duly accounted to the only persons to whom he was bound to account. I adopt fully the principle of the cases cited which determine that an agent, as agent, is only liable to account to his principal; but it is also clear that any person having charitable or trust funds in his hands is liable to account to the persons entitled to those funds. Suppose an executor or trustee who is entitled to receive all the property of a testator employs an agent to collect such property and then dies, the agent having a sum in his hands belonging to the trust, cannot the residuary legatees call

upon him for an account, or can they only get at the fund through the legal personal representative of the deceased executor or trustee? I think that the agent cannot in such a case be permitted to say that he has settled the account with the executor, and is not liable to account to the persons beneficially interested in the money in his hands. Then, further, assuming that there are settled accounts in existence between the agent and the executor, the court will not disturb those accounts, but considering them as perfectly good as they stand will allow the persons beneficially interested to examine them and surcharge and falsify them. It was said that the plts. could not now, owing to the lapse of time, call upon their predecessors for an account. But that is no answer to their claim to examine the deft.'s accounts. It was admitted that, if it had been established by the evidence that the deft. had received a sum of money in respect of the rates, which he had not paid over, he would be liable to account for the same to some one. It is difficult to say that he is accountable to the old overseers, because they have already discharged him; and the deft. says he is not liable to the new overseers, because they did not employ him. But if that be so, is he entitled to say that he may retain any money he may have received? For that must be the result of that argument, if correct. Clearly he cannot. The deft. stated that he had accounted to his employers. But the court does not know that that is the case; and cannot say it is satisfied that he has duly accounted. He must therefore account in respect of the rates received by him during the time of his employment; any accounts settled with the former overseers not to be disturbed; but the plts. must have liberty to surcharge and falsify the same, making the deft. all just allowances. The deft. must deliver up the rate-books, which he has clearly no right to retain, the plts. allowing him free access to them at all reasonable times so as to enable him to make out his accounts; and he must pay the costs of the suit up to and including the hearing.

Solicitors for plts., *Hamber and Harrison*.

Solicitor for the deft., *W. N. Finch*.

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HERTLETT, Esqrs., Barristers-at-Law.

Saturday, Jan. 31, 1863.

Ex parte MELLISH.

Clerk to trustees—Gratuity for extra services—  
1 Geo. 3, c. 208.

*The clerk to the trustees of a parish acting under a local Act of Parliament having discharged certain onerous duties in connection with legal proceedings in which the parish was engaged, the trustees passed a resolution giving him a sum beyond his usual stipend as a gratuity:*

*Held, that there was no power to give gratuities out of the rates, and this court therefore refused to grant a mandamus directing the treasurer of the parish to sign and pay a cheque for such gratuity.*

W. Williams moved for a rule calling on E. Child and Henry Pitt, treasurers of the parish of St. Paul's, Shadwell, to show cause why a mandamus should not issue commanding them to sign and pay a cheque for 150*l.*, which had been drawn by the trustees of the parish, and had been ordered by them to be signed and paid. The applicant, Mr. Peter Mellish, was clerk to the trustees and vestry clerk, and had a great deal of extra work and trouble in certain heavy litigation with the London Dock Company, in consideration of which the trustees had passed a resolution giving him 150*l.* as a gratuity. This the treasurer refused to acquiesce in, and therefore this application was made. The 16th section of 50 Geo. 3, c. 208 (loc. & per.), provides that the trustees

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shall sue and be sued in the name of their clerk. The 19th section provides for the appointment of treasurers and defines their duties; and the 71st section enacts, that a proper person or persons shall be appointed by the vestry to act as a clerk or clerks to the trustees and commissioners, and that the person or persons so to be appointed shall be considered as under the control of the trustees and commissioners respectively, to whom he or they may be so appointed clerk or clerks, and shall be paid out of the funds for the time being under the management of such trustees and commissioners respectively, such reasonable salary as the said vestry shall appoint to be paid to such clerk or clerks. There is no clause giving a power to increase the salary.

CROMPTON, J.—I think this was a clear gratuity.

BLACKBURN, J.—There is no power to give gratuities out of rates. *Rule refused.*

Nov. 12, 1862, and Feb. 21, 1863.

HARGREAVES (app.) v. TAYLOR (resp.)

*Local board of health—Discretion as to works to be done—Justices at petty sessions reviewing determination of local board.*

*Under sect. 54 of the 11 & 12 Vict. c. 63 (the Public Health Act), a discretion is vested in the local board of health to determine what works are necessary to be done, and the justices at petty sessions have no jurisdiction to review the determination of the local board upon such a subject.*

This was a case stated by justices under the 20 & 21 Vict. c. 43, upon a refusal to convict. The case stated was as follows:—

"This case is the result of a summons issued by Mr. Thomas Hargreaves, surveyor, of the Taunton local board of health, in their behalf, against Mr. William Taylor, of the borough of Taunton, under the 54th and 129th sections of the Public Health Act 1848, for disobedience to a notice of the said board, requiring him to construct under three combined privies, his property, a continuous eject of nine-inch brickwork set in cement, the new eject to be trapped and connected with the Mary-street sewer, and to have an attached efficient water supply sufficient for the immediate removal of the soil. The case was heard before the justices of the peace for the county of Somerset, acting in and for the division of Taunton assembled in petty sessions at Taunton, on the 29th day of January. 1862. Upon such hearing it was duly proved that Mr. Taylor was the owner and part occupier of the premises mentioned in the summons, and that the same are situate in the borough of Taunton and within the jurisdiction of the Taunton local board of health. That complaint in writing of the premises as a nuisance was duly made by the local board, and entry and examination by the surveyor under their order was duly had after notice to Mr. Taylor, according to law; and thereupon the said local board, after due report from their surveyor, caused a notice, of which a copy is annexed, to be duly served on Mr. Taylor on the 5th Dec. 1861. That the said Mr. Taylor afterwards executed and completed all the works required by the said notice, except providing an attached water supply; but at the hearing he promised to take care that water should be, from time to time, thrown into the privy drain sufficient to keep it clear. We, the majority of the justices who heard the case, considered that the deft. had done all the works necessary and sufficient, but not all the works that the board of health had called upon him to do, and dismissed the complaint. Whereupon the complainant duly applied to us within three days, in writing, stating that he was dissatisfied with our decision in point of law, and desiring us to state and sign a case, setting forth

the facts and grounds of our decision for the opinion of the Court of Queen's Bench thereon, which we hereby state accordingly. A copy of the evidence taken on the hearing is annexed, and is to be taken as part of this case. Dated," &c.

Coleridge, Q. C. (Folkard with him) appeared for the app., and contended that the justices had no functions to inquire into the question, their duties being merely ministerial.

No one appeared for the resp. *Cwr. adv. vult.*

Feb. 21.—MELLOR, J.—The question for our decision in this case depends upon the construction to be put upon the 54th section of the Public Health Act, 11 & 12 Vict. c. 63. The case is not free from difficulty, and the doubts expressed by my brother Blackburn during the argument are not altogether dispelled; but he does not dissent from the view entertained by the other members of the court, that the discretion to determine what works are necessary to be done within the 54th section is vested in the board of health, and not in the justices at petty sessions. The section begins by declaring that the local board of health shall see and provide that all drains whatever, and waterclosets, &c. within their district, are so kept as not to be a nuisance to the public health; and in the event of the necessary works not being done in pursuance of their notice, the local board may execute the works themselves and recover the expenses in a summary manner, or order them to be declared private improvement expenses, recoverable from owners or occupiers by a rate in the manner provided by the Act. Under these circumstances, it seems more reasonable to hold that the discretion as to the nature and extent of the works required to be done is vested in the local board rather than the justices at petty sessions. We are therefore of opinion that the justices were wrong in assuming jurisdiction to review the determination of the board of health as to this matter, and we think our judgment must be for the app.

*Judgment for the app.*

Friday, April 17, 1863.

DRAY AND WIFE v. PULLEN AND HUBBLE.

*Negligence—Contractor—Statutory duty—Metropolis Local Management Act—Nuisance.*

*The owner of premises within the Metropolis Local Management Act, for the purpose of draining into the public sewer, employed a contractor to do the work, and for that purpose it was necessary to break up the street. The contractor so negligently reinstated the street, that an accident was occasioned thereby to the plt.'s wife:*

*Held, that the contractor, and not the employer, was liable, and that there was nothing in the Metropolis Local Management Act (18 & 19 Vict. c. 120, ss. 77, 110, 111), to alter the ordinary liability of employer and contractor in such a case.*

*Hole v. Sittingbourne and Sheerness Railway Company distinguished.*

This was an action to recover damages for an injury to the plt.'s wife, from falling down in consequence of a trench which had been dug in the highway having been negligently and improperly filled up.

The declaration contained two counts: 1. One upon the ordinary liability for negligence. 2. One upon the duty imposed by the Metropolis Local Management Act, 18 & 19 Vict. c. 120, ss. 77, 110.

At the trial before Blackburn, J., in London, it appeared that the deft. Pullen was the owner of a house in the Greenwich district of the Act, and that a complaint having been made by the inspector of nuisances as to the state of the privy in the house, the deft. Hubble as a contractor was employed to make a drain therefrom into the sewer, and for that purpose he

dug a trench in the highway; but after the work was done he filled up the trench so improperly that upon a fall of rain a subsidence took place in the trench, and the plt.'s wife while crossing it with a basket of clothes, tripped up, fell down and injured one of her legs. The jury found a verdict for the deft. Pullen, and a verdict for the plt. as against Hubble; damages, 65*l*.

*H. Mills*, Q.C. now moved to enter the verdict for the plt. as against Pullen for the same damages, pursuant to leave. It is conceded that Hubble was not in the position of a servant to Pullen; but the liability of Pullen rests on the Metropolitan Local Management Act. The power is given to him by sect. 77 to drain into the sewer, and by sect. 110 he was bound to reinstate the highway in a safe manner. Hubble could only justify through Pullen. In *Hole v. The Sittingbourne and Sheerness Railway Company*, 30 L. J. 81, Ex., the defts. were empowered to make a swing-bridge to open, so that vessels might pass; they employed a contractor to build it. While the bridge was in the contractor's hands, from some defect it could not be opened, and the plt.'s vessel was prevented navigating the river, and it was held that the defts. were liable.

*COCKBURN*, C. J.—I am of opinion that there should be no rule. There is nothing to take this case out of the ordinary rule that, if a person, in the exercise of his private rights, or of a right conferred upon him by statute, employs a contractor to do the work, and the contractor negligently performs it, the contractor, and not the employer, is liable for injuries caused by such negligence. This case is distinguishable from *Hole v. The Sittingbourne and Sheerness Railway Company*. There the company was directed by the Act of Parliament to make a swing-bridge so as to open, and the duty imposed upon them by the statute was not discharged, and it was properly held that it was no answer to say, that the bridge not opening resulted from their having employed another person. In this case Hubble was employed to take up the public pavement and make the communication with the sewer in the highway. Sect. 110 directs the person taking up the pavement to fill in and make good the temporary obstruction with all convenient speed, and, in case of default, sect. 111 imposes a penalty. But the same obligation as that imposed by sect. 110 would have existed independently of that enactment, which would have been wholly unnecessary but for the imposition of the penalty by sect. 111.

*CROMPTON*, J.—This case falls within the ordinary rule of contractors. It is conceded that Hubble was in the situation of a contractor, and not of a servant, and if he had not negligently performed the work, the mischief to the plt.'s wife would not have happened. The obligation imposed by sect. 110 is implied in all Acts which give parties power to interfere with the high roads. In the *Sittingbourne* case the defts. had no right to obstruct the river but by a swing-bridge.

*BLACKBURN*, J.—The duty cast on the persons breaking up streets and highways, by sect. 110, was for the purpose of introducing the liability to the penalty imposed by sect. 111, for delay in reinstating the same, and it was not intended to alter the liability of principals and contractors.

*MELLOR*, J.—In the *Sittingbourne* case there was a perpetual obligation, imposed by the statute, to keep up a swing-bridge, which was not performed by the company. Here the person breaking up the street, by sect. 110, is to take the necessary means to have the street made good again. He has taken that means and employed a contractor, who was guilty of the negligence which occasioned the injury complained of.

*Rule refused.*

Wednesday, April 22, 1863.

NORTON v. M. A. JONES.

*Metropolitan Carriage Act—Fare—Child under ten years of age.*

*The 16 & 17 Vict. c. 127, s. 14 (the Metropolitan Carriage Act) provides, that when more than two persons shall be carried inside any hackney carriage drawn by one horse only, a sum of sixpence for each person shall be paid for the whole hiring, in addition to the fare directed to be paid for two persons under the 16 & 17 Vict. c. 33, and that two children under ten years of age shall be considered as one adult person:*

*Held, that if two children under ten years of age are carried in excess of two persons, they shall be counted and paid for as one adult; but that if one child only be so conveyed in excess, he shall still be considered as an extra person within the meaning of the Act, and paid for accordingly.*

This was a case stated by R. P. Tyrwhitt, Esq., one of the Metropolitan Police magistrates, under the 20 & 21 Vict. c. 43, s. 2, for the opinion of the court.

On the 4th May last the app. Norton, a cabman, was hired to drive the resp. and three other persons from Clarges-street to Great Ryder-street, a distance of less than one mile. Three of these persons were each above the age of ten years, and the fourth was a child under ten years. At the end of the journey the resp. paid him, and, in addition to his fare, the sum of 6*d*. for the third adult. He thereupon demanded an additional sixpence for the child, which was paid to him under protest. A summons having been taken out against him, the magistrate convicted him of making an illegal charge. Against this conviction he now appealed.

*B. C. Robinson* for the app.—The decision of this case must depend on the construction put on the 16 & 17 Vict. c. 33, and 16 & 17 Vict. c. 127. In the schedule of the first Act it is provided that when more than two persons shall be carried inside any hackney carriage one sum of 6*d*. shall be paid for the whole hiring, in addition to the fares before mentioned, and that two children under ten years of age shall be counted as one adult person; and the 14th section of the later statute enacts that the sum of 6*d*. shall be paid for each person beyond two persons, with a similar provision as to counting two children under ten years of age as an adult person. In neither of these sections does the Legislature say that two children are to be considered as one person. It directs, indeed, that the hirer having two children shall enjoy the advantage of paying for them as one adult person; but it leaves the case of one child untouched; and when one child only is carried in excess of two persons, he must be regarded as a person within the meaning of the Act, and paid for accordingly.

No counsel appeared for the resp.

*COCKBURN*, C.J.—I am of opinion that our judgment should be for the app., but at the same time I acknowledge that it is difficult to come to any satisfactory conclusion on this Act, which is so ingeniously drawn that it may admit with equal fairness of either of two interpretations. At first I was inclined to think that the intention of the Legislature was this: that by the first Act, where more than two persons should be carried inside any hackney carriage, the sum of sixpence should be paid for those who were in excess of that number, but that in calculating the excess two children should be assessed only as one adult person; and that by the subsequent Act the only change that was effected was, that the driver should be entitled to charge sixpence for each person in excess of two, and that in the case of children he must still count two as one adult person. Now, although that section seems to be capable of that construction, yet I think that, if

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we look at the former Act, the other construction will be found to be the correct one. By that Act it is provided that, where more than two persons are carried, one sum of sixpence is to be paid for the whole hiring in addition to the fares before stated. Now, suppose that in addition to two adults one child is conveyed; there are still more than two persons carried, and the cabman would be entitled to claim his extra sixpence. But then comes a proviso that two children under ten years of age shall be counted as an adult. This I consider was designed to be in favour of the hirer; but that nevertheless two adults with one child are still more than the two persons whom the driver is bound to carry. Then, as I consider that as the only distinction made between the two Acts is, that by the first the driver can only charge sixpence for the entire number in excess, while by the second he may demand that sum for each person, I think that the same construction must prevail; and that the proviso must be interpreted as introduced for the benefit of the hirer, and as giving him the privilege of paying the same fare for two children which he would have been required to pay for one.

CROMPTON, J.—I agree in the construction which has been put on the two clauses by my Lord. I think that they are substantially the same, and that the only distinction which the later Act makes, is to confer an advantage on the driver by enabling him to charge sixpence for each person, instead of all whom he may carry beyond two. I think, further, that if there are two children in excess, the hirer will be entitled to pay for them as one adult; but that if only one child be carried, he must still be paid for as an extra person.

BLACKBURN and MELLOR, JJ. concurred.

*Judgment for the app.*

*Thursday, April 23, 1863.*

REG. v. JUSTICES OF WILTSHIRE.

*Assault—Compromise—Jurisdiction of justices.*

*After the issuing of a summons for a common assault, and before the day appointed for hearing by the justices, the parties compromised the matter, and informed the justices thereof. The justices, however, proceeded to hear the summons, and convicted the defts., the prosecutor having given evidence, though involuntarily:*

*Held, that the convictions could not be quashed on the ground of want of jurisdiction.*

Sleigh moved for a *certiorari* calling on the Rev. John Hawkins and H. R. Seymour, two justices of Wiltshire, and on a person named Alexander, the prosecutor, to show cause why two convictions against Charles Bryant and A. King should not be quashed, on the ground that the justices had no jurisdiction to convict.

It appeared that Alexander had obtained summonses against Bryant and King for a common assault, and that afterwards, and before the day of hearing, the case was compromised and settled amicably. Alexander then called on the Rev. J. Hawkins, one of the justices, and informed him that he had agreed to settle the matter, and that there would be an end of it; that Bryant and King had expressed their regret for the assault, and that he (the prosecutor) had forgiven them. On the return day of the summons neither the prosecutor nor the defts. appeared before the justices, and a warrant was issued by the justices (under 11 & 12 Vict. c. 43, s. 2) for the apprehension of the defts. King was arrested, lodged in prison, and bail refused; Bryant, however, kept out of the way. At a subsequent day the prosecutor and defts. attended, by order of the justices, when a solicitor appeared under protest for the defts., and, after stating what had passed, urged that the justices had no jurisdiction to hear the case. The justices

ruled otherwise; and the prosecutor, on being requested so to do by the justices, gave evidence involuntarily, and in the result the defts. were fined 1*l.* each.

Sleigh contended that the convictions were made without jurisdiction. They were made under the 9 Geo. 4, c. 31, s. 27. The prosecutor had a right to compromise the matter (*Keir v. Leeman*, 6 Q. B. 308); and having so done the summonses fell to the ground. [COCKBURN, C. J.—Did the compromise do anything more than terminate the matter as between the parties? Can you oust the magistrates' tribunal, which was seized of the complaint by the summons, of its jurisdiction?] In *Reg. v. Dens*, 20 L. J. 189, M. C., where an information before a magistrate stated that the informant having been assaulted prayed for articles of the peace, the magistrates proceeded to deal with the assault, and the informant protested against their adjudicating upon it. And it was held that the magistrates had no jurisdiction to adjudicate against the will of the informant, as under the 9 Geo. 4, c. 31, s. 27, the justices have no jurisdiction to convict of an assault unless the party aggrieved complain of that assault before them with a view to their adjudicating upon it. [COCKBURN, C. J.—In that case there was no complaint preferred for the assault, and no summons for it obtained, but the party only wanted articles of the peace. BLACKBURN, J.—Magistrates cannot originate a complaint, but the question is, whether a party having originated the complaint in the magistrates' court, and being anxious to withdraw from it, but not having actually done so, as it appears he gave evidence, although it may be urged that he substantially withdrew, is that the same as never having made the complaint?] The complaint no longer existed, and the justices were informed of what had been done. [COCKBURN, C. J.—The complaint still existed, there was the summons. It is like the issuing of a writ. MELLOR, J.—If neither party had appeared the justices were not bound to dismiss the summons. They might have adjourned the case. When the summons once issued, the magistrates were seized of the complaint.]

By the COURT.—The magistrates were seized of the complaint, and had jurisdiction, and they have exercised it. We cannot interfere.

Attorneys for the applicants, *Lewis, Wood and Street*.

*Rule refused.*

*Saturday, April 25, 1863.*

KERKIN AND OTHERS v. JENKINS.

*Vagrant Act*—5 Geo. 4, c. 83, s. 4—*Unlawful purpose*—*Justices*—*Conviction*.

*An information under the 5 Geo. 4, c. 83, s. 4 (the Vagrant Act), charged the apps. with being found in the resp.'s house at night "for an unlawful purpose, to wit, for the purpose of feloniously stealing the resp.'s property." The evidence showed that they were in the resp.'s house, partaking with his servants of provisions which were his property, without his knowledge or consent. The justices found that the apps. were in the house for the unlawful purpose of joining in the taking and consuming the resp.'s property without his consent or knowledge, and convicted them:*

*Held, that, as the information laid a felonious purpose, it was essential to support it, that a felonious intention should be shown; that, as the justices had merely found that the apps. were in the house for the purpose of unlawfully taking and consuming the resp.'s property, without stating that they were there to commit a felony, the conviction was bad.*

This was a case stated by two of the justices of Cornwall, under 20 & 21 Vict. c. 43, for the opinion of the court.



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THE ANDREW WILSON.

[ADM.]

At a petty sessions, holden for the St. Austell division of East Powder, Cornwall, on the 3rd June last, an information preferred by David Jenkins (the resp.) against Samuel Kerkin, James Huxtable, and George Colenso (the apps.), under 5 Geo. 4, c. 83, s. 4, commonly called the Vagrant Act, charging that they on the 7th May, at Church Town, in the parish of Gowan, in the said county, at eleven o'clock at night, were found in the dwelling-house of the resp. for a certain unlawful purpose, to wit, for the purpose of feloniously stealing and converting to their own use certain provisions the property of the resp., contrary to the form of the statute, was heard, and the said apps. duly convicted.

It was proved that on the day in question the household of the resp. (who is vicar of the parish) consisted of himself, his daughter, and three female servants. At ten p.m. the family retired to their respective rooms; but the resp. and his daughter, suspecting that all was not right, went down stairs to keep watch. The apps. and the resp.'s servants and his schoolmistress were in the servants' bedroom, which was fastened. The resp. demanded admission, which was refused. Two of the apps. then escaped by the window, and the third was afterwards turned out of the house. On entering the room the resp. found on the table the fragments of an entertainment consisting of provisions, a portion of which was proved to be his property; and it was also proved that the apps. were in the resp.'s house without his knowledge or consent. It was also proved that one of the apps. had been paying his addresses to one of the servants of the resp., but it was not shown that he had never been there at night.

We convicted the apps. on the ground that they were, under the circumstances proved to us, in the house of the resp. for an unlawful purpose within the meaning of the Act.

The question of law arising on the above statement for the opinion of the court is, was the purpose for which we found the apps. to have been in the resp.'s house, namely, the purpose of joining in the taking and consuming of the provisions which were resp.'s property, without his knowledge or consent, an unlawful purpose within the meaning of the Act?

*Karslake, Q.C.* for the resp.—The apps. were proved to have been in the resp.'s house for a felonious purpose. [CROMPTON, J.—The purpose is very material here. Did they not go to the house for another purpose than that laid in the information?] They went for the purpose of consuming the resp.'s property. The case may be assimilated to that of *Reg. v. White*, 9 C. & P. 344, where it was held, that if a servant take his master's property and hand it over as a gift, it amounts to a felony. Had the parties been indicted, the judge must have left it to the jury to say whether the facts constituted a felony, and the court will not disturb the finding of the magistrates before whom all the facts were.

*Field* for the apps.—The conduct of the parties amounted to gross impropriety, but did not constitute a felony. But assuming that on an indictment a felony might have been found, the offence has not been found in this case. The information charges the parties with felony, but the justices have merely found that they were there for an unlawful purpose. The conviction, therefore, cannot be sustained.

COCKBURN, C. J.—I think that the justices have stopped short of finding the charge on which the information is based. The information alleges that the apps. were in the house of the resp. "for an unlawful purpose, to wit, for the purpose of feloniously stealing." But the justices have hesitated to hold that the purpose was felonious, and have merely said that they were there for the unlawful purpose of consuming the resp.'s provisions. Now this may be, and is, an unlaw-

ful purpose; but it is not such an unlawful purpose as is laid in the information. Had the matter formed the subject of an indictment a judge probably would not have withdrawn the evidence from the consideration of the jury, although he might have been tolerably certain that the result would be an acquittal. But we are not sitting here to decide a fact, but to interpret the law, and as the magistrates have shrunk from actually finding that the offence is a felony, and have asked us to define whether the act does amount to a felony, we must hold that their finding does not sustain the information, and that the conviction must therefore be quashed.

CROMPTON, J.—I do not consider that, to insure a conviction under the Act, it is always essential that a felony should be proved; but, as the resp. has chosen to lay the unlawful purpose as a felonious one, he is confined to it, and it is our duty to see whether the charge has been found. Now there was some evidence which might have been left to a jury of a felonious intention, and the magistrates might probably have come to a conclusion that a felonious act was contemplated. But they have shrunk from doing so, and merely found that the apps. were in the house for the unlawful purpose of consuming the resp.'s property. This is not the offence laid in the information, and I therefore think that the parties were not properly convicted of the matters with which they were charged.

BLACKBURN, J.—The conviction can only be supported by finding that the parties were in the house for the purpose of committing felony, for the information is so laid. Has the offence, then, been so found, and is the evidence sufficient to sustain the finding? Now the magistrates have simply found that the apps. were in the resp.'s house for the unlawful purpose of joining in the taking and consuming the resp.'s property without his knowledge or consent. This is insufficient, as I think that they should have shown that they were there with a felonious intent. It is difficult to define precisely what would amount to a felony, and the evidence might probably have warranted the justices in finding a felonious act, but as they have not done so, I think that the conviction must be quashed.

MELLOR, J. concurred. *Judgment for the apps.*

## ADMIRALTY COURT.

Reported by ROBERT A. FRITCHARD, D.C.L., Barrister-at-Law.

Wednesday, April 1, 1863.

THE ANDREW WILSON.

*Salvage—Appeal from award of justices—Sum in dispute.*

*The meaning of the words "sum in dispute" is the 464th section of the Merchant Shipping Act 1854 is not to be limited to the sum awarded by the justices.*

*It is the duty of the Court of Admiralty, on such appeals, not to interfere with the award of the justices, except in extreme cases.*

*On an appeal from an award of justices, the sum of 24l., allotted by them on a claim for salvage services, held insufficient, and a further sum of 20l. and costs given.*

This was an appeal from an award made by two justices of the peace at Lowestoft, upon a claim for salvage brought by the owners and crew of the steaming *Minnet* against the vessel *Andrew Wilson*. It appeared that on the 21st Dec. 1862, the *Andrew Wilson*, a schooner of 76 tons, whilst on a voyage from Inverkeithing to Bruges, was off Lowestoft Harbour; the wind was strong from W.N.W., flying about in squalls to N.E.; that the *Andrew Wilson*, when about half a mile from Lowestoft Harbour,

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hoisted a waif, to which the tug responded, and was engaged by the master of the *Andrew Wilson* to tow that vessel into Lowestoft Harbour, which she did after experiencing some difficulty, owing to the parting of one tow-rope and securing another. For these services the justices awarded 24*l.*, including 4*l.* for expenses; and from this decision the present appeal was brought. The value of the property was 400*l.*, and it transpired from the proceedings that in consequence of the state of the weather the tug had employed six experienced beachmen, in addition to her ordinary crew of four hands.

*Deane, Q.C.* appeared for the appra.

*The Queen's Advocate* for the respa.

*Dr. LUSHINGTON.*—The first question which the court must decide is, whether or not the court has any jurisdiction under the 464th section of the Merchant Shipping Act 1854, inasmuch as the sum of 24*l.* only has been awarded by the justices. The material words of that section are:—"If any person is aggrieved by the award made by such justices or such umpire as aforesaid, they may, in England, appeal to the High Court of Admiralty of England; but no such appeal shall be allowed unless the sum in dispute exceeds 50*l.*" There may be some obscurity in the language of this section, but I am of opinion that the words "sum in dispute" must not be limited to the sum awarded by the justices. If the Legislature had otherwise intended, if the expression "sum in dispute" was intended merely to refer to the sum allotted by the justices, I cannot but think that the section would have been differently worded—that no such appeal should be allowed unless the sum awarded should exceed 50*l.* I am fully sensible of the inconvenience of allowing appeals of this nature, and that it is the duty of this court not to interfere with the awards of justices except in extreme cases, and unless the reward so given be altogether insufficient. In this case the steam-tug which performed the services is of the value of 1800*l.*, and in addition to her ordinary crew of four hands, the master had on board six experienced beachmen, who of course must share in the salvage remuneration. It is admitted that the services were well and efficiently performed, and bearing in mind that, though not a hurricane as deposed to by some of the witnesses, there was nevertheless a violent gale at the time, that many other vessels had hoisted signals of distress, and that the *Andrew Wilson* had only a small kedge anchor left, I cannot but think that her danger was considerable. I am therefore of opinion that 20*l.* in addition to the sum awarded by the justices is only an adequate remuneration. The salvors are also entitled to their costs.

### COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

April 22 and 23, 1863.

MOULTON (app.) v. WILBY (resp.)

*Salmon Fishery Act 1861, 24 & 25 Vict. c. 109—Sects. 11 and 12—Appeal against conviction under sect. 12—Salmon cage—Fixed engine—Fishing weir or fishing mill dam—Fish pass—Ownership of fishery and mill dam in different persons—Construction of Act.*

*App. was owner of a fishery and a salmon cage, which cage was built upon a spur of mason work attached to the masonry of a weir or dam in the river Dee, belonging to another person, and over which dam app. had no control. The cage was within fifty yards below the dam, which had no free gap or fish pass in it as required by sect. 12 of the Salmon Fishery Act 1861. The position of the cage was such that no fish could ascend or descend the river*

*without getting into the cage, from which subsequent escape was very difficult. The app.'s practice was to get the salmon out of the cage by means of a net, and it was admitted that this was a mode of fishing lawfully exercised by virtue of an ancient right at the time of the passing of the Act of 1861. An information was laid against app. for taking six salmon out of the cage by means of a net on the occasion in question, and the justices convicted him of an offence against the 12th section of the Act, in having caught salmon otherwise than "by rod and line within fifty yards below a dam not having a fish pass attached thereto" in accordance with the Act. On appeal to the Ex., the Court*

*Held, that the conviction was right.*

*First, the salmon cage is not a "fixed engine" within sect. 11, and if it were, and although it was a mode of fishing lawfully exercised by virtue of an ancient right at the time of the passing of the Act, yet the proviso at the end of sect. 11, that it should not apply to "fishing weirs" or "fishing mill dams" takes it out of the operation of sect. 11 altogether, and that section consequently has nothing to do with the present question.*

*Secondly, the second heading or division of sect. 12 is an absolute prohibition of the catching of salmon by any one in any manner, "except by rod and line" in the head race or tail race of any mill, or within "fifty yards below any dam, unless such mill or dam has attached thereto a fish pass" in the form prescribed by sect. 12. Nor can the provisions of the Act be evaded by the fact that the weir and the salmon cage belong to different owners. The conviction therefore was right under the second division of sect. 12 of the Act.*

*This was an appeal against a conviction by justices of the peace for the city of Chester, under the Salmon Fishery Act 1861.*

*The following case was stated by the justices under 20 & 21 Vict. c. 43, s. 2, for the opinion of the Court of Ex. :—*

*Ralph Moulton, upon complaint of Joshua Wilby, was duly summoned to appear on the 25th July last, before us, the undersigned, two of her Majesty's justices, &c., for that the said R. Moulton "did, on the 26th May last, catch in the salmon cage, on the river Dee, in the city of Chester, and within fifty yards below a dam there existing, six salmon otherwise than by rod and line, contrary to the provisions of the 12th section of 24 & 25 Vict. c. 109." Upon hearing the complaint on the said 25th July last, the before-mentioned parties appeared before us, accompanied by Mr. Bridgman, solicitor for the said J. Wilby, and Mr. Hoastage, solicitor for the said R. Moulton.*

*It was proved by the complainant Wilby (the resp.), who was a watcher for the conservators of the river, that on the 25th July last the deft. took, by means of a landing net, six salmon out of the salmon cage in which the fish were then impounded; that the salmon cage was within fifty yards below a fishing mill dam such as is mentioned in sect. 4 of the said Act on the river Dee; that the fishing mill dam had not a fish pass attached thereto, in accordance with the 12th section of the 24 & 25 Vict. c. 109; that the mode in which the salmon were taken was similar to that in use before the passing of the last-mentioned Act; that since the passing of the said Act bars had been placed in the salmon cage, which bars, when up, constituted a clear opening for salmon to pass through the cage, both up and down, according to the provisions of the 22nd section of the said Act; that the bars were up on the 26th May.*

*For the defence, it appeared to our satisfaction, and it was admitted on the part of the complainant, that there was an ancient right of fishing in the aforesaid*

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salmon cage, by charter, grant, or immemorial usage, which right had been purchased many years ago by one Mr. Topham, from whom it descended to the present owner, Mr. Robert Topham, whose tenant the deft. Moulton was before and on the said 26th May; and under which charter, grant, or immemorial usage the said deft. and previous tenants of Mr. Topham had lawfully fished, and been used to fish, before and until and at the time of the passing of the aforesaid Act. It was not disputed that deft. Moulton was Mr. Topham's tenant, and as such tenant was licensed by Mr. Topham (if Mr. Topham had the power to give such licence by law) to do the act complained of.

Upon the above facts we were of opinion that the matter of the said complaint had been proved against deft. Moulton, and we convicted the said R. Moulton of an offence against the 12th section of the said Act of 1861, and adjudged him to pay a penalty of 5s. for his said offence, and also adjudged him to pay 1s. for each salmon so as aforesaid taken.

The question for the court is, whether upon the facts stated the justices were justified in convicting the app. as aforesaid.

By the plan, annexed to and forming part of the case, it appears that a weir or mill dam stretches diagonally across the river Dee, commencing at the left bank of the river some distance above the Old Dee Bridge and reaching to the right bank of the river close to the same bridge. At the lower end of such weir, next the bridge on the right bank, are the Dee Flour Mills, which, together with the weir, belong to a Col. Wrench. At the higher end of the weir, on the left bank of the river, there are other mills now belonging to Mr. Topham, who purchased them, together with the fishery and salmon cage, some years ago of Col. Wrench, to whom before such purchase all the mills and the weir, together with the fishery and the salmon cage, belonged as sole proprietor of the whole. The weir or dam causes the water to fall many feet, and when the water is lower than the top of the weir, its only escape is the aperture at the higher end of the weir (between it and the mills on the left bank), where there is a large water-wheel for working the mills, and a floodgate to regulate the supply and passage of the water to the mills. Connected with and running out from the higher end of the weir, at right angles to it, in a direction down the river towards the bridge, is a block of masonry called a "apurr," several yards long. The salmon cage, which is some yards below the said water-wheel and floodgate, is built on this spur on the one side and on the other on a sunken wall of masonry connected with the left bank. Over the water-wheel or through the floodgate, in which the wheel is placed, the water flows between solid masonry until it reaches the salmon cage, through or under which it flows on to the stream below, and all fish ascending the river to spawn, or passing back again down the river, have to pass through the above-mentioned aperture: in making for which upwards, or passing from which downwards, they must necessarily pass through the salmon cage, the receding bars of which are placed in such manner that, having passed through them into the cage, they find themselves in a trap, from which escape into the river is very difficult.

The following sections of the Salmon Fishery Act 1861 (24 & 25 Vict. c. 109) were referred to in the argument and judgment.

By sect. 4 (interpretation clause) the term "dam" shall mean all weirs and other fixed obstructions used for the purpose of damming up water. "Fishing weir" shall mean a dam used for the exclusive purpose of catching, or facilitating the catching of fish. "Fishing mill dam" shall mean a dam used, or intended to be used, partly for the purpose of catching, or facilitating the catching of fish, and partly for the purpose of supplying water for milling or other pur-

poses. "Fixed engine" shall include stake-nets, bag-nets, putts, putchers, and all fixed implements or engines for catching, or facilitating the catching of fish.

Sect. 11. No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters, and any engine placed or used in contravention of this section may be taken possession of or destroyed; and any engine so placed or used, and any salmon taken by such engine, shall be forfeited, and in addition thereto, the owner of any engine placed or used in contravention of this section shall, for each day of so placing or using the same, incur a penalty not exceeding 10*l*.; and for the purposes of this section, a net that is secured by anchors, or otherwise temporarily fixed to the soil, shall be deemed to be a fixed engine; but this section shall not affect any ancient right or mode of fishing as lawfully exercised at the time of the passing of this Act, by any person by virtue of any grant or charter or immemorial usage, *provided always, that nothing in this section contained shall be deemed to apply to fishing weirs or fishing mill dams.*

Sect. 12. The following regulations shall be observed with respect to dams:—(1.) No dam except such fishing rivers and fishing mill dams as are lawfully in use at the time of the passing of this Act by virtue of a grant or charter or immemorial usage, shall be used for the purpose of catching, or facilitating the catching of salmon. 1. Any person catching or attempting to catch salmon in contravention of this Act, shall incur a penalty not exceeding 5*l*. for each offence, and a further penalty not exceeding 1*l*. for each salmon which he catches. 2. All traps, nets and contrivances used in or in connection with the dam for the purpose of catching salmon shall be forfeited; and no fishing weir, although lawfully in use as aforesaid, shall be used for the purpose of catching salmon, unless it have therein such free gap as is hereinafter mentioned. And no fishing mill dam, although lawfully in use as aforesaid, shall be used for the purposes of catching salmon, unless it have attached thereto a fish pass of such form and dimensions as shall be approved of by the Home-office. Nor unless such fish pass has constantly running through it such a flow of water as will enable the salmon to pass up and down such pass, but nevertheless that such pass shall not be larger nor deeper than requisite for the above purposes. (2.) No person shall catch or attempt to catch, *except by rod and line*, any salmon in the head race or tail race of any mill, or *within fifty yards below any dam, unless such mill or dam has attached thereto a fish pass of such form and dimensions as may be approved by the Home-office*, and such fish pass has constantly running through it such a flow of water as will enable salmon to pass up and down it; and if any person acts in contravention of the foregoing provision—1. He shall incur a penalty not exceeding 2*l*. for each offence, and a further penalty not exceeding 1*l*. for every salmon caught. 2. He shall forfeit all salmon caught in contravention of this section, and *all nets or other instruments used or placed for catching the same.*

By sect. 21, no person is to fish during weekly close time otherwise than with a "rod and line," and any one acting in contravention thereof is to forfeit all fish taken, and "any net or moveable instrument used by him in taking the same," in addition to a pecuniary penalty.

*McIntyre*, for the resp., in support of the conviction.—The clear intention of the Act was to prevent any one from fishing or taking fish in any other way than with rod and line in the head or tail race of any mill, or within fifty yards below any dam not having attached to it a fish pass as described in sect. 12. There was here a taking of salmon in direct contra-

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vention of the second clause of the 12th section of the Act. The app. will contend that the taking was complete when the fish were in the cage, and that the cage is a "fixed engine" within sect. 11, and being part of a "fishing weir" or "fishing mill dam" is protected by the proviso in that section. But that argument will not avail, for sect. 11 has no bearing on the case. By that proviso "fishing weirs" and "fishing mill dams" are not to be taken as "fixed engines." The plan, which is part of the case, shows that the salmon cage formed part of the dam, but the taking was not complete until the fish were taken out of the cage by the net. The cage was a "*facilitating* of the catching," and although an ancient and lawful mode before the Act, yet it came within the second part of the first division of the 12th section, which enacts that no fishing weir or fishing mill dam, although lawfully in use as aforesaid, shall be used for the purpose of catching salmon, unless it have therein such free gap or fish pass as the Act requires. Again, the conviction is supported by the express words of the 2nd clause of sect. 12, that no fish are to be taken "except by rod and line in the head race or tail race of any mill, or within fifty yards below any dam, unless such mill or dam has attached thereto a fish pass," such as the Act directs. [POLLOCK, C. B.—Suppose, instead of a net, he had used a "rod and line" to get the fish out of the cage?] He would still have been liable, for the impounding them in the cage would have been an unlawful *facilitating* within the Act. [MARTIN, B.—Is this a "fishing weir," or a "fishing mill dam" within the Act?] It is submitted that it clearly is a "fishing mill dam" under sect. 4. The cage is bounded on each side by the dam, the sole operation of which is, that except into this narrow trap there is no passage for the fish. The case finds it to be a "fishing mill dam" without a fish pass, and that fish were caught within fifty yards of it otherwise than by "rod and line." How then can it be said not to be within sect. 12 the Act?

E. Beavan for the app. contra.—The effect of sustaining the conviction will be to take away valuable property from the app. without any compensation, and the court will not do that unless they see that the language of the Act is very clear. The question is, whether the salmon cage is a lawful mode of getting the fish. The case finds it to be an ancient mode similar to that in use before the Act, and that there was an ancient right of fishing in the said cage by charter, grant, or immemorial usage. It was therefore lawful within and expressly secured by the 11th section. As to the proviso that sect. 11 is not to apply to fishing weirs or fishing mill dams, it is submitted that this is not either a "fishing weir," or "fishing mill dam," but a "fixed engine." The case does not find it to be part of the mill dam, but, on the contrary, it is found to be several yards below. [BRAMWELL, B.—It is manifest that if the dam were not there the fish would not enter the cage, but swim past it. Does it not then come within sect. 12?] It is a "fixed engine" under sect. 11, but being in lawful use by ancient right it is expressly exempted from the operation of the Act; the taking was complete when in the cage, and it cannot be an offence under sect. 12. But even if not protected as a "fixed engine" under sect. 11, app. cannot be convicted under sect. 12. That section consists of two parts; the first relating to dams and fixed engines, and fishing by nets, &c. within a dam, which this is not. The second part, under which this information is framed, is confined to fishing by nets and other instruments *ejusdem generis*, namely, "moveable instruments," as contradistinguished from "fixed engines" such as this salmon cage. [WILDE, B.—The 11th section does not, and the 12th section expressly does, apply to dams. The first part of the 12th section cannot, I think, apply to the person to whom the

dam does not belong. The second part of that section, however, is more general, and my difficulty is to see how any one catching salmon in any way but by "rod and line" within the prohibited distance of any dam not having the requisite fish pass, can escape the operation of the second part of this section.] It is contended that that does not apply to "fixed engines." By sect. 11, which deals with fixed engines and permanent structures such as this salmon cage, such engines are to be taken possession of and destroyed; and sect. 20 directs the removal of fixed engines in the close season. But by sect. 12 "all nets and other instruments" are to be forfeited. Where they are moveable they are to be forfeited and carried off; where fixed, to be destroyed. How could this cage, which is fixed to the freehold, be forfeited and carried away? Sect. 21 supports this view. [WILDE, B.—A net which is staked down, is affixed to the freehold.] Sect. 21 makes special provision for the taking of forfeited nets. [WILDE, B.—Sect. 21 makes rather against your present argument. It says, "nets or moveable instruments;" but sect. 12 says, "nets or other instruments used or placed," &c.] Again, the app. was not the owner of the dam, and had no power to affix a fish pass to it. It would be a great hardship and injustice if the ancient right, for which app. has paid a large sum, be taken from him, without any compensation, because the dam has not the pass which app. has no power to compel the owner to affix to it. [BRAMWELL and WILDE, BB.—It clearly is the intention of the Legislature to get rid of these obstacles as public nuisances, and to give the fish free room to go up the river.] That may be; but it was also their object to protect vested and immemorial rights. [BRAMWELL, B.—And salmon also.] Sect. 11 expressly saves all ancient rights of fishing. [WILDE, B.—Yes; but not fishing by means of these dams. They are expressly excepted from the operation of sect. 11, and brought within that of sect. 12.]

McIntyre in reply.—The preamble shows the Act must be construed with reference to its object, viz., the preservation of salmon, and the provisos relative to certain instruments are to be construed strictly and not widened. The plan shows the cage to be on the spur, the only object of which is to guide the fish into the cage. By sect. 20, the spur is to be of a certain length, and to be legal must have a fish pass. Sect. 11 is a general section, destroying all "fixed engines," wherever placed; but then comes the proviso, and says the section which would destroy all fixed engines shall not affect this one, as it is part of a fishing mill dam. [MARTIN, B.—In my opinion, the 11th section has nothing to do with this case. But there is the 12th section. The first branch of that section applies, in my opinion, to the case where the owner of the fishery has also control over the "fishing weir;" and it seems to me that unless the "fishing mill dam" belongs to the owner of the fishery, he does not use it in the way contemplated by the section. Here the owner of the cage has no control whatever over the "fishing mill dam."] The second clause of the 12th section is an absolute enactment that, unless there is a free pass, no one can fish there in any manner whatever. There is no difference between a fixed and a moveable engine, and if the owner of the fishery cannot get the owner of the dam to make a fish pass, and the Home-office will not help him, then his fishery is gone. If not, it would be easy to avoid the operation of the Act by a severance of the dam from the fishery. If sect. 11 does not apply, the latter part of sect. 12 does, and no mode of fishing, whether by moveable or fixed engines, can be used by any person within fifty yards below any mill dam, which has not the proper fish pass affixed to it.

POLLOCK, C. B.—We are all agreed in thinking

that the appeal in this case must be dismissed, and that the conviction was right. The 11th section of the Salmon Fishery Act 1861 does not apply, and has nothing to do with the present question. That section is directed against "fixed engines," and contains a proviso that it "shall not affect any ancient right, or mode of fishing as lawfully exercised at the time of the passing of the Act, by any person by virtue of any grant, or charter, or immemorial usage." There is no doubt that the mode of fishing against which this information is laid is one that was sanctioned by immemorial usage, and, had the Act stopped there, it would no doubt have been a lawful mode of fishing within sect. 11; but then comes the further proviso, that "nothing in this section contained shall be deemed to apply to fishing weirs or fishing mill dams," which takes the whole matter out of the operation of sect. 11 altogether. But then comes the 12th section, which says that "no person shall catch, or attempt to catch, except by rod and line, any salmon in the head race or tail race of any mill, or within fifty yards below any dam, unless such mill or dam has attached thereto a fish pass of such form and dimensions as may be approved by the Home-office," &c., and then proceeds to inflict penalties on any person acting in contravention of the foregoing provision. That is an absolute prohibition. Now, this weir or dam had no such fish pass as the Act requires; nothing, in short, enabling the fish to pass up and down the river freely; and the fish were caught otherwise than by rod and line. There was therefore a catching of fish by prohibited means, in a prohibited part of the river, and consequently the conviction was right, and the appeal must be dismissed.

MARTIN, B.—I am entirely of the same opinion. Although at one time I had a doubt upon the matter, I am now convinced by Mr. McIntyre's argument, and satisfied that he is right in his construction of the statute, that the second heading or division of the 12th section is an absolute prohibition to the catching of salmon in any manner, *except by rod and line*, within the prescribed part of the river, unless there be the fish pass required by the Act. And, even if the owner of the mill dam refuses his consent to such fish pass being attached thereto, and such fish pass cannot be obtained, the owner of the fishery is nevertheless absolutely prohibited. Looking at the 23rd and 24th sections, however, it is clear that the owner of the fishery may get a free pass, contrary to the wish of the owner of the dam, if the Home-office will give him their assistance. The conviction must be affirmed.

BRAMWELL, B.—I agree with the rest of the court in thinking that this conviction was right. But, first, I would say that I agree with what my brother Martin said in the course of the argument, and my Lord in his judgment, that sect. 11 does not apply to this case, and has nothing to do with "fishing weirs" or "fishing mill dams," or anything connected with them. The 12th section applies to dams, and that section is headed thus: "The following regulation shall be observed with regard to dams." It then proceeds to prohibit, in the first place, the use of all dams for the purpose of catching or facilitating the catching of salmon, "except such fishing weirs and fishing mill dams as are lawfully in use at the time of the passing of the Act, by virtue of a grant," &c.; and then it proceeds to enact, "that no fishing weir, although lawfully in use as aforesaid, unless it have therein a free gap," and "no fishing mill dam, although lawfully in use as aforesaid, unless it have attached thereto a fish pass as therein described, shall be used for the purpose of catching salmon." Now, this fishing mill dam and the contrivance connected therewith had not any fish pass attached to it. My brother Martin seems doubt whether a weir can be said to be used

for the purpose of catching fish where the ownership of the weir and of the fishery is in different persons. It may be that that is a doubtful question; but my own notion is that it can be, although the two things do not belong to the same person, for it is clear that if the dam were not there the salmon cage would be useless; the fish would swim by and not enter the cage; but being there its effect is to drive the fish into the cage. The provisions of the Act cannot, I think, be evaded by the fact that the weir and the cage belong to different owners. The difficulty, to my mind, in the construction contended for by the resp. was, that where, possibly, as is said to be the case in the present instance, the weir, or a large part of it, belongs to a person who is not also the owner of the fishery, it would be taking away a valuable right from the owner of the fishery without any compensation. But the doubt which, together with my brother Martin, I at one time entertained on that point has been set at rest by Mr. McIntyre's argument, and he has satisfied both me and my brother Martin that it is forbidden by the Act to any one to fish in any manner, except with a rod and line, within fifty yards below any mill-dam that has not a fish pass. It is clear, therefore, that the Legislature did not shrink from doing what has been argued to be so great a hardship and injustice. It will, however, I think, be found in the long run that there is no hardship in restraining these particular rights. I have no doubt the conviction was right, and the appeal must, therefore, be dismissed.

WILDE, B.—I am of the same opinion. The app. is in this alternative. This engine is either a part of the dam or it is not; if it is, then it becomes a "fishing mill dam" that has been used for fishing purposes without a fish pass, in contravention of the first branch of the 12th section. If it is not a part of the dam, then the app. comes within the second division of the 12th section, as having caught fish otherwise than by rod and line within fifty yards below a dam not having a fish pass attached to it. The case clearly falls within the second, if not within the first, branch of the 12th section.

*Appeal dismissed—Conviction affirmed.*

Attorneys for app., *Chester and Urquhart*, Stapleinn, agents for *Hostage and Tallock*, Chester.

Attorneys for resp., *Chester and Urquhart*, agents for *Bridgman*, Chester.

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYO, Esqrs., Barristers-at-Law.

Wednesday, April 15, 1863.

MARKHAM v. STANFORD.

*Agreement to let turnpike tolls—Non-execution by sureties—General Turnpike Act—3 Geo. 4, c. 126, ss. 55 and 57—What amounts to good demise of tolls.*

*By sect. 57 of the General Turnpike Act (3 Geo. 4, c. 126), it is provided that all contracts or agreements for letting of turnpike tolls, signed by the trustees or their clerk, &c., and the lessee or farmer, and his sureties, shall be valid, notwithstanding the same may not be by deed, or under seal:*

*Held, that an agreement for the letting of tolls, signed by the clerk of trustees, and by the lessee or farmer of the tolls, was valid, and therefore could be enforced at law by the trustees, notwithstanding it had not been signed by the sureties; their execution of the agreement being a formality for the benefit of the trustees, which they might waive without prejudice to their rights against the lessee or farmer of the tolls.*

This was an action brought by the plt., as clerk of commissioners of turnpike-roads in the county of

C. B.]

MARKHAM v. STANFORD.

[C. B.]

Northampton, against the deft., as lessee of the tolls, to recover rent under an agreement for the purchase and sale of the said tolls.

The cause was tried before Pollock, C. B., at last Northampton Summer Assizes, when a verdict was entered by direction of the learned judge for the deft., with leave to move to set it aside and enter a verdict for the plt.

It appeared at the trial that the trustees of the turnpike-roads, having power under sect. 55 of 3 Geo. 4, c. 126, to let the tolls, put them up for sale by auction; the deft. attended the sale, bid for them, was declared the highest bidder, and the tolls were accordingly knocked down to him.

Sect. 57 of the Act provides that all contracts and agreements to be made or entered into for the farming or letting of the tolls of any turnpike-road, signed by the trustees or commissioners letting such tolls, or any two or more of them, or by their clerk or treasurer, and the lessee or farmer, and his sureties, of such tolls respectively shall be good, valid and effectual to all intents and purposes, notwithstanding the same may not be by deed or under seal.

By the conditions of sale "one month's rent in advance is to be immediately paid down as a deposit by the person taking the said tolls, which is to be forfeited if such taker shall refuse or neglect to execute the usual articles of agreement, with two sufficient sureties, to be approved by the trustees prior to the first day of November, at the office of A. B. Markham, attorney, at Northampton, or shall refuse or neglect to enter on the said tolls, or having executed such agreement with sureties, and having entered upon the said tolls, shall not in all things fulfil and perform the covenants, conditions and agreements to be contained in such agreement."

At the same time the following agreement was signed by the plt. and deft.

"I, the undersigned John Stanford, of Tewkesbury, in the county of Gloucester, toll-gate keeper, do hereby agree to take the tolls of the Wootton and Courteen-hall gates, at the sum of 411l., and I do hereby agree on my part to fulfil the conditions for letting the tolls, and do hereby propose Joseph Dickens, of Northampton, fishmonger, and William Whitbread, of Courteen-hall gate, toll collector, as my sureties.—Dated this 31st Oct. 1861.

"JOHN STANFORD.

"A. B. MARKHAM, Clerk to the Trustees.

"Deposit, 34l. 5s."

This agreement was never signed by the sureties. The deposit was duly paid; but the deft. refused to execute a lease of the tolls, or to have anything further to do with them. Under these circumstances the action was brought. It was contended on behalf of the deft. at the trial, that there was not a sufficient agreement in writing within sect. 57 of the statute, and therefore the action could not be maintained. The learned judge took that view, and directed a verdict to be entered for the deft., reserving leave to move to enter a verdict for the plt. if the court should be of opinion that there was by the agreement a good demise of the tolls.

*Field* having in Michaelmas Term moved and obtained a rule,

*Beasley* now showed cause.—The directions of the statute should be closely followed, and they have not been observed in this case. This is nothing more than an executory agreement. The deft. never entered into possession of the tolls. He refused to execute the agreement, and he paid nothing but the deposit under the conditions of sale, and that he forfeited. By the document he signed, the deft. said: "I agree to enter into a formal agreement hereafter." All, then, that plt. could do was to sue him for not executing a lease, and that is not the form of action here:

*Ball v. Nixon*, 9 Bing. 393;

*Oldroyd v. Crampton*, 4 Bing. N. C. 24.

*Field* (Markham with him) in support of the rule.—The case of the deft. is, that he was not sued in the proper form. That objection was raised at the trial, and therefore an application was made to amend, which the learned judge refused. But in truth an amendment was not necessary, for here there was a good demise of the tolls. The language of the instrument is positive and direct. The words are words of present demise, "I do hereby agree to take the tolls." The agreement is signed by both plt. and deft., and is a good binding agreement. He referred to 4 Geo. 4, c. 95, s. 51.

ERLE, C. J.—I am of opinion that this rule should be made absolute. It appears to me that both counts of the declaration have been abundantly proved. By the conditions of sale "one month's rent in advance was to be paid down as a deposit by the deft., which was to be forfeited if he should refuse or neglect to execute the usual articles of agreement with two sufficient sureties, or if he should refuse or neglect to enter on the said tolls," and so on. Now, sect. 55 of the General Turnpike Act gives power to the trustees or commissioners to farm out the tolls, and prescribes the mode in which this shall be effected. They are to let the tolls by auction to the best bidder, on his producing sureties for the payment of the money monthly or otherwise. Then, sect. 57 provides "that all contracts or agreements to be made or entered into for the farming or letting of the tolls of any turnpike-road, signed by the trustees or commissioners letting such tolls, or any two or more of them, or by their clerk or treasurer, and the lessee or farmer, and his sureties, of such tolls respectively shall be good, valid and effectual to all intents and purposes, notwithstanding the same may not be by deed or under seal, any Act or Acts of Parliament or law to the contrary notwithstanding." It appears that the tolls were put up for sale in the proper manner, that the deft. was the highest bidder, and so declared, and he entered into an agreement in this form:—"I do hereby agree to take the tolls of the Wootton and Courteen-hall gates at the sum of 411l.; and I do hereby agree on my part to fulfil the conditions for letting the said tolls, and do hereby propose Joseph Dickens and William Whitbread as my sureties." This agreement was signed by the plt. as clerk of the trustees, and by the deft.; and it seems to be a good demise of the tolls. If the sureties had signed it, it is admitted the instrument would have been perfect. Is it then void because it was not executed by the trustees? It seems to me that that is no ground of defence on the part of the lessee. It was clearly a formality that the trustees could waive if they should so please; it was a formality for their benefit and security. I think there was, by this agreement, a good demise of the tolls, and an undertaking to pay for them. The deft. was to pay for the tolls by monthly instalments; the tolls were vested in him; he was the lessee, and bound to pay. This rule will, therefore, be absolute.

WILLES, J. concurred.

BYLES, J.—I am of the same opinion. It is plain there was here a lease of the tolls executed by the lessee, and the only question is, was this void by reason of its not having been executed by the sureties? But that was a condition in favour of the trustees which they might, if it so pleased them, dispense with. It should be observed that one instalment is paid; the deft. actually paid one month's rent by paying the deposit.

KEATINGE, J. concurred.

*Rule absolute.*

April 15, 16 and 21, 1863.

**COOPER v. WANDSWORTH BOARD OF WORKS.**

*Trespass—Demolition of house by board of works.*

*Where an Act of Parliament gives a local board power to pull down buildings in case due notice of their erection has not been given:*

*Held, that they cannot exercise their powers without giving notice to the party erecting, and hearing his defence.*

This was an action tried before Willes, J., at the sittings after Michaelmas Term, when a verdict was found for the plt. for 400l. damages.

The declaration was in trespass for entering the land of the plt. and pulling down, demolishing and destroying a certain building and carcass of a house in course of erection.

Plea.—That the trespasses and acts in the declaration mentioned were lawfully done and performed and executed by the defts. as such district board, under and in pursuance of, and in exercise of, and by virtue of powers contained and given to the defts. as such district board by the 76th section of an Act of Parliament passed in the session holden in the 18th and 19th years of Queen Victoria, being an Act for the better local management of the Metropolis.

The plt. is a builder at Brixton-hill, Surrey, and the defts. are the Board of Works for the Wandsworth district, acting under 18 & 19 Vict. c. 120; and the action is brought to recover damages caused by the defts. in demolishing a house in course of erection by the plt., in Atkins-road, Clapham-park, Surrey.

By sect. 76 of the above-mentioned Act, it is enacted that, before beginning to lay or dig out the foundation of any new house or building within any parish or district, or to rebuild any house or building therein, and also before making any drain for the purpose of draining, directly or indirectly, into any sewer under the jurisdiction of the vestry or board of any such parish or district, seven days' notice in writing shall be given to the vestry or board by the person intending to build or rebuild such house or building, or to make such drain, and every such foundation shall be laid at such level as will permit the drainage of such house or building in compliance with this Act, and as the vestry or board shall order, and such vestry or district board shall make their order in relation to the matters aforesaid, and cause the same to be notified to the person from whom such notice was received within seven days after the receipt of such notice, and in default of such notice, or if such house, building, or drain, or branches thereto, or other connected works and apparatus, or water supply, be begun, erected, made, or provided in any respect contrary to any order of the vestry or board, made and notified as aforesaid, or the provisions of this Act, it shall be lawful for the vestry or board to cause such house or building to be demolished or altered, and to cause such drain or branches thereto, and other connected works and apparatus and water supply, to be relaid, amended, or remade, or in the event of omission, added, as the case may require, and to recover the expense thereof from the owner thereof in the manner hereinafter provided."

It was admitted that a notice to the board had been posted by the plt., but had not been received by the board, and that the plt. began digging the foundation of his house within five days from the time at which he alleged he had sent his notice to the defts. He proceeded with his house till he had reached the second storey, when the defts. sent their surveyor and thirty men, who, without any notice to the plt., demolished the house and then went before a magistrate and compelled him to pay the expense of so doing.

It was also admitted that the house was pulled down for want of notice, and not because of any breach of the Act of Parliament; and it was agreed that the

amount of the damages should be determined in such manner as the court or judge might direct, if they were of opinion that the defts. were liable; and a verdict to be entered for the plt., subject to this arrangement.

A rule having been obtained, on the ground that the defts. were justified by the 76th section,

*Denman, Q. C. (Prentice with him)* now showed cause, and cited

*Dr. Butler's case*, 1 Str. 557;

*Harper v. Carr*, 7 T. R. 270;

*Painter v. The Liverpool Oil Gas Company*, 3 A. & E. 433;

*R. v. Burn and another*, 6 T. R. 198;

*Hammond v. Bendyshe*, 13 Q. B. 869;

*Tinkler v. Wandsworth Board of Works*, 27 L. J. 342, Ch.;

*Poplar Board of Works v. Knight*, 28 L. J. 37, M. C.;

*Clothier v. Webster*, 31 L. J. 316, C. P.

*Bovill, Q. C. and Robinson*, in support of the rule, contended that the defts. were justified under the 76th section, and that they could not tell whether the house had been properly built without pulling it down. They referred to

*Bonnaker v. Evans*, 16 Q. B. 162;

*Paley on Convictions*, 69;

*Re Hammersmith Rentcharge*, 4 Ex. 87.

ERLE, C. J.—I am of opinion that this rule should be discharged. This was an action of trespass for demolishing a house, and the ground of defence has been under the 76th section of the 18 & 19 Vict. c. 120, and by that section it is enacted [he read the section]. The vestry say that no notice was given, and therefore they demolished. The contention of the plt. is, that the powers granted by that statute are subject to the principle that no man is to be deprived of any part of his property without an opportunity being afforded him of being heard. The district board say: "No notice has been given, and we have a right at any time to demolish, without any delay, and without any notice to the owner." It is clearly a power carrying with it enormous consequences, and it would apply to any house, though quite completed, and at any time of the day; and it seems to me that it is a power that may be carried to a most pernicious extent, and ought to be qualified by the restriction which this court is going to put upon it. The board must give notice, to enable the party concerned to be heard; he may have many reasonable excuses, and I cannot see any disadvantages that the board would suffer by allowing him to be heard, but I can see great disadvantages that might arise by the adoption of an opposite course. I do not rest my judgment solely on the fact that the powers of the board are in their nature judicial; the authorities collected in the judgment of Parke, B., in the *Hammersmith case*, 4 Ex. 96, show that no man ought to be deprived of his property without an opportunity of being heard.

WILLES, J.—I am of the same opinion. I think that a tribunal empowered by law to affect the property of her Majesty's subjects must give the party interested an opportunity to be heard. You must look at the analogy which exists between this and other tribunals, and at the powers which it exercises. These powers consist in removing certain excrescences which may arise in the public streets so as to insure the health of the inhabitants; they are to be exercised *in rem*, and, with respect to nuisances, the board exercises the particular powers of a court of very high jurisdiction—a power to remove the nuisance. I think it is clear that judicial powers are exercised by the board; the Act speaks of coming under the jurisdiction of the board. The object of the notice is simply that the board should have the option of directing how the work should proceed. If no notice is given the party

G. B.] SOUTHAMPTON DOCK COMPANY v. HILL—REG. v. WILLIAM BURGESS. [C. CAS. R.]

concerned may show that he did the best in his power to give notice, but that he failed through the default of a third person whom he did his best to control. Now, there is an appeal, not to any tribunal in its nature more judicial than the local board of works, but to the metropolitan board; nothing can be more clear than that the Legislature thought that what was to be heard before the local board was worthy of an appeal, and therefore was worthy to be heard. Now, the board are not only empowered to demolish the house, but the party offending is to pay the costs, and it is clear that the justices could not proceed under the 225th section to enforce this without having the person before them, and there is a common law obligation on the board to give the person interested an opportunity of being heard before they proceed to demolish; this they did not do, and I am of opinion that this verdict ought to stand.

BYLES, J.—I am of the same opinion. This is a case in which the board of works have pulled down a house and thrown the charge on the plt., without any notice whatever, and they have given him no opportunity of being heard, and I am of opinion that they acted wrong, whether they acted judicially or ministerially. I am of opinion that they acted judicially, and on the authority of a number of cases; though the statute has not directly provided for it, the common law will supply the deficiency and will not allow a person to be punished without being heard. If they acted judicially, they have acted contrary to the whole current of cases; and if they acted ministerially, they have acted unjustly, and exceeded their powers.

KEATING, J.—I am entirely of the same opinion. The board of works have to exercise a discretion and a very important discretion, and they are bound to hear the party concerned, in order that they may be able to form a correct opinion as to what they ought to do. Suppose he had appeared before the board, and said, "I did not give you notice, but the house has been built, and the drains arranged in full conformity with the statute," could it for one moment be said that the board of works had a right to pull down the house?

Rule discharged.

Friday, April 24, 1863.

SOUTHAMPTON DOCK COMPANY v. HILL.

Southampton Dock Company—6 Will. 4, c. 29 (local and personal).

By sect. 149 of 6 Will. 4, c. 29 (the Southampton Dock Company's Act) it is enacted that the company shall take or receive for every article of goods, wares, or merchandise whatsoever, which shall be landed at the said dock premises, such rates, rents, or sums not exceeding those specified and set forth in the schedule to this Act annexed, for wharfage, &c., and that the company shall take and receive for every article of goods, wares, or merchandise not particularised and set forth in the schedule, such sum as shall be equal to the rate or sum rated or affixed on goods, wares, or merchandise of a similar nature, package, value and quality to those specified in the schedule:

Held, that the company have no power, under this Act, to make an *ad valorem* charge upon any articles not included in the schedule or that have no particular resemblance to any so included.

This was an action tried before Willes, J., at Guildhall, when a verdict was taken for the plt. for 40s., subject to the opinion of the court, whether, under the Southampton Dock Act, the plts. had power to make any such charge for wharfage as was claimed, viz. 17l.

The action was brought for money payable for tolls, dock dues, and wharfage of two valuable packages, landed at Southampton, which contained a jewelled

looking-glass and a jewelled stereoscope belonging to the Sultan. The value of the two was 7200l.

Lush, Q.C. (T. Jones with him), for the plts., contended that there was nothing in the schedule of tolls and dues authorised to be taken under the Southampton Dock Act which could apply to these packages, as they were exceptional, being neither bullion nor furniture, but being costly articles studded with diamonds and other precious stones, and therefore, as they were of such value, the company had only charged what was reasonable.

Montagu Smith, Q.C. (H. James with him), for the defts., contended that by sect. 149 of 6 Will. 4, c. 29, the company were entitled, if the articles were not mentioned in the schedule, to charge the same as they would for articles "likest to them in nature, package, value and quality," and that as bullion and amethysts, for which 1s. 6d. per package was charged, were "likest" to the articles in question, that sum of 17l. was excessive.

ERLE, C. J.—In this case the charge was made upon the value of the article, and there is no doubt the dock company ought to be compensated in some measure according to the value of the article and the risk they incur. These articles were of great value, and I think the charge was a reasonable one according to their value. The question before us is, whether, under the 149th section of the Southampton Dock Company's Act, they had a right to charge a sum exceeding the several sums set forth in the schedule. It is clear that if these articles had been down in the schedule, they could only have charged the sums set opposite to them, and no more. But one of these articles was such as had never been exported before; it was a looking-glass in a frame set with precious stones, and was not enumerated in the schedule. That being so, the company are empowered by the 149th section to charge the same as they would for articles "likest" to them in nature, package, value and quality; but there is nothing in the statute to entitle the company to make an *ad valorem* charge. I cannot but think, however, that this charge was a reasonable one, and I have done all I can to find something in the Act of Parliament to support the company in it; but not having been able to do so, the rule must be made absolute to enter the verdict for the defts.

Rule absolute.

## CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, April 25, 1863.

(Before POLLOCK, C. B., WIGHTMAN and WILLIAMS, JJ., MARTIN, B. and KEATING, J.)

REG. v. WILLIAM BURGESS.

Larceny—Ownership—Co-operative society—Felonious taking by member.

Upon the trial of an indictment for stealing the money of B., it was proved that B. received the money as the servant of a co-operative society, of which the prisoner was a member, for the sale to members of goods provided by the common funds, and that B. was accountable to the treasurer for the money so received. The money was marked and put into a till under B.'s charge, from which the prisoner clandestinely took it:

Held, that B. was sufficiently possessed of the money to sustain a conviction for larceny of the money, although the prisoner was a member of the society.

Case reserved for the opinion of this Court by Mellor, J.

The prisoner was convicted before me at the last assizes at Chester, of stealing 5s., alleged in one count to be the money of David Bancroft, and in the



second count to be the moneys of the Stockport Industrial and Equitable Co-operative Society.

There was evidence that the Stockport Industrial and Equitable Co-operative Society was duly enrolled, but there was no evidence that trustees had been appointed pursuant to the 18 & 19 Vict. c. 63, s. 18.

The proceeds of the society consisted of the payments of the members in respect of shares held by them therein; and the affairs were managed by a committee of shareholders, of which the prisoner was a member; and under their superintendence the actual duties of management were performed by a general manager and a treasurer.

The society occupied several sites of premises as stores for goods, which were provided from the funds contributed by the members, and the goods were sold to the members of the society.

The New Burke-lane Store was under the care of David Bancroft, a boy aged thirteen, and it was his duty to sell the goods at the store; and each day before shutting up, the treasurer called at the store, stated an account with Bancroft of all moneys received by the latter, giving to Bancroft a duplicate of such account for his protection, and keeping the account in a book belonging to the society.

On Christmas-eve the account had been settled as usual; but as the store was kept open after such settlement, 1*l.* 14*s.* 6*d.* was received by Bancroft, and not paid over, but remained in the till.

The prisoner had occasionally called at the store to assist Bancroft, as he said; and in consequence of suspicions entertained by other members of the committee, one of them on Christmas-day proceeded with Bancroft to the store, and having taken the money and marked a portion of it, they then restored the money so marked to the till.

On the opening of the store on the 26th Jan. the prisoner called there, and whilst, as he supposed, the attention of the boy Bancroft was occupied in the business, the prisoner was seen by a person secreted for the purpose of observing, to take two half-crowns of the marked money from the till, and put them into his pocket and go away.

Mr. Giffard, counsel for the prisoner, objected that, as the prisoner was a member of the society, and a shareholder in the funds, he could not be convicted on either count.

That the possession of Bancroft was the possession of the society, and that the possession of the society was the prisoner's possession in common with the other members.

I overruled the objection, and the case went to the jury on the facts, and the prisoner was convicted, but I postponed the judgment and discharged the prisoner on his own recognisance to appear and receive sentence when called upon.

I request the opinion of the Court of Criminal Appeal whether the prisoner was rightly convicted.

JOHN MELLOR.

No counsel appeared on either side.

POLLOCK, C.B.—We are all of opinion that David Bancroft, who was employed at a store kept by the co-operative society, to sell the goods there, and who had charge of a till there from which 5*s.* was stolen by the prisoner, and who was accountable for the money, was sufficiently possessed of the money stolen to sustain the conviction of the prisoner—the indictment alleging the money to be the money of David Bancroft—although the prisoner was one of the subscribers to the co-operative society.

The rest of the Court concurring,

*Conviction affirmed.*

## COURT OF QUEEN'S BENCH

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HEATLEY, Esqrs., Barristers-at-Law.

Saturday, April 25, 1863.

REG. on the prosecution of THE CHURCHWARDENS AND OVERSEERS OF THE POOR OF THE PARISH OF ST. MARGARET'S, LEICESTER, v. THE CHURCHWARDENS AND OVERSEERS OF THE POOR OF THE PARISH OF HINCKLEY, LEICESTER.

*Settlement—Apprenticeship deed—Secondary evidence.*

*The ordinary rule is, that, to admit secondary evidence of a deed of apprenticeship, proof should be given that a search has been made for the original instrument among the papers both of the master and the apprentice. When, however, more than sixty years had elapsed since a deed of apprenticeship had expired, and when it was shown that a fruitless search had been made, among the papers of a deceased apprentice, for the deed:*

*Held, that a counterpart was properly admitted as secondary evidence of its contents to prove a settlement by apprenticeship, without showing that the papers of the master had also been examined, as the presumption would be, after so long a period, that, as the apprentice was alone interested in the preservation of the deed, the instrument, if not found with him, was lost.*

This was an appeal against an order of two justices of the borough of Leicester, under the provisions of the 16 & 17 Vict. c. 97, adjudging Thomas Walton, a pauper lunatic, to be legally settled in the parish of Hinckley, Leicester.

The appeal was tried at the quarter sessions of Leicester, on the 9th April 1861, when the court confirmed the order, subject to the opinion of the Court of Q. B. on the following case:—

Thomas Walton, the pauper, now aged eight years, is son of Thomas Walton, of the said borough of Leicester, framework knitter. Thomas Walton the father had not gained a settlement in his own right in any parish. The said Thomas Walton the father has, however, a derivative settlement in the parish of Hinckley from his father Samuel Walton, who died in Leicester in March 1858, at the age of seventy-seven.

It was alleged that Samuel Walton, when of the age of fourteen, was bound apprentice by indenture to one Thomas Blakesley, of Hinckley, and that he served Thomas Blakesley and inhabited in the parish for forty days and upwards, under the said indenture, and did not gain any subsequent settlement elsewhere.

On behalf of the resps., to prove the apprenticeship, the parish clerk of Kenilworth, Warwickshire, was called, who produced from the parish chest a document which purported to be a counterpart of an indenture of apprenticeship made on the 13th July 1791, by which the parish authorities of Kenilworth bound the said Samuel Walton as apprentice to Thomas Blakesley. It was not executed by the churchwardens of Kenilworth. The admission of this document was objected to.

The resps. then called Elizabeth Walton, the widow of Samuel, in order to prove a search for the original indenture. She produced some papers which had belonged to her deceased husband, and swore that these were all her husband's papers which had come to her hands at his death, and that her husband, as she believed, had no other papers; and among these papers no indenture was found.

No other search in any other quarter was shown.

To this it was objected by the apps., that the apprentice's home was not a probable place of deposit, and that any search among the papers of a parish apprentice was useless, and that sufficient search for the original document had not been shown. The sessions, how-

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ever, admitted the document as evidence of the apprenticeship, and confirmed the order subject to the opinion of this court as to whether they were right in receiving the indenture as evidence.

If the court should be of opinion that the said indenture was, under the circumstances, admissible for the purpose of proving the apprenticeship, then the order to be confirmed; if they should be of a contrary opinion, then the order to be quashed.

*Mundell* in support of the order of sessions.—Sufficient search was made for the original deed to lay the foundation for the reception of secondary evidence of its contents. There is no authority which defines accurately the proper place for the preservation of an indenture of apprenticeship. The text-books state that it should be sought for among the papers as well of the master as the apprentice; but they also add that stricter inquiry should be made with the latter; and the natural and logical reason for this difference is given by Abbott, C. J., in *Brewster v. Sewell*, 3 B. & Ald. 299, in the fact that the apprentice is interested in the preservation of the instrument as useful hereafter in procuring a settlement. In *Reg. v. Fordingbridge*, 27 L. J., N. S., 290, M. C., this court presumed, after the lapse of sixty years, that an apprentice deed had existed; and admitted secondary evidence of settlement by apprenticeship from other sources. A similar presumption will be drawn here. Besides, the whole matter is one for the sessions primarily to decide, and the court, adhering to their rule in *Reg. v. Saffron Hill*, 1 EL. & BL. 96, will not disturb the decision unless they are perfectly satisfied that the latter were wrong.

*C. G. Mercrother* for the apps.—The search here was imperfect. It should also have been extended to the papers of the master. It is so laid down in Taylor on Evidence, p. 388, that in the absence of decisive testimony both places should be examined. He also referred to

*Rez v. Castleton*, 6 T. R. 236;

*Rez v. Denio*, 7 B. & C. 620.

*CROMPTON, J.(a)*—The question is whether sufficient search has been made for the original document to admit secondary evidence of its contents. I do not see my way to saying that the sessions were wrong in admitting such evidence; although I entertain considerable doubts on the point. I agree with what my late brother Maule said, in the case of *Hall v. Ball*, 3 M. & G. 247, "that an expired indenture of apprenticeship sometimes remains with the master, sometimes with the apprentice. At the same time it is much more probable that the custody would be with the apprentice." I think also that the observation made by Lord Tenterden in *Brewster v. Sewell*, 3 B. & Ald. 299, is most reasonable, "that an indenture of apprenticeship may be useful after the apprenticeship is expired to entitle the party to the freedom of a corporation, or to exercise a trade, or it may be evidence of his settlement: any of these reasons may induce a person to take care of such an instrument; while there would be no ground for the master retaining it, and he would probably destroy it. The papers of the apprentice therefore would be, after the expiration of the service, the primary and most natural place of search. At the same time the rule should ordinarily be observed, that all places where a document is likely to be should be searched before secondary evidence be given of its contents. I have entertained doubts of the propriety of the decision of the sessions, but, as my brothers hold a clear opinion the other way, I shall not dispute it.

*BLACKBURN, J.*—I think that the only question is whether sufficient search has been made for the original

indenture. Now, to determine this, it must be shown that the search has been made where the instrument would most probably be. It is for the presiding judge to decide whether reasonable evidence has been given to satisfy his mind that the document has been lost; but it is also a mixed question of law and fact which the court can subsequently review. Now, to ascertain, in the present instance, whether there was reasonable evidence to satisfy the minds of the members of the sessions who heard this case that the indenture was lost, we must look at the facts. It appears that so far back as the year 1791 the service of the apprentice began. When the seven years had expired, where would the deed be? While the deed was in existence and during the currency of the service, it would be in the custody of the master. But after the period of apprenticeship had passed the interest to preserve the instrument became vested in the apprentice, in order that he might at some later date avail himself of it to procure a settlement. I find this so laid down in Mr. Taylor's Treatise on Evidence, s. 402, p. 388, where he says, "An expired indenture of apprenticeship remains sometimes with the master and sometimes with the apprentice, but, as the apprentice appears to have the greatest interest in its preservation, stricter inquiry should be made of him than the master; though, in the absence of positive proof respecting the possession, search should be instituted among the papers of both." Now, if this question had arisen immediately after the expiration of the service, it would have been right to search among the papers of the master; but, where sixty-three years have passed, the presumption is so strong that, if the master had not handed the document over, he had destroyed it, and that the document, therefore, if not found in the custody of the apprentice, was lost, that the judge or the sessions might have thought that the proof of its absence from the papers of the latter was sufficient to satisfy their minds of its loss, and to admit secondary evidence of its contents. We are not necessarily bound by the decision of the justices; but I think that there was reasonable evidence to justify the conclusion at which they arrived.

*MELLOR, J.*—To satisfy ourselves that a reasonable search has been made, we must inquire into the nature of the document offered in evidence. Now, I agree in thinking that, had the inquiry arisen immediately after the expiration of the apprenticeship, we should not have been satisfied unless a search had been made in both places; but so long a period has passed, the presumption is that the apprentice would have it, or that it had been destroyed. We are at liberty, certainly, to review and correct the decision of the sessions; but, in doing so, we must be satisfied that a reasonable inquiry has not been made. I think that in this case a reasonable inquiry has been made, and that the sessions were right in the conclusion to which they have come. *Order of sessions confirmed.*

EVANS (app.) v. BOTTERILL AND OTHERS (resps.)

25 & 26 Vict. c. 114, s. 2.—*Poaching Act—Unlawful pursuit of game—Unlawful use of guns or nets for killing and taking game.*

The 2nd section of the 25 & 26 Vict. c. 114, s. 2, provides that a constable may arrest any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or having any game unlawfully obtained, or any gun, net, or engine used for the killing and taking of game, and may summon him before two justices; and that if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used such articles as aforesaid for unlawfully killing or taking game, he shall be convicted:

2 M

(a) Cockburn, C.J. was absent at the Court of Criminal Appeal.

*Held, that it is not necessary to the conviction of a person so charged that he should be shown to have come from some land; and that the presumption of that fact may be drawn from the surrounding circumstances.*

*Where, therefore, five men were taken at six a.m. on a Sunday morning on a highway, carrying bags in which were found one hare and fifteen rabbits, and also with several nets and stakes used for the fastening down of the nets; but were not proved to have been on any land in pursuit of game:*

*Held, that this constituted sufficient evidence on which the magistrates might have convicted them of having obtained the game by unlawfully going on land in search of game, or of having used nets and stakes for unlawfully killing and taking game.*

*The case of Brown v. Turner, 7 L. T. Rep. N. S. 683, confirmed.*

This was a case stated for the opinion of the court.

At a petty sessions, holden at Northampton, on 1st Nov. 1862, before certain justices for the county of Northampton, John Botterill, Daniel Earl, John Ayers, Joseph Burton, and Richard Adams (the resps.) were charged by a certain information of Joseph Terry Evans, one of the inspectors of the county police (the app.) that they on the 26th Oct., at the parish of Hardington, in the said county, were searched by the said app. on a certain highway called Cotton-end, he having good cause to suspect the said resps. of coming from certain lands where they had been in search and pursuit of game, and having in their possession game unlawfully obtained, and nets used for unlawfully taking game; and there being then found on them certain game, to wit, one hare and fifteen rabbits, and also seven nets, which he then lawfully seized and detained, and prayed that they might be summoned to answer the information and complaint.

The said app. stated that about six a.m. on Sunday morning, 26th Oct., he saw nine men coming along the highway carrying bags; that he searched them, and found in the bags one hare and fifteen rabbits, and also several nets and stakes used for the purpose of fastening down the nets. He gave no evidence of their having entered or been upon any land in search or pursuit of game, or of using any net thereon, and he stated that he had none. The justices thought that some evidence should be given of their having unlawfully obtained such game by going on land in search and pursuit of game, or having used the nets for unlawfully taking game, and dismissed the complaint.

*Markham* for the app.—The decision of the magistrates is erroneous. They evidently believed the resps. guilty, but acquitted them from a misconception of the statute. Proof of the party charged having been actually on land in pursuit of game is not essential. The charge was founded on the 25 & 26 Vict. c. 114, s. 2. (a) The language of that Act has already received judicial construction in the recent case of *Brown v. Turner* in the C. P., 7 L. T. Rep. N. S. 683, where *Erie, C. J.* held, that its pro-

visions permitted the presumption that men found under circumstances not dissimilar to the present had been on land in pursuit of game without actual proof of their having been there. [*COCKBURN, C. J.*—I do not see that there is any information charging the offence.] The magistrates are desirous of obtaining the interpretation of the Act by the court for their guidance, and would not wish the case settled on a technical ground.

*COCKBURN, C. J.*—The 2nd section authorizes a constable to search any person whom he may have ground for suspecting of coming from any land where he has been in the unlawful pursuit of game, or of having game unlawfully obtained, or having any implements used for killing game. There are then two classes of offences with which such person may be charged, and on proof convicted. The first is, that of unlawfully going on any land in pursuit of game. Now in such a case the difficulty would always arise of being able to show that he had been on some land. I agree, therefore, with the view expressed by *Erie, C. J.*, in *Brown v. Turner*, that such proof is not necessary, and that if a man be found with dead game at an early hour of the morning, and also with guns and nets, the inference may be drawn that he has been on some land, without showing what land, in the unlawful search and pursuit of game. Then there is the other class of offence, that of using any of the articles mentioned in the unlawful killing or taking of game. On this charge a magistrate may act without embarrassing himself with the first; and if a party be proved to be in possession of game at an early hour of the morning on the highway, and also of guns and nets and other similar implements, the conclusion may fairly be adopted that the game is the produce of the unlawful employment of the instruments. I think, then, that there was evidence on which the justices might, in the present instance, have convicted of either offence, had they been desirous of doing so. But there is no information charging the crime, and I do not see how, had they come to an unfavourable determination to the resps., their conviction could have been sustained.

*CROMPTON, J.*—I am also of opinion that there was sufficient evidence to have enabled the magistrates to convict; but they were not bound to do so. At the first examination of the Act, it occurred to me that it required that the actual land on which the parties had been should be shown, but further reflection has led me to the conclusion that this is not indispensable, and that the decision of the Court of C. P. is right, that a presumption may be drawn from surrounding circumstances of the parties having been in the unlawful pursuit of game, without proof of the place where they had carried on such unlawful pursuit. But the information here does not charge the offence.

*BLACKBURN, J.* concurred.

*MELLOR, J.*—I have had occasion to look into the Act at chambers, and my first impression was, that to establish the offence, the particular land should be specified. But subsequent reflection has altered my opinion, and I think that the inference may be drawn from the surrounding facts if they are sufficient to raise a reasonable suspicion.

The COURT, after some consideration, declined to give any judgment either for the resps. or app.

REG. on the prosecution of THE NORTH LONDON RAILWAY COMPANY v. THE PARISH OF ST. PANCRA.

*Railway company—Rateable value—Parish—Tolls.*  
In the year 1857 the N. L. Railway Company by deed agreed with the L. and B. Railway Company that they should be permitted to carry their traffic over the line of the latter, on the con-

(a) 25 & 26 Vict. c. 114, s. 2: "It shall be lawful for any constable or peace officer on any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person adding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of a gun, or net, or engines used for the killing or taking game; or also stop or search any cart or other conveyance in or upon which such constable shall have good cause to suspect that any such game or any such article is carried, and should there be found any such game or article on such person, to detain it; and shall summon him before two justices, and if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any article as aforesaid for unlawfully killing or taking game, he shall be convicted."

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*dition that they should pay the net toll on every single journey ticket of 1d. per passenger, and on every return ticket 1½d. The fares the N. L. Railway Company charged for carrying over their line and that of the L. and B. railway have been, for first-class passengers, 6d. for a single ticket, and 9d. for a return ticket, and for those of the second class 4d. for a single ticket and 6d. for a return ticket, and out of such fares they have always paid the agreed tolls of 1d. and 1½d. A portion of the line of the N. L. Railway passes through the parish of St. P. The parish of St. P., in assessing the rateable value at which the N. L. Railway should be assessed on the land occupied by them in the parish to the relief of the poor in the parish, included the tolls so paid:*

*Held, that the principle on which this assessment was made was illegal, and that in fixing the value of the line the sums so paid for tolls should be deducted, as they formed no part of the profits of the company.*

On the 1st Feb. 1861, in an appeal by the North London Railway Company against a rate for the relief of the poor of the parish of St. Pancras in the county of Middlesex, made on the 19th March 1859, wherein the said North London Railway Company were assessed on a rateable value of 4000*l.*, the Middlesex Quarter Sessions amended the rate by reducing the said sum of 4000*l.* to 525*l.* subject to the following case.

By the rate the said resp. were rated on the lands occupied by them in the said parish, in the following manner:—

On property from Maiden-lane to the west side of Hampstead-road, at a gross estimated rental of 4444*l.*, and rateable value 4000*l.* The resp. are the owners of a line of railway, hereinafter called the North London Railway, which for the purposes of the case is to be taken to commence at a place known as the Hampstead-road terminus, and after passing through the parish of St. Pancras, St. Mary, Islington, and Hackney, to end at a place in the parish of Bow, called the Bow Junction, where it joins a system of railways the property of the London and Blackwall Railway Company, which form the only access and outlet of the North London Railway to and from the city and the adjacent parts of London. The North London Railway at a certain point joins the Blackwall Railway, and from thence they together form a continuous line of railway to the city. The London and Blackwall Railway extends westwards from Bow Junction to Fenchurch-street, where it has a principal central station, and also extends eastward from Stepney to Blackwall and other places. The North London Railway to Bow Junction is seven and one-eighth miles long; the London and Blackwall Railway, from the Bow Junction to Fenchurch-street, is one and seven-eighths miles long; the part of the North London Railway which is within the parish of St. Pancras, is ninety-six chains long.

The Blackwall Company, by their Acts, 6 & 7 Will. 4, c. 123, and 9 & 10 Vict. c. 273, are empowered to demand and receive as toll not exceeding 9d. for every person carried over their railway; a large portion of the value and source of profit to the North London Railway is its access and outlet by means of the Blackwall Railway to Fenchurch-street.

In the year 1857 the resp. agreed by deed with the London and Blackwall Railway that they should be allowed to carry their traffic over the London and Blackwall Railway to Fenchurch-street, Stepney, or Shadwell, upon the terms of paying the net tolls on every single journey ticket of 1d. per passenger, and on every return ticket of 1½d. per passenger, with a provision that if they increased their fares beyond certain rates therein mentioned, the tolls should be increased pro rata.

The resp. have always charged one fare for convey-

ing a passenger from any part of their line to any other part of the line, or to any part of the Blackwall line.

The fares they have charged have been for first-class passengers, single ticket 6d., and return ticket 9d.; second class, single ticket 4d., and return ticket 6d.; and out of and in respect of such fares, they have paid the agreed tolls of 1d. and 1½d.

In estimating, for the purposes of the rate, the gross receipts claimed by the resp. in respect of that part of the line situate in the appa.' parish, the resp. charged themselves with the residue of such fares after deducting the tolls so paid. To this the appa. objected, and contended that they were not entitled to deduct the tolls. The sessions allowed the deduction, and found as a fact that the payments made to the Blackwall Railway were reasonable, and reduced the rate to 595*l.*

The questions are—1. Whether, in ascertaining the rateable value of the subject of the rate, any sum should be deducted in respect of the payments to the Blackwall Company.

2. If so, whether the sums mentioned in the agreement as payable to the Blackwall Company for passenger tolls are the sums that ought to be deducted.

If the court should answer both questions in the affirmative, the order of sessions to be confirmed. If they should answer either in the negative, the order to be quashed, and the rateable value to stand at 1855*l.*

*Field* in support of the order of sessions.—The principle on which the sessions have proceeded in assessing this rate is the correct one. The sums deducted form no part of the profits of the North London Railway, but are tolls or rent which they pay to the Blackwall Railway for the outlet at Fenchurch-street. They are therefore no part of their value. Suppose the railway were desirous of letting the line—in calculating the value with that object, the sums paid under the agreement to the Blackwall Railway would clearly be deducted.

*Overend, Q. C. and D. D. Keane* for the appa.—The fallacy on which the other side have proceeded is in treating these payments as rent. They are not rent; but a right or privilege which the resp. have purchased, and by the exercise of which the value of their property is enhanced. Nor does it make any difference that the payment is periodical. The parish are therefore justified in claiming that the actual profits which are thereby obtained should form the basis of the assessment.

*Cockburn, C. J.*—I think that it is very clear that the principle on which the sessions have proceeded in assessing this rate is well founded. The doctrine of landlord and tenant, which is often improperly and disadvantageously introduced into rating cases, may properly be enforced here. The case is similar to that of the Great Northern or North-Western Railway Company, which charge passengers one fare for the whole distance from London to Scotland, but which use several other lines; and for this privilege they pay no doubt certain dues. Could it be said that they should be rated on these sums so paid? Certainly not. In the present instance we have two lines, which meet at a certain point. The respective proprietors agree, for the benefit of both, that the passengers of the one should be carried over the line of the other, on the payment of certain tolls. The sums so paid, therefore, could form no part of the tenantable value of the line that pays. The London and Blackwall Company, which receive the toll, are clearly liable to be assessed for it; and if we were to hold the resp. liable, we should be making the same sum liable to sustain the burdens of two parishes. I am of opinion, therefore, that the order of sessions must be confirmed.

*Groompton, Blackburn and Mellor, JJ.* concurred. *Order of sessions confirmed.*

Wednesday, April 29, 1863.

SHERBORN (app.) v. WELLS (resp.)

*Metropolitan Police Act—2 & 3 Vict. c. 47—Cattle—Turning loose—Meaning of.*

*The 54th section of the 2 & 3 Vict. c. 47, imposes a penalty on all persons who, to the annoyance of passengers, shall turn loose any horse or cattle in a thoroughfare:*

*Held, that the expression "turned loose" means leaving the cattle without any control.*

*Where, therefore, the app. sent his cattle without any halter, but under the care of a boy, to graze on a highway:*

*Held, that this was not an offence within the Act.*

This was a case stated for the opinion of the court.

On the 14th July 1862 the app. was charged before the justices of Sunbury, in the county of Middlesex, with having on the previous 23rd June "turned loose" eleven head of cows in a public thoroughfare in the parish of Bedfont, Middlesex, and within the metropolitan police district.

The evidence of the resp. was, that on the 23rd June he saw eleven head of cow cattle loose, the property of the app., and a boy near them. It also appeared that the app.'s servant had the care of and was with the cattle, that they were grazing on the sides of the highway, and that the app. was the owner of the lands on both sides of the road, and claimed the grass and herbage growing on such parts of the road as were not gravelled, and it also appeared that the cattle were put there to graze by the app.'s order.

The justices convicted the app. The question was, whether they were right in convicting upon the evidence given of the cattle being loose and in the care of a servant, who had no hold of them either by halter or otherwise, notwithstanding his claim to the herbage.

*C. Pollock* for the app.—The 54th section of the 2 & 3 Vict. c. 47, which imposes a penalty on all persons who shall turn loose any horse or cattle, means leaving them without any control. It was not intended to apply to a case like the present, where the animals were accompanied by a boy. Even under the Highway Act, 5 & 6 Will. 4, c. 50, s. 74, cattle are only liable to be impounded when they are found straying without a keeper.

No counsel appeared for the resp.

COCKBURN, C. J.—I think that the construction contended for by Mr. Pollock is the right one, and the meaning of the section is the allowing animals to go loose and free from all control. It cannot apply to a case where a boy has been sent to look after them.

CROMPTON, J. concurred.

BLACKBURN, J.—The words mean turning them loose and without control. It is not necessary that the cattle should be actually tied by a halter.

MELLOR, J. concurred. *Judgment for the app.*

THE INHABITANTS OF THE TOWNSHIP OF PRESTON (apps.) v. THE INHABITANTS OF BLACKBURN (resps.)

*Order of removal—24 & 25 Vict. c. 55, s. 1—Three years' residence—Irremovability.*

*The 24 & 25 Vict. c. 55, s. 1, which provides that after the 25th March then next the period of three years shall be substituted for that of five years in the 1st section of the 9 & 10 Vict. c. 66, and that the residence of a person in any part of a union shall have the same effect in reference to the provisions of the said section as a residence in any parish, is retrospective.*

*On the 14th March 1862 two justices of the borough*

*of B. made an order for the removal of a pauper from B. to P. At the time of the order the pauper had resided continuously for eighteen months next before the application in B. For more than three years to the commencement of the eighteen months he had resided in the township of L. L. and B. comprise the B. Union:*

*Held, that the pauper had become irremovable, and that the order was bad.*

On the 14th March 1862 two justices for the borough of Moulden made an order for the removal of Edward Moulden, his wife Annie and child, from Blackburn to Preston.

On the 21st April the grounds of removal were received and lodged.

On the 12th May notice of appeal was given, and on the 7th July the overseers of the two townships agreed to state the following case for the opinion of the court:—

The place of the last legal settlement of Edward Moulden was in Preston. At the time of the order of removal he had resided continuously for eighteen months next before the application for the said warrant in Blackburn. For more than three years to the commencement of the eighteen months he had resided in the township of Livesey, in the said county. Livesey and Blackburn are comprised in Blackburn Union, so that he had resided in the said union for more than three years before the application for the order of removal.

The question arises under the 9 & 10 Vict. c. 66, and 24 & 25 Vict. c. 55.

The appa. contend that the 24 & 25 Vict. c. 55 has a retrospective effect, and that the continuous residence for three years in Blackburn did prevent his removal to Preston.

The resps. contend that it does not take effect until the expiration of three years from the time when it came into operation.

If the court should think the pauper is removable, the order is to be confirmed; otherwise, to be quashed.

*Maule* in support of the order of removal.—The question depends on the effect given to the 24 & 25 Vict. c. 55, s. 1. The words are, "That after the 25th March next (1862), the period of three years shall be substituted for that of five years in the 1st section of the 9 & 10 Vict. c. 66; and the residence of a person in any part of a union shall have the same effect in reference to the provisions of the said section as a residence in any parish." If the first part of this section had stood alone there is no doubt that it would be retrospective, but in the latter part a provision is introduced creating a new species of residence. This would not have conferred the character of irremovability under the 9 & 10 Vict. c. 66. It would seem, therefore, that the intention was that the Act should be prospective, and that the time should not commence to run until after the 25th March 1862.

*Patchett*, contra, was not heard.

COCKBURN, C. J.—I think that the first branch of the 1st section of the 24 & 25 Vict. c. 55, is retrospective, and that its effect is at once to substitute the period of three for five years' residence under the former Act. Nor can I see that its operation should be postponed because the Legislature have deemed it right to enlarge the area, a residence within which is to confer the privilege of irremovability. I think that the later, like the former Act, is retrospective; that the pauper was irremovable, and that the order must therefore be quashed.

CROMPTON, BLACKBURN and MELLOR, JJ. concurred. *Order of removal quashed.*

Q. B.]

REG. v. JUSTICES OF ESSEX—WILKINSON v. DUTTON.

[Q. B.]

Thursday, April 30, 1863.

REG. v. JUSTICES OF ESSEX.

*Bastardy—Order of affiliation—Appeal—Notice.*

*The twenty-four hours' notice of appeal against an affiliation order, runs from the time when the order is verbally made by the justices in court, and not from the time when the order is formally drawn up in writing and signed by the justices.*

Pearce, on behalf of one Johnson, moved for a *mandamus* to the justices of Essex to hear an appeal. On the 17th Feb. last an affiliation summons, under the 7 & 8 Vict. c. 101, against Johnson, as the putative father of a bastard child, came on for hearing before justices of Essex in petty sessions, when he was adjudicated to be the putative father, and ordered to pay a certain weekly sum. The order was not formally drawn up until 1st March, when it was signed by one of the justices. It purported to have been made on the 17th Feb. On the 2nd March Johnson gave notice of appeal. On the 3rd March the order was signed by the other justices; and on the 4th the recognisances for payment of costs were entered into. The next petty sessions after the 17th Feb. were held on March 3. The appeal came on for hearing at the last Easter quarter sessions, when the justices dismissed the appeal, holding that the order was made on the 3rd March, when it was signed by all the justices, and therefore that the notice of appeal was bad. It was now contended that the order was not made until it had been signed, and that the time for appealing ran from that time. *Reg. v. Flintshire Justices*, 15 L. J. 50, M. C., in which the late Williams, J., when sitting in the Bail Court, held that the words "making of the order," in sect. 4 of 7 & 8 Vict. c. 101, meant an order in writing properly made and signed by the justices, and that the time for appealing was to be calculated from the signing of the order by the justices.

Cockburn, C. J.—I think that there should be no rule in this case. I do not at all concur in the ground on which the court of quarter sessions acted, viz. on the assumption that the order was made on the 3rd March. I think that it was made on the 17th Feb., at the time the justices adjudicated upon the hearing of the complaint. The written record of the adjudication is merely a memorial of the order which the justices have orally pronounced. The signatures on the 1st and 3rd March must be taken to have been made *sine pro tunc*. If the order is not made at the period when the adjudication is pronounced, it would be almost impossible for the parties to know when it is made. The adjudication and the order in this case must be taken as having been made on the 17th Feb., and then it follows that the recognisances were too late. I also think that we ought not to interfere in the other way suggested by *certiorari* (although it may be productive of much confusion when magistrates do not sign their orders at the time they make them), for I think it too much to say that the delay in signing the order vitiates the adjudication.

Crompton, J.—I am of the same opinion. The right of appeal is given by 7 & 8 Vict. c. 101, s. 4, "if within twenty-four hours after the adjudication and making of any order on the putative father, such putative father give notice of appeal to the mother, and also within seven days give sufficient security by recognisance or otherwise for the payment of costs, it shall be lawful for such putative father to appeal to the quarter sessions," &c. Mr. Welsby, in his note upon this section, gives the right doctrine on this matter: "A party may give notice of appeal under this section within twenty-four hours after the order is verbally pronounced by the justices, although it is not formally drawn up and signed by them till afterwards." That must be so. There cannot be two periods from which the twenty-four hours are to run.

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They must begin to run from a certain time. The section cannot mean that they are to begin to run from the time of an act being done, such as signing and sealing, of which the putative father can know nothing. There are several cases (including *Reg. v. Derbyshire*, 7 Q. B. 193) which show that the time is to be calculated from the making of the order, and not from the service. In the previous part of sect. 4, when time was intended to run from the service of the summons, it is so expressed. The real meaning of the section is, that the twenty-four hours' notice of appeal is to run from the adjudication in court on the putative father to pay the weekly sum. The recognisances in this case, therefore, were not entered into in time. I also think that we ought not to interfere by *certiorari*. This is one of the cases in which, in practice, the order is not formally drawn up at the time it is made.

Blackburn, J.—I am of the same opinion. Before the 7 & 8 Vict. c. 101, the practice was established in these cases that the formal order was not drawn up at the time when the order was pronounced, but some time afterwards from memoranda. This is so stated in "Paley on Convictions," p. 246, 4th edit. Even when a court of record has pronounced sentence of death, the formal record is not drawn up at all unless required. The true construction of the statute seems to me to be that the time from which the twenty-four hours' notice begins to run is from the delivery of the judgment. The recognisances, therefore, were not entered into in time.

Mellor, J.—I am of the same opinion. For the purpose of appealing against the order on the putative father, the notice of appeal runs from the time when the adjudication was pronounced and the order verbally made.

Rule refused.

Saturday, May 2, 1863.

WILKINSON (app.) v. DUTTON (resp.)

*Assault—Evidence of a rape—Jurisdiction of justices to convict of an assault.*

*The app. was charged with an assault upon the resp. At the hearing the resp. gave evidence of a rape, but the justices convicted the app. of an assault:*

*Held (confirming Ex parte Thompson, 3 L. T. Rep. N. S. 294), that the conviction was good.*

This was a case stated under the 20 & 21 Vict. c. 43, upon a conviction for an assault. Upon the hearing before the justices the woman deposed to facts which, if believed, amounted to a rape; they convicted the app., however, of a common assault.

Sawyer now appeared in support of the conviction, and contended that the justices were right, and that the case came within the decision of this court in *Ex parte Thompson*, 3 L. T. Rep. N. S. 294; and, although that case was afterwards reargued in the Ex. (*Re Thompson*, 3 L. T. Rep. N. S. 409) upon an application for a *habeas corpus*, and two of the learned barons, Pollock, C. B. and Wilde, B., held the conviction bad, while the other two, Bramwell and Channell, BB., held it to be good; yet the judgment of this court being unanimous, and not overruled, must be considered as governing the present case.

Powell was called upon, who argued that the jurisdiction of the justices was ousted as soon as it appeared from the evidence that a rape had been committed.

Cockburn, C. J.—This case is governed by the former decision of this court. I read at the time the judgments of the learned Barons of the Ex., and, with every possible respect for the opinions of those learned judges who differed from the decision of this court, I still adhere to the opinion which we formerly expressed.

Crompton, J.—I was not a party to the former decision in this court, but having given the question

my best consideration, I am quite satisfied that this court was right.

BLACKBURN and MELLOR, JJ. concurred.

*Judgment for the resp.*

REG. v. THE INHABITANTS OF HENDON.

*Poor-law—Three years' residence—Irremovability—*  
24 & 25 Vict. c. 55, s. 1.

*On the 6th Aug. 1855 an order of removal was made for the removal of a pauper from parish A. to parish B., the pauper at that time having resided three years (but not five years) in such parish of A. The pauper, however, was not removed, in consequence of a request from the parish of B. that she might not be separated from her mother, they (the parish of B.) acknowledging her settlement to be in B., and consenting to relieve her. The parish of B. continued to relieve her until the passing of the 24 & 25 Vict. c. 55, which, by sect. 1, substitutes a three years' for a five years' residence, as conferring the status of irremovability. Upon this, the parish of A. obtained an order of removal to the parish of B., and upon a case stated upon an appeal against such order:*

*Held, that the pauper not having in fact been removed under the order of 1855, she became irremovable by virtue of her previous three years' residence, and the operation of the 24 & 25 Vict. c. 55, s. 1.*

This was a case stated by the Somersetshire Sessions, upon an appeal against an order of removal, upon which appeal they confirmed the order. It appeared from the facts, that the pauper Catherine Vickery had, previously to the 6th Aug. 1855, resided for a period over three years (but less than five years) in the resp. parish, and that on that day an order of removal was made to the app. parish of Hendon, Middlesex; that on the 10th Sept. following the attorney for the app. parish wrote to the resp. parish officers the following letter:—

"Hendon Union, Edgware, Sept. 10, 1855.

"Sir,—Having ascertained that Catherine Vickery is settled in Hendon, I think you may be saved the expense of removing her, as I propose at the next meeting of the guardians to get them to acknowledge her, and grant her relief weekly where she is, as it would be cruelly in the extreme to separate her from her poor old mother, whose only comfort appears to be in having her daughter with her.—I am, Sir, your obedient servant,  
"W. S. TOOTELL, Clerk."

The resp., acting upon this letter, did not actually remove the pauper, and she remained in their parish, with the sanction of the app. parish, until the 24th June 1862, during the whole of which period she regularly received relief from such app. parish. On the coming into operation, however, of the 24 & 25 Vict. (which by sect. 1 substitutes three years for five years as the period conferring irremovability) the app. parish declined any longer to support the pauper, saying that, as at the time of the making of the order of the 6th Aug. 1855 she had been resident in the the resp. parish three years, she had acquired the status of irremovability.

By sect. 1 of the 24 & 25 Vict. c. 55, it is enacted, "that after the 25th day of March next (1862) the period of three years shall be substituted for that of five years, specified in the 1st section of the statute 9 & 10 Vict. c. 66."

*Prudeauz*, for the resp. parish, now argued, that the agreement by the letter of the 15th Sept. 1855 must be taken as operating as a constructive removal, and that the appa. must now be stopped from denying it: (*Reg. v. The Inhabitants of Halfax*, 12 Q. B. 111: *Reg. v. Caldecote*, 17 Q. B. 52.) [MELLOR, J.—The irremovability is a boon to the pauper.] This is the act of the overseers, who ought not to be permitted to

say that the former order was not acted upon. Had the pauper been removed under it, this objection could not have arisen, and she was only not removed in consequence of the request of the app. parish.

COCKBURN, C. J.—We cannot help regretting that we are compelled, by the language of the statute, to decide against you. The pauper had undoubtedly not been in fact removed, and she had acquired in 1855 the status of irremovability by a three years' residence, and we have already held that the late Act is retrospective. It was, however, a most dishonest objection for the parish officers of the app. parish to take.

H. T. Cole, for the appa., stated that, as public officers, they were bound to protect the parish.

COCKBURN, C. J.—They were certainly not bound to act dishonourably.

CROMPTON, BLACKBURN and MELLOR, JJ. concurred. *Order of sessions quashed.*

THE DROITWICH UNION AND OTHERS (appa.) v. THE WORCESTER UNION (respa.)

*Lunatic pauper—Costs of maintenance—*16 & 17 Vict. c. 97, s. 96—24 & 25 Vict. c. 55 s. 6.

*By sect. 96 of the 16 & 17 Vict. c. 97, justices may make an order for the costs of maintenance, &c., of a lunatic pauper upon the parish by which he is sent. By sect. 6 of the 24 & 25 Vict. c. 55, which passed in Aug. 1861, such costs are, from and after the 25th March 1862, to be borne by the common fund of the union. On the 24th March such an order of justices was made pursuant to sect. 96 of the 16 & 17 Vict. c. 97, upon the parish: Held, that as the 24 & 25 Vict. c. 55, s. 6, did not come into operation until the following day, the order was good.*

This was a case stated by consent under the 12 & 13 Vict. c. 45, s. 11.

It appeared that an order of justices was made on the 24th March 1862 under the provisions of the 16 & 17 Vict. c. 97, s. 96, upon the parish of settlement of a pauper lunatic for the payment of his costs of maintenance, &c. This order was received by the parish officers on the following day (the 25th). By sect. 6 of the 24 & 25 Vict. c. 55, which received the Royal assent in Aug. 1861, it is enacted that, "The cost of the examination of any lunatic pauper, present or future, of his removal to and from, and his maintenance in an asylum, licensed house, or registered hospital, who would under any provision of the 16 & 17 Vict. c. 97, be chargeable to a parish in a union, shall from and after the 25th day of March next be borne by the common fund of the union comprising such parish."

*Streeten* appeared in support of the order, and argued that, as the 24 & 25 Vict. c. 55, which threw the burden of maintenance upon the common fund of the union, did not come into operation until the day after the order was made, such order was properly made upon the parish as provided for by sect. 96 of the 16 & 17 Vict. c. 97, and that the fact that the order was not served until the 25th was immaterial.

*Powell* was called upon, and he contended that, as the 24 & 25 Vict. c. 55, was actually passed when the order of the 24th March was made, the justices ought to have provided by it, that the expenses to be incurred on and after the 25th March should be borne by the common fund of the union. [MELLOR, J.—The justices had jurisdiction on the 24th to make the order; it would be another question as to the future payments under it.] The order was not made with reference to the existing law. [CROMPTON, J.—Your argument would be of equal force if, instead of having been made on the 24th March, it had been made the

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day after the Act passed.] They should, in their order, have provided for the prospective as well as the retrospective payments.

CROMPTON, J.—There will be practically no real difficulty, for after the 25th March the sums will be charged to the proper parties, notwithstanding the order. The order, at the time it was made, was perfectly good.

BLACKBURN and MELLOR, JJ. concurred.

Order confirmed.

WILSON (app.) v. STEWART (resp.)

Master and servant—Harbouring prostitutes—2 Vict. c. 47, s. 44.

*A servant who, in the absence of his master, harbours prostitutes in the house, may be found guilty of that offence, though it is not enough to convict him to show merely that he is the servant of such master.*

This was a case stated under the 20 & 21 Vict. c. 43, by one of the metropolitan police magistrates, upon a refusal by him to convict the resp. under sect. 44 of the 2 Vict. c. 47 (one of the Metropolitan Police Acts) for being an aider and abettor in harbouring prostitutes. It appeared that one Fryer was the keeper of a house known as "Kate Hamilton's," and that he being from home the resp., who was a waiter there, managed the house in his master's absence. The magistrate thought that the relationship of master and servant was not enough to justify a conviction of the resp., and he submitted the question to the court, of whether or not he was right in this view?

Kenne, for the app., contended that, as the resp. was actually found engaged in managing the house in his master's absence, there was sufficient to justify a conviction. [CROMPTON, J.—It is not clear as the case is stated. We are only asked whether he was liable by virtue of the relationship existing of master and servant? BLACKBURN, J.—The mere relationship of master and servant is certainly not sufficient.] The magistrate no doubt intended to ascertain the opinion of this court as to whether or not a servant acting in the management of the house was liable under the statute?

No one appeared for the resp.

CROMPTON, J.—We cannot interfere to find a fact which has not been found by the magistrate, and therefore we must dismiss the appeal, but without costs. But, if it is desirable for future guidance that we should express any opinion, we can only say that there is no doubt that a man may be an aider and abettor, though he is only in the capacity of a servant; for if, as in this case, the master goes away and the servant manages the house in his absence, that would do to make him liable. The magistrate, however, does not ask that, but merely whether or not, being a servant, he is liable?

BLACKBURN and MELLOR, JJ. concurred.

Appeal dismissed without costs.

Monday, May 4, 1863.

REG. v. GROVES.

Recognisance to keep the peace—Certiorari.

*The deft. was arrested and taken before a magistrate on a charge of using threats towards F. O. The magistrate, after hearing the evidence of F. O., refused, on the application of the deft., to adjourn the case, and compelled him at once to enter into recognisances to keep the peace towards F. O. for twelve months. The deft. subsequently brought an action against F. O. for a malicious prosecution, and recovered a verdict for 25l. He then applied to the court for a certiorari to remove the recognisances and information, in order that the recognisances might be discharged:*

*Held, that the certiorari should not be granted, as he had already vindicated his character by recovering damages for the malicious prosecution; and further, as the magistrate had acted on an information on oath, and the court could not interfere.*

The deft. and a gentleman of the name of Frederic Oates, were both persons of property, residing in the West Riding of Yorkshire, the former on his estate, Kirkhammerton-lodge, and the other at a place called Spofforth. They had been on intimate terms until four years since, when a coolness arose between them in consequence of the deft. refusing to allow Mr. Oates to fish in a river on his estate.

On the 13th Aug. 1862 the deft., on his way home from the moors, stopped at the White Horse Inn, Spofforth, to procure some refreshment. While there Mr. Oates came in, and the deft., wishing to renew their friendship, offered him his hand, which he refused. Nothing more passed, and no threats of any kind were used. On the 18th Aug. the deft., while engaged with some friends at his residence, Kirkhammerton-lodge, was arrested by a policeman on a warrant, for using threats towards Mr. Oates, and immediately removed to Wetherby, a place about eight miles distant from his house. The warrant was founded on an information by Mr. Oates, in which he swore that the deft. had threatened to "nail" him, and he (Mr. Oates) was afraid the deft. might do him some bodily harm. At Wetherby he was taken before the magistrate, when Mr. Oates having given his evidence, the deft. applied for an adjournment. The magistrate, however, refused to adjourn the hearing, and required the deft. at once to enter into recognisances to keep the peace towards Mr. Oates for twelve months.

The deft. subsequently brought an action against Mr. Oates for a malicious prosecution, and obtained a verdict for 25l.

*Shepherd* now moved, on an affidavit of the above facts, for a certiorari to remove the recognisances and information taken, in order that the recognisances might be discharged, and contended that the magistrate had been guilty of misconduct in not allowing an adjournment. [COCKBURN, C. J.—I do not see what benefit you will derive from the success of your motion. Your client has vindicated his character by obtaining a verdict in the action for malicious prosecution; and the only advantage that he can obtain is to get rid of his recognisances to do that which he is bound to do to keep the peace.] He is unwilling that the recognisances should remain in force when he feels that they should never have been granted. *Rees v. Tregarthen*, 5 B. & Ad. 673, may probably be cited as an authority against this application. But in that case the magistrate had all the evidence before him, and the court held that they could not interfere with the discretion he had exercised.

By the COURT (a):—It would probably have been preferable that the magistrate should have adjourned the case, but he acted on an information on oath, and we cannot interfere. *Rule refused.*

Thursday, May 7, 1863.

REG. v. INHABITANTS OF HEYTESBURY.

Highway—Indictment for non-repair—Order of Justices—Costs of abortive trial.

*An indictment for non-repair of a highway under 4 & 5 Will. 4, c. 50, s. 95, came on to be tried at the assizes, when the jury were discharged without a verdict, they being unable to agree:*

*Held, that the judge could not direct the costs of such trial to be paid out of the highway-rate under the above section.*

*The order of the justices directing the indictment to be preferred, was also held bad on the authority of*

(a) Cockburn, C. J., Crompton, Blackburn and Mellor, JJ.



Q. B.]

REG. v. KNOX—REG. v. THE OVERSEERS OF ISLINGTON.

[BAIL.

Reg. v. Hickling, 7 Q. B. 890, for not showing on the face of it that it was made at a special session of the highways, held within the division in which the road was situate.

This was an indictment against the defts. for the non-repair of a highway, tried at the last assizes at Devizes, before Shee, Serjt. The jury not being able to agree, were discharged without giving a verdict. The learned commissioner directed the prosecutor's costs to be paid out of the highway rate in the defts.' parish : (5 & 6 Will. 4, c. 50, s. 95.)

The order to prefer the indictment was made at a special session of justices for the division of Warminster (Wilts), in which division Heytesbury is partly situate, on the hearing of a summons against the surveyors of Heytesbury for the non-repair of a highway in that parish when they denied the liability of the parish to repair.

M. Smith on a former day obtained a rule nisi to set aside the order or certificate for costs.—Sect. 95 enacts, "the costs of such prosecution shall be directed by the judge of assize before whom the said indictment is tried, or by the justices, to be paid out of the rate made and levied in pursuance of this Act in the parish in which such highway shall be situate." First, the judge had no authority to make the order as the indictment was not tried within the meaning of that section. There was no verdict, and the prosecution is still pending, and the deft. may obtain the verdict. Secondly, the order of the justices at the special sessions directing the indictment to be preferred (5 & 6 Will. 4, c. 50, s. 95) is bad, as it does not show on the face of it that it was made at a special session for the highways, held within the division in which the road is situate:

Reg. v. Hickling, 7 Q. B. 890.

T. W. Saunders now showed cause.—The word "tried" in sect. 95 has an extensive meaning. In Reg. v. Haslemere, 32 L. J. 30, M. C., it was held to include the case where the defts. plead guilty, and the case is not tried in the ordinary sense of the word. [CROMPTON, J.—You must show that the case has been tried when the jury are discharged without a verdict.] Although the trial is an abortive one, it is nevertheless a trial. [BLACKBURN, J.—We held, in Reg. v. Charlesworth, 31 L. J. 25, M. C., where the jury was discharged by the judge, that there was no trial.] There is one contingency, it is true, in which the prosecutor could not have his costs from the defts., when the way in question is not a highway : (Reg. v. Surrey, 21 L. J. 195, M. C.) But upon the trial in this case, it was admitted on all hands that this was a highway. [The Court, however, ruled that the indictment had not been tried within the meaning of sect. 95.] Secondly, the objection as to the defect on the face of the order cannot be taken now, because the order itself is not before the court, but only a statement of it on affidavit. [CROMPTON, J.—How do you distinguish this from Reg. v. Hickling?] The order should be brought up by certiorari, and be quashed. He referred to

12 & 13 Vict. c. 45, s. 7.

CROMPTON, J.—The power of amendment in that statute can only be exercised by the court when the order is brought up on a return to a certiorari. We are now asked to say that the judge had no jurisdiction to make the order for costs, because the order of justices directing the indictment to be preferred is bad on the face of it. If it is bad, although it is not brought before us to be quashed, I do not see how that gives another party jurisdiction to act upon it. The judge has proceeded upon an invalid order. The law is clear and the order is void.

M. Smith and Bullar appeared to support the rule.

Rule absolute.

## BAIL COURT.

Reported by T. W. SAUNDERS, Esq., Barrister-at-Law.

Thursday, May 7, 1863.

(Before WIGHTMAN, J.)

REG. v. KNOX.

Church-rate—Justices' jurisdiction.

To oust the justices of their jurisdiction to adjudicate upon a church-rate summons, the deft. must decline to accept their adjudication. Where, therefore, though objecting to the validity of a church-rate, he nevertheless submits his objections to the decision of the justices, he cannot afterwards object that they had no jurisdiction.

This was a rule for a certiorari to remove an order of justices for the payment of a church-rate made upon a Mr. Knox, in order that the same may be quashed. It appeared that he having refused payment he was summoned before certain justices, and at the hearing he made several objections to the validity of the rate, and upon these being decided against him, he said he should appeal, but he did not in any other way dispute the validity of the said rate, or object to the justices determining the said objections.

J. Brown now showed cause, and contended, upon the authority of Reg. v. The Justices of Salop, 29 L. J. 39, M. C., that the jurisdiction of the justices was not ousted.

Pearce, contra, argued, upon the authority of Reg. v. The Justices of Leicestershire, 29 L. J. 203, M. C.; 2 L. T. Rep. N. S. 436, that the deft. had sufficiently objected to the validity of the rate to take away the jurisdiction of the justices:

Dale v. Pollard, 10 Q. B. 508;

R. v. Wrottesley, 1 B. & A. 648.

WIGHTMAN, J.—I think this case falls within the ruling in Reg. v. The Justices of Salop, and is not really distinguishable from it. There were certainly in this case many objections taken to the rate, but they were left to the justices to decide; and when they decided them, he says he will appeal. So it was in Reg. v. Salop; but the court said they could not grant the certiorari after the justices had been permitted to go into the case. There might perhaps be some difference if the motion were for an order upon the justices to issue a warrant. Here it is sought to question the order, which I think was properly made.

Rule discharged.

REG. v. THE OVERSEERS OF ISLINGTON.

Islington vestry—Demand to be rated—18 & 19 Vict. c. 120.

Under the 18 & 19 Vict. c. 120 (the Metropolis Local Management Act), the powers of the trustees of the parish of Islington conferred by a local Act are transferred to the vestry under the above-mentioned Act:

Held, that a demand of an inhabitant to be inserted in the rate-book of the poor-rate should be made upon such vestry, and not upon the overseers.

This was a rule calling upon the overseers of the parish of Islington to show cause why a mandamus should not issue commanding them to insert a Mr. Williams in the poor-rate for that parish.

Several objections were urged in answer to the rule, the one argued, however, and upon which the court gave judgment, was, that no proper demand to be put upon the rate-book had been made; the only demand made having been upon the overseers of the parish, who it was alleged had no control over the rate or the rate-books, instead of being made upon the vestry under the 18 & 19 Vict. c. 120 (Metropolis Local Management Act). It appeared that by a local Act the management of the poor was administered by a

[ARCHES.]

MOLYNEUX v. BAGSHAW.

[ARCHES.]

body of trustees, the powers of whom were, by the 18 & 19 Vict. c. 120, transferred to the vestry constituted under it.

Kearns appeared in opposition to the rule, and contended that the demand as being made upon the overseers was made upon parties who had no power to comply with it, and that it should have been made upon the vestry: (sect. 250.)

Phipson, Q.C. and Tapping, contra, contended that the demand was correctly made; sect. 4 of the 19 & 20 Vict. c. 112 (the Amending Act), expressly pointing out the overseers as the proper parties.

WIGHTMAN, J. held, that with reference to this parish, the demand to be put upon the rate-book was made upon the wrong parties; that it should have been made upon the vestry, who alone had the power to comply with it.

*Rule discharged.*

### COURT OF ARCHES. CANTERBURY.

Reported by Dr. SWABEY, of Doctors'-commons.

*April 27 and May 11, 1863.*

The Office of the Judge promoted by MOLYNEUX (Clerk) v. BAGSHAW (Clerk), on the admission of the articles.

*Poor-law union—Appointment of chaplain—Right of incumbent—4 & 5 Will. 4, c. 76.*

*A clergyman of the Church of England, duly appointed chaplain of a union by the authority of the Poor Law Commissioners, may perform the service of the Church of England in the union-house, by their direction and under their authority, without the consent of the incumbent of the parish in which the union-house is locally situated.*

This case came before the court by letters of request from the Bishop of Ely.

The Rev. John Henry Molyneux, perpetual curate of the parish of St. Gregory with St. Peter annexed, in the county of Suffolk, proceeded against the Rev. Edward Salmon Bagshaw for publicly reading and preaching, without the previous leave and against the remonstrance of the plt, in the chapel of the workhouse of the Sudbury Union, within the said parish of St. Gregory and St. Peter.

The articles, the admission of which was now opposed, stated in substance:—First, the nomination and licence of Mr. Molyneux to the perpetual curacy of St. Gregory and St. Peter's annexed. Third, that there is a certain building called the chapel of the workhouse of the Sudbury Union, attached to the said workhouse of the Sudbury Union, and situate within the said parish of St. Gregory and St. Peter annexed, in Sudbury aforesaid, and within and subject to the ministerial or parochial supervision and charge of Mr. Molyneux, as perpetual curate of the parish. Fourth, that no clerk or minister of the United Church of England and Ireland in holy orders is allowed or permitted, by the ecclesiastical laws of this realm, to officiate in the said building called the Chapel of the Workhouse, &c., by publicly reading to a congregation there assembled the common prayers, or by preaching, or administering the sacraments, or by performing the other ecclesiastical duties and divine offices according to the rites and ceremonies of the United Church, without previous leave and against the remonstrance of the incumbent of the parish, as such, having the ministerial or parochial supervision and charge of the said parish, including the chapel of the workhouse of the union. Fifth and sixth, pleaded a prohibitory letter from plt. to deft. Seventh, that, after the receipt of such letter, Mr. Bagshaw did, on Sunday, the 7th Dec. 1862, and on following Sundays,

officiate in the said chapel of the workhouse, by publicly reading the office of morning and evening prayer, according to the rites of the said United Church, to a congregation consisting of upwards of 100 persons there assembled. Eighth, pleaded public preaching on the same days and to the same congregation. Ninth, that Mr. Bagshaw is a priest or minister in holy orders of the said United Church.

And the rest were the usual formal articles, concluding with the prayer that Mr. Bagshaw should be monished to abstain from such illegal conduct, and be condemned in costs.

The following documents, though not before the court in the present stage of the case, may serve to illustrate it:—

“Sudbury Union.

“To the Guardians of the Poor of the Sudbury Union, in the counties of Suffolk and Essex;

“To the Rev. John William Henry Molyneux, chaplain of the workhouse of the said union;

“To the clerk or clerks to the justices of the petty session held for the division or divisions in which the said union is situate;

“And to all others whom it may concern.

“We, the Poor Law Board, hereby declare that we deem the Rev. John William Henry Molyneux unfit for the office of chaplain of the workhouse of the Sudbury Union, in the counties of Suffolk and Essex; and in pursuance and execution of the powers and authorities given in and by the statute in that behalf made and provided, we hereby remove him from the said office, and order and direct the said Rev. John William Henry Molyneux to cease to exercise and discharge the powers and duties of the said office.

“And we hereby require the guardians of the poor of the said union, as soon as conveniently may be, to appoint a fit and proper person to be chaplain of the said workhouse in the room of the said Rev. John William Henry Molyneux, and to report to the Poor Law Board the said appointment, when made, together with the amount of the salary intended to be given to the person so to be appointed chaplain of the said workhouse as aforesaid.

“Given under our hand and seal of office this 29th day of Sept. in the year one thousand eight hundred and sixty-two.

“C. P. VILLIERS, President.

“H. FLEMING, Secretary.”

“Extract from the Minute-book, Sudbury Union,  
Nov. 6, 1862.

“Rev. G. Bull moved, and Mr. Orpen seconded: That the Rev. Mr. Bagshaw be appointed chaplain of this union-house; and a large majority having voted in favour of Mr. Bagshaw, he was duly appointed chaplain on the following terms: To perform two full services on the Sunday at the union chapel, at such hours as the guardians may direct, and such other duties as they may appoint in conformity with the consolidated order of the commissioners, and not hold any other regular appointments.

“Stipend, 100*l.* a-year, to be paid quarterly.

“EDWARD BULL, Chairman.”

“We, Thomas Lord Bishop of Ely, do hereby signify our consent to the appointment of the Rev. Edward Salmon Bagshaw, as chaplain to the Sudbury Union.

“Dated the 27th day of Nov. 1862. “T. ELY.”

“No. 2200*b*, 1863.

“Poor Law Board, Whitehall, S.W.,

“20th Jan. 1863.

“Sir,—I am directed by the Poor Law Board to acknowledge the receipt of your letter of the 16th inst., and to inform you that they see no objection to the appointment of the Rev. Edw. Salmon Bagshaw to the office of chaplain at the workhouse of the Sudbury Union.

"The board approve of the payment of a salary of one hundred pounds per annum to the Rev. Mr. Bagshaw for the performance of the duties of his office, and in performance of the provisions contained in article 172 of the general order of the 24th July 1847, they now direct that the said annual salary of one hundred pounds shall be paid to him by the guardians according to the terms of the order applicable to the payment of salaries in force in the union.

"I am, Sir, your obedient servant,

"C. GILPIN, Secretary.

"To E. Steadman, Esq., Clerk to the Guardians of the Sudbury Union, Sudbury."

The admission of these articles was now opposed, on behalf of Mr. Bagshaw, by

Dr. Deane, Q. C. and Dr. Twiss, Q. C.—In this case it may be convenient, though perhaps not strictly regular, to take the opinion of the court, at this stage of the proceedings, whether the chaplain of a union workhouse may officiate there without the leave of the incumbent of the parish in which the union-house is locally situated. The question is, whether there is anything in the statute law which takes the case out of the general ecclesiastical law, which is not disputed. The building called the chapel of the workhouse is no doubt locally within the parish, but does it follow that the building so situated is under the ministerial authority of the incumbent of the parish? The statute on which the question depends is 4 & 5 Will. 4, c. 76 (the Poor Law Amendment Act). We contend that its enactments, *pro tanto*, override the general law. The 46th section enables the commissioners to direct the overseers or guardians of any parish or union to appoint such paid officers as the commissioners shall think necessary for superintending or assisting in the administration of the relief and employment of the poor. The 48th section empowers the commissioners by order under their hands and seals, either upon or without any suggestion or complaint on that behalf from the overseers or guardians of any parish or union, to remove any master of any workhouse or assistant overseer or other paid officer of any parish or union. The interpretation clause, sect. 109, says the word "officer" shall be construed to extend to any clergyman, schoolmaster, &c., who shall be employed in any parish or union in carrying this Act or the laws for the relief of the poor into execution. The effect of these sections as to the appointment of a chaplain is determined by the case of *Reg. v. The Guardians of the Baintree Union*, 1 Q. B. 130, where a *mandamus* was directed to the guardians to appoint a chaplain in accordance with an order of the commissioners. The note of the case is, "The Poor Law Commissioners may order the guardians of a union to appoint a chaplain for the union workhouse with a salary, such chaplain being an officer within the meaning of 4 & 5 Will. 4, c. 76, s. 46, interpreted by sect. 109." As to the dismissal of a chaplain, see *Ex parte Molyneux*, 7 L. T. Rep. N. S. 599, where the judges of the Q. B. took the same view of the effect of the above enactments as in the *Baintree* case. The word "union" in the above Act is to be construed to include any number of parishes united, for any purpose whatever, under the provisions of this Act. The statutes for the regulation of gaols and lunatic asylums have special enactments as to chaplains, which are not to be found in the Poor Law Acts. We submit that the articles, as laid, do not show that Bagshaw has been guilty of any ecclesiastical offence whatever.

The *Queen's Advocate* (Sir R. J. Phillimore) and Dr. Tristram in support of the articles.—As far as we know, this is yet an undecided point of great importance. If, under the authority suggested, a clergyman may preach and read to a large number of persons in a building locally situated in another man's parish, where is the limit to be drawn? Does the authority

extend to administration of the sacraments and to the collection and disposal of offertory money? Is the whole Rubric to be indirectly set aside by obscure clauses in the Poor Law Act? But we contend that the Act properly read gives no such power to the commissioners and guardians to appoint a chaplain in spite of the incumbent of the parish. It is admitted that in the section already referred to the power is only given by inference; but express enactment is required to put aside a common law right. The 19th section of the Act, however, makes certain provisions for religious service and religious assistance quite inconsistent with the appointment of such an officer as Mr. Bagshaw claims to be: "And be it further enacted that no rules, orders, or regulations of the said commissioners, nor any bye-laws at present in force or to be hereafter made, shall oblige any inmate of any workhouse to attend any religious service which may be celebrated in a mode contrary to the religious principle of such inmate, nor shall authorise the education of any child in such workhouse in any religious creed other than that possessed by the parents or surviving parent of such child, and to which such parents or parent shall object, or in the case of an orphan to which the godfather or godmother of such orphan shall so object. Provided also, that it shall and may be lawful for any licensed minister of the religious persuasion of any inmate of such workhouse at all times in the day, on the request of such inmate, to visit such workhouse for the purpose of affording religious assistance to such inmate, and also for the purpose of instructing his child or children in the principles of their religion." The proper construction of the 46th and 109th sections is to be gathered from *Reg. v. The Poor Law Commissioners, re Cambridge Union*, 9 A. & E. At 918, Littledale, J. is reported to say: "The words 'paid officers' in sect. 46, might include collectors; but we cannot say that it does so, if (as the fact is) the word 'collector' nowhere occurs in the Act, and the functions of a collector are not necessary for the purposes mentioned in sect. 46, and they are not necessary for 'superintending or assisting in the administration of the relief and employment of the poor,' or 'for the examining and auditing, allowing or disallowing of accounts. . . . In the interpretation clause, sect. 109, 'officer' is said to mean 'collector'; but it does not follow that a collector is one of those officers whose appointment the commissioners have a general power to direct for the purposes of this Act." We submit that a similar construction applies to "chaplain" or "clergyman." An analogous point was determined in the Consistorial Court of the diocese of Dublin, in *The Office of the Judge promoted by Milligan v. Bedford Jones*, in connection with a district county lunatic asylum, reported in the *Irish Jurist* of 15th Dec. 1861. The case of *Reg. v. The Visiting Justices of Hanwell*, under 9 Geo. 4, c. 40 (the Pauper Lunatic Act), is stated in 1 Phillimore's Burn, 308, l.

Dr. Deane in reply.

Dr. LUSHINGTON.—The only question before me on the admission of these articles is, whether such a chaplain may read the church service and preach on Sundays.

*Cur. adv. vult.*

May 11.—The learned DEAN gave the following judgment:—I really feel no difficulty in this case, except that which arises from the defective state of the articles, the admissibility of which is formally the question before the court, for, on looking at my notes of the argument, I find that it turned on matters not before the court on these articles; but though the matter is not strictly in form before me, yet, at the request of the parties, I will dispose of what I understand to be the substantive question in dispute between them, especially as the argument was full and able. [The learned Dean then stated the nature of the case and the substance of the articles, as above.] In these

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articles I do not find any averment that Mr. Bagshaw was appointed chaplain to this union house by the authority of the Poor Law Commissioners. The only means by which I can extract from the materials now before me that Mr. Bagshaw has been appointed such a chaplain, is from the note addressed by Mr. Molyneux to him forbidding him to officiate, and which note is annexed to these articles. This should have been clearly stated, for the assertions, that any clergyman may officiate within the parish of another, and that a chaplain appointed by the Poor Law Commissioners may do so, are totally different. But the question I am really asked to decide is, whether the chaplain so appointed has a right to officiate by their direction and under their authority. That within the limits of his parish an incumbent has the sole cure of souls, and that if another clergyman performs the services of the Church of England within those limits without the leave, *a fortiori*, in spite of the prohibition, of the incumbent, he is guilty of an ecclesiastical offence, are propositions too clear to admit of doubt. But if it pleases the Legislature to introduce exceptions it has full power to do so. The statute under which the exception is said to exist in the present case is 4 & 5 Will. 4, c. 76. If that statute has received in the Q. B. a construction applicable to the question which I have to decide, I must follow that construction; for it is an invariable rule that the Ecclesiastical Court, in construing a statute, must follow the decisions of the common law courts. The *Braintree Union* case decided that the Poor Law Commissioners may order the guardians of a union to appoint a chaplain for that union. It is said that that decision is inconsistent with the decision in the *Cambridge* case; if that were so, the *Braintree* case, which is the later of the two, would be binding on me; but the cases are clearly distinguishable, and there is really no conflict between the judgments. It is not for me now to point out the distinction; it is sufficient for the present purpose that the Lord Chief Justice has stated that they were distinct. The legal power to appoint must then be taken as established. The fact that Mr. Bagshaw was so appointed was not disputed in argument, though the fact is nowhere stated in the articles; neither is it said whether he officiated, as charged, with or without the authority and direction of the Poor Law Commissioners. I must take it that he did act under their authority, and if so, I think that he was simply acting in discharge of his duty. I do not rely on any particular circumstances of this union; but assuming the facts of the appointment and the direction to officiate, I think that a clergyman of the Church of England, duly appointed by lawful authority to be chaplain of a poor-law union and required by that authority to perform the service of the Church of England in the union-house, is, in performing such service, doing nothing but what he was bound to do. I reject these articles, and with costs.

Dr. *Tristram*, on behalf of Mr. Molyneux, asked leave to appeal.

Dr. LUSHINGTON.—I will give that leave only on condition that the articles are amended by stating the appointment of Mr. Bagshaw by the Poor Law Commissioners, and that he performed the services complained of by their authority, so that an intelligible case on the facts may be presented to the Privy Council.

Proctor for the plt., *Brooker and Du Bois*.

Proctor for the defts., *Skipwith*.

## V. C. KINDERSLEY'S COURT.

Reported by JOSHUA METCALFE, Esq., Barrister-at-Law.

Friday, Jan. 23, 1863.

Re THE ALFRETON DISTRICT FRIENDLY AND PROVIDENT SOCIETY.

*Winding-up Act of 1862—Provident society.*

*A petition was presented to have a friendly and provident society which had done no business since 1844 wound-up under the Companies Act of 1862: Held, that the society came within the terms of that Act*

This was an unopposed petition for the winding-up of the above society under the Companies Act of 1862. It appeared that in 1844 dissensions arose amongst the members of the society, and that no business had since been done. There were about a hundred members, nearly all of them in a humble condition of life. All the trustees with the exception of one was dead, the only surviving official being a Mr. Mather, who had opposed several attempts which had been made to adjust the affairs of the society, on the ground that the magistrates applied to were nominal members.

*Simmonds* appeared for the petitioners, and submitted that the case came within the provisions of the Winding-up Act of 1862 (25 & 26 Vict. c. 89).

The VICE-CHANCELLOR, after some discussion, made the order.

Solicitor for the petitioners, *S. D. Ashby*.

## COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYD, Esqrs., Barristers-at-Law.

Monday, Jan. 26, 1863.

STOTT AND OTHERS v. CLEGG AND OTHERS.

*Lessees of turnpike tolls compounding—Right to do so. The defts. hired some turnpike tolls for three years from the trustees, and, as such lessee, entered into an agreement with the defts. for a composition of his tolls for that period. The defts. afterwards refused to carry out the terms of the agreement, whereupon the plt. brought his action for the breach, the defts. demurring on the ground that such an agreement was contrary to law:*

*Held, that such a composition, by a lessee, was not illegal, and therefore that the action would lie against him.*

This was a demurrer to the declaration.

The declaration stated that before and at the time of the making of the agreement hereinafter recited, the plt. were possessed of certain collieries and a certain farm situated in the township or division of Ebsworth, in the parish of Myddleton, in the county of Lancaster, and the plt. and their customers were in the habit of using certain roads called the Bamford turnpike-roads with carts laden and unladen, coming from and going to the said collieries and farms, paying toll for such use at certain turnpike-gates belonging to the trustees of the said Bamford turnpike-roads, to wit, Half-acre, Wheelbarrow-lane, Heywood-lane-end, Fairfield-gates, and the defts. had become and were the lessees and the farmers of the tolls of the said Bamford turnpike-roads, and thereupon, on the 5th May 1862, it was agreed by and between the plt. and the defts. that, in consideration of 291l. 15s. to be paid by the plt. to the defts. by quarterly payments, the plt. and their customers going to and from their said collieries and farm, should from and after the making the said agreement have the right of passing through Half-acre, Wheelbarrow-lane, Heywood-lane-end, and Fairfield-gates with carts and other conveyances, laden or unladen, until the 1st April 1863, free from all toll, and that the chain-horses

should have the right of helping up the carts at Simpson Clough as then used. And the plts. have in all respects performed their part of the said agreement, so as to entitle them, and all things and conditions have happened and been performed which were necessary to happen and be performed to entitle them to have the said agreement of the defts. performed by them; yet the plts. and their customers going to and from the collieries and the said farm, by the default of the defts. in that behalf, have not had or been suffered or permitted by the defts. to enjoy, nor have they nor are they suffered or permitted by the defts. to enjoy the said right of passing through Half-acre, Wheelbarrow-lane, Heywood-lane-end and Fairfield-gates aforesaid with carts and other conveyances, laden or unladen, free from toll, according to the said agreement of the defts.; but on the contrary thereof, after the making the said agreement, and before this suit, drivers of the carts, &c., of the plts. and of their customers, going to and from the said collieries and the said farm, laden or unladen, have been and were, by the default of the defts., prevented and hindered from passing through the several gates aforesaid free from toll; and have been and were compelled, by the respective collectors of the tolls, &c., to pay tolls for the said carts and other conveyances respectively; whereby the plts. have been compelled to pay divers sums of money for and in respect of, and have been, and are compelled to sell the coals from their said collieries at a less price than they otherwise would and might have done, and might and would do, and are prevented from carrying on their trade and business at the said collieries and at the farm in so beneficial and profitable a manner as they otherwise would and might have done, and might and would do, and have incurred a great loss and inconvenience. And the plts. also sue the defts. for money payable by the defts. to the plts. and for money had and received, and the plts. claim 500*l.* and a writ of injunction to restrain the defts. from the repetition or continuance of the injuries above complained of, and other injuries of a like nature.

Pleas:—3. To the first count, that the said tolls, which the plts. and their customers have been and were compelled to pay, were, at the time of the making of the said agreement, and of such payments respectively, such tolls as were authorised and directed to be taken, and the same were demanded and taken by and by virtue of the particular Turnpike Acts in force relating to the said Bamford turnpike-roads, &c. 5. That the said first count is bad in substance. Demurrer and joinder in demurrer.

The ground of demurrer was, that such an agreement was contrary to law.

*Manisty* (Holl with him), for the plts., referred to 13 & 14 Vict. c. 87 (loc. and pers.); 3 Geo. 4, c. 126, ss. 42, 55; 4 Geo. c. 95, ss. 11, 13, and contended that as the trustees let the tolls for three years, there was nothing in the Acts to prevent the farmer from making what bargain he liked; the sole object of the statute being to prevent the collectors of the trustees from taking such tolls as they ought not.

*Mellish* (*Griffith Williams* with him).—There are these two enactments, and by taking them together the court is to determine whether the farmer can enter into a composition for more than a year, as by the last Act the trustees are expressly bound not to enter into a composition for more than that time. No doubt the collector of the trustees would be liable to a penalty if he took more or less than the authorised toll; and we find by sect. 55 that the same penalty is imposed on the farmer. He referred to

*Peacock v. Harris*, 10 East, 104.

*ERLE, C.J.*—I am of opinion that the plt. is entitled to our judgment in this case. He has made an agreement, and there is nothing on the face of it which would enable me to say that it was unlawful in

any respect. The question turns upon the point whether there is anything in sect. 55 of 3 Geo. 4, c. 126, which would by implication operate as a prohibiting of such a contract. That section contains a prohibition to collectors to take more or less than the specified toll from any one passing through their gate, and it is contended that such a composition would amount of necessity to more or less than would be paid if the tolls were demanded and paid each time they became due. But that construction seems to me to be strained, and that the prohibition was intended to prevent collectors from demanding from the public more than was right; and also, where the tolls were not let, to prevent the collectors employed by the trustees from taking too little. In 13 Geo. 3, c. 84, which was repealed by 3 Geo. 4, c. 126, there is a clause prohibiting both trustees and lessees from making compositions for tolls; but by sect. 42 of the latter Act, trustees are prohibited from making compositions for more than three years; but no mention is made of lessees. Then, by sect. 13 of 4 Geo. 4, c. 95, it is enacted that "the trustees and commissioners of every turnpike-road may from time to time, as they shall see convenient, compound and agree for any term not exceeding one year at any one time;" but again there is no provision as to lessees, and it is clear to me that the proper inference to draw from these statutes is, that the prohibitions were not intended to extend to lessees. Then the trustees have by sect. 55 of the same Act the power of protecting their interests, as they can, which letting the tolls impose conditions which will have that effect.

*WILLIAMS, WILLES and KEATING, JJ.* concurred.

*Judgment for plt.*

*Attorney for plts., Geo. Greenwood.*

*Monday, April 27, 1863.*

*WARMBY v. DEAKIN.*

*Turnpike Act, 1 & 2 Will. 4, c. 25—Cattle—Exemption from toll.*

*The resp., a cattle dealer, removed some sheep from one of his pastures to another, in doing which they had to go through a turnpike-gate. The app. demanded the toll, on the ground that the sheep were only going to remain in the pasture for one night, and were going to market the next morning, and that, as they were in fact on their way to the market, they were not exempted from toll by the 1st section of 1 & 2 Will. 4, c. 25:*

*Held, that they were exempt, and that the justices were right in convicting him for unlawfully demanding and taking the toll.*

This was an appeal from the decision of justices, who had convicted the app., a toll-keeper on a turnpike-road, for having unlawfully demanded and taken toll from the resp., he having claimed exemption therefrom. It appeared that the resp. was a cattle dealer and farmer, and that he had purchased, in the way of his business, some sheep at a fair, which were destined for a market near at hand. These he depastured in one of his fields, and afterwards drove them through the turnpike-gate in question to another of his fields, previous to taking them to market, and which field was nearer the place where the market was held than the other. The app., being the gate-keeper at the gate through which the sheep passed, demanded toll for the sheep, which the resp. paid, claiming, however, at the time, exemption under the 1st section of the Turnpike Act, by which it is enacted "that no toll shall be demanded or taken for or in respect of any horse, ass, sheep, swine, or other beast or cattle of any kind going to or from water or pasture, or to or from being shod or farried, and passing on any turnpike-road, provided that such horse, ass, sheep, swine, or other beast or cattle of any kind, do not pass upon such turnpike-road more than the space of two miles going to or

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returning from water or pasture, or to or from being shod or farried."

*Cleasby, Q.C.*, for the app., contended that the resp. was in fact driving his sheep to market, and therefore that he could not legally claim exemption under the above statute.

*Welsby*, for the resp., was not called on.

*ERLE, C.J.*—I am of opinion that this conviction should be affirmed. The resp. was a farmer and cattle dealer, and only moved his sheep from one pasture to another, both being in his own occupation, and in doing which he was obliged to pass through the turnpike-gate. Now the statute says that no toll shall be demanded or taken in respect of any sheep going from pasture to pasture, and therefore, as these sheep were only being driven from one pasture to another, it is clear that the toll-keeper had no right to demand a toll. The app. contends that the resp. was not a farmer but a dealer, and was going to take the sheep to market the next day, and had put them into the pasture to get them fresher. I do not, however, agree with him in this, that a dealer is not a farmer, or a farmer not a dealer, and I am of opinion that the resp. was a dealer and a farmer, and that he has done nothing to deprive himself of his right to claim his exemption from toll under this statute.

*WILLES, BYLES and KEATING, JJ.* concurred.

*Judgment for the resp.*

Thursday, April 30, 1863.

HODGSON (app.) v. LITTLE (resp.)

*Salmon Fishery Act 1861 (24 & 25 Vict. c. 109)*—

*What is a fishery within the meaning of sect. 20—Obstructions to free passage of fish.*

*The occupier of a fishing mill dam removed the locks, but left the remainder of the contrivances for catching salmon, by which means the fish were stopped from going up the river. Without the locks the fishery was not available:*

*Held, that the fishery did not cease to be a fishery because part of the machinery for catching fish had been removed, and that the occupier had been rightly convicted, under sect. 20, for not removing obstructions to the free passage of fish during the close season.*

Case stated by justices of the county of Durham, under the 20 & 21 Vict.-c. 43:—

At a petty sessions holden at Darlington, in the county of Durham, on the 20th day of Oct. 1862, before George John Scurfield, Robert Colling, James Cookson and Joseph Whitwell Pease, Esqrs., four of her Majesty's justices of the peace acting in and for the said county, an information was preferred by Robert Little (hereinafter called the resp.) against Joseph Hodgson (hereinafter called the app.), under sect. 20 of the Salmon Fishery Act 1861 (24 & 25 Vict. c. 109), charging for that on the 8th Sept. last, at the township of Dinsdale, in the said county of Durham, he the said app. then being the occupier of a certain fishery for salmon in the river Tees, did not within thirty-six hours after the commencement of the close season, as fixed by the Salmon Fishery Act 1861, cause to be removed and carried away from the waters within his fishery, the inscales, locks, tops and rails of all cruires, boxes or cribs, and all planks and temporary fixtures used for taking or killing salmon, and all other obstructions to the free passage of fish in or through the cruires, cribs and boxes within his fishery, and in each default for the space of (to wit) fourteen days, did continue, contrary to the form of the statute in such case made and provided, was heard and determined by us, the said parties respectively being then present, and upon such hearing the app. was convicted before us of the said offence, and we adjudged him to forfeit all the engines and other things, to wit,

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the lock sluices, gates or doors that were not removed and carried away in compliance with the said section, and for every day, to wit, fourteen days during which he had suffered such things to remain unremoved beyond the period prescribed by the said Act to pay the sum of 1*l.*, and also to pay to the resp. the sum of 5*l.* 13*s.* for his costs in that behalf. And, whereas, the app. being dissatisfied with our determination upon the hearing of the said information as being erroneous in point of law, hath, pursuant to sect. 2 of the statute 20 & 21 Vict. c. 43, duly applied to us in writing to state and sign a case setting forth the facts and grounds of such our determination as aforesaid for the opinion of this court, and hath duly entered into the recognisances as required by the said statute in that behalf. Now, therefore, we the said justices, in compliance with the said application and the provisions of the said statute, do hereby state and sign the following case:—Upon the hearing of the said information it was proved that during the times hereinafter mentioned the app. was a corn miller, occupying as tenant, and for the purposes of his business, a corn mill, close by the fish-locks hereinafter mentioned, and that the fishing mill dam and locks hereinafter mentioned were used for the double purposes of fishing and of supplying water for the purposes of the said mill. That the Dinsdale fishing mill dam extends across the river Tees, and is of such height that when the river is in an ordinary state, salmon passing up the river can rarely, if ever, leap over it, and are frequently seen attempting to do so in vain. That at the end of the dam, on the Durham shore, there is an opening, which is locally termed a fish-lock. It was also proved that on the up-stream side of the fish-lock two grooved openings, of the width of about three feet each, are found. In the grooves of each of these openings a moveable sliding door, formed of wood and iron, is placed, which can be raised or lowered in the grooves at pleasure. When these doors are down, as it is proved they were on the 8th Sept. last, and on thirteen subsequent week days, no salmon can pass through the fish-lock. Within the lock, and at a distance of about three feet from the sliding doors down the stream, another frame is placed, in which, when the fish-lock was used for taking salmon, locks were placed, the door above being opened. It was proved that these locks had been used by the app. during the last fishing season up to the 19th May last, when they were removed; but that, on the said 8th Sept., and on the said thirteen subsequent days, the doors were neither removed nor drawn up out of the water, and, consequently an impassable obstruction was presented to the free passage of salmon through the lock. It was also proved that a similar fish-lock, with similar grooved doors and locks, existed at the Yorkshire end of the dam; and that the circumstances already described with reference to the lock at the Durham end of the dam were equally applicable to this. That it was proved that the locks in question were used by the app. for taking salmon during the last fishing season, and up to the said 19th May last, when he discontinued using them, by an order from his landlord's agent, and upon the representations of the inspectors of salmon fisheries that the locks were not in accordance with law, and that they still remained in the same state as they were when so used, except that the locks had been taken out, but no proof was given that the locks had been actually used for the purpose of catching fish after the said 19th day of May, and that what had been removed were the doors above described. It was also proved that locks and cruires were synonymous terms. For the app. it was contended that the lock was not on the said 8th Sept. or other subsequent days a fishery for salmon, or a crib box or cruire, within the meaning of the section under

which the information was laid, and that it was a fishing mill dam not used for fishing, but for the purposes of the mill only, after the said 19th May, the use of which was regulated by other sections of the Act. It was also contended on behalf of the app., that the app., if otherwise liable to penalties under the said 20th section, was not so, inasmuch as the removal of the doors would injure the milling power. We being of opinion that the evidence given before us aforesaid proved that the app. was the occupier of the fishery, and that the case was within the operation of the said 20th section of the Salmon Fishery Act 1861, gave our determination against the app. in manner before stated.

If the court should be of opinion that the said conviction was legally and properly made, and the app. is liable as aforesaid, then the said conviction is to stand; but if the court should be of opinion otherwise, then the said information is to be dismissed.

*Maniety* for the app.—By sect. 4 the following, amongst other definitions, are given:—"Dam" shall mean all weirs and other fixed obstructions used for the purpose of damming up water. "Fishing weir" shall mean a dam used for the exclusive purpose of catching or facilitating the catching of fish. "Fishing mill-dam" shall mean a dam used, or intended to be used, partly for the purpose of catching or facilitating the catching of fish, and partly for the purpose of supplying water for milling or other purposes. By sect. 17 close time is to be from the 1st Sept. to the 1st Feb. By sect. 20 the proprietor or occupier of every fishery for salmon shall, within thirty-six hours after the commencement of the close season, cause to be removed and carried away from the water within his fishery, the inscales, hecks, tops and rails of all cruives, boxes, or cribs, and all planks and temporary fixtures used for taking or killing salmon, and all other obstructions to the free passage of fish in or through the cruives, cribs and boxes within his fishery, and if any proprietor or occupier omits to remove and carry away in manner aforesaid anything hereby required to be removed and carried away, he shall incur the following penalties, that is to say: First, he shall forfeit all the engines or other things that are not removed and carried away in compliance with this section. Second, he shall, for every day during which he suffers such things to remain unremoved beyond the period prescribed by this Act, pay a sum not exceeding 10*l*. I submit that a lock is not a temporary fixture, but a fixture fastened to the freehold. Under sect. 23 any proprietor of a fishery, with the written consent of the Home-office, may attach to every dam existing at the time of the passing of this Act a fish pass of such form and dimensions as the Home-office may approve, so that no injury be done to the milling power, or to the supply of water to or of any navigable river, canal, or other inland navigation by such fish pass. Next I submit that, the hecks having been removed and the fishery having been given up, it is no longer a fishing mill dam, but only a mill dam. If the proprietor of the fishery desire to let the fish go up the river he can do by constructing a fish pass under sect. 23. He has mistaken his remedy.

*Davison* (with him *Fowler*) for the resp.—The clear object of the Act of Parliament is to give a free run to the fish. The Legislature says that where there is a dam something shall be done to let the fish pass. With regard to a dam only, such as a mill dam, the owner of the fishery above may, under sect. 23, have a fish pass placed. With regard to fishing mill dams, sect. 12 says, that they shall not be used for the purposes of catching salmon, unless they have attached to them fish passes. I submit that this is a fishery properly so called. Is this sluice one whit less part of the fishing machinery than the hecks?

*ERLE, C.J.*—The app., the occupier of a mill and a fishing mill dam and fishery, was convicted under sect. 20 of the 24 & 25 Vict. c. 109, for not removing obstructions to the free passage of fish through the locks of his fishery. It appears that the app. had a mill, and what I think was a fishery within the meaning of the statute—the substantial contrivances for the taking of fish. Sect. 20 says, that the occupier of every fishery shall within thirty-six hours after the commencement of the close season cause to be removed all obstructions to the free passage of fish through the locks within his fishery. It seems to me that the conviction applies directly to the words of that section. The contrivance was what I would call hatches and hecks. The hatches had been kept, although the hecks had been taken away; but the whole was in use in May last. The fishery was now no longer available, because the hecks had been taken away. But the app. kept down the hatches, which was part of the contrivance for taking the fish, and it is found as a fact that when the hatches were down no fish but an extraordinarily gifted animal could pass. It seems to me clear that the Legislature meant that a free passage should be left for the fish. It provides that for the future any mill dam to be made must leave a passage; and as to the old mill dams, if altered, the party altering must leave a free passage for fish. The app. has an old fish dam, and he says that, by taking away part of his engines, he has turned the whole into a mere mill dam. The grand question tried is, the right to stop the fish passing up the river. I think the conviction was right.

*WILLES, J.*—I am of the same opinion. The substantial question is, whether sluices are obstructions to the free passage of fish in a fishery. The Legislature has given no construction to that term "fishery." Must it be a fishery that is actually being used as such? I think not. It must mean that which is in its nature capable of being used as machinery for catching fish, for otherwise, at the close season, the owner might take away part of his machinery, and say that he was not an owner of a fishery, which would be absurd. The words are very large, "all obstructions." It appears to me clear that this is a fishery, and that a sluice is an obstruction.

*BYLES, J.*—This is a remedial Act, and ought to be construed widely, so as to suppress the mischief which it was intended to. If this is not a fishing mill dam, it is a mill dam, and it falls within the 25th section, for the app. has altered it so as to create a total obstruction. To hold, then, that this is not a fishery, would only be to alter the remedy. Here there was a complete apparatus for fishing. There is no reason why it should not be used so to-morrow. Although part of the machinery has been removed, it might be restored to-morrow.

*KEATING, J.*—I am of the same opinion. I think this is a fishery. The only question is, whether the free passage of the fish has been obstructed.

Attorney for resp., *G. Capes*.

## COURT OF ARCHES. CANTERBURY.

Reported by DR. SWABBY, of Doctors'-commons.

April 27 and May 22, 1863.

(Before the Right Hon. S. LUSHINGTON, D.C.L.)  
The Office of the Judge promoted by JONES (Clerk)  
against JELF (Clerk).

*Criminal suit—Citation—Appearance and admission—Articles—Costs.*

*It is proper for the promoter in a criminal suit to bring in articles, though the party cited has by special process admitted his breach of the law as intimated in the*

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*citation; for the court, without the specification so afforded by articles, would not in many cases know what sentence to pronounce on such an admission.*

*If the promoter has been obliged to seek the assistance of the court in asserting a clear legal right which has been denied by the party cited, the latter will be condemned in costs.*

*But, semble, otherwise, if the party cited had at once acknowledged to the promoter his error in point of law, and his discontinuance of the illegal practice complained of.*

This case came by letters of request from the Lord Bishop of Bangor, dated 30th Jan. 1863; the decree called upon the deft. to answer to certain articles, &c., especially for having publicly read prayers, preached and administered the Holy Sacrament, and performed other ecclesiastical duties and divine offices according to the rites and ceremonies of the Church of England, within two years last past, in a certain unconsecrated chapel or building at Caerdeon within the parish of Llanaber and diocese of Bangor and province of Canterbury, without sufficient licence or authority.

This decree was personally served on the 19th Feb.

On the 4th March Mr. Jelf's proctor wrote to the proctor for the promoter, stating that Mr. Jelf had executed a proxy authorising them to appear and admit in acts of court that he had offended against the laws ecclesiastical as alleged in the decree, and to submit to the judgment of the court without further proceedings.

Mr. Jones's proctor tendered articles which Mr. Jelf's proctor refused to accept, and on 16th April *Stipendiary* appeared for Mr. Jelf, exhibited the special proxy above mentioned, prayed that further proceedings might be stayed, and the judgment of court given on his admission of having offended, etc.

*Nelson*, for Mr. Jones, prayed leave to exhibit articles, and by direction of the judge brought in articles, the 6th of which pleaded the public performance of certain services of the Church of England in an unconsecrated building in the parish of Llanaber, on the 29th Nov., and on the 25th and 28th Dec. 1862. 7th. That such services were performed without sufficient licence or authority, and in spite of the objection of the Rev. John Jones, the rector of the parish.

On the 27th April the *Queen's Advocate* (Sir R. J. Phillimore), with him Dr. *Swabey*, on behalf of Mr. Jones, moved the court to admonish Mr. Jelf against so offending in future, and to condemn him in costs.

Dr. *Twiss* and Dr. *Tristram*, on behalf of Mr. Jelf, argued against the prayer of condemnation in costs, and urged that at least the articles had been unnecessarily brought in after the special proxy admitting the offences laid in the decree.

Dr. LUSHINGTON.—It appears to me that there would be a great difficulty in the court proceeding to give judgment without seeing the articles. This may turn out to be a case of simple misapprehension of the legal position of the party. But suppose a case where the decree calls on a clergyman to answer a charge of immorality, without the specification which the articles afford it would be impossible for the court to know what sentence it ought to pronounce.

Dr. *Twiss* then said that he had not seen the articles, and asked the court to adjourn the cause to give him an opportunity of seeing and of considering whether any other matters than those appearing on the face of the articles ought to be brought before the court.

Dr. LUSHINGTON.—I certainly understood that I came here to-day to pass sentence, but if in your discretion as Mr. Jelf's counsel you ask me to adjourn the case I will do so.

Subsequently an affirmative issue was given to the articles on behalf of Mr. Jelf, and an affidavit from him brought in with a view to the question of costs.

The affidavit in substance stated that Mr. Jelf had resided for nine years on his own property at Caerdeon in the parish of Llanaber, which is about nine miles in breadth and as much in length, with a population of about 1810 persons, many of them not speaking Welsh; that the rector provides only one English service on Sunday, namely, in the afternoon in the parochial chapel at Barmouth, about three miles and a-half from Caerdeon, and that the other Sunday services in that chapel and the parish church are in Welsh; that in the year 1855 Mr. Jelf built a school-house on his property, and that the then Bishop of Bangor granted a licence enabling the rector or his curate to perform the Church Service in English in such schoolroom, from which time till Nov. 1862 Mr. Jelf, with the approbation of the rector, was in the habit of performing the services of the Church in English, which were attended by his own household and by a number of the parishioners and visitors who did not understand Welsh; that in 1861 Mr. Jelf commenced building a chapel on his estate, supposing that he had the consent of the rector to its being licensed for public service, and that it was not till Aug. 1862, when the chapel was nearly finished, that he learned through the Bishop of Bangor that the rector objected to its being licensed, except on condition of an endowment being provided, or an undertaking given for the payment of a curate's salary till such endowment should be made; that Mr. Jelf being unable to comply with these conditions the Bishop of Bangor granted him a licence which purported to declare the said building a private chapel for the use of Mr. Jelf, his family, household and friends, and to authorise him to perform divine service and preach in the English language in the said building; that about the 7th Dec. 1862 Mr. Jelf received a letter from the rector's solicitors, stating that if the services were continued he should take proceedings; that Mr. Jelf laid a case before counsel, and, being advised that the services complained of might be held to be a breach of the ecclesiastical law, had, in and since the month of Jan. 1863, discontinued such services; that in all the proceedings complained of Mr. Jelf had acted with the sanction of the bishop of the diocese; that the cause was instituted after the discontinuance of the services, which discontinuance might have been known to the rector; and that the institution of the cause, and the further proceedings taken therein were unnecessary to protect the parochial and ministerial rights of the rector. Mr. Jones filed a counter affidavit, which, among other things, set out the answer received from Mr. Jelf by his solicitors to their communication of the 7th Dec. 1862, which was to the effect that he was officiating under the authority of a licence granted by the Bishop of Bangor acting under legal advice. Mr. Jones's affidavit further set out the following letter from Mr. Jelf to the Bishop of Bangor, which had been inclosed by the latter to Mr. Jones:—

“Christ Church, Oxford, Dec. 12, 1862.

“My dear Lord Bishop,—A night's reflection has only confirmed me in the determination which I expressed in my letter of yesterday of allowing Mr. Jones to take his own course. I am more and more convinced that if there be any precedents against me there are peculiar features in the case which make those precedents inapplicable, while more precedents in my favour are a portion more applicable to a private chapel than to a public one.

“If the court, acting on these inapplicable precedents, should decide against the validity of your Lordship's licence (which I think very unlikely), there is still an appeal to the Privy Council, which is practically a court of equity in such cases, and would decide this perfectly new case on its merits, which I need not say, are wholly on our side. I shall, therefore, let the matter proceed as Mr. Jones likes, and defend the



licence, both in the Ecclesiastical Court, and, if necessary, before the Privy Council, and I am sure in so doing I have your Lordship's full sanction. I am, however, desirous of putting forward more prominently my willingness to take Mr. Jones's consent if he chooses to give it me. For many reasons, especially for the sake of peace and harmony, I had much rather now act with his consent than without it, even at the end of a successful defence. My only doubt upon the matter is, whether I am shrinking from a public duty, but if your Lordship thinks I can rightly and honourably so far compromise the matter, I am willing to do so.—Believe me, &c.

"W. E. JELF."

May 22.—The *Queen's Advocate* (Sir R. J. Phillimore) and Dr. *Swabey* now prayed as before. As to costs, they contended that Mr. Jelf's letter of the 12th Dec. was a challenge to Mr. Jones, which obliged him to resort to the court to maintain what was now acknowledged to be his right. The mere discontinuance of the services in January, without any notification to Mr. Jones that Mr. Jelf had changed his view of the law, could not alter the effect of the above letter.

Dr. *Twiss* and Dr. *Tristram* argued against condemnation in costs, or in mitigation thereof, and cited

*Bliss v. Woods*, 3 Hagg 486;

*Palmer v. Tjion*, 2 Add. 196; and

*Williams v. Brown*, 1 Cart. 53.

The *Queen's Advocate* in reply on the cases.

Dr. LUSHINGTON—There can be no doubt but that the Bishop of Bangor and Mr. Jelf, in all their original conduct, and in their anxiety to supply to the English residents in this parish the advantages of a church service in English, were actuated by the best of motives; but the only question I have to determine is one of law. The letters of request bear date in the latter part of January in the present year. The only articles of any importance for the present purpose, are the 6th and 7th; of these the 6th alleges the performance of the services complained of in November and on the 25th and 28th Dec. in last year. The 7th alleges that the services were so performed without sufficient licence and against the prohibition of the rector of the parish. To these articles an affirmative issue has been given. It is not a case of any doubt or difficulty as to the law; if any principle of law is clear, it is that which asserts that one clergyman cannot officiate in the parish of another without the consent of the incumbent. It is perfectly true that costs are always in the discretion of the court, but that discretion is under the control of precedents and the practice of the court. Not one of the cases cited has any application to the present. In the first and third difficult questions of law under certain Acts of Parliament had to be determined; the second was a case of brawling, which the court considered to have arisen out of party squabbles in the parish. The expression of consent on behalf of Mr. Jones, in Aug. 1861, to the proposed chapel being licensed, was of the loosest and most indefinite character, and as a matter of prudence and business Mr. Jelf ought not to have gone further without a more definite understanding. However this may be, it is a matter of astonishment to me that Mr. Jelf, after the receipt of the letter from Mr. Jones's solicitors on the 7th Dec. 1862, should have continued the services, in spite of the rector's remonstrance, down to the 28th Dec. Then Mr. Jelf's answer to that letter, and his own letter of the 12th Dec. forwarded by the bishop to Mr. Jones, contain a direct challenge to Mr. Jones to assert his rights in a court of law, and no one can be surprised that Mr. Jones should have given instructions to take proceedings. Even then, if Mr. Jelf had repented of the venial error into which he had fallen, and had informed Mr. Jones that the services were discontinued, and that he was satisfied of his own error in point of law, I should have thought any con-

tinuance of these proceedings unnecessary, and worse than unnecessary; but it does not appear from Mr. Jelf's affidavit, that any such intimation was given. I therefore admonish Mr. Jelf not to offend in like manner in future, and condemn him in the costs of these proceedings.

*Nelson and Son*, proctors for Mr. Jones.  
*Skipwith* for Mr. Jelf.

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and  
C. J. B. HERTSLET, Esqs., Barristers-at-Law.

Saturday, Feb. 21, 1863.

MARSHALL V. THE ULLSWATER STEAM NAVIGATION COMPANY.

*Fishery—Ownership of soil.*

*In the absence of proof to the contrary, the presumption is that the grantee of a several fishery in a lake, at a free or quit rent, is the owner of the soil.*

*The lord of a manor by deed granted and enfeoffed to M. part of his fishery, to hold to M., his heirs and assigns, at a yearly free or quit rent. On the death, livery of seisin was indorsed:*

*Held, that M. was entitled to maintain trespass against a wrong-doer for the erection of a pier on the soil of the part of the fishery so granted.*

Declaration.—That the defts. broke and entered land of the plt. covered with water, being a part of Ullswater Lake, and with steamboats came into and upon and sailed upon and over the same to and from a certain pier or jetty, and wrongfully caused divers persons to go upon the said pier or jetty, and there to embark or disembark from the said steamboats, and thereby disturbed the water there and drove away the fish of the plt. there then being.

Second count.—That the plt. was possessed of several fisheries in Ullswater Lake, and the defts. wrongfully caused steamboats to be navigated and propelled upon the said lake, and by means thereof stirred up and disturbed the waters of the said lake and the said fisheries of the plt., &c.

Pleas:—1. Not guilty. 2. To the first count, that the said land in that count mentioned was not the land of the plt. as alleged. 3. To the first count, that there was a highway over and along the said land in which, &c., for all the liege subjects of our Lady the Queen to sail, navigate, pass and repass with boats, vessels and steamboats at all times of the year at their free will and pleasure, and that the facts complained of in the said first count were an use by the defts. of the said highway. 4. To the second count, that the plt. were not possessed of the several fisheries as alleged. 5. To the second count (except to so much thereof as charges the defts. with casting and throwing into and upon the said lake and fisheries the said ashes, cinders, dust and other noxious refuse and materials), the defts. say that before and at the times of committing the acts complained of in that count, there was and of right ought to have been, and there is and still of right ought to be, a certain common and public highway into, through, over and along the said lake into the parts in which were the alleged fisheries of the plt. for all the liege subjects of our Lady the Queen to sail, navigate, pass and repass with boats, vessels and steamboats at all times of the year at their free will and pleasure, and that the acts complained of, to which this plea is pleaded, were an use by the defts. of the said highway. 6. To the second count, that the said parts of the lake, in which were the alleged fisheries of the plt., were the soil and freehold of certain persons, and that they (defts.) caused the said steamboats to be navigated and used, as in the said count mentioned, by the leave and in the exercise of the said rights of such

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last-mentioned persons, as such owners of the soil and freehold of the said parts of the said lake as aforesaid. 7. The defts. say that they committed the acts complained of by the plt.'s leave. 8. To the first count, so far as it relates to the said acts complained of, in respect of and as to and concerning the said pier or jetty, the defts. say that the said pier or jetty was not the plt.'s, as alleged.

The cause was tried at the Westmoreland summer assizes 1861, before Martin, B. The *locus in quo* is in the manor of Glenridding; and, the defts., having a lease from one Askew of certain lands in that manor, on the north side of the Lake of Ullswater, had erected an hotel and steamboat-jetty opposite thereto, stretching out about 28 feet into the lake, from which steamers plied upon and across the lake. The lake is about nine miles long, and one mile in breadth at the spot in question, and extends from a south-west to a north-east direction, at either end of it being a river, not navigable. The lake lies within what was formerly the barony of Barton, out of which, by subinfeudations, several manors have been carved, among them that of Glenridding, on the north-west side, and that of Patterdale, at the south-east extremity of the lake. The plt. is owner of the manor of Glenridding, except a small part possessed by Askew, under a conveyance from himself, and is also proprietor of two fisheries on the lake, comprising the whole extent of the water at that part of the lake which is adjacent to the *locus in quo*—one of these, the fishery contiguous to Patterdale, paying a quit-rent to the lord of that manor.

From the deeds put in at the trial, it appeared that in 1643 the manor of Glenridding, and some estates in Patterdale (but not the manor of Patterdale) were conveyed by the then owner of Patterdale to one Mounsey, from whom both the plt. and the defts. now deduced their titles. This was not a conveyance of any part of the lake or of its soil, nor did it appear that the grantor was owner thereof. In 1741 one Hodgson conveyed to a George Mounsey, a descendant of the first owner of that name, a several fishery in that part of the lake adjacent to Patterdale manor, paying a quit-rent or rent in fee of 4d. to the lord of that manor. This deed was indorsed with livery of seisin, and the rent had been duly rendered. In 1807 one John Mounsey, a descendant of the same family, conveyed the *locus in quo*, with limited right of fishing within Mounsey's property in the lake opposite thereto, to Askew (under whom the defts. now claimed). The deed did not give to Askew any right or power to use driving nets or any other right than to take and kill fish by angling, or with draught nets, nor to set up or use any carriage, boat, nor in any manner to claim, title to, or injure Mounsey in the freehold and enjoyment of the said fishery. In 1823 one Mounsey, the then owner of the manor of Glenridding and the fisheries above mentioned, conveyed to the plt. the said manor and all rights, members and appurtenances thereto belonging, and the demesne lands belonging thereto, subject to the payment of a quit-rent of 2s. 4d. to the lord of the manor of Patterdale; also an island in the lake (which was on the part opposite the *locus in quo*), and all that fishery or right of fishing in the lake (adjacent to Patterdale), which said fishery is subject to the payment of a quit-rent of 4d. to the lord of Patterdale, together with all fishing ways, watercourses, ponds, commons, pools, waste grounds, and all other rights, &c., to the said manor belonging, or in any way appertaining to or with the same, and all be had, or held, or used, or occupied, or enjoyed, or reputed to be part or member thereof. Under this conveyance the plt. claimed to have the soil in the lake as well as the fishery over the lake at and opposite to the *locus in quo*.

In 1859 the defts., under an agreement with Mr. Askew erected the hotel and the jetty or pier in question, which was erected on the soil of the lake, about twenty-eight feet out into the lake, in that part of it which lay in front of the land they occupied under him. Some evidence was given of the exercise of acts of ownership by the plt. over the soil of the lake, as by taking sand and the like, and he was admitted to be in possession of the fisheries referred to.

The plt. contended that, either as being owner of the manor or of the fisheries, he was owner of the soil of the lake, and the defts. denied this, and contended that, claiming under the owner of the soil on the bank, who, as they alleged, was entitled to the soil of such part of the lake as lay opposite to and in front of the land, they were entitled to the verdict. Evidence was given, and it was taken as a fact, that so far back as memory went all persons having property on the borders of the lake, who could lawfully get upon it in boats from the public road or otherwise, had been accustomed to use such boats as of right without any interference, but there was no evidence of any interference with the plt.'s right of fishery, and steamboats had not been used on the lake until the period of the present controversy. It was admitted that the lord of the manor of Patterdale was lord of the barony of Barton and lord of the other manor on which the lake lay. The verdict was entered for the plt., with leave to defts. to move to enter it for them, and a rule had been obtained accordingly for that purpose.

Manisty, Q. C., Mellish, Q. C., and T. Jones showed cause; and

Pickering and Kemplay supported the rule.

Authorities cited:—

*Doe v. Pearsey*, 7 B. & C. 304;  
*Berridge v. Ward*, 10 C. B., N. S., 400;  
*Simpson v. Dendy*, 8 C. B., N. S., 433;  
*Lord v. Sydney*, 12 Moo. P. C. C. 473;  
*Duke of Somerset v. Fogwell*, 5 B. & C. 875;  
*Holford v. Bailey*, 8 Q. B. 1000;  
*Lamb v. Newbiggin*, 1 C. & K. 549;  
*Smith v. Kemp*, 2 Salk. 637;  
*Phear on Rights to Water*, p. 12, 63;  
*Williams v. Wilcox*, 8 A. & E. 333;  
*Lord Advocate v. Hamilton*, 1 McQ. H. of L. Cas. 46;

*Menzies v. Macdonald*, 2 McQ. H. of L. Cas. 463  
 Com. Dig. "Navigation," A.;  
 3 Kent Com. 427\* to 432\*, 8th ed., p. 521;  
 Bell's Com. 171, 3rd ed.;  
 Co. Lit. 4 b.;  
*Hamilton v. Donegal*, 3 Ridgway's P. C. 267;  
*Devon v. Hodnett*, 1 Hud. & Brook Ir. Rep. 322;  
*Templemore v. Allen*, 8 Ir. Com. L. Rep. 199;  
*Little v. Winckfield*, 8 Ir. Com. L. Rep. 284.

*Cur. adv. vult.*

WIGHTMAN, J.—In this case I am now about to read the judgment of my brother Mellor and myself. The evidence in this case was of a very indecisive character, and we had felt some doubt as to the decision at which we ought to arrive. Upon the arguments on the rule, several questions were discussed which it is not necessary for us to determine, as we must dispose of the case upon the evidence and admissions which were given at the trial. Whether the soil of lakes, like that of freshwater rivers, *prima facie* belong to the owners of the lands or of the manors on either side, *ad medium filum aqua*, or whether it belongs *prima facie* to the King in right of his prerogative, it is not in this case necessary to determine; for it is clear, upon the authorities, that the soil of land covered with water may, together with the water and the right of fishery therein, be severally appropriated to a third person, whether he has land or

not on the borders thereof or adjacent thereto. It may be inferred from the evidence and the admissions in the case, that the barony of Barton included that portion of the lake of Ullswater which is within the county of Westmoreland, extending, as it appears, to about the middle of the lake; and it would seem that before the reign of Edw. I., and before the statute *Quia Emptores* and the declaratory explanation thereof by the statutes of Edw. II. and III., the manor of Patterdale, with other manors, was, by subinfeudation, carved out of the barony of Barton; and apparently the manor of Patterdale had assigned to it that portion of the lake called Ullswater-head which comprises within its boundaries the *locus in quo*, and that by another subinfeudation the manor of Glenridding was carved out of the manor of Patterdale. It appears to us that the manor of Glenridding did not include any portion of the lake or any property therein, for in the conveyance of the 12th Aug. 1640, from Mr. Richard Cresswell to Mrs. Joan Mounsey, there is no mention of any interest in the lake of Ullswater. By the deed of feoffment of 1741, made between Edward Hodgson, of Blawick in Patterdale, and George Mounsey of Patterdale-hall, the former, for the considerations therein mentioned, aliened, bargained, sold, enfeoffed and confirmed unto George Mounsey, his heirs and assigns for ever, "all that part of his said Edward Hodgson's fishery in Ullswater-head, situate and being on the west side of the mouth of the river Goldrill called the Esk, that is to say, from the eastern bank or shore of the said river westward though the Parkside-field so far as the said fishery extended, yielding and paying therefore yearly and every year unto Edward Hasell, his heirs and assigns, on the usual rent days, the yearly rent of 4d." Upon this deed of feoffment livery of seisin appears to have been duly made. It further appears from the extracts from the court-rolls of the manor of Patterdale, member of the barony of Barton, under date 28th July 1783, that in a survey and rental of the said manor the name of John Mounsey, Esq., was included amongst the freeholders of such manor, and under the head of "tenements out of which the rent issues," we find him chargeable with several rents, among which is the rent of 4d. "for part of High Blawick Fishery." Now, in the feoffment of 1741 the description of fishery conveyed is left uncertain, but inasmuch as the deed which conveyed it was a feoffment with livery of seisin duly indorsed, and as it was conveyed subject to a free rent of 4d. to Mr. Hasell, then lord of the manor of Patterdale, and which it appears from the court-rolls of that manor was subsequently duly rendered, we are driven to the conclusion that the fishery conveyed must have been a several fishery, and presumably included the soil thereof. A feoffment with livery of seisin indorsed would not be appropriate to the conveyance of an incorporeal right, although it might, if the livery was *secundum formam chartæ*, so operate. A free rent of 4d. was incapable of being reserved out of an incorporeal inheritance by a common person. Mr. Pickering, in his able argument, relied very much on certain expressions in the judgment of this court in *The Duke of Somerset v. Fogwell*, 5 B. & C. 884, in which it was held that a several fishery in a navigable river created before Magna Charta did not convey with it the ownership of the soil, but was "an incorporeal and not a territorial franchise," and he relied on the passage in Co. Lyt. 4, there cited: "If a man be seised of a river and by deed do grant *separatam piscariam* in the same, and maketh livery of seisin *secundum formam chartæ*, the soil doth not pass." The doctrine of this passage has been the subject of controversy, as appears from the note 20 commenting upon it, and note 180 commenting upon Co. Lyt. 22 a, by Hargreave and Butler; and it must now

be taken as established by the authority of *Holford v. Bailey*, 8 Q. B. 1016, that "the allegation of a several fishery *prima facie* imports ownership of the soil, though they are not necessarily united;" and in the same case in error, reported in 13 Q. B. 444, Parke, B., in delivering the judgment of the court, says: "A several fishery is no doubt *prima facie* to be assumed to be in the soil of the deft., and therefore *liberum tenementum* is a good plea; and the plt. must reply by showing a grant of a several fishery, or a prescriptive right to one." These decisions are in conformity with the rule stated in the later editions of Blackstone's Commentaries, vol. 2, p. 39: "He that has a several fishery must also be, or at least derive his right from, the owner of the soil." The case of *The Duke of Somerset v. Fogwell* in no sense conflicts with those authorities. It was the case of a several fishery in a navigable river within the flow and reflow of the tide, and the presumption, in the absence of proof to the contrary, was, under the circumstances, that the soil of the river remained in the King, although there are expressions adopting the passage in Co. Lyt. that, as between subject and subject, a grant followed up by livery, which properly applies to a thing corporeal, did not convey the soil, livery being made *secundum formam chartæ*. We think that these expressions must be interpreted with reference to the circumstances of the case. It appears to us that, in the absence of proof to the contrary, we ought in this case to presume from the fact of the reservation of a free or quit rent, that such an estate must have been originally conveyed by the owner of the manor of Patterdale to some predecessor in title to Hodgson, the party conveying by the feoffment of 1741, as that such a rent could be reserved out of it, and inasmuch as such a rent could not be reserved by a common person out of an incorporeal inheritance, a corporeal inheritance must be presumed to have been granted, and we think that the feoffment of 1741, which affected to convey the fishery in question, subject to the usual "free rent of 4d." to Mr. Hasell, operated to convey the same estate to George Mounsey as was possessed by Hodgson. In this view of the case, the stipulation in the conveyance of 1807, by John Mounsey to the Rev. Henry Askew (under whom the defts. claim) carefully guarding the limited grant of a right to fish in his fishery in Ullswater-lake, "so as not to injure the said John Mounsey in the freehold and enjoyment of the said fishery otherwise than as above mentioned," becomes intelligible and consistent. Inasmuch, therefore, as the pier in question has been erected upon the soil of that part of the lake which is comprehended in the fishery conveyed to Mr. Marshall by the deed of Dec. 1823, subject to the free or quit rent of 4d. to Mr. Hasell, the lord of the manor of Patterdale, we think that our judgment must be for the plt., and the rule obtained by Mr. Pickering must be discharged.

COCKBURN, C. J.—I am desirous to have it understood that, in concurring with my learned brothers in discharging this rule, I am acting, not upon conviction, but in deference to authorities by which, sitting here, I deem myself bound, but which, if I were sitting in a court of appeal, I should consider myself called upon to canvass. I agree with the rest of the court in thinking that, if the right to a several fishery as such is consistent with the ownership of the soil, *a fortiori*, if *prima facie* it is to be taken as implying such ownership, there is evidence in this case, in the reservation of the quit-rent and the fact of the grant of the fishery to the plt.'s predecessor having been accompanied by livery of seisin, to lead to the conclusion that the ownership of the soil was here united with the several fishery. My difficulty arises from my inability to accede to the doctrine that, upon a grant of a fishery alone, the ownership of the soil and a right of

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several fishery can possibly be united. It is certain that both Bracton and Sir Edward Coke considered a several fishery as a thing essentially distinct from the ownership of the soil; and Lord Coke expressly lays down that, by the grant of a several fishery, and even when accompanied by livery of seisin *secundum formam chartæ*, the soil does not pass, but if the water becomes dry, the grantor shall have the soil. The language of Lord Coke is precise and positive, and is well deserving of observation. He says: "If a man be seised of a river, and by deed do grant *separatim piscarium* in the same, and maketh livery of seisin, *secundum formam chartæ*, the soil doth not pass, nor the water, for the grantor may take water there; but if the river become dry, he may take the benefit of the soil, for there passed to the grantee but a particular right, and the livery being made *secundum formam chartæ* cannot enlarge the grant. For the same reason, if a man grant *aquam suam*, the soil shall not pass, but the piscary within the water passeth therewith." Now, independently of the high authority of Lord Coke in such a matter, I must say that this doctrine appears to me the only one which is reconcilable with principle or reason. It is admitted on all hands that a several fishery may exist independently of the ownership of the soil in the bed of the river. Why then should such a fishery be considered, in the absence of negative proof, as carrying with it the property in the soil? On the contrary, it seems to me that there is every reason for holding the opposite way. The use of water for the purpose of fishing is, when the fishery is united with the ownership of the soil, a right incidental and accessory to such ownership. In a grant of the land the water and the incidental and accessory right of fishery would necessarily pass with it. If then the intention be to convey the soil, why not convey the land at once, leaving the accessory to follow? Why grant the accessory that the principal may follow incidentally? Surely such a proceeding would be at once illogical and unwelcome. The greater is justly said to comprehend the less; but this is to make the converse of that proposition hold good. A grant of land carries with it, as we all know, the minerals which may be below the surface. But who ever heard of a grant of the minerals carrying with it the general ownership of the soil? Why should a different principle be applied to a grant of that which is above the surface of the soil, as the grant of the minerals is a grant of that which is below it? Nor should it be forgotten that the opposite doctrine involves the startling and manifest absurdity that, should the water become dry or be diverted from natural causes, the fishery, which was the primary and principal object of the grant would be gone, and the property in the soil, which only passed incidentally and as accessory to the grant of the fishery would remain. I must further observe, that if I felt myself at liberty to follow my own view of the case in this respect, I should not feel any serious difficulty in dealing with the two principal facts relied on as supporting the position that the property in the soil passed with grant of the fishery. It may be that in strictness a quit-rent is not properly reservable on the grant of an incorporeal hereditament; but if the law were clear that the grant of the several fishery carried with it no right to the soil, the fact that a quit-rent had been reserved by the lord of the manor by whom the grant was originally made, would only show that the parties had been mistaken in supposing that a quit-rent could be reserved on such a grant. So again, the fact that livery of seisin has been resorted to to give effect to the grant, would only show that the parties erroneously supposed that this form of conveyance was necessary, or at all events was available to effect their purpose. These things would not to my mind convert a grant of the use of the surface of the soil for a specific

purpose into a grant inferentially of the soil itself. Indeed, in the case put by Lord Coke, he assumes that the grant of the fishery has been accompanied by livery of seisin, and yet lays it down that this shall not have the effect of making the freehold in the soil pass. Nevertheless, however strong may be my own opinion upon this question, I think the authorities on it are too strong to be overruled except in a court of appeal. In *Holford v. Bailey*, Lord Denman, in delivering the considered judgment of this court, says: "No doubt the allegation of a several fishery *primâ facie* imports ownership of the soil, though they are not necessarily united." And the same doctrine is enunciated by Parke, B., in delivering the judgment of the Court of Ex. Ch. in the same case; and though to a certain extent this *dictum* may be said to be extra-judicial, as being unnecessary to the decision, which turned upon the question whether trespass would be for disturbance of a several fishery, the affirmative of which was held on grounds altogether independent of the ownership in the soil, yet it cannot be denied that these *dicta* occurring in the considered judgment of the Court are entitled to very great weight. And in the learned note to p. 122 *b* of Hargreave and Butler's edition of Co. Lyt., the annotator, after passing in review the conflicting authorities upon this subject, concludes (I cannot but think contrary to the effect of his own reasoning), that the true doctrine on this subject is, that a several piscary is presumed to comprehend the soil until the contrary appears. I feel that in disposing of this rule we ought to yield to the authority of those opinions; but entertaining individually a very different view, I am desirous to have it known that while I submit to them, I am far from acquiescing in them. I concur with the judgment of the court, for the plt.

Rule discharged.

Saturday, Jan. 31, 1863.

REG. v. THE INHABITANTS OF HORLEY.

*Highway—Dedication—User—Occupation road.*

*An award under an Inclosure Act in 1816 set out certain public roads and private occupation roads. One of the occupation roads was a soft road, it had no gate at either end, and the public used it without any interference. On two occasions the inhabitants had repaired it by subscription. Held, that there had been sufficient dedication and user to render the parish liable to repair, although they had never adopted the road in question.*

This was a rule nisi to set aside the verdict entered for the Crown, and for a new trial on the ground that matters of fact ought to have been decided by the jury.

An indictment was tried against the inhabitants of Horley, in the county of Surrey, before Erle, C. J., at the Surrey assizes, for non-repair of a highway, and the material point raised was, whether the road in question was a highway, and whether the parish was bound to repair it. The *locus in quo* was originally Horley-common.

An Inclosure Act was passed in 1810 for the purpose of inclosing these and certain other lands, and the award made in 1816 set out certain public roads and certain private occupation roads, and amongst the latter was the road in question, which was set out of the requisite width. There being no gate at either end, everybody had used it from 1816 without interruption. On two occasions the inhabitants, by subscription, repaired it. It was what was called a soft road, and in the course of time houses had been built near it, and it was now sought to throw the burden of repairs on the parish, and hence the indictment.

At the trial the defts. did not dispute the facts, but contended, that according to *Reg. v. St. Bene-*

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*dict.* 4 B. & Ald. 447, the jury should be directed that it was not a public highway. The learned judge, without expressing an opinion, directed the jury to find a verdict for the Crown, subject to the point of law whether this had become a public road.

*Lush*, Q. C. (*Denman*, Q. C. and *Foot* with him), for the prosecution, shewed cause, and contended that the case relied on by the defts., of *Reg. v. St. Benedict*, had been overruled. It was well settled law that, in order to make the parish liable for repair of a road, no acquiescence on the part of the inhabitants was necessary: (*Reg. v. Inhabitants of Leake*, 5 B. & Ald. 469.) This road had been used by the public long before the Highway Act, and, if the jury had been allowed to go into the facts, they would no doubt have found that the road had been dedicated to the public.

*Bovill*, Q. C. (*Hamm* with him) in support of the rule.—The road in question had been set out as an occupation road; and, so far as regards the user by the public, the utmost that could be proved was, that nobody interfered with the passage of the public going there, but there was no evidence of dedication and acquiescence.

*Cockburn*, C. J.—It is clear the facts in this case were not disputed. Though this was originally an occupation road, yet the public had used it for a long series of years, and the question raised seems to me to be whether, under such circumstances, a road so used by the public could become a public highway without the acquiescence of the parish. The case of *Reg. v. Leake*, not to speak of later cases, shows that the point relied on by the defts. was not sustainable; and, if the jury had been allowed to draw their own inference from the facts, they would, no doubt, have found for the prosecution. The rule will therefore be discharged.

WIGHTMAN, CROMPTON and BLACKBURN, JJ. concurred.

Rule discharged.

Saturday, April 25, 1863.

RICHENS (app.) v. WIGGENS (resp.)

Tolls—3 Geo. 4, c. 126, s. 28—5 & 6 Will. 4, c. 18—*Manure—Exemption.*

The 3 Geo. 4, c. 126, s. 28, is not repealed by the 5 & 6 Will. 4, c. 18.

By the 3 Geo. 4, c. 126, s. 28, toll is not to be demanded from a cart laden with manure by reason only of any basket or baskets, empty sack or sacks, or spade, shovel, or fork necessary for loading or unloading such manure being in or upon such cart, in addition to such manure, if the load is substantially manure for land:

Held, that the words "necessary for loading or unloading," refer exclusively to the preceding words "spade, shovel, or fork," and not to "baskets or sacks."

A cart, therefore, laden with manure is exempt from the payment of toll, although on the top of the manure there were also carried some empty baskets that had been used for the purpose of taking the proprietor's agricultural produce to market on the previous day.

This was a case stated for the opinion of the court by one of the metropolitan police magistrates, in pursuance of the 20 & 21 Vict. c. 43.

The app. Thomas Richens, of Isleworth, market gardener, summoned Thomas Wiggins, of Hammer-smith, turnpike-gate toll collector, for unlawfully detaining a sack belonging to the app.

The facts are, that one evening the app.'s servant drove through the resp.'s gate in a cart laden with garden produce packed in baskets, and paid the toll, and returned the next morning with the cart laden with manure for land, on the top of which were the baskets empty.

The resp. demanded toll on account of these baskets being in the cart. The servant refused to pay, claiming to be exempt therefrom; whereupon the resp. seized and detained the sack.

The question for the decision of the court is, whether the toll was or was not payable.

By 3 Geo. 4, c. 126, s. 32, carriages employed only in conveying manure, unless laden also with some other thing not exempted by this Act from toll, are exempt from tolls, and by sect. 28 toll is not to be demanded from such carriages so laden, by reason only of any basket or baskets, empty sack or sacks, or spade, shovel, or fork, necessary for loading or unloading such manure or materials, being in or upon any such waggon, cart, or other carriage, in addition to such manure, if the loading thereof is substantially manure for land, anything in any Act contained to the contrary thereof notwithstanding.

By 5 & 6 Will. 4, c. 18, entitled "An Act to exempt carriages carrying manure from toll," after reciting that disputes had arisen as to the exemption from toll for horses and carriages when employed in carrying manure for improving land, it is enacted that no toll shall be demanded or taken on any turnpike-road, for, or in respect of any beast, cattle, or carriage when employed in carrying or conveying only dung, soil, compost, or manure for land, save and except lime, and the necessary implements used for filling the manure, and the cloth that may have been used in covering any hay, clover, or straw which may have been conveyed.

For the app. it was contended that, since the latter Act does not mention the former Act, the provisions of the former Act, with reference to the exemption of carriages carrying manure, remain in force; but I thought that, in order to carry out the avowed object of the latter Act, it must be taken to qualify the privilege of the former Act so far as regards the conveying of articles in addition to and with a load of manure; and therefore I decided that the toll was payable.

If the court decides that the toll was not payable, then the resp. is either to restore the sack to the app., or pay him two shillings as the value thereof.

*Lush*, Q. C. for the app.—The 5 & 6 Will. 4, c. 18, does not, either in actual words or by necessary implication, repeal the 3 Geo. 4, c. 126. The language of its preamble shows, on the contrary, that it was intended to explain the nature and extend the amount of exemption already given. The two Acts must therefore be read together. And the app. is within the exemption of the 28th section of the former statute. The words "necessary for loading or unloading manure" must be held to be confined to their immediate antecedents, "spade, shovel, or fork," and to have no relation to basket and sack. This will be manifest by a reference to the earlier Act of the 53 Geo. 3, c. 82, s. 2, where the words "for more convenient carriage" are inserted after the word "sack." If the load be substantially a load of manure, the exemption will not be defeated by the fact that some additional article is carried. The construction and object of these Acts are well explained by Lord Ellenborough in *Chambers v. Eaves*, 2 Camp. 394.

*Hayes*, Serjt. for the resp.—The earlier Act will be considered to have been repealed, for the reasons assigned in the case. But, assuming that it is not, its provisions do not advance the app.'s case. The expression "necessary for loading" refers to "baskets and sacks," as well as spades or forks. The exemption from toll could only therefore have been claimed by proof that the sack in the cart was intended to be used in the unloading of the manure.

CROMPTON, J. (a)—I am of opinion that the

(a) Cockburn, C.J. was engaged in another court.

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decision of the magistrate was erroneous. The magistrate does not raise the point which has been submitted to us to-day, on the construction of the 28th section of 3 Geo. 4, c. 126; but, at the same time, as he asks the court whether the toll was payable or not, the resp. has a right to press any argument which he may think to be well founded. The first question then is, what is the construction to be given to the 28th section of 3 Geo. 4, c. 126? and the second, is that Act repealed by the 5 Will. 4, c. 18? I agree with Mr. Lush in the construction that he has given to the words "by reason of any basket or baskets, empty sacks, or spade, shovel, or fork necessary for the loading or unloading of manure." I think that "baskets and sacks" were intended to apply to articles used for agricultural purposes, and that the words "necessary for loading or unloading" refer to "the spades and forks." And it would certainly be a most vexatious proceeding, if, when the load is substantially a load of manure, the toll collector should be permitted to exact a toll merely because the cart was also carrying some empty baskets back. I think that that view is in accordance at once with the grammatical and common-sense construction of the Act; and it is confirmed by the fact that in the 2nd section of the 53 Geo. 3, c. 82, which is repealed, but in substance re-enacted by the 3 Geo. 4, c. 126, after the words "empty sack or sacks" occur the words for "more convenient carriage," which are omitted in the 28th section of the 3 Geo. 4, c. 126. It seems to me clear, from a comparison of the two sections, that the words "necessary for loading or unloading of manure" were intended to apply to those things which could be used for loading or unloading manure, i. e., spade, shovel, or fork, and that "empty sack or sacks" had reference to articles placed on the cart for more convenient carriage. But then the magistrate says the second Act has repealed the words of the first; but there is no such repeal that I can discover. The title of the Act and the words of the 3rd section show that the Act was intended to be in favour of exemption; and I think that it would be a very strong thing to hold that the exemption contained in sect. 28 of the earlier Act was repealed by a statute which was generally intended for exemption. It seems to me that the two Acts may well stand together; for the 5 & 6 Will. 4, c. 18, extends to horses, beasts and cattle, some of the exemptions which, by sect. 28 of 3 Geo. 4, c. 126, were confined to waggons, carts and other carriages. I think that we ought not to hold that the exemption is repealed except by express words or necessary implication. Now there are no repealing words here, but on the contrary the words employed confer increased exemption, and certainly there is no necessary implication, since the two provisions may well stand together. I think therefore that the magistrate was wrong, and that our judgment must be for the app.

BLACKBURN, J.—I also am of opinion that the decision was wrong. The question turns upon the construction of the 28th section of the 3 Geo. 4, c. 126. In that Act the Legislature has thought it necessary to exempt generally manure from the payment of toll for the encouragement of agriculture; and they have accordingly said in sect. 32, that carts laden with manure shall not be subject to toll. They have also passed the 28th section, which must be construed in reference to ordinary business practice. Now, when a farmer sends his goods to market, he must have his empty carts coming back; and that is a very convenient opportunity for bringing manure. Every one also knows, when he sends in his agricultural produce, he must send it in baskets or sacks, and that he must bring the empty baskets or sacks back; and the Legislature did not intend that he should forfeit his privilege of bringing manure because the cart also contains the empty baskets. My brother Hayes says, that

"baskets or sacks" mean "baskets or sacks necessary for loading or unloading the manure." Now, I think that such a construction would amount to nonsense. I cannot suppose any case in which sacks could be employed for unloading or loading manure. I think that the Legislature meant what they have actually said, and that empty sacks or baskets were sacks or baskets taken in in the ordinary course of business, and not replenished. But, further, the magistrate thinks that the earlier Act has been repealed by the later. But I do not see on what grounds that opinion is based. The title of the 5 & 6 Will. 4, c. 18, is, "An Act to exempt carriages carrying manure from tolls." But, according to the contention of the resp., it would be an Act to impose tolls. If the body of the Act is examined, it will be manifest, from the 3rd section, that the Legislature thought that they were conferring an exemption; for they say, that those who may have made leases for tolls may be released from their agreement. But, if they had imposed fresh tolls, this would not have been necessary. I think, therefore, that the cart, in the present instance, was exempt from the payment of toll; and that our judgment must be for the app.

MELLOR, J.—I was at first struck by the suggestion of my brother Hayes; but, when I come to look at the language of the 28th section, I think that the construction put upon it by the rest of the court is right. The magistrate considers that the first Act is repealed by the second; but it does not appear that the Legislature had in view any such object; for, if they had, they would have made some reference to it; and I think, further, that, if we consider the 3rd clause and the title of the 5 & 6 Will. 4, c. 18, it will be perfectly clear that the purpose was to increase, rather than narrow, exemption. I think, therefore, that the magistrate erred in the conclusion at which he arrived; and the appeal must be allowed. *Judgment for the app.*

Wednesday, April 29, 1863.

REG. ON the prosecution of THE REV. JAMES FAWCETT, Clerk (resp.) v. THE OVERSEERS OF THE POOR OF THE TOWNSHIP OF SCRIVEN-WITH-TENTERGATE, YORKSHIRE (apps.)

*Vicar—Poor-rate—Stipend of curate.*

*In the assessment of the sum at which he should be rated to the relief of the poor, the rector or vicar of a parish is entitled to have the stipend deducted which he pays to a curate for the performance of the duties of the parish. The stipend, however, should be deducted from the whole income, and not from that only derived from glebe lands or a tithe rentcharge within the parish.*

*The income of the vicar of the parish of K. was derived, partly from a tithe rentcharge apportioned over certain townships in the parish and partly from glebe lands lying without the parish. He kept and paid a curate 100l. per annum for the parish. In assessing the vicar to the relief of the poor in the township of S. in the parish, the overseers deducted the 100l. from the income of the vicar generally, and not from the rentcharge only:*

*Held, that the assessment was right.*

This was a case stated under the provisions of the 12 & 13 Vict. c. 45, for the opinion of the court.

At a special session holden on the 17th Sept. 1862, for the wapentake of Clare, in the West Riding of Yorkshire, the resp. the Rev. James Fawcett, vicar of Knaresborough, Yorkshire, appealed against a rate made by the apps, the overseers of the poor of the township of Scriven-with-Tentergate, in the said county.

The income of the resp. is 386l. 13s. 4d. per annum, derived from the following sources:—216l.

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from glebe lands lying without the parish of Knaresborough; 84*l.* from the interest of money in the funds, the proceeds of the sale of glebe lands; and a tithe rentcharge of 86*l.* 13*s.* The rentcharge is apportioned over five separate townships in the parish, of which Scriven is one. The portion derived from Scriven is 60*l.* per annum. The resp. pays a curate for Knaresborough 100*l.* per annum; and it was admitted that, having regard to the extent of the parish, the services of the curate were necessary.

On the 17th Sept. 1861 the appa. made a poor-rate for the township of Scriven, in which they assessed the resp. on his whole income; and for that portion of the rentcharge in the township, on a gross estimated rental of 60*l.*, at a rateable value of 35*l.*

The resp. objected to this rate, on the ground that the stipend paid by him to his curate exceeded the rentcharge; and that in estimating the rateable value of his rentcharge, he was entitled to reduce the sum to be estimated as the gross estimated rental by the sum paid to the curate, thereby reducing his assessment in the township of Scriven to a nominal assessment.

The appa. claimed, on the other hand, to apportion the amount of the curate's stipend on the whole income of the vicarage, and accordingly allowed and deducted a competent sum for that purpose from the gross estimated rental of the rentcharge in their township.

The justices determined that the resp. had sustained his appeal, and relieved him entirely from the assessment.

The question for the opinion of the court is, are the appa. right, upon the foregoing facts, in apportioning the curate's salary on the sum of 386*l.* 13*s.* 4*d.*, the income derived by the resp. from his vicarage, and deducting a relative proportion of such salary from the sum of 60*l.*, the amount of the rentcharge arising from their township; or is the resp. entitled to have his assessment reduced to a nominal assessment by reason of the salary of the curate exceeding the amount of the rentcharge?

If the court should be of opinion that the salary should be apportioned on the whole income, then the order of the justices shall be quashed. If otherwise, the order shall be confirmed.

*F. M. White* for the resp.—The appa. have proceeded on an erroneous principle in making the whole income subject to the curate's stipend. It is admitted that the vicar alone was quite inadequate to the performance of the duties of the parish, and that the services of the curate were indispensable. Under such circumstances, *Reg. v. Goodchild*, E. B. & E. 53, establishes that the amount of remuneration shall be deducted from the amount on which the rate is laid. But from what amount is it to be deducted? The natural answer is, from that derived from the parish to which the labours of the curate are devoted. It would be most unreasonable to make other parishes contribute to the support of a minister from whom they derive no benefit.

*Price*, Q. C. for the appa.—*Reg. v. Goodchild* decided not that the stipend paid necessarily to an assistant should be deducted from the rentcharge alone, but that it should be taken from whatever was made the subject of the rate. There is nothing here, therefore, to take the case out of the rule which subjects the entire income of a vicar to the payment of poor-rate.

*Cockburn*, C. J.—It may be laid down as a general rule, that a rector or vicar of a parish is entitled to have the stipend of his curate deducted from his rateable income. Assuming this, then, as a rule, I think that the vicar in the present instance was wrong in charging the stipend of his curate wholly and exclusively on the tithe rentcharge. He should have charged it against all the sources of the income of his vicarage. In this case, however, a new ele-

ment is introduced, which somewhat confuses it, since one source of the income is derived from glebe farms out of the parish; and, as Mr. White has forcibly put it, it is hard that these farms and parishes should be taxed in respect of a stipend to a curate from whose services they derive no benefit. But, as that is so exceptional a case, and so little likely to recur, it should not be allowed to influence our decision on the principle—which is, that the stipend paid to the curate should be deducted or set against the aggregate source of income, and not one alone. I think, therefore, that the sessions were wrong in holding as they have done, and that the original rate should be confirmed.

CROMPTON, BLACKBURN and MELLOR, JJ. concurred.  
*Order of sessions quashed.*

Tuesday, April 21, 1863.

REG. v. THE BOARD OF GUARDIANS OF THE EPSOM UNION.

*Mandamus—Sufficiency of return—Nuisance Removal Act—Sewer—Good and serviceable repair.*

*By the 18 & 19 Vict. c. 121, s. 22, the local authorities of a district are required to lay down a sewer in such district when necessary, and keep the same in good and serviceable repair:*

*Held, that the expression "repair" does not mean the reconstruction of a sewer which has been originally defectively made; but the keeping the original sewer in proper repair.*

*To a mandamus, therefore, requiring the defts. to put a sewer within their district in good and serviceable repair, it was*

*Held, a sufficient return that the sewer, which had originally been constructed by another board, had been defectively made; that it was not such a sewer as was required by the Act, and that in consequence of its defective structure it could not be put into good and serviceable repair.*

This was a mandamus to the guardians of the Epsom Union, which, after reciting that a nuisance removal committee had been appointed under the Nuisances Removal Act, 18 & 19 Vict. c. 121, s. 3, and that they having found a certain ditch to be a nuisance, had constructed a sewer in its place, and that the sewer was out of repair, called upon the defts. the guardians, upon whom, in consequence of the nuisance relief committee having lapsed, and not having been reappointed, the liability to keep the sewer in repair was cast by the Act, to put the sewer into good and serviceable repair, and to do all such works and acts as might be necessary to abate the nuisance complained of.

The defts. in their return to the mandamus, pleaded: first, that the sewer so laid down and constructed was so insufficient in size and dimensions, and laid down in so defective and improper a manner and without due regard to the nature of the soil, that by reason thereof it was wholly inadequate, and was not such a sewer as was required by the Act, and that it could not be put into serviceable repair by such defect; and, secondly, that the only outfall of the sewer was intended to convey the sewage into a certain river or stream, on the banks of which were certain factories, and that if the sewer were capable of conveying the sewage into that river, it would be a nuisance, and that if the defts. were to permit the river to be so polluted, they would be liable to an action for a nuisance.

The cause came on for trial at the last Kingston Assizes, before Cockburn, C. J., when it was proved that the sewer had been constructed at Ewell, by a different board from the defts.; that the pipes were too small, that the whole work had been done in a very defective manner, and that to render the sewer free from all objection, it would be necessary to lay

down entirely new pipes. And as to the second part of the return conflicting evidence was offered as to the feasibility of deodorizing the sewage so as to prevent its becoming a nuisance at the outfall. It was admitted, however, by both parties that the process would be expensive and the result doubtful.

The jury found a verdict for the defendants. Leave, however, was reserved to the prosecutors to move to enter the verdict for them, if the court should think that the facts proved constituted an insufficient answer.

Lush, Q. C. now moved, pursuant to leave.—The finding as to the first portion of the return is not supported by the evidence. There was no proof that the pipes were bad. Besides, if the pipes were insufficient, it was the duty of the defendants to have supplied their place with more suitable ones. The expression "keep the same in good and serviceable repair," in the 18 & 19 Vict. c. 121, s. 22, means that good pipes should be laid down if the original pipes were bad. As to the second part, the prosecutors are entitled to judgment *non obstante veredicto*. The facts stated in the return constitute no answer to the *mandamus*. It was incumbent on the defendants to have deodorized the sewage at the outfall.

COCKBURN, C. J.—I think that there should be no rule. You are asking us to construe the word "repair" as if it meant "construction" in the first instance. I quite agree that we are not to look to the term repair as signifying restoration of the works to exactly the same condition in which they were when they were first made. If there are improvements which can be made within certain reasonable limits, and which can be fairly included in the expression "repair," I do not think that we should be very nice in putting a construction on the word. But here an entirely new set of works is desired which it seems to me does not fall within the range of the term repair; and I do not think that that is within the duty of the defendants.

CROMPTON, J.—I think that this *mandamus* refers only to the sewer as it stands, and not to the construction of a new set of works.

BLACKBURN and MELLOR, JJ. concurred.

*Rule refused.*

April 22 and May 23, 1863.

THE EASTERN COUNTIES RAILWAY COMPANY (apps.) v. THE OVERSEERS OF GREAT AMWELL, HERTFORDSHIRE (resps.).

*Railway company—Rating—Gross earnings—Terminal charges.*

*The Eastern Counties Railway Company maintain, at each of the stations and termini on their line, a staff of servants and appliances, which are employed chiefly for the purposes of the goods traffic, but partly for the accommodation of passengers. They make a gross charge of so much per ton to their customers for goods carried on the line, but from the amount so charged certain sums are deducted and set apart as the earnings of the staff and appliances at each station. To these sums the name of "terminal charges" is given:*

*Held, that these "terminal charges" were to be considered as part of the general earnings of the line, and not of the stations.*

*In calculating, therefore, the amount of the gross earnings and expenses of the line in a parish, for the purpose of assessing the railway to the relief of the poor in such parish, the terminal charges must be included.*

On an appeal against a poor-rate for the parish of Great Amwell, Hertfordshire, whereby the apps. were assessed in respect of that portion of their line of railway which is situated in the said parish, the court of

quarter sessions confirmed the rate subject to the opinion of the court on the following case:—

The apps. are the owners of a railway from London to Hertford, under the provisions of 4 & 5 Vict. c. 42, and common carriers of passengers and goods upon the said railway.

The portion of the apps.' railway which runs through the resps.' parish is about three miles in length, extending from the boundary of St. John, Hertford, to St. Margaret's; and the Ware station upon the said railway is also within the resps.' parish.

The apps. maintain, as well at the said station as at each of the other stations, and at each of the termini on the said railway, a large staff and appliances, consisting of servants, horses, buildings, warehouses, granaries, wharves, sidings, turn-tables and loading-cranes, the whole being employed chiefly for the purposes of the goods traffic; but some of the servants and portions of some of the buildings are also used for accommodating passengers. The apps. make a gross charge of so much per ton to their customers for goods carried on the said railway, which charge includes not only the carriage along the line of railway, but also the various services rendered by the said staff and appliances at each station or terminus in loading, unloading, weighing, and otherwise handling such goods on the premises of the company.

The company alone are carriers upon the said line.

No special contract or charge is made in respect of the before-mentioned services expressly and exclusively as distinguished from carriage, and no allusion to them appears on the printed lists of rates made by the company.

There is no appropriation to be found in the books or the accounts of the company of any portion of such gross charge to the services in question; nor is any separate account kept of sums received in respect of them.

The company make a separate charge, and in addition to the one already mentioned, if goods are collected and delivered by them at their customers' place of business beyond the limits of their station, or if they are warehoused beyond a specified time upon their premises.

The company give the name of "terminals" to all sums received in respect of the services of the staff and appliances hereinbefore mentioned in respect of goods other than the services for which a separate and additional charge is admitted to be made as aforesaid.

The apps. adopted the following method of ascertaining the gross earnings of the said staff and appliances in respect of the services so rendered by them in loading and unloading as aforesaid, and not covered by the said separate charge.

The various railway companies who in common with the apps. are parties to the clearing system mentioned in the Railway Clearing Act 1850, 13 & 14 Vict. c. 28 (local), have established what is called a clearing house for the purpose of apportioning as between the said companies, according to established rates, the earnings in respect of goods carried in a single journey over the lines of more than one company.

Under this arrangement, if goods are despatched at station A. on the line of one company and pass through station B. on the line of a second company, and are delivered at station C. on the line of a third company, the clearing house deducts according to the said rates from the gross charge for the conveyance of goods, two sums called terminal charges, the one for the accommodation afforded in receiving, loading, and despatching the goods at station A., the other for the accommodation afforded in receiving, unloading and warehousing within the same limit if required, and either delivering them to or unloading them into the vehicles at station C. After deducting the said terminal



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charges, the residue is apportioned according to the distance traversed between the three companies; but the terminals themselves are divided between the first and third companies only, on the ground that station B. has not afforded any of the accommodation to which terminals apply. The gross parochial earnings of the apps. in the said parish during the year 1859 in respect of passengers and goods traffic, were 6036*l.*; and the amount of the terminal charges calculated upon the last-mentioned system would be 2829*l.*

In calculating the rateable value of their line in the said parish the apps. claim to deduct the said 2829*l.* for terminal charges according to the said established rates from the said sum of 6036*l.*; and contend that the difference between these two sums will be the true gross amount of the parochial earnings of the line of the said railway within the resps. parish; and they are willing that there should be deducted from the gross expenses of the said line the full costs of earning such terminals. The resps., on the other hand, contend that the said sum of 2829*l.* forms part of the general earnings of the line of railway, and that the said sum of 6036*l.* must therefore, for the purpose of this rate, be considered the gross amount of the parochial earnings of the line in the said parish.

The assessment under which the apps. are rated for the said Ware station is separate and distinct from the assessment under which they are rated for the said line of railway.

The questions for the opinion of the court are:—

1. Whether, in ascertaining the general earnings of the said portion of the line, the apps. are entitled to deduct the said sum of 2829*l.* as hereinbefore mentioned?

2. Whether the capacity to earn the said sum is to be considered in determining the rateable value of the station?

If the opinion of the court should be in the affirmative of either of these questions, then judgment is to be entered for the apps. If in the negative, for the resps.

*Lush*, Q. C. (with whom were *W. A. Clark* and *J. P. Murphy*), appeared for the resps., but the Court called on

*Bovill*, Q. C. (with whom were *Bushby* and *Biddis*) for the apps.—In a question of rating the terminal charges must be considered in reference to the particular stations where they accrue, and not to the line generally. The case is similar to that of canals or waterworks. In *Rez v. Kingwinford*, 7 B. & C. 236, the proprietors of a canal were held to be rateable to the relief of the poor of each parish through which the canal passed for the amount of tonnage dues actually earned there, and not for a part of the whole amount earned along the whole line of the canal. So also in *Rez v. Lower Mytton*, 9 B. & C. 810, it was decided that the whole annual profits taken at a lock were to be considered for the purposes of rating, although those profits might have been derived from traffic on a canal passing through other parishes. A similar principle was also adopted in the more recent cases of

*The East London Waterworks v. The Old Mile-end-town*, 17 Q. B. 512; and

*Reg. v. The West Middlesex Waterworks*, 1 E. & E. 716.

*Lush*, Q. C. in reply.—The terminals formed part of the general expenses, and should be apportioned over the whole line. An attempt is made here to divide that which can never be separated. The stations may be the direct sources of the value; but the whole line indirectly conduces to produce that value. The correct principle is laid down in *Reg. v. The Hammer-smith Bridge Company*, 15 Q. B. 369, which decided that the proprietors of a bridge, in reference to profits derived from the bridge, were to be rated not merely for that part where the profits were taken, but for all the

approaches which contributed to the production of those profits.

*Curr. adv. vult.*

May 23.—The judgment of the Court was now delivered by

*BLACKBURN, J.*—In this case it appears that if the stations and line in Amwell belonged to different companies, and if the clearing-house system were in force, certain allowances would be made to the companies owning the stations by way of remuneration for the accommodation afforded in receiving, loading and unloading, dispatching and delivering the goods either taken in or given out at the station. The apps. contend that these allowances, which are called terminals, are not part of the earnings of the line, but are to be considered as earnings of the station. We however are of opinion that we must, in conformity with the established practice, treat the station as only indirectly contributing to the profits of the line, and consequently as being to be rated as land and buildings whose value is to some extent enhanced by their capacity of being employed in connection with the line. We think the amount of those terminals and the amount of the expenses incurred in earning them are parts of the general earnings and general expenses of the line, and are to be treated in the same way as any other part of the gross receipts and outgoings. We therefore give judgment for the resps.

*Judgment for the resps.*

Monday, May 25, 1863.

JORDAN v. GIBBON.

*Trespass—False imprisonment—Civil trespass—Giving into custody.*

*The plt. having seen (late at night) his wife and a man go into a certain house, obtained access thereto, and, not finding the man, declared he would remain there until he saw him. The deft., who was lodging there, being much annoyed by the plt., who continued to remain outside the door of his apartments, after urging him in vain to leave, sent for a policeman to remove him, and on his declining to interfere unless he was given in charge, the deft. gave him in charge, and he was conveyed to the police-station, at which place the deft. attended and declined to make any charge. Upon an action brought for an assault and false imprisonment:*

*Held, that although the plt. was committing a civil trespass, and so may have been removed from the house, yet, as he was not actually committing a breach of the peace, his arrest and detention were unlawful.*

*Karslake, Q. C.* in this case moved for a rule to set aside the verdict for the plt., and for a new trial on the ground of the verdict being against evidence, or to reduce the damages. It appeared that the plt., suspecting an improper intimacy between his wife and a Mr. Boucicault, went to a house in Pall-mall late at night, kept by a Mr. Clark, where he believed them to be. The plt.'s wife had apartments there, and two rooms in the upper part of the house were occupied by Col. Gibbon, the deft. Whilst in the house the plt. behaved with considerable violence, and having gone into the deft.'s apartment and not finding the object of his search (Mr. Boucicault), he remained on the landing outside the deft.'s rooms, declaring he would remain there until he saw him, but at that time behaving peaceably. He was frequently requested to leave by the deft., who, finding his own persuasion ineffectual, sent for a policeman to remove him. The officer, however, upon being informed that the plt.'s wife was living in the house, refused to interfere unless he was given into custody, whereupon the deft. gave him into custody, and he was conveyed a short distance to the police-station, to which place the deft. accompanied him. When there it was ascertained that Mr. Bouc-

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caut had left the house, and the deft. then said that if the plt. would promise not again to return to the house, he would forego making any charge against him. This he promised to do, and he was liberated, and they parted apparently on friendly terms. Subsequently the plt. brought the present action for an assault and false imprisonment, and the jury upon the trial returned a verdict for the plt. with 25*l.* damages. It was now contended that, under all the circumstances, the deft. was justified in giving the plt. into custody. [COCKBURN, C. J.—There was no continuing breach of the peace. It was merely a continuing civil trespass, for which he may have been removed from the house.] Although he was not then actually guilty of a breach of the peace, his conduct was such as to create alarm in the minds of the inmates of the house, and of the deft. in particular, near to whose door he persisted in remaining. Moreover, under all the circumstances, the damages were excessive.

COCKBURN, C. J.—No doubt the plt. had no right there, and the deft. would have been justified in having him removed; but unfortunately he took the wrong means, in making a charge against him and having him taken in custody to the station-house. You may, however, have a rule upon the question of damages.

*Rule nisi on the ground of the damages being excessive.*

Wednesday, May 27, 1863.

REG. v. THE STOCKTON AND DARLINGTON RAILWAY COMPANY.

*Poor-rate—Assessment upon a toll which a railway company were empowered to take, but which they did not take.*

*By the Stockton and Darlington Railway Amalgamation Act 1858, the company were empowered to take a toll not exceeding 2*d.* a ton upon certain goods passing through the Shildon tunnel. This toll the company did not take, upon the ground that if they did take it the carriage of the goods would be altogether lost to them. The company being rated to the poor-rate in respect of this toll:*

*Held, that, as the toll was not in fact taken, it could not be assessed to the poor-rate.*

This was a case stated by the quarter sessions for the county of Durham, upon an appeal by the defts. against a poor-rate for the township of Shildon.

The case stated that part of the apprs.' railway, in the said township of Shildon consists of what is called the Shildon tunnel, and by the 77th section of the 21 & 22 Vict. c. 116, called the Stockton and Darlington Railway Amalgamation Act 1858, it is enacted that the company may demand and take, in addition to the other tolls by this Act authorised, any tolls not exceeding 2*d.* a ton for all goods, animals and passengers passing through the Shildon tunnel. This toll is levied by the apprs. on certain coal and coke passing through the Shildon tunnel and intended for home sale. It is also levied on general merchandise, &c. (not including minerals), and the amount so levied is included in the amount at which the defts. are willing to be rated to the relief of the poor of the resps.' township. There is also a large quantity of coal, coke, ironstone and limestone carried through the said tunnel by the apprs. for exportation and for manufacture of iron, upon which the toll granted by the 77th section is not levied directly or indirectly, but only a mileage rate, not exceeding the maximum mileage rate which the apprs. are empowered to charge by the said Act of 1858. The reason why the apprs. do not levy this toll of 2*d.* upon such last-mentioned coal, coke, ironstone and limestone is, that, if they did so, the carriage of such coal, &c., would, in the apprs.' opinion, be alto-

gether lost to them. The apprs. do not charge the maximum parliamentary toll upon such last-mentioned coal, &c., on any part of their line of railway.

The question for the opinion of the court is, whether the apprs. are liable to be rated in respect of the toll of 2*d.* per ton upon coal, coke, ironstone and limestone, passing through Shildon tunnel, for the purpose of exportation or the manufacture of iron, and upon which coal, &c., they do not levy such toll directly or indirectly? If the court should be of opinion that they are liable to be so rated, the order of sessions and the rate are to be confirmed. If the court should be of the contrary opinion, the order of sessions and the rate to be quashed.

*Welsby* now appeared in support of the order of sessions, and contended that the rate was right; for, as the apprs. (the railway company) had a right to enforce the toll of 2*d.* per ton, it was immaterial whether they, in fact, enforced it or not, the test being what a tenant would give. [COCKBURN, C. J.—The question is, what is the rateable value? If the company had levied this toll, they would have lost their custom.] We must look to what they have a right to take; it does not follow that they would lose by enforcing the toll. [WIGHTMAN, J.—Suppose if they were to put on the toll, and got nothing? COCKBURN, C. J.—We must take the company to be the best judges of what is for their own advantage. They find that the public will not pay the amount.] This was a question of fact for the sessions, and they have found for the resps. [COCKBURN, C. J.—The case states why the toll is not levied, and we must really assume that the apprs. are the best judges of their own interest.]

*Manisty, Q. C. and Davison, for the apprs., were not called upon.*

By the COURT.—There must be judgment for the apprs. *Judgment for the apprs.*

REG. v. THE INHABITANTS OF LLANGIAN.

*Poor-law—Order of removal—Justice of the quorum—Mayor and ex-mayor of a municipal corporation—13 & 14 Car. 2, c. 12, s. 1; 35 Geo. 3, c. 101, s. 1. The 13 & 14 Car. 2, c. 12, s. 1, enables two justices, one of whom is to be of the quorum, to remove any poor person likely to be chargeable. The 35 Geo. 3, c. 101, s. 1, recites the above enactment and repeals so much of it as enables justices so to remove, and prohibits a removal unless the party is actually chargeable, in which case "two justices of the peace" are empowered to remove:*

*Held (dissentiente Cockburn, C. J.), that since the passing of the latter statute, neither of the removing justices need be of the quorum, and that a pauper removed by an order of the mayor and ex-mayor of a municipal borough within the 5 & 6 Will. 4, c. 76, which had no separate commission of the peace, was well removed.*

This was a case stated by quarter sessions upon the confirmation of an order of removal from the borough of Pwllheli, and the question was, whether the order of removal which was made by the mayor and the ex-mayor of the borough of Pwllheli, such persons being justices only by the operation of the 5 & 6 Will. 4, c. 76, s. 57, which enacts "that the mayor for the time being of every borough shall be a justice of the peace of and for such borough, and shall continue to be such justice of the peace during the next succeeding year after he shall cease to be mayor," was good?

The borough of Pwllheli is one of the boroughs within the operation of the 5 & 6 Will. 4, c. 76, but has no separate commission of the peace.

By the 13 & 14 Vict. c. 12, s. 1, it is enacted that "it shall and may be lawful upon complaint," &c., "for any two justices of the peace, whereof one to be of the quorum of the division where any person or per-

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sons that are likely to be chargeable to the parish, shall come to inhabit," to grant a warrant of removal.

The 35 Geo. 3, c. 101, s. 1, after reciting the above section, enacts, "that from and after the passing of this Act so much of the said in part recited Act . . . as enables justices to remove any person or persons that are likely to be chargeable to the parish . . . shall be, and the same is repealed, and that from thenceforth no poor person shall be removed by virtue of any order of removal from the parish or place where such poor person shall be inhabiting to the place of his or her last legal settlement until such person shall have become actually chargeable to the parish, township, or place in which such person shall inhabit; in which case two justices of the peace are hereby empowered to remove the person or persons in the same manner and subject to the same appeal, and with the same powers, as might have been done before the passing of this Act with respect to persons likely to become chargeable."

G. Evans now appeared in support of the order of sessions, and contended, first, that although neither of the two removing justices might be of the quorum, yet as the 1st section of the 13 & 14 Car. 2, c. 12, which requires one of the removing justices to be of the quorum, is repealed by sect. 1 of the 35 Geo. 3, c. 101, which gives the power to remove to two justices of the peace generally, the order was well made by the removing justices. Secondly, that the Mayor of Pwllheli, one of the removing justices, must be considered as of the quorum.

Beavan, contra, argued that it was still necessary that one of the removing justices should be of the quorum, which neither was in this case, there being no commission of the peace for Pwllheli, inasmuch as the 35 Geo. 3, c. 101, s. 1, only alters the law with reference to who may be removed, rendering it necessary that the party shall be *actually chargeable*, and not interfering with the process of removal; also that the mayor could not be considered in this case as of the quorum. He referred also to the 4 Geo. 4, c. 27, which gives power to justices not of the quorum to act in places where there are justices of the quorum, and contended that that statute will not apply, as in this case there are no justices of the quorum.

COCKBURN, C. J.—I am sorry to differ from my learned brothers, but I cannot think that these justices are justices of the quorum, nor that the statute of Charles is so far altered by the latter Act as that they need not be of the quorum. All that the 35 Geo. 3 does, is to render it necessary that the party should be *actually chargeable* before he can be removed. It simply changes the basis of removability from being likely to be chargeable to being *actually chargeable*. I think it is straining the language of the statute to say that it renders it unnecessary that the justices should be of the quorum. I do not regret, under the circumstances, that my learned brothers feel compelled to differ from me, for no doubt the point is a purely technical one. As to the second point, if the last Act does not repeal the first, then I think these justices are not of the quorum, being of the quorum meaning, of those having a peculiar power given by the commission. Now, the mayor and ex-mayor are plainly not of the quorum in the sense in which the words are understood. The mayor certainly has precedence in the borough, but that does not make him of the quorum. In my view of the case, the order is bad for want of jurisdiction in the justices making it.

WIGHTMAN, J.—According to the words of the statute of Charles, the order is to be made by two justices, one of whom is to be of the quorum, and that statute is recited in the 35 Geo. 3, c. 101, which repeals the provision as to removal, and that no poor person shall be removed until he shall have become *actually chargeable*, "in which case two justices of the peace," without

mentioning "of the quorum," "are hereby empowered to remove," &c. Now it does not appear from the statute itself, that they had lost sight of the distinction between justices of the quorum and ordinary justices, because, in the 10th section, reference is made to justices of the quorum. In that clause it is necessary that one of the justices should be of the quorum, but in the former clause this is not necessary. I should certainly be disposed to put a very liberal construction upon the statute if required, but I think it is only necessary to look to the very words. I think, therefore, the justices had jurisdiction to make the order.

BLACKBURN, J.—I agree with my brother Wightman, that the order of removal was well made. The first Act certainly requires one of the justices to be of the quorum, but by the second Act that is repealed; and I think it renders it unnecessary that the justices should be of the quorum. It was no doubt the main object of the second statute to alter the law as to the removal, but the words of the section certainly, to my mind, change the qualification of the removing justices. I confess I am inclined to think, also, that, if it were necessary to hold that one of the justices should be of the quorum, a mayor of a borough under the Municipal Corporation Act must be considered as of the quorum. *Order confirmed.*

Saturday, May 30, 1863.

GARBUTT (app.) v. SIMPSON (resp.)

*Bastardy—Order of affiliation—Evidence to contradict the woman.*

*Although evidence cannot be called to contradict a witness as to facts which go only to his credit, yet, if such evidence is also material to the fact in issue, it is not open to such objection.*

*Upon an application for an order of affiliation against A., the woman deposed to a connection with him in a certain month, which she swore produced her pregnancy. Upon cross-examination she was asked as to her having, in the same month, had connection with B., which she denied. A. then proposed to call witnesses to prove such connection with B., which the justices refused to hear, upon the ground that the denial of the woman was conclusive:*

*Held, that the evidence was admissible.*

This was an case stated under the 20 & 21 Vict. c. 45, by justices at petty sessions, upon an application for an order of affiliation.

The case stated that, according to the evidence of the mother, the child was born on the 20th March 1862, and that the intercourse took place between the resp. and the app. at the latter end of June, and on the 21st July 1861, at a place called Seamer, which was corroborated by two other witnesses. On cross-examination by the app.'s attorney, the resp. swore as follows:—"I know George Thompson. George Thompson did not come to see me on Sunday night in June 1861. I remember him and Musham being often there. Thompson never had connection with me in June 1861, or at any other time; he did not come to see me." The case proceeded to state as follows:—"After cross-examination of the resp. and her witnesses was concluded the app.'s attorney tendered a witness, Edward Musham, proposing to prove by him that in the middle of the month of June 1861, the said George Thompson had connection with the resp., and that he (Musham) frequently went with Thompson to Seamer, to meet the resp. in that and subsequent months. The app.'s attorney also admitted that his other witnesses, with the exception of the app. himself, would be called to contradict the resp.'s evidence as elicited in her cross-examination. The attorney for the resp. thereupon took an objection to the admissibility of such evidence, on the ground that

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the witness was called to contradict the resp.'s evidence elicited in cross-examination, and cited *Reg. v. Gibbons*, 31 L. J. 98, M. C.; 3 L. T. Rep. N. S. 805, in support of his argument, urging that the resp. having denied in cross-examination the above alleged facts, the app. was bound by her answers, and that the evidence of Musham and the other witnesses was not therefore admissible, as it would go merely to her credibility, George Thompson being the only person who could give evidence affecting the paternity of the child. The app.'s attorney urged that the case cited did not apply, and that the evidence was admissible not only to contradict the evidence of the resp. in a material particular, but for the purposes of proving that George Thompson had had such connection with her at the time of her conception as might have resulted in his being the father of the said child. We, however, being of opinion that the evidence tendered was inadmissible, thereupon made an order on the app., adjudging him to be the father, and ordering him," &c.

If the court should be of opinion that we were right in rejecting the evidence, the order made by us to stand. But if the court should be of a contrary opinion, then the app. to be allowed to have his witnesses heard, and the order already made to stand, fall, or be mitigated, according to our judgment after hearing such evidence.

*Shepherd* now appeared for the app., and contended that the justices were wrong in refusing to receive the evidence tendered on his behalf, which was not intended so much to contradict the resp. as to prove a fact which bore upon the issue then to be decided. [MELLOR, J.—As a general rule, if a question is asked which only goes to the credit of the witness, he cannot be contradicted; but here it would seem that the evidence was for something beyond that, and goes to the very root of the inquiry.] The case of *Reg. v. Gibbons* is not in point, as there the only object of the evidence was to discredit.

No one appeared for the resp.

BLACKBURN, J.—No doubt the justices made a mistake. The woman had sworn that the man was the father, and she was asked as to another person having had connection with her about the time when conception must have taken place, and, having denied this, it was proposed to call a witness, not so much to contradict her as to show that another person was the father of the child. The evidence was improperly rejected.

MELLOR, J. concurred. (a)

*Case to be remitted to the justices to be reheard.*

TAYLOR (app.) v. NEWMAN (resp.)

*Summary conviction—Pigeons—Killing—Claim of right—24 & 25 Vict. c. 96, s. 23.*

*By sect. 23 of the 24 & 25 Vict. c. 96 (Larceny Act) it is enacted that, whosoever shall unlawfully and wilfully kill, wound, or take any house-dove or pigeon, under such circumstances as shall not amount to larceny at common law, shall, on conviction, &c.:*

*Held, that this provision does not apply to a case where a party, under a claim of right, kills a pigeon which is doing mischief upon his land.*

*A., the occupier of land, gave notice to B., who kept pigeons, that such pigeons did damage to his land, and that he would destroy them if they were not restrained. After this notice, finding the pigeons on his land, he fired his gun, whereupon they rose; he then fired again and killed one of them, and*

*being convicted upon an information laid under the above section,*

*Held, that such conviction was bad.*

This was a case stated by justices at petty sessions upon a conviction under sect. 23 of the 24 & 25 Vict. c. 96 (the Larceny Consolidation Act), for unlawfully killing a pigeon.

By the above section it is enacted: "Whosoever shall unlawfully and wilfully kill, wound, or take any house-dove or pigeon, under such circumstances as shall not amount to larceny at common law, shall, on conviction before a justice of the peace, forfeit and pay, over and above the value of the bird, any sum not exceeding 2l."

It appeared that the app. was the occupier of certain land, upon which the pigeons of the resp. were in the habit of coming and picking out the seed there sown. Of this the app. frequently complained, and at last he sent the resp. a written notice complaining of the damage, and stating that he would destroy the pigeons if they were not restrained from coming upon his land. After this, finding the pigeons still upon his land doing mischief, he fired his gun, whereupon they began to fly away, and then he fired again and killed one of the pigeons, which he permitted to remain where it had fallen. An information having been laid against him under the before-mentioned statute, he was convicted by the justices.

*Francis* now appeared in support of the conviction and argued that, reclaimed pigeons being private property, the app. was guilty of an unlawful act in killing the pigeon in question, and so guilty within the meaning of the section; that the present law is a re-enactment of sect. 33 of the 7 & 8 Geo. 4, c. 29, and was meant to apply to cases of all unlawful killing where the act does not amount to a larceny at common law. That, even if he had a right to kill the pigeon whilst actually on the ground eating his corn, he had no right to do so when it was flying away. [BLACKBURN, J.—I cannot believe that the statute was ever intended to apply to a case where the pigeon was feeding upon a man's land, but only to cases where he does the act wantonly or without any colour of right. It seems strange to treat this as a criminal act.] If any damage were done the app. could have maintained his action; here moreover he killed it whilst flying. [BLACKBURN, J.—If he was justified in shooting it whilst on the ground, he might kill it in the air. He would have no right to follow it off his ground.] It is upon the same footing as shooting a dog: (*Vere v. Lord Camdon*, 11 East, 568.) [MELLOR, J.—That case turned upon the goodness of a plea; here we have to do with the words in an Act of Parliament, and the question is what is the meaning of the word "unlawfully?""] He referred also to

*Dewell v. Sanders*, Cro. Jac. 492.

*Hannen*, for the app., contended that this was not an "unlawful killing" within the meaning of the statute: (*Rex v. Brooke*, 4 C. & P. 131; *Rex v. Chagger*, 21 L. J. 43, M. C.) That the statute does not mean to refer to all killing of pigeons which may not be justifiable, but such improper killing as, though it would not amount to larceny at common law, would nevertheless be in itself a criminal act. That as this was done in the assertion of a right, it was not a criminal act: (*Reg. v. Cridland*, 7 El. & Bl. 879; *Hannam v. Mockett*, 2 B. & C. 937, Bayley, J.'s judgment.) [MELLOR, J.—I cannot but think that the section means to refer to those cases which do not amount to larceny, but are still unjustifiable killing, not to cases where the killing is under a claim of right.]

*Francis* in reply.

BLACKBURN, J.—I confess that I have entertained some little doubt upon the subject, but I think that upon a proper construction of the statute the app. ought not to have been convicted. The section im-

(a) Cockburn, C. J. was unavoidably absent, and Wightman, J. was sitting in the Divorce Court.

question is found in a statute "to consolidate and amend the statute law of England and Ireland relating to larceny and other similar offences;" and as far as this provision goes it is a re-enactment of a section in the previous Act of the 7 & 8 Geo. 4, c. 29, and the preamble recites that "it is expedient to consolidate and amend the statute law of England and Ireland relating to larceny and other similar offences;" and this leads to the inference that the offences contemplated by the statute are those *ejusdem generis* with larceny. Now the section as to pigeons follows immediately after that applicable to dogs and some other animals, and it imposes a penalty for unlawfully and wilfully killing, wounding, or taking any house-dove or pigeon under such circumstances as shall not amount to larceny at common law. Now, what is the kind of unlawful killing here referred to? There has been at times considerable difficulty in knowing whether the taking of pigeons under certain circumstances, as where they are not taken from the pigeon-house, amounts to larceny; and it was to meet such cases that the section was framed. I think in this case that the farmer who was protecting his crops, and who really thought he was doing a lawful act, cannot be said to have unlawfully killed the bird. The section must be taken in connection with the rest of the statute which applies to larceny; and therefore, although I have entertained some doubts upon the subject, I think that the justices were wrong.

MELLOR, J.—There is no doubt that the words of the section are very wide, but the construction contended for on the part of the resp. would lead to very serious results, and I think cannot be applied to a case where a person kills a pigeon, as in this case, under a colour of right. There may, no doubt, be cases not amounting to larceny where, under circumstances showing a wilful and wanton intention, a party may be punishable under this section, and for these the section provides; but I do not think that the present case comes within it, and I think, therefore, that the conviction was erroneous.

— Conviction quashed.

SMITH (app.) v. STOKES (resp.)

*Highway Act—Steam thrashing machine nuisance—*  
5 & 6 Will. c. 50, s. 70.

*A portable steam thrashing machine moving on wheels, and stationed at work, is within the operation of sect. 70 of the 5 & 6 Will. 4, c. 50 (Highway Act), which makes it unlawful for any person to erect or cause to be erected any steam-engine within a certain distance from a carriage-way without being protected or screened.*

This was a case stated under the 20 & 21 Vict. c. 43, by justices upon a conviction at petty sessions of the app. for an offence under sect. 70 of the 5 & 6 Will. 4, c. 50 (Highway Act) which enacts, "that it shall not be lawful for any person to sink any pit or shaft, or to erect or cause to be erected any steam-engine . . . within the distance of twenty-five yards . . . from any part of any carriage-way or cartway, unless such pit or shaft, or steam-engine . . . shall be within some house or other building, or behind some wall or fence sufficient to conceal or screen the same from the said carriage-way or cartway, so that the same may not be dangerous to passengers, horses, or cattle, &c." In this case the app. was convicted in the penalty of 2*l.* for having in use a steam thrashing machine within four yards of the centre of a highway without being screened, &c., as required by the foregoing section.

Thrupp appeared for the app., and argued that the steam-engines contemplated by the section were those alone which were of a fixed description, and that a steam thrashing machine which was unknown at the

time the statute was passed, and which is a moveable machine going upon wheels, is not and cannot be said to be an erection within the meaning of the enactment. [BLACKBURN, J.—The evil is just as great whether the steam-engine is moveable or immovable.] But a steam-engine upon wheels, and used only perhaps for an hour or so, cannot be said to be an erection; if so, any locomotive passing along a road would come within the section. [BLACKBURN, J.—No doubt, if the machine is moving along the road it could not be said to be an erection; but I think it is otherwise if it stands at a place for use.] The section would seem to contemplate a permanent erection. If the Legislature had contemplated such a case, it would have provided for it in terms.

No one appeared for the resp.

BLACKBURN, J.—I think the justices were right. The object of the section is to prevent any one from putting up a steam-engine within a certain distance of the road, unless it is protected by some building or fence. Then, here the case is, that a portable steam-engine, which is only to be used for a time, is brought to the side of the road. It seems to me that it makes no difference its not being of a permanent nature. It is an erection—that is, it is put up for the purpose of work. No doubt, if it were merely passing on a road, or even stopping for some temporary purpose, such as the taking in of water, the section would not apply; but, as soon as it is set up to do work, it is within the statute.

MELLOR, J.—The object of the section is to prevent the danger of a steam-engine near a highway without being properly fenced in. It is not necessary that it should be a permanent erection. The argument of Mr. Thrupp is, that an erection means a permanent erection—something attached to the soil. I do not think that is correct. The words of the section do not confine us to erections which are of a permanent nature.

Conviction affirmed.

Tuesday, June 2, 1863.

TOUTILL AND ANOTHER v. DOUGLAS AND OTHERS.

*Provident society—Not registered under Act of 1862—*  
*—Liability of trustees to be sued as such.*

*An industrial and provident society was formed under the Act of 1852 (15 & 16 Vict. c. 31). That Act and the 17 & 18 Vict. c. 25, and 19 & 20 Vict. c. 40, relating to the same subject, were repealed in toto by the 25 & 26 Vict. c. 87, which empowered all societies registered under the Act of 1852 to register under that Act. The society in question has not registered under the 25 & 26 Vict. :*

*Held, that the trustees could not be sued as such for a debt due from the society.*

Demurrer to declaration.

The declaration stated that, "The plts. by their attorney sue J. D., J. B. and R. W., as trustees of the York City and District Provident and Industrial Flour Mill Society, according to the statutes in such case made and provided, for money payable, &c., for goods bargained and sold by the plts. to the said society, and for money found to be due from the said society to the said plts. on accounts stated between the plts. and the said society.

Demurrer.

*Kemplay* in support of the demurrer.—The ground of demurrer is, that the defts. are not liable to be sued as trustees. These societies are now regulated by the 25 & 26 Vict. c. 87. Sect. 1 repeals the previous Acts, 15 & 16 Vict. c. 31, 17 & 18 Vict. c. 25, and 19 & 20 Vict. c. 40. Sect. 2 enacts, that all societies registered under the Act of 1852 shall be entitled to obtain a certificate of registration under that Act. Sect. 6 enacts, that the certificate of registration shall rest in the society all the property that may at the

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time be vested in any person in trust for the society, and all legal proceedings then pending against any such trustee or officer on account of the society may be presented against the society in its registered name. This society was registered under the Act of 1852, and was entitled to sue and be sued in the name of the officers appointed for that purpose (17 & 18 Vict. c. 25, s. 2), but those Acts have been repealed, and the society has not registered under the 25 & 26 Vict. c. 87; consequently the trustees cannot be sued as such, but the pls. must sue the members as in the case of an ordinary partnership.

*Melish (Patching with him) contra.*—The trustees are liable to be sued, notwithstanding that the society has not been registered under the 25 & 26 Vict. The property of the society remains in them until the society registers under the new Act. The Friendly Societies Acts are made applicable to all provident societies formed under the Act of 1852; and by the Friendly Societies Act 18 & 19 Vict. c. 63, s. 48, and by sect. 19, the trustees may be sued. (WRIGHTMAN, J.—But all the societies under the Act of 1852 are now non-existing, because the Act is repealed.)

COCKBURN, C. J.—I have no doubt in this case. The Act of 1852 and the subsequent Acts having been repealed by the 25 & 26 Vict., which contemplated a new status for these societies by making them incorporated, the rights and liabilities of the societies under the repealed Acts exist only for the purpose of registration under the new Act. It is impossible to say that the repealed Acts can any longer exist for the purpose of enabling them to sue or be sued in the names of their officers.

WRIGHTMAN, J.—There are no words in the new Act to keep alive any of the provisions in the former Acts, and no doubt the Legislature contemplated that all the existing societies would register under the new Act.

*Judgment for the debts.*

May 30 and June 3, 1863.

REG. on the prosecution of PARISH OF FRANT (resps.) v. WILLIAM WRIGHT, Surveyor to Tonbridge Wells Improvement Commissioners (app.)

*Highway—Diversion—Local Act—Jurisdiction.*

This was an appeal from an order of quarter sessions confirming an order or certificate of two justices, for the diversion of a footway near Tonbridge Wells. The certificate showed, on the face of it, that the new footway was rather longer than the old way, but it was found that the new way was more commodious. The jury impanelled by the sessions, under sect. 89 of the General Highway Act, 5 & 6 Will. 4, c. 50, found that the new way was more commodious, and that the app. would not be aggrieved by the diversion; but the question of nearness was not found by them, and the chairman refused (although requested) to leave that question to the jury. The app. contended, first, that the question of nearness ought to have been left to the jury; and, secondly, that the certificate was bad on its face, because the reasons given for the commodiousness were speculative, and only affected a portion of the public; and, thirdly, that the justices had no jurisdiction, because the old way was within the limits of the Tonbridge Wells local Act, and the justices had been set in motion by the vestry of the parish of Frant. The quarter sessions overruled the two first objections, and granted a case for the Q. B. on the third objection. This case was then (by arrangement) stated under Baines's Act (12 & 13 Vict. c. 45, s. 9), and the costs of the appeal (if the quarter sessions were bound to award costs) were to follow the event.

The two first points were abandoned on the argument; but it may be observed that the Court (Cock-

burn, C. J., Blackburn and Mellor, JJ.) were quite prepared to overrule the case of *R. v. Shiles*, 1. Q. B. 919, on which the first point was grounded.

*Lush, Q. C. (with him Hurst and Conolly), for the resps.* as to the third point, argued that as the old way was within the ambit of the Tonbridge Wells Local Act, 9 & 10 Vict. c. cccxlix., and the new way was without that ambit and within the parish of Frant; and that as the commissioners under the local Act (to whom the app. was the surveyor) had no power under their Act to divert ways, or to summon a meeting of the inhabitants of the district comprised within the Act, that therefore the power of diversion must remain with the justices, and that the vestry of Frant were the proper body to consent under sect. 84 of the General Highway Act.

*Bovill, Q. C. (with F. Russell and Thrupp), for the app.,* relied first, upon the 113th section of 5 & 6 Will. 4, c. 50, and pointed out that, by sects. 70, 72, 75, 77, 86, 87 and 88 of the Tonbridge Wells local Act, the old way was taken out of the parish of Frant, and put within the ambit or limits of that Act, and made repairable by the inhabitants of the Tonbridge Wells district created by that Act, and that the commissioners under that Act, and not the parish of Frant, were liable to be indicted in case of its non-repair; and that if the commissioners had no power to divert the way in question, it was not for the court to rectify a *casus omissus* in the General Highway Act. (a) And secondly, he contended that under the 5th section of 5 & 6 Will. 4, c. 50, the inhabitants of the Tonbridge Wells district, and not the vestry of Frant parish, ought to have originated the proceedings before the justices, and that as by sect. 92 of 5 & 6 Will. 4, c. 50, the new way would have to be repaired by the district and not by the parish, the latter had really no interest whatever in the matter.

*Lush, in reply,* contended that the 113th section was to be read *reddendo singula et singulis*, and only applied where the way could be diverted under the local Act (citing *Reg. v. Poynter*, 13 Q. B. 399), and that no machinery existed for adopting the construction of the 5th section contended for by the other side.

The COURT, however, quashed the order upon the grounds that the app. had brought his case within both the 5th and 113th sections of the general Act.

*Order quashed.*

Wednesday, June 3, 1863.

THE CHURCHWARDENS, &C. OF WELLINGTON (apps.) v. THE CHURCHWARDENS, &C. OF WHITCHURCH (resps.)

*Poor-law—Order of removal—Break of residence—9 & 10 Vict. c. 66, s. 1.*

*Under sect. 1 of the 9 & 10 Vict. c. 66, an absence for a mere temporary purpose, with an intention to return, will be no break of residence. But an intention to return at a remote period after a permanent absence is not sufficient to prevent the absence from being a break.*

*A. B., who was residing with his family in a house in the parish of C. D., entered into a contract with certain parties to go to Cuba, and work in a mine there for three years. He accordingly went, and was absent two years and a-half, when he returned to his family, who were still residing in the same house. During his absence his family were regularly supplied with money for their support out of his earnings:*

*Held, that his absence under these circumstances constituted a break of residence.*

This was a case stated by consent under the 12 & 13 Vict. c. 45, upon an order of removal of William Brooks

(a) This is now rendered immaterial by the new Highway Act, 26 & 26 Vict. c. 61.

and his family from the parish of Whitchurch, Devonshire, to the parish of Wellington, Somersetshire.

The case stated as follows:—

"The pauper William Brooks is by occupation a miner, and is now about thirty-six years of age, and in Nov. 1847 he married Elizabeth his present wife, by whom he has six children. At the time of the pauper's said marriage he resided in the parish of Buckland Monachorum, in the county of Devon, and he continued to reside in that parish about five years after his said marriage, and then, namely in or about the year 1852, removed from Buckland Monachorum with his wife and children into the parish of Whitchurch, in the county of Devon aforesaid, to reside, and took a house and premises at a place called Horrabridge in that parish, and resided and inhabited therein with his wife and family continuously until the month of May 1859, a period of about seven years. In the month of April 1859 the pauper William Brooks entered into an engagement, by contract or agreement in writing, with a London company to go to the Cobre mines in the island of Cuba, to work for them there for a period of three years, a copy of which contract or agreement accompanies this case, and is to be taken as part thereof. It was part of his agreement with the company that they should allow his wife and family 5*l.* per month, as will be seen from the 6th paragraph of the contract. The pauper states that it was always his intention to return to England to his wife and family at the expiration of such three years. The pauper went to Cuba, according to his agreement, in the month of May 1859, leaving his wife and children at Horrabridge aforesaid inhabiting the same house wherein they had resided during the previous seven years, and his said wife and family received their allowance from the said company according to the stipulations contained in the contract or agreement regularly for about one year and five months. The pauper became ill whilst in Cuba, and was admitted into a hospital there, for a period of about four months, and about the month of Oct. 1860 a disagreement arose between him and the manager of the mine, in consequence of which the allowance to his wife and family in England was discontinued, and no more money was sent to her by the company at all, but in the following month of Feb. 1861 the pauper himself made a remittance to his wife of 20*l.* out of his own money, and she received it in April 1861, and this was the last money she received either from her husband or the company. In the month of Sept. 1861, the wife having no money left and no means of subsistence for herself and children, applied for relief to the board of guardians of the Tavistock Union, of which the parish of Whitchurch forms a part, which was granted, and she and her children became chargeable to the said parish of Whitchurch, and received 5*s.* as relief on the 26th Sept. 1861, and a further sum of 5*s.* as relief on the 3rd Oct. following, which sums were regularly charged to the said parish of Whitchurch. The wife afterwards again applied for relief, but the guardians refused to give any further outdoor relief, but granted an order for her and her children's admission to the Union workhouse, but she refused to go into the workhouse, and continued to reside in the same house until her husband returned from Cuba. The pauper, in consequence of illness, left Cuba on or about the 25th Sept. 1861 to return to his wife and family in England, and he arrived home on or about the 17th Nov. 1861, having been absent about two years and six months, and he found his wife and family in the same house in which he had left them in the said parish of Whitchurch, and in which they had resided continuously from the time he left them to go to Cuba until his return. After the pauper's return he applied for relief for himself and family, which was granted to him by the said parish of Whitchurch, and he has continued to

receive regular weekly relief from that parish ever since, and was in receipt of such relief at the time the order of removal to the app<sup>l</sup>. parish was made.

"The question for the opinion of the court is, whether the facts above stated constitute such a break of the pauper's residence in the said parish of Whitchurch as to render him and his family legally removable?"

"If the court shall be of opinion that there was no such break of residence, and that the paupers were not removable at the time the said order was made, then the order of removal is to be quashed.

"But if the court shall be of opinion that that was a break of the pauper's residence in the said parish of Whitchurch, and that they were legally removable at the time the order was made, then the order of removal is to be confirmed."

By the articles of agreement referred to in the case, it was (*inter alia*) stipulated that the said William Brooks (the pauper) should proceed to the Cobre mines in the island of Cuba, and there employ himself in the service of the said association as a miner, or in such other way connected with the mining as the said association or their agent might think fit, for the time of three years, subject to certain conditions as to putting an end to such service at an earlier period; and it was also stipulated as follows:—"The said William Brooks shall, while in the island of Cuba, reside in such place and remove from time to time to such parts as shall be required by the said directors or their representative," &c.

By the 9 & 10 Vict. c. 66, s. 1, it is enacted that "No person shall be removed, nor shall any warrant be granted for the removal of any person from any parish in which such person shall have resided for five years next before the application for the warrant."

*Karslake*, Q.C. and *T. W. Saunders* now appeared for the resp<sup>s</sup>, and argued that, as the pauper had in fact left his residence in England, and had gone to Cuba to serve for three years under a contract which required him to reside there, this amounted to a break of residence, notwithstanding his wife and family were all that time and until his return to them residing in the same house that he occupied at the time of his leaving; for that the facts were inconsistent with the idea of a continuing residence in England:

*Reg. v. The Inhabitants of Stapleton*, 1 Eil. & Bl. 786; 22 L. J. 102, M.C.;

*Reg. v. Marylebone*, 16 Q. B. 352;

*R. v. Nampnett Shrubnell*, 17 J. P. 83.

*Cole*, for the app<sup>s</sup>, contended that the pauper had not lost his status of irremovability by going to Cuba under the contract and residing there, as his residence there was for a definite period, and he intended to return at its expiration (*Reg. v. Brighton*, 24 L.J. 41, M.C.; 4 Eil. & Bl. 236); that the length of absence is immaterial if there is an intention to return, and his home is kept up for him; that here he made provision for his wife and family during his absence, which was for a definite period; and that they resided in the same place all the time of his absence, and were there when he returned to them.

*Karslake*, Q.C., in reply, was stopped by the Court.

COCKBURN, C.J.—We must consider this case with reference to the irremovability of the father, and that depends upon whether he has resided five years in the parish of Whitchurch. Now, it appears that he was absent for the period of two years and a-half under a contract to serve certain parties in Cuba for the term of three years. I have no desire to lay down any general definition of what is a *temporary absence* or a *prolonged absence*; whether it is the one or the other will depend upon the particular circumstances of each case. The question here is, can it be said that a resi-

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dence of three years, under the circumstances of the case, is too long to permit it to be considered as a temporary residence? I have no difficulty in saying that such an absence is too long to be considered as a temporary absence. Then, does the wife's continued residence alter this? I think not. There is certainly a maxim that where the wife is, there also must the husband be considered as being. But that does not apply here, where the husband is abroad for such a length of time. I think, therefore, that he was not residing in this country during the time of his absence from England, nor do I think that his intention to return affects the case.

BLACKBURN, J.—I am of the same opinion. The question is, whether the pauper has been resident in the resp.<sup>a</sup> parish for the statutable period? If he was removable, his wife and family were removable; if not removable, neither were they. Now, it appears that he was under a contract to serve in Cuba for the period of three years, and that he actually was away, under that contract, for two years and a-half. No doubt his wife and family were residing here all that period, and that he intended to return to them. But can it be said that whilst he was in Cuba, under such a contract, he was residing in England? As to the definition of the words *temporary absence*, there may be some difficulty; but I think no better definition can be given than that given by my brother Crompton in *Reg. v. Stapleton*. He there says: "I do not think that any more definite guide can be given than by the use of the words permanent and temporary. An absence for a mere temporary purpose, with an intention to return, would be no break of residence. But an intention to return at a remote period, after a permanent absence, is not sufficient to prevent the absence from being a break." This seems to me to express the most correct definition. There is necessarily a vagueness as to what shall amount to a permanent or a temporary absence; much must depend upon all the facts of each particular case. In this case I think it would be straining the words to hold that this was a merely temporary absence.

*Judgment for the resp.<sup>a</sup>*

Attorneys for resp.<sup>a</sup>, Carpenter and Jaxton, Tavistock.

For the app.<sup>s</sup>, White, Wallington.

Thursday, June 4, 1863.

Ex parte ABEL SMITH.

*Quo warranto*—For what office it will not lie.

The office of a committeeman of the Licensed Victuallers Association is not one for the intrusion into which a *quo warranto* information will lie.

J. Brown moved for a rule calling upon a Mr. Thos. Robt. Elt to show cause why a *quo warranto* information should not be filed against him for exercising the office of committeeman of the Licensed Victuallers Association. [COCKBURN, C. J.—Is not this a private charitable society?] It is so in some sense. It was founded in the year 1793, for the education of the children of members of the society and the relief of decayed members. [COCKBURN, C. J.—Still it is purely a charity, and supported by the funds of the charity. BLACKBURN, J.—In olden times the *quo warranto* information always had reference to an intrusion into some office connected with the Government of the country.] That has been greatly relaxed in modern times: (*Darley v. The Queen*, 12 Cl. & Fin. 520.) This society is for purposes of education.

COCKBURN, C. J.—Assuming that *Darley v. The Queen* has extended the old rule, yet it has not gone to the extent of saying that a *quo warranto* information may be filed in respect of an intrusion into an

office not of a public or quasi public nature. Here the office is one in a society of a purely eleemosynary kind. Therefore there will be no rule. *Rule refused.*

Saturday, June 6, 1863.

REG. v. THOMAS.

*Bastardy*—Application for a summons—Time for—Twelve calendar months from the birth of the child—Former application dismissed.

An application for a summons for an order of affiliation must be made within twelve calendar months after the birth of the child (unless money has been paid for its maintenance within that period), and when such summons has been heard and dismissed, no other summons can issue founded upon the same application.

On the 26th March 1860 A. applied for a summons against B. in respect of a bastard child born on the 15th Nov. 1859. This summons was heard on the 30th April following, and was dismissed on the ground of the want of sufficient corroborative evidence. Subsequently, in Dec. 1862, another summons was issued, and upon the hearing on the 29th of that month an order was made. The order itself purported to be founded upon the application made on the 26th March 1860:

*Held*, that the order was bad, for that the application of the 26th March 1860 was spent by the hearing and judgment on the 30th April; and that being so, there was no application to support the order within twelve months of the birth of the child.

This was a rule to quash an order of affiliation, whereby two justices adjudged one Henry Thomas to be the putative father of a bastard child, and ordering him to pay Sarah Lewis, the mother of such child, a certain sum per week for its maintenance.

The order, which was made on the 29th Dec. 1862, recited that on the 26th March 1860 the said Sarah Lewis having been delivered of a bastard child within twelve calendar months prior thereto made application for a summons, &c., and that a summons thereupon was issued to the said Henry Thomas to appear at a petty sessions to be holden on the said 29th Dec. 1862. The order then proceeded in the usual way. The affidavit of the said Henry Thomas, upon which the *certiorari* was obtained, stated that on the 26th March 1860 an application was made by the said Sarah Lewis for a summons against him for an order of affiliation with reference to a bastard child born on the 15th Nov. preceding; that on the 30th of the following April such summons was heard, when, in consequence of there being no sufficient corroborative evidence, it was dismissed; that in December last a fresh summons was issued, founded upon the original application made in March 1860, which summons he attended, and objected that the justices had no jurisdiction, inasmuch as they could not proceed upon the original application in March 1860, the summons whereupon had been dismissed, and as there was no other application within twelve months of the birth of the child, as required by the 7 & 8 Vict. c. 101, s. 2; that the said justices overruled his said objection, and made the order in question.

G. Browne now appeared to support the order, and contended that the order was good upon its face, for that there was nothing to prevent the summons issuing at any time if the application for it is made within the twelve months of the birth of the child: (*Potts v. Cambridge*, 27 L. J. 62, M. C.; 30 L. T. Rep. 257.) [COCKBURN, C. J.—The matter having been once heard, can you make application any number of times?] I should contend that being once heard is no bar to proceeding again—a decision dismissing such a summons has been held



to be in the nature of a nonsuit. [BLACKBURN, J.—But what authority is there for saying that there can be a fresh hearing upon the old application? Must you not make a fresh application for a fresh summons?] I contend not. The statute only requires the original application to be made within twelve months; having made it within such time the woman is not afterwards restricted as to time with reference to future applications. [COCKBURN, C.J.—The justices can only proceed upon the application of the mother; she did make her application, and it was heard and dismissed. That application, therefore, was spent. If she had been within the statute time she certainly might have made another application, but here she was out of time.] There is another answer to this rule: the deft. does not swear that he did not pay money for the maintenance of the child within the twelve months, in which case the application may have been made at any time. [COCKBURN, C. J.—We cannot in the face of all the other circumstances import that fact into the case. We find what was the real objection as taken before the justices, and it was not suggested that money had been paid within the twelve months.]

*Giffard*, contra, was not called upon.

By the COURT.—It is quite clear that the justices had no jurisdiction. *Order quashed.*

### COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Wednesday, June 3, 1863.

THE OVERSEER OF THE PARISH OF STAPLE-INN (app.) v. THE GUARDIANS OF HOLBORN UNION (reps.)

*Poor-law—Extra-parochial place annexed to union—Its liability to common fund of the union.*

*Staple-inn, Holborn, was extra-parochial, having no overseer, no poor, and no poor-rate; it was not included in any union, it was entered separately as extra-parochial in the report of the Registrar-General on the census of 1851.*

*Justices, in pursuance of 20 Vict. c. 19, afterwards appointed an overseer for the parish of Staple-inn, and the Poor Law Commissioners then made an order that from the 29th Sept. 1858 it should be added to the Holborn Union. It never had any poor, nor any rate made either before or after it became a parish: Held, that Staple-inn was liable to contribute to the common fund of the Holborn Union.*

The opinion of the Court of Ex. was required under the 20 & 21 Vict. c. 43, upon the following CASE.

1. At a special session duly held before us, two of her Majesty's justices of the peace for the county of Middlesex, acting within the district wherein the parish of Staple-inn is situate, Henry Smith Pownall, Esq., the overseer of the said parish, appeared to show cause why a certain contribution of 50*l.*, required by order of the guardians of the Holborn Union, dated in May 1862, to be paid to the said union by the said parish of Staple-inn, had not been paid.

2. The following facts were proved and undisputed.

3. The Holborn Union was duly formed in March 1836, soon after the passing of the 4 & 5 Will. 4, c. 76.

4. At that time, and long afterwards, Staple-inn was extra-parochial, having no overseers, no poor, and no poor-rates, and it was not included in the said union. It was entered separately as extra-parochial in the report of the Registrar-General on the census of 1851.

It was enacted by 20 Vict. c. 19, s. 1, "that after the 31st Dec. 1857, every place entered separately in

the report of the Registrar-General on the last census, which now is or is reputed to be extra-parochial, and wherein no rate is levied for the relief of the poor, shall, for all the purposes of the assessment to the poor-rate, the relief of the poor, the county police, or borough rate, the burial of the dead, the removal of nuisances, the registration of parliamentary and municipal voters, and the registration of births and deaths, be deemed a parish for such purposes, and shall be designated by the name which is assigned to it in such report, and the justices of the peace having jurisdiction over such place, or over the greater part thereof, shall appoint overseers of the poor therein, and with respect to any other place being or reputed to be extra-parochial, and wherein no rate is levied for the relief of the poor, such justices may appoint overseers of the poor therein, notwithstanding anything contained in the 101st chapter of the statute passed in the session of Parliament in the 7th and 8th years of her present Majesty."

5. In pursuance of this Act the justices appointed an overseer for the parish of Staple-inn, and afterwards on the 25th Aug. 1858 the Poor Law Commissioners made an order that the said parish of Staple-inn should, on and from the 29th day of Sept. then next, be added to the Holborn Union.

6. No expenses have ever been incurred by the union for or on behalf of the parish of Staple-inn, for the relief of the poor belonging to that parish. The said parish has not, and never has had, any poor; no rate has ever been made since it became a parish; consequently no claims for contribution to the common fund or otherwise of the said union has ever been made upon the parish of Staple-inn until the claim in question.

7. The making of the contribution order and the service on Mr. Pownall, the overseer, and demand and refusal of payment, were proved and admitted.

8. The present claim is made under the provisions of the 24 & 25 Vict. c. 55, s. 9, which enacts: "And whereas it is also expedient to alter the mode in which the contribution of parishes to the common fund of the union in which they are comprised are now calculated: be it therefore enacted, that after the 25th day of March next, the several parishes comprised in any union already formed or hereafter to be formed under the provisions of the 4 & 5 Will. 4, c. 76, shall contribute to the common fund thereof in proportion to the annual rateable value of the lands, tenements and hereditaments in such parishes respectively assessable by the laws in force for the time being to the relief of the poor, and in no other manner, whether the lands, tenements and hereditaments shall be actually rated or not, and whether the rate levied shall be collected in full, or upon any composition; provided always, that nothing herein contained shall alter or affect the liability of any parish comprised in any such union in regard to any charge lawfully created in the said union, and secured upon the poor-rates of all or any of the parishes comprised therein, which shall have been created at any time previous to the said 25th March, but the same shall continue to be charged and payable in like manner as it would by law have been charged and payable if this Act had not been passed. Provided also, that nothing herein contained shall apply to any contribution which shall be in arrear from any parish in such union on the said 25th March, but the same shall be recoverable, and shall be applicable in the same manner as if this Act had not been passed."

9. It was proved and admitted the sum so claimed was the proper contribution of Staple-inn to the common fund under this section if it is liable to contribute at all; but it was objected, on the part of the parish of Staple-inn, that it had never become part of the Holborn Union; and even if it had, inas-

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much as it had never yet contributed to the common fund of this union, and the above section was passed to alter the mode in which contributions of parishes to the common fund of the union in which they are comprised had been previously calculated, that the section did not apply to Staple-inn, and that it is not now liable to contribute under the provisions of the above section.

10. It was our opinion that the parish of Staple-inn is liable to contribute, and we made the order for payment of the said contribution accordingly.

11. The overseer of the parish of Staple-inn being dissatisfied with our determination as being erroneous in point of law, has duly applied to us to state a case setting forth the facts and grounds of our determination for the opinion thereon of the Court of Ex., under the provisions of the 20 & 21 Vict. c. 43, which, with the concurrence of the union, we have consented to do in the form agreed to by both parties, so far as we lawfully may or can under the said statute.

The opinion of the court is therefore requested whether, upon the facts here stated, the parish of Staple-inn is or is not liable to contribute to the common fund of the Holborn Union.

(Signed) WILLIAM PAYNE.

24th Jan. 1863. EDWARD WILLIAM COX.

*Manisty, Q.C. (C. H. Hopwood with him) for the resps.*—By the 20 Vict. c. 19, every place entered separately in the report of the Registrar-General on the then last census which was reputed to be extra-parochial, was, for the purposes of assessment, to be deemed a parish, and the justices were to appoint overseers. The justices did, for Staple-inn, appoint an overseer, and the Poor Law Commissioners afterwards made an order that the same parish should be added to the Holborn Union. The provisions of the 24 & 25 Vict. c. 55, a. 9, clearly apply, and the apps. are liable. *Reg. v. Boteler*, 32 L. J., N. S., 91, M. C., is directly in point in favour of the resps.

*Pickering, Q.C. (Crompton Hutton with him) for the apps.*—The apps. are not liable, as they were without poor at the time of the making of the order of the Poor Law Commissioners of the 25th Aug. 1858. The commissioners had not power under sects. 26, 28 and 32 of 4 & 5 Will. 4, c. 76, to make that order, and the order was made without jurisdiction, and was void. The parish of Staple-inn never became part of and never was added to or comprised in the Holborn Union as Staple-inn, and never contributed to the common fund of the Holborn Union at the time of the passing of the 24 & 25 Vict. c. 55, or on the 25th March 1862: it did not become liable to contribute by virtue of that Act, the object of that Act being to alter the mode of assessing the sums to be paid by the parishes contributing to the common fund of the union according to the laws then in force, and not to charge parishes which had never contributed or been liable to contribute at all. By the 4 & 5 Will. 4, c. 76, a. 28, the commissioners are first to ascertain particulars: it is a condition precedent to their proceeding, and until complied with they had no power to make such an order: (*R. v. St. Pancras*, 6 K. & E. 1.) In *Reg. v. Boteler* the order constituting the place there referred to as part of the union was after the 24 & 25 Vict. c. 55 had passed. Here, therefore, there was no power to direct Staple-inn to be a part of the Holborn Union, and consequently no power to order that Staple-inn should contribute to the common fund of that union.

*Manisty in reply.*—It is not because there never was any poor, there never may be; such as in the case of wanderers, wayfarers, lunatics, and several other descriptions of persons. The apps. may be liable in respect of their own poor and in their own parish. The fact of the parish never having contributed to the

common fund of the union when the 24 & 25 Vict. c. 55 passed, or on 25th March 1862, does not prevent them from becoming liable to contribute.

*POLLOCK, C. B.*—In my opinion the commissioners had a clear right to treat Staple-inn as a parish, and also had the right to direct, under the Acts of Parliament, that it should form part of the Holborn Union. The parish must contribute according to its capacity to pay, and that really disposes of the whole case. I think the resps. are entitled to our judgment.

*BRAMWELL, B.*—I am of the same opinion. Although the app. parish has never had any poor nor any rate made, nor in any other way whatever troubled the union, it may be considered somewhat hard upon this society, yet it is quite clear it ought to pay a something, as it may be liable for casual poor, wanderers, wayfarers, and such like. When a district is formed it is made altogether, and includes all adjoining and surrounding places, for the convenience of all, and notwithstanding it never yet has paid or contributed any burden, it may be required to do so. I think, therefore, the order of the justices was right and reasonable.

*CHANNELL, B.*—I am also of opinion that the order of the justices was right, and that the resps. in this case are entitled to our judgment. No doubt, when the order of the Poor Law Commissioners was made, Staple-inn was not contributing to the common fund, and I feel all the difficulty suggested by reason of there being no poor of the inn heretofore; but the order of the commissioners to annex Staple-inn to the Holborn Union was, in my opinion, a good and valid order, and the app. is liable by virtue of the 24 & 25 Vict. c. 55, the order now appealed against having been made since the passing of that Act.

*WILDE, B.*—I am of the same opinion. If the order of the Poor Law Commissioners were not a good order, no effect could be given to the Act of Parliament; but I agree that the order of the Poor Law Commissioners is good, and the app. cannot claim exemption from liability to the common fund of the union.

*Judgment for the resps.*

Attorneys for app., *Pownall and Co.*, Staple-inn.

Attorneys for resps., *James and Curtis*, 23, Ely-place.

## EXCHEQUER CHAMBER.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

### ERROR FROM THE QUEEN'S BENCH.

*Saturday, May 9, 1863.*

(Before *ERLE, C. J., POLLOCK, C. B., WILLIAMS and WILLES, JJ., BRAMWELL and CHANNELL, BB. and KEATING, J.*)

*HOLDSWORTH v. WILSON* (Clerk to West Ham Local Board of Health).

*Public Health Act 1848—Compensation—Arbitration—Appointment of umpire—Award of costs—Taxation.*

*Under the 11 & 12 Vict. c. 63 (the Public Health Act 1848) arbitrators may appoint an umpire after the twenty-one days limited by sect. 125 for making their award have expired without their having enlarged the time, provided such appointment be within the time limited by sect. 126 for making the umpirage.*

*So held by this Court, affirming the judgment of the Court of Q. B.*

*An award for costs generally, without ascertaining the amount, is good under this Act, and the party to receive, after delivering his bill for the amount, may maintain an action to recover them. The party to pay may have the costs taxed, but taxation is not a condition precedent to the other party's right to bring an action to recover them:*

*So held, reversing the judgment of the Court of Q. B.*

This was a writ of error on a judgment of the Court of Q.B. in an action brought by the plt. to recover the sum of 180*l.* 14*s.* 7*d.*, being the amount of compensation awarded to him, as hereinafter mentioned, for certain damage done to his property at West Ham, by the works of the Local Board of Health for the West Ham district. The action is also brought to recover the sum of 144*l.* 3*s.* 5*d.*, or any other sum to which the plt. may be held entitled for his costs of and incidental to the reference hereinafter mentioned.

By consent of the parties, a case was stated in substance as follows:—

In 1856 the provisions of the Public Health Act 1848 were adopted by the inhabitants of West Ham, and the parish of West Ham was constituted a district for the purposes of that Act, by a statute passed in 1856.

In the years 1859 and 1860, the Local Board of Health acting for the district constructed, under the powers of the Acts, extensive sewerage works, and in so doing damaged a house and other property belonging to the plt. situated within the district.

A claim was then made by the plt. on the local board for the damage he had sustained, and upon a question arising as to the amount, Mr. J. Hammack was, on the 10th Aug. 1860, appointed by the plt., in accordance with the provisions of the Public Health Act 1848, as an arbitrator to decide the question of amount, and on the 14th Aug. 1860 Mr. J. Marshall, the salaried surveyor of the local board, was duly appointed by the local board as their arbitrator.

The arbitrators thus appointed had some correspondence with reference to the appointment of an umpire, but they did not extend the time for making their award, and nothing further was done by them until the 26th Oct. 1860, when Mr. Oliver, the attorney for the plt., served upon each of the arbitrators a notice, requiring them to appoint an umpire pursuant to the statute, within seven days from the service.

On the 27th Oct. a letter was sent by Mr. Oliver to the defts., who then acted, and has since continued to act, as the clerk to the said local board, and inclosed a duplicate of the notice served on the arbitrators, and stating that if it was not done within the time stated, the necessary steps would be taken.

After this a correspondence passed between the parties, acknowledging the receipt of the notice, requesting an interview, and intimating a desire on the part of the arbitrators to appoint an umpire.

In accordance with an appointment made, the arbitrators met on the 31st Oct., and appointed Mr. Tite as umpire.

The umpire, Mr. Tite, accepted the umpirage, and having extended the time for making his award, and having viewed the premises where the damage occurred, appointed the 3rd Jan. 1861 as the day on which he proposed to proceed with the reference, of which appointment both parties had due notice.

In accordance with this appointment, Mr. Tite attended at his chambers on the 3rd Jan. 1861, and as Mr. Marshall did not attend, nor any other person representing him or on behalf of the local board, Mr. Tite proceeded with the reference *ex parte*, and having heard the evidence on the part of the plt., made his award on the 16th Jan. 1861, by which he awarded that the amount of compensation to be made to the plt. for the damage sustained was the sum of 180*l.* 14*s.* 7*d.*, and he also awarded that the costs of and consequent upon the said reference should be borne and paid by the local board.

On the 31st Jan. a copy of this award was served upon the defts., and applications were subsequently made to the local board for payment of the amount

awarded, as well as for the sum of 144*l.* 3*s.* 5*d.*, the amount claimed by Mr. Oliver for costs.

The grounds on which the local board refused to pay the amount awarded for the said compensation were, that the appointment of the umpire was void, as the power of the arbitrators to make it had expired before the 31st Oct.

The questions for the opinion of the Court were—

1. Whether, having regard to the said statute, the appointment of the umpire was too late.

2. Whether the plt. is entitled to maintain this action to recover the said costs, or any part thereof, the same not having been taxed or ascertained by the umpire, or any proper officer, before action brought.

The Court of Q. B., after argument, decided first, upon the authority of *Bradshaw's case*, 12 Q. B. 562, that the umpire was properly appointed, and that the umpirage was valid; and secondly, that the plt. could not maintain an action to recover the costs until the amount had been taxed and ascertained by the proper officer: (see the report of the case in 6 L. T. Rep. N.S. 286.)

Since the judgment, Mr. Barham, the clerk to the board, has died, and Mr. Wilson, the now deft., has been appointed in his stead.

Against this judgment the deft. brought a writ of error.

The following is the material section of the 11 & 12 Vict. c. 63:—

Sect. 125. That in case there be more than one arbitrator, the arbitrators shall before they enter upon the reference, appoint by writing under their hands an umpire, and if the person appointed to be umpire die, or become incapable to act, the arbitrators shall forthwith appoint another person in his stead; and in case the arbitrators refuse or neglect to appoint an umpire for seven days after being requested so to do by any party to the arbitration, the court of general or quarter sessions shall, on the application of any such party, appoint an umpire; and the award of the umpire shall be binding, final and conclusive upon all persons, and to all intents and purposes whatsoever; and in case the arbitrators fail to make their award within twenty-one days after the day on which the last of them was appointed, or within such extended time (if any) as shall have been duly appointed by them for that purpose, the matters referred shall be determined by the umpire, and the provisions of this Act with respect to the time of making an award, and with respect to extending to the same in the case of a single arbitrator, shall apply to an umpirage.

*Collier, Q.C. and Prentice* for the defts.—The judgment of the Court of Q. B. is erroneous. The question mainly turns on the construction of sect. 125 of the Public Health Act. By that section the arbitrators are to make their award within twenty-one days after the appointment of the last of them, and the point is, could the arbitrators, as they have done in this case, appoint the umpire after the expiration of twenty-one days from the date of the appointment of the last arbitrator? It is contended that when the twenty-one days had expired, the arbitrators power was exhausted, and that they could not do so. And sect. 126, which enacts "that the time for making an award shall not be extended beyond three months from the date of the submission, or from the day on which the umpire shall have been appointed, as the case may be," confirms that view, for otherwise the arbitrators may appoint an umpire at any time, it may be years, after the time limited for making their award has elapsed. The Court of Q. B. acted upon the authority of *Bradshaw's case*, 12 Q. B. 562, which was considered in point, but upon which some doubt was thrown. That case was a decision under the Lands Clauses Acts, when the provisions of that class of statutes was not so well understood. The present case, however, is not under that Act, and is distinguishable from that. As to the second point, that the plt. is not entitled to recover the costs, the question is so fully discussed in the judgment of Blackburn, J.

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in the court below, that it is only necessary to refer to that in support of the decision below.

*Garth* (*Houltain*, Q. C. with him) for the plt.—The appointment of the umpire was valid in this case. The decision in *Bradshaw's* case is correct. Looking at the dates in that case, there can be no doubt that the appointment of the umpire there was a valid appointment by the Board of Trade. The distinction between this case and *Bradshaw's* was not pointed out in the court below. [ERLE, C. J.—If *Bradshaw's* case came to be adjudged over again, it is possible that it might stand.] Independently of authority, it is submitted that the appointment of the umpire was good. At common law, although the time for making an award has expired, the arbitrators might appoint an umpire. The power to appoint an umpire is collateral to that of making an award, and it is convenient that it should be so regarded. In Russell on Arbitrations, p. 223, 2nd edit., it is said: "When the submission makes no special provision respecting the time when the arbitrators are to appoint the umpire, and a day is given to the umpire subsequent to that limited for the arbitrators making their award, they may appoint an umpire at any time before the time for making the umpirage has expired, for the power of appointing an umpire is quite collateral to that of making an award, and survives when the latter power is extinct;" for which, among other authorities, *Harding v. Watts*, 15 East, 556, is cited. There Lord Ellenborough said: "It is very convenient for arbitrators to begin by appointing an umpire, because they are more likely to agree upon a proper choice of one before they themselves begin to quarrel; but if the parties have not expressly restrained them from making the choice after the time for making their own award expires, there is nothing to restrain them in reason and sense from choosing the umpire at any time while he has power to act. Such a choice is collateral to the power which they themselves have of awarding between the parties. They may choose the umpire either before or after the time for making their own award expires, provided it be within the time given to the umpire." Sect. 126 limits the time given to the umpire to three months for making his award, and there is no special provision respecting the time when the arbitrators are to appoint the umpire; it is not required to be within twenty-one days from the appointment of the arbitrators. When the arbitrators fail to appoint the umpire for seven days after being requested so to do by either party, the quarter sessions may, on the application of such party, appoint one: (sect. 125.) [KEATING, J.—Is there anything which obliges the parties to give that notice to appoint an umpire within twenty-one days after the appointment of the arbitrators?] Nothing.

*Collier* in reply.—The passage from Russell on Arbitrations has no application to this case. Sect. 125 requires the arbitrators "before they enter upon the reference to appoint by writing under their hands an umpire." And although the section does not say when the arbitrators are to enter upon the reference, it does say that they are to finish it within twenty-one days or the enlarged time. If they are not to appoint the umpire within twenty-one days, within what extended time are they to do so? The object of these sections is to secure to the parties a speedy award. Can an umpire be appointed twenty years afterwards? [KEATING, J.—Might not the Legislature have thought it sufficient to give the parties the power of serving the seven days' notice to appoint the umpire and to secure the appointment of one by the quarter sessions. ERLE, C. J.—In *Bradshaw's* case the parties put the Board of Trade in action.]

*Garth* as to the second point.—The umpire gave the plt. the costs, and his solicitor delivered the bill of costs to the deft. more than a month before action

brought. It was the deft.'s duty to have made the application to have them taxed if he objected to them, and therefore, as against the deft., the plt. has a right to recover them. [BRAMWELL, B.—If the master had allowed the plt. certain payments which had not in fact been made, would that have bound the deft.? If not, is the taxation a condition precedent to the plt.'s suing for them.] On this point the judgment of Crompton, J. in the court below is in favour of the plt.

ERLE, C. J.—We are of opinion that the judgment of the court below upon the first point should be affirmed. The question that arises on this writ of error is, whether there has been a valid appointment of an umpire by the arbitrators under the circumstances stated. By sect. 125 of the Public Health Act the arbitrators before they enter upon the reference are bound to appoint an umpire, and if they neglect or refuse to do so for seven days after being requested so to do by either party, the quarter sessions, on application of any such party, are to appoint an umpire. In this case two arbitrators were appointed, one on the 10th Aug. and the other on the 14th Aug., and they have twenty-one days from the latter day, within which they are to make their award (sect. 124). By implication therefrom it is said on behalf of the deft. they have only twenty-one days within which they are to appoint an umpire; but I am of opinion that the Legislature contemplated that, if the arbitrators failed to appoint an umpire the parties might compel them to do so after that time, for the appointing of an umpire is something distinct from entering on the reference. If after the appointment of the arbitrators they within twenty-one days either neglect or refuse to appoint an umpire, then the parties can prevent the proceeding being abortive by giving seven days' notice to them to appoint an umpire, and if within that time they fail to do so, the parties can go to the quarter sessions and so get one appointed. Much was said during the argument, that to hold the appointment of the umpire valid in this case would be extending the power of the arbitrators to appoint an umpire to a very indefinite period. I do not intend to lay down any such indefinite principle. The rule that has been read from Russell on Arbitrations I intend to follow, and to hold that the appointment of the umpire will be good under this Act, if made within the time allowed for making the umpirage. And the courts have so held that if the umpire is appointed by the arbitrators within the time fixed for the making the umpirage, though they cannot make their award then, yet they may appoint an umpire. Now in this case the time is fixed for making the umpirage, and before the end of three months from the date of his appointment the umpire would be bound to make his umpirage if he does his duty. The time can never be extended beyond six months for making the umpirage. We are therefore of opinion that, on the construction of the Health of Towns Act, the power existed of appointing the umpire as was done in this case. I further take leave to say, with respect to *Bradshaw's* case, for the preparation of the judgment in which I am responsible, that that decision was perfectly sound. There the Board of Trade did appoint the umpire, and the court adjudicated that he was well appointed. We therefore think that the judgment of the Court of Q. B. should be affirmed on the point as to this being a valid umpirage, and the appointment of the umpire being valid. With respect to the other point as to the question of the costs, we are of opinion that the judgment of the court below was wrong. We consider that the award would be valid for the amount of compensation and the costs. Between parties in an action in the Superior Courts an award for costs means the judicial costs of the litigation, and that the costs are to be ascertained ministerially by the proper officer, who is to have authority

to settle the amount, and the same rule applies to an award like this. The plt. in this case sent in the amount of costs and brought an action to recover them as a liquidated sum, which they are in this sense, that they can be settled at any time by going before the taxing officer for that purpose. The taxation is for the benefit of the party by whom the costs are to be paid, and it is not a condition precedent to the action being brought to recover them. On this point the judgment of the court below will be reversed.

The rest of the Court concurring,

*Judgment of the Q. B. affirmed on the first point and reversed on the second point.*

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

*Saturday, May 30, 1863.*

(Before COCKBURN, C. J., POLLOCK, C. B., WILLIAMS and CROMPTON, JJ., and BRAMWELL, B.)

REG. v. LEWIS LEE.

*False pretences—Existing fact.*

*The prosecutor lent 10l. to the prisoner on the false pretence that he was going to pay his rent, and if the prisoner had not told him that he was going to pay his rent, the prosecutor would not have lent the money:*

*Held, that this was not a false pretence of any existing fact to warrant a conviction.*

Case reserved for the opinion of this Court by the Chairman of the Devonshire Quarter Sessions.

Devon to wit.—At the general sessions of the peace of our Lady the Queen, held at the Castle of Exeter, in and for the county of Devon, on Tuesday, the 12th day of May, in the twenty-sixth year of the reign of our Sovereign Lady Victoria, by the grace of God Queen of the United Kingdom of Great Britain and Ireland, Defender of the Faith, and in the year of our Lord 1863, before Baldwin Fulford, John Northmore, Esquires, and others their companions, justices of our said Lady the Queen, assigned to keep the peace of our said Lady the Queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses and other misdemeanors in the said county committed,

Lewis Lee was indicted and tried for obtaining money by false pretences.

The following is an extract of so much of the indictment as sets out the charge:—

That, "contriving and intending to cheat and defraud, he did, unlawfully, knowingly and designedly falsely pretend to one James Oliver Hill that he the said Lewis Lee had to pay his rent to the Squire, meaning thereby Richard Sommers Gard, on the 1st of March then next, but, as that day was Sunday, he had to pay the said rent on the Monday then following, and that he, the said Lewis Lee, wanted 10l. to make up his said rent; by means of which said false pretence, the said Lewis Lee did then and there, to wit, on the 27th day of Feb. in the year aforesaid, at Monkton aforesaid, unlawfully obtain from the said James Oliver Hill 10l., the money of the said James Oliver Hill, with intent then and there to cheat and defraud. Whereas, in truth and in fact, the said Lewis Lee had not to pay his said rent on the 1st of March then next, or on the Monday then following. And whereas, in truth and fact, the said Richard Sommers Gard had not fixed with the said Lewis Lee to pay his said rent on the said 1st day of March, or the following day. And whereas, in truth and in fact, the said Lewis Lee did not want the said 10l. to make up his said rent. And whereas, in truth and in fact, the said Lewis Lee did not, on the said 1st day of March then next, or on the Monday then following, or at any

other time afterwards, pay his said rent, or the said sum of 10l. for his said rent. And the said Lewis Lee, at the time he so falsely pretended as aforesaid, well knew the said pretence to be false."

The following facts were proved in evidence:—That prisoner was a tenant to the said Richard Sommers Gard, and owed him 180l. for rent, and that he had promised Mr. Gard's bailiff to pay it in February; that he did pay part of in February, and promised to pay the remainder the first week in March. That James Oliver Hill, the prosecutor, was also tenant to Mr. Gard, and lived on the adjoining farm; and, on Wednesday, the 25th Feb., he was on the prisoner's farm, and saw there stock worth 200l. or more. That the prisoner had been, for some weeks, in treaty with prosecutor's father-in-law to let him a field to grow flax, for which prisoner asked him 5l. an acre. Prosecutor's father-in-law had offered him 4l. 10s., and they were to meet on Monday or Tuesday, the 2nd or 3rd of March, to make final settlement. It had been agreed that the rent of a field should be paid thus: 10l. on taking possession, 10l. in May 1863, and the remainder when the flax was cleared.

The prosecutor owed prisoner 16l. 10s. for a haifer and some hay, and on Friday, the 27th Feb., prisoner called on him in the evening to settle the debt. Prosecutor put down two 10l. notes, but the prisoner said he could not give change, upon which it was arranged that the prisoner should take one of the 10l. notes and that the balance should be paid at the Honiton market the next day, which was done. Prisoner then said: "I am going to pay" or "I have got to pay" my rent to the Squire on the 1st of March, but as that is Sunday, I am going to pay it the next day. Will you advance 10l. for your father-in-law on the rent of the flax field?" Prosecutor replied, "I do not wish to be mixed up with my father-in-law's affairs, but you will see him on Monday or Tuesday, when you can make a settlement of everything." Prisoner then said, "Will you lend me 10l. till Tuesday or Wednesday, and I will give you a note of hand for it, to make it all business-like." Prosecutor then lent him 10l., and prosecutor a formal promissory note for that amount. Prisoner did not say he required the sum of 10l. to make up his rent; but the prosecutor stated that he believed that was what he wanted it for. The prosecutor in his evidence stated that, if he had not told him he was going to pay his rent, he should not have let him have the money.

It was also proved that for about ten days previous to the 27th Feb. prisoner had made arrangements to emigrate to New Zealand, and had taken a passage for himself and his family, and had obtained a grant of land there. That on Saturday evening the 28th Feb. he and his family privately left Monkton for London to go to New Zealand, having previously cleared off all his effects, cattle, corn, implements, and the best of his household furniture. He did not go to pay his rent, which is still unpaid; but at the time he obtained the 10l. from Hill he well knew that he was (as appeared from his letters, which were in evidence) about to leave the next day for New Zealand, and he did so leave. He was, however, apprehended at Deal, where he was waiting for the ship on board which his family had embarked at Gravesend, he having left Gravesend for fear of the police, as appeared by his letters.

The jury found the prisoner guilty, and stated their opinion that the prisoner's statement that he was going to pay his rent on the Monday was a false pretence, and that the money was advanced on the credit of that false pretence.

The prisoner was thereupon sentenced to twelve calendar months' imprisonment with hard labour; the hard labour not to commence until the decision of the

Criminal Court of Appeal on this case, and he remains in custody under this sentence, as well as under civil process for debt.

The Court agreed to submit the following questions for the opinion of the Court of Criminal Appeal:—

1. Whether the indictment, upon the face of it, shows a false pretence? and,

2. Whether the statement of the prisoner, as shown in evidence, is a false pretence within the meaning of the 88th section of the 24 & 25 Vict. c. 96?

BALDWIN FULFORD, Chairman.

No counsel appeared on either side.

COCKBURN, C. J.—The facts stated to have been proved in this case do not warrant the conviction. The money was advanced on the credit of the false pretence that the prisoner was going to pay his rent; but that is not a false pretence of any existing fact, although it is found that the prisoner had not the intention of paying his rent. The conviction must therefore be quashed.

The rest of the Court concurring,

Conviction quashed.

Saturday, May 30, 1863.

(Before COCKBURN, C. J., POLLOCK, C. B., WILLIAMS, and CROMPTON, JJ., and BRAMWELL, B.)

REG. v. JARRALD AND OST.

*Larceny Act—24 & 25 Vict. c. 96, s. 58—Being armed with intent to break and enter by night—Indictment—Proof.*

Under the 24 & 25 Vict. c. 96, s. 58, which enacts that "Whoever shall be found by night armed with any dangerous or offensive weapon or instrument, with intent to break or enter into any dwelling-house or other building," it is necessary to state in the indictment and prove in evidence the ownership of the building in order that the jury may know the charge they have to try, and the prisoner the charge he has to meet.

Case reserved for the opinion of this court by the Chairman of the Suffolk Quarter Sessions, held at Bury St. Edmunds.

At an adjourned sessions, held for the county of Suffolk at Bury St. Edmunds, on the 16th March 1863, William Jarrald and Thomas Ost were tried upon the following indictment:—

Suffolk to wit.—The jurors of our Lady the Queen upon their oath present, that William Jarrald and Thomas Ost, on the 21st Feb. 1863, were found by night, to wit, at the hour of half-past three in the morning of the same day, armed with a certain dangerous and offensive weapon and instrument, to wit, a loaded gun, with intent then to break and enter a building, to wit, a malting, and to commit a felony therein, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her heirs and dignity.

It having been proved that the prisoners were found in a field adjoining to three separate and distinct maltings, and that they were going in a direction which would lead them to any one of the three—the maltings being the property and in the occupation of three different owners, viz. Coe, Ardley and Branwhite—the counsel for the prisoners, at the conclusion of the case for the prosecution, objected that the indictment ought to have stated the ownership of the building mentioned, and the place where it was situate. No amendment was made; and the prisoners were both found guilty, and each was sentenced to three years' penal servitude.

The question submitted for the consideration of the Court of Criminal Appeal is, whether under the circumstances above stated the prisoners were rightly convicted. PEREZ HUDDLESTON, Chairman of the

said Court of Quarter Sessions.

*Bushor* for the prisoners.—It is submitted that this conviction cannot be sustained. The indictment is bad because the ownership and situation of the malting are not stated therein. The indictment is founded on the 24 & 25 Vict. c. 96, s. 58, which enacts that "whoever shall be found by night armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling-house or other building whatsoever, and to commit any felony therein; or shall be found by night having in his possession without lawful excuse (the proof of which excuse shall lie on such person) any picklock, key, crow, jack, bit, or other implement of housebreaking, or shall be found by night having his face blackened or otherwise disguised, with intent to commit any felony therein, shall be guilty of a misdemeanor, and being convicted thereof, &c." Although the venue in the margin renders it unnecessary to state the county in the body of the indictment, still it would not be sufficient that the prisoners were found by night in the county merely, or that the malting was situate in the county merely. The section is placed in the series headed "as to sacrilege, burglary and housebreaking," in all which offences it is necessary to allege in the indictment the ownership and situation of the property. The evidence shows that there were three maltings belonging to three different persons, and the indictment should have stated the name of the owner and the situation of the one, the prisoners intended to break and enter. [POLLOCK, C. B.—Supposing the prisoners had been overheard to say that they intended to break into whichever of the three they found most convenient, would they be punishable because it could not be specified that they intended to break into any particular one?] The indictment might have contained as many counts as there were different buildings and owners. [COCKBURN, C. J.—But then it might be said that the jury would have the same difficulty in specifying the particular one into which the prisoners intended to break and enter.] The criminal law does not punish a man for having a general criminal intention; a particular intent must be alleged and proved. Unless it can be said that a man is going to break into some one house in particular he cannot be convicted under this Act of Parliament. Stating the charge so generally in the indictment gives the prisoners no information as to the offence of which they are accused, and which the prosecutor is going to prove against them. The prosecutor upon this indictment might go before the grand jury and give evidence as to the premises of A. B., and thereupon procure a true bill to be returned, while at the trial the indictment would be satisfied by giving evidence of an intention to break into premises of a different person in a different part of the county. Again, consistently with what is alleged in the indictment, the intent might be to break into the prisoner's own malting. If the charge had been with intent to break and enter a dwelling-house, it would have been clearly insufficient to allege the charge so generally in the indictment. The precedent in Archbold's Crim. Plead. states the ownership and situation of the premises. In 1 Russ. on Crimes, 824, it is said: "It is necessary to ascertain with exactness the felony really intended, as it must be laid in the indictment and proved agreeably to the fact. And a felony intended to be committed, will not support an indictment charging a felony actually committed." In *Res v. Ridley*, Russ. & Ry. 515, where the first count of the indictment alleged that the deft., at the parish of W., in the county of N., having entered into a certain close there situate, with intent there illegally to kill game, was there found at night armed with a certain gun; and the second count charged him, in like manner with having entered into a certain inclosed ground, but

neither the close nor the inclosed ground were described by name, ownership, occupation, or abutals; the majority of the judges thought the description insufficient, because it was substantially a local offence, and the deft. was entitled to know to what specific place the evidence was to be directed, and judgment was arrested. The same rule is laid down in Starkie on Criminal Pleading, that it is necessary to specify the ownership and situation of the premises in order to identify the offence charged.

*Orridge* for the prosecution.—This is not a local offence, and it is not necessary to allege the ownership and situation of the premises in the indictment. [COCKBURN, C. J.—Must you not identify the charge so as to enable the prisoner to know what he has to meet?] The recent cases on the game laws are analogous, where it was held that it was not necessary to show that the prisoner had come from some land, and that the presumption of that fact might be drawn from the surrounding circumstances.

*Evans v. Botterill*, 8 L. T. Rep. N. S. 272;

*Brown v. Turner*, 7 L. T. Rep. N. S. 683.

[COCKBURN, C. J.—The Poaching Act, 25 & 26 Vict. c. 114, was passed to meet a particular case, where there is good reason to suspect that men have been out poaching, and it is impossible to trace them to any particular place.]

The 14 & 15 Vict. c. 100, s. 24, was then referred to.

COCKBURN, C. J.—I am of opinion that this conviction cannot be sustained. The first question is, What is the offence created by the Legislature? According to Mr. Orridge's contention, any man found by night with a dangerous or offensive weapon, or some instrument from which it is impossible to doubt that he is going to break into some house or building, is guilty of misdemeanor. I do not think that is so, and I am of opinion that there must be a definite intention to break into some particular house. As to whether there must be an intention to commit a particular felony upon the point I say nothing. It is not enough to say that a man intended to break into a house generally. The rules of criminal pleading must not be lost sight of, and it must not be forgotten that there is no opportunity of getting a new trial in criminal cases on the ground of surprise, or that, if the deft. had had a better knowledge of what the nature of the offence charged was, he might have been able to meet it. The jury and the prisoner ought to know the precise offence charged against the prisoner, and as this does not appear on the indictment, I think the conviction cannot be sustained.

POLLOCK, C. B.—I am of the same opinion. I will merely add, that Cockburn, C. J. has placed the doubt I felt in such a point of light that I feel his construction of the Act must be so. If a man is found at night with a pair of pistols and burglarious instruments upon him, under circumstances that there can be no doubt that he is out for a criminal purpose, the statute never intended that such a case as that should be the subject of penal servitude. Unless the statute goes that length this indictment is bad.

WILLIAMS, J.—I am of the same opinion. If sect 58 intended that it should be a crime if a person was found at night armed with an offensive weapon or instrument with intent to break or enter into any dwelling-house, and commit a felony therein, although it could not be ascertained what dwelling-house, and although it could not be ascertained what felony he intended to commit, then this indictment is good. But I think the statute did not mean that, and that it is necessary to specify the ownership and situation of the premises the deft. intended to break into.

CROMPTON, J.—I am of the same opinion. I think that the indictment is good only in case it shows an intention to break and enter some definite dwelling-house or building, and to commit some definite felony

therein. Under a particular statute it was not necessary to specify the mode in which a murder was alleged to have been committed. But you must specify a definite crime. In this case I think no crime was proved, for it was open to the jury to infer that the prisoners intended to break and enter into any one of the three malting-houses; that is just the same in principle as any one of 300. The words, to commit "any" felony therein, are the same as to break and enter into "any" dwelling-house, as to which all the precedents show that it is necessary to allege the ownership and situation of the premises.

BRAMWELL, B.—I concur. Conviction quashed.

## V. C. STUART'S COURT.

Reported by JAMES R. DAVIDSON, Esq., of Lincoln's Inn, Barrister-at-Law.

Jan. 30 and 31, and Feb. 10, 1863.

SLEE v. THE MAYOR, &C. OF BRADFORD.

*Setting back line of new buildings*—Local Government Act of 1858, sects. 34 and 35—*Bye-laws*—Public Health Act—*Towns Improvement Clauses Act*—Committee of town council—Approval by committee—Powers of local board.

The town council of a borough (being also the "local board" under the Public Health Act 1846), under powers contained in their local Act, appointed a "building and improvement committee," whose duty it was to execute the powers vested in the town council by the 34th section of the Local Government Act 1850.

Plt., a manufacturer, being desirous of pulling down his manufactory in the borough, and of erecting a new one, sent plans and sections of his proposed new building to the surveyor of the council, who returned to him an approval of the plans by the building and improvement committee, but accompanied by a note (in a printed common form) stating that the ratification of the approval of any plans and particulars by the committee referred only to such matters as were required to be set forth or described therein in accordance with certain bye-laws; and that the approval of the committee gave no authority for the making of any projection on the front of any building into any street beyond the proper line of such street, &c. The bye-laws had been made under the provisions of the Local Government Act 1858.

Relying on this approval, plt. pulled down the manufactory, and afterwards received a notice from the town council (acting under the 35th section of the Local Government Act 1858), that any building thereafter to be built must be built on the line marked red in the plans thereto annexed, which line was about 13 feet behind the mark on the plans which had been approved by the committee:

Held, that the town council were not at liberty to give any such notice after the notice of approval by their committee given by their surveyor, and injunction granted to restrain the council from interfering in any way with the erection of the building according to the plans and sections which had been approved.

The 34th section of the Local Government Act 1858 empowers a town council (being a local board) to make a bye-law requiring a notice, plans and sections of a new building to be given to the council. The 35th section of the same Act applies only to such buildings as have been taken down "without any previous approval" of a plan for their re-erection.

This was a motion for an injunction.

In the year 1850 a local Act, 13 & 14 Vict. c. lxxix., was passed for the better regulation and manage-

ment of the borough of Bradford. It incorporated portions of the Public Health Act 1846 (11 & 12 Vict. c. 63), and several provisions of the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34).

By sect. 11 of the Bradford Improvement Act, the town council (who, by another section, were constituted the local board of health under the Act of 1846) were empowered to appoint out of their own body, from time to time, a committee, "for all or any of the purposes of that Act," and it was provided that "the acts of the committee should, in case the council should so order, but not otherwise, be submitted to the council for their approval." Further than the above expressions there appeared to be no power vested in the council of delegating their power to a committee.

Under this section a committee, called "The Building and Improvement Committee," was appointed.

By the 68th section of the Act of 1847, it is enacted that, "When any house or building, any part of which projects beyond the regular line of the street, or beyond the front of the house or building on either side thereof, has been taken down in order to be rebuilt or altered, the commissioners may require the same to be set backwards, to or toward the line of the street, or the line of the adjoining houses or buildings, in such manner as the commissioners direct, for the improvement of such street; provided always, that the commissioners shall make full compensation to the owner of any such house or building for any damage he thereby sustains."

In the year 1858 the Local Government Act (21 & 22 Vict. c. 98), was passed. By sect. 4 it was provided that the Act should be construed together with, and be deemed part of, the Public Health Act 1846; and that bye-laws framed under that Act should be subject to confirmation, enforced and dealt with in all other respects as bye-laws under the Public Health Act. It was also enacted that local boards under that Act should have all the powers, &c. of local boards of health constituted under the Public Health Act 1846 and the Acts incorporated therewith.

Under the powers given by the Local Government Act 1858, bye-laws were made by the town council of Bradford, and duly approved in the year 1850 by the Secretary of State. The 20th of such bye-laws is as follows:—

Every person who shall intend to erect any new building shall give a fortnight's notice to the council of such intention by writing, delivered to the surveyor, or left at his office, and shall at the same time leave or cause to be left at the said office plans and sections of every floor of such intended new building, drawn to a scale of one inch to every eight feet, showing the position, form, and dimensions of the several parts of such building, and of the water-closet, privy, cesspool, ashpit, well, and all other appurtenances, and such plans and sections shall be accompanied by a description of the intended mode of drainage and means of ventilation of drains, and of the materials of which the drains are to be made, also of the construction and dimensions of the chimneys and flues, and means of water supply. A plan shall be left at the same time showing the position of the buildings and appurtenances of the properties immediately adjoining, the width and level of the street, the level of the lowest floor of the intended building, and of the yard or ground belonging thereto. The plan shall show also the proposed lines of house drainage, and their size, depth and inclination.

Subsequently, in March 1862, the bye-laws were altered, and the 24th altered bye-law (confirmed in April 1862) was as follows:—

The council shall by their order approve or disapprove proposed new works or buildings within the times severally specified herein for the deposit of notices thereof.

The p<sup>l</sup>ts. were leather merchants, tanners and mill-band makers, carrying on their business in partnership in a manufactory and tan-yard built upon a piece of land abutting on a street called Chapel-lane, held by them under an agreement for a lease for a term of twenty-one years.

The bill alleged (par. 6) that "shortly before the

month of May 1862 the p<sup>l</sup>ts. being desirous of effecting extensive improvements in their said manufactory and premises, determined to pull down and rebuild on the same site their said buildings, in case such rebuilding should be permitted by the def<sup>t</sup>'s council, and for the purpose of ascertaining whether such rebuilding would be so permitted, and also in compliance with the 20th bye-law, which was and still is in force, they caused to be prepared by Messrs. Andrew and Delannay, architects, certain plans, sections and particulars of the said proposed new buildings, such as were required by the said 20th bye-law; and they caused such notice in writing to the def<sup>t</sup>'s council of their said intention to erect such new buildings as was required by the said 20th bye-law to be delivered to the surveyor of the said council or left at his office as required by the said bye-law," together with the said plans; "and they the said p<sup>l</sup>ts. in all respects complied with the said bye-law."

Paragraph 7 of the bill alleged that "the p<sup>l</sup>ts.' said notice, plans, sections and particulars were laid before the Building and Improvement Committee of the said council . . . and the committee by their resolution duly and finally approved of the same." The bill proceeded to charge that such approval and resolution were duly entered on the minutes of the council and of the committee, but the p<sup>l</sup>ts. were ignorant of the precise date. The p<sup>l</sup>ts. also charged that such approval was the approval of the def<sup>t</sup>'s council, and was a due exercise of the jurisdiction vested in that behalf in the def<sup>t</sup>., and became and was irrevocably binding on the def<sup>t</sup>s.

The plans and sections so sent showed the dimensions and relative situations of the parts of the proposed new building, and also its proposed site with reference to the adjacent buildings and the line of the street.

On the 15th May 1862 a letter was received by the borough surveyor, stating that the committee of the council had approved the plans; but at the foot of the letter was a note stating that such approval did not give the consent of the committee or council to any part of the plans deposited, or to the doing of any work whatsoever, other than that set forth and described in the bye-laws; and that such approval gave no authority for the making of any projection beyond the proper line of the street.

The p<sup>l</sup>ts., believing that they had by such letter a sufficient approval of their plans, proceeded to take down their manufactory.

It appeared that, on the 24th June 1862, when the buildings had been taken down, the town council passed a resolution to the effect that a resolution of the Building and Improvement Committee, with reference to the buildings proposed to be erected by Mr. Henry Slee, should be approved; and the council thereby authorised the same committee to prescribe the line on which the new building was to be built, and to give notice that the line of frontage should be set back; and for this purpose the committee were to have the authority of the town council.

On the 25th June 1862 a resolution was passed by the said committee, whereby it was ordered, that the buildings recently occupied by Mr. Slee having been pulled down, any house or building to be thereafter built on the site thereof, or of some part thereof, should be built on the line marked red in certain plans thereto annexed.

On the 27th June a copy of this resolution was sent to the p<sup>l</sup>ts. A notice was also given of the intention of the town council to purchase the piece of land between the old line of street and the new line of frontage as prescribed. This notice was afterwards withdrawn, and various notices in reference to the questions of purchase and arbitration, and as to damages or value, passed between the parties.



V.C. S.]

SLEE v. THE MAYOR, &amp;C. OF BRADFORD.

[V.C. S.]

The last of these notices, dated 5th Jan. last, was signed by the mayor, and gave the p<sup>l</sup>ts. notice that, if for twenty-one days after service they failed to state the particulars of their claim in respect of the premises, or to treat with the corporation, or if the p<sup>l</sup>ts. and the corporation should not agree as to the amount of compensation to be paid by them for any loss to be sustained by the p<sup>l</sup>ts. in consequence of the house or building being set back, the amount would be settled under the provisions of the Lands Clauses Act.

The bill prayed that the defts. might be restrained from proceeding to summon a jury, from interfering with the p<sup>l</sup>ts. in rebuilding their premises, from enforcing any penalty against the p<sup>l</sup>ts., and from attempting to enforce any order requiring the p<sup>l</sup>ts.' building to be erected on the prescribed line.

*Maitre, Q. C. and Bagehawe*, for the p<sup>l</sup>ts., now moved in the terms of the prayer of the bill. They argued that the town council, having given their consent on the 14th May, were not justified afterwards in exercising the powers vested in them by the 35th section of the Act of 1858.

*Sir Hugh Cairns, Q. C. and Freeling* for the defts.—Whether or not the council had authority under the local Act (and it was submitted they had not) to delegate their powers in respect of setting back new buildings to a committee, they never did, as a matter of fact, delegate any such power to any committee.

*Maitre* replied.

The VICE-CHANCELLOR.—The question in this case is of great importance. It involves the construction of three Acts of Parliament, of two bye-laws, and of a qualified notice of approval upon the terms of which the p<sup>l</sup>ts. mainly rely. The p<sup>l</sup>ts. are the owners and proprietors of a manufactory in the town of Bradford, in which they carry on the business of leather merchants, tanners and mill-band makers, in partnership. They had a design for pulling down and re-erecting the greater part of this manufactory upon an improved plan. Before proceeding to pull it down, being aware that the corporation of Bradford and the town council, under the powers of their Act of Parliament, must approve of what was to be done, they endeavoured to proceed to give the proper notices in compliance with the Acts of Parliament and the bye-laws of the council. It is necessary to consider, first of all, whether, with reference to pulling down and re-erecting a building of this kind, the bye-laws have any application; for it has been contended, on the part of the defts., the town council, that, upon the true construction of the Act of Parliament in question, they have no power to delegate their authority to approve the plans of rebuilding with reference to lines of the streets to any committee at all; and that they have no power to make bye-laws upon that subject, but that the power on the subject is reserved to themselves. The first observation with reference to that is, that the p<sup>l</sup>ts. served their notice and delivered the plans which were submitted for approval, not to any committee, but to the council according to the form prescribed by the Act. Upon that I think there is no question between the parties. The plans indicated the position in which the front of the new building was to be rebuilt with reference to the adjoining property. The bye-law requires that there should not only be plans and sections showing the position of different parts of the building with reference to other parts; but that, also, there should be a plan clearly indicating the position of the new building with reference to adjoining property and the line of the street. The first question is, whether or not that bye-law was authorised by the Act of Parliament; and, considering that this is an interlocutory application, what the court is to consider is, whether the present application is to be refused, the consequence of which must be to place the p<sup>l</sup>ts. in a position

in the highest degree inconvenient to them, for they will not be able to proceed with their new buildings unless they submit to what is required of them by the town council; or whether the court is not, till the questions involved in this suit are decided at the hearing of the cause, to restrain the defts. from interfering with the p<sup>l</sup>ts. rebuilding their manufactory according to the plans which were approved by a committee. The 68th section of the Act of 1847, which is incorporated in the Bradford Improvement Act 1850, provides that "where any house or building, any part of which projects beyond the regular line of a street, or beyond the front of the houses or buildings on either side, has been taken down in order to be rebuilt or altered, the commissioners may require the same to be set backward to or toward the line of the street or the line of the adjoining houses." That is a power given by the Act of 1847, and the Act of 1850 in the 11th section, according to the best construction I can put upon the difficult language of it, as applied to a case like the present, seems to authorise the town council to make bye-laws with reference to that subject. Now the Public Health Act 1846 is incorporated with the Act of 1858, upon the construction of which the case of the defts. has been mainly rested. The 34th and 35th sections of the Act of 1858 refer to the rebuilding in towns of houses which have been taken down. But it is said for the defts. that the 34th section, although providing that bye-laws may be made on various subjects, does not authorise any bye-law to be made by the local board with reference to a question like that now before the court. Upon the best construction I can put upon the language, that seems to me to be a mistake. The reason why I think there was a power to make a bye-law upon this subject is this, that the question here is, in what position with reference to the line of the street is the front of the new building to be re-erected. It is obvious that the reason why the corporation of Bradford wish to have the front of the building removed further back is, that the street may be widened. Now the question here seems to me to be simply respecting the width of the street, for the width of the street must depend upon the position of the front of this house. Now the very first thing on which the local board is authorised to make bye-laws by the 34th section, is, "with respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof; with respect to the structure of walls of new buildings," and so on; and then they may provide for the observance of this by requiring notice to be given as to the deposit of plans and sections by persons intending to lay out streets, or to construct buildings. The plan submitted by the p<sup>l</sup>ts. for approval was a plan with reference to the construction of a building; but the latter part of the clause says that "for the purpose of this Act, the re-erecting of any building pulled down to or below the ground-floor shall be considered the erection of a new building." That is this very case. This is not the erection of a new building; it is the erection of a building which, according to the words of this section, has been pulled down, and is proposed to be rebuilt; and that is treated on the same footing, with reference to bye-laws, as the erection of new buildings. It is quite plain that the local board of Bradford put that construction upon it, for they made a bye-law under which the present p<sup>l</sup>ts. had the very difficult task of endeavouring to proceed. The 20th bye-law is in these terms: "Every person who shall intend to erect any new building, shall give a fortnight's notice to the council of such intention, by writing delivered to the surveyor, or left at his office" (that is, notice to the council, not to any committee); "and shall, at the same time, leave or cause to be left at the said office, plans and sections of every floor of such intended new building, shewing

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the position, form and dimensions of the several parts of such building," with other words which it is not necessary to refer to. The first plan required to be deposited is one to show the dimensions of the various parts of the new buildings. Then, besides that, this is required: "A plan shall be left at the same time, showing the position of the buildings and appurtenances of the properties immediately adjoining, the width and level of the street," &c. Notice was given to the council, and plans were deposited. It is stated in the bill that "shortly before the month of May" (the particular date I do not find) "the p<sup>l</sup>ts. caused a notice in writing to the defts.' council of their intention to erect such new buildings as was required by the 20th bye-law to be delivered to the surveyor of the said council, or left at his office as required by the bye-law." Now, the plans and sections so left were several. They showed not only, as required by the bye-law, the dimensions and particular position of every part of the new building, with reference to other parts of the new building; but, as mentioned in the bye-law, they showed the position of the front of the building with reference to the adjoining properties. On the 14th May the borough surveyor informed the p<sup>l</sup>ts., "Your plans, sections and particulars of a carrier's warehouse and offices proposed to be erected in Chapel-lane, for Mr. Henry Slee, have been laid before the Building and Improvement Committee of the council, and that said committee has approved of the same." Now, whether the committee had or had not the power to approve, is a question that must be dealt with; but, assuming for a moment that they had the power, it is said that this approval was only a qualified approval, and so qualified as to reserve in express terms to the council the power of altering the line of the new building, with reference to the position of the street. The question therefore is, what, upon the construction of the qualification annexed to the approval, had been done with reference to reserving a power to approve of the line of the new building with reference to the line of the street. This note says that "the ratification of the approval of any plans and particulars by the Building and Improvement Committee refers only to such matters and to such parts of the said plans and particulars as are required to be set forth, shown, or described thereon in accordance with the bye-law." Now it appears from what I have said that the bye-law required as one of the particulars a plan of the line with reference to the adjoining buildings, but it is said that the words of qualification are to be found in this passage: "It will therefore be understood that the approval of the committee gives no authority whatever for the making of any projection on the front of any building into any street beyond the proper line," and so on; "nor for the placing of any building material on any part of any street or road, nor," and here are the material words, "nor (with reference to plans of buildings) of any lines or widths or causeways or streets, nor of the height of any new chimney proposed to be built in connection with any mill, manufactory, or business premises whatsoever, although any or all of such matters may be fully set forth, shown, or described in the plans, sections and notices deposited with and approved by the committee." Now that would seem greatly in favour of the construction of the defts.; but mark the words that follow: "But in every case in which such work, alteration, interference," &c., that is, with the width of the street or the line of the building, "is required to be done, separate and specific notice thereof must be given to the borough surveyor, and the consent or permission of the committee or council obtained for every such work." Now specific notice, as specific as a plan could give, was given on the uppermost of the plans deposited before me, which shows exactly the time in which the front of the building was pro-

posed to be erected by the p<sup>l</sup>ts. Therefore it seems to me that this qualification of the approval in no degree interfered with that upon which the p<sup>l</sup>ts. insist, namely, that their plan gave notice of, and showed everything that was required to be submitted with reference to the line of the new building for the approbation of the committee or of the council. If that is so, the question is reduced to this, whether the council have, under the 35th section of the Act of Parliament, a power reserved to them to contravene any effect which may have been given by the approval of the committee; for that the approval of the committee was given to this line of building under as specific a notice as their bye-law and their intimation of the qualification, which is annexed to their approval required, seems to me sufficiently established. The 35th section of the Act of 1858 is in these terms: "When any house or building has been taken down in order to be rebuilt or altered, the local board may prescribe the line in which any house or building to be hereafter built shall be erected," at the same time making compensation, and so on. The difficulty is in reconciling the absolute and clear language of this clause with what is previously stated in the 34th clause; but taking the two together, it seems to me (as my impression is, that the 34th section authorised the local board to make bye-laws upon this subject), that the 35th section can only be considered to apply to the case in which a building has been taken down without any previous approval of the plan. I am not aware of any other way of reconciling the two provisions; because, the other construction contended for the defts. involves this, which, I think, never can have been intended by the Legislature, that, although a man's plans and sections of his building may have been approved of, it is not until he has actually taken down his building, and whether he has had them approved of or not, that the question of how it is to be re-erected, with reference to the line of the street, is to be considered and determined. It seems to me reasonably plain that, if the object of the Act of Parliament was the improvement of the line of street, it could never have been intended by this section to say, that although before the building was taken down plans and sections with reference to the line of the building, as in connection with the line of the adjoining buildings and streets, had been approved of, and the owner of the building took it down upon the faith of its being erected in the old line, yet, when the building is taken down, a new power arises, and the town council have the right of saying, "Although you took it down, fairly expecting to build it up in the old line, now arrives the time when our power comes into operation, and we will prohibit you." That seems to me not a reasonable construction; and it is one which the court could only adopt if it were forced upon it by clear and unqualified language. The language of the 34th section, taken in connection with the 35th, seems to me to show that there is nothing in the 35th section (which says nothing about plans) which is intended to interfere with what has been done with reference to the approbation of plans of new buildings to be erected in relation to the line of the street. At the same time it is impossible not to see that there is very great difficulty in the matter. The difficulty is illustrated by this, that when the town council resolved to interfere with what the p<sup>l</sup>ts. were about to do on the faith of the approval of the plans, they now admit they entirely misunderstood the construction of the Act of Parliament, and lost their way as completely as they say the committee did when it approved of these plans and sections; for their notion was that they had, under the Lands Clauses Act, a power to purchase all that piece of ground that would be left between the old line of the street and the new line of the front which they insisted on the p<sup>l</sup>ts. erecting; and they gave notice for

the purchase, and entered into other proceedings, which it is needless to consider more minutely now, because it seems to be thought that the view then taken was a mistake, and has been abandoned by the defendants. The question, then, resolves itself into this, whether or not, when, endeavouring to act in compliance with Acts of Parliament of very difficult construction, the owners of a manufactory have delivered plans for the approval of a town council, and the council by their committee signify the approval of their plans, and when, on the faith of that approval, the building is taken down, it is competent to the defendants to say: "Your plan, so far as it relates to the front of your building, shall be entirely altered, and we will require you to set back the front of the building to a position entirely different from that indicated by your plan with reference to the adjoining buildings and the width of the street?" I have already stated my impression that, with reference to the width of the street and the erection of buildings, the council had power to make bye-laws. My impression is, with reference to the proceedings under those bye-laws, that the plaintiffs gave such notice as was necessary, not only as to the plans of the particular parts of the building, but as to the position of the front of the building with respect to the line of street; that, under such circumstances, the approval given by the surveyor, not of the committee, but of the council, that is to say, of the local board, is one upon the faith of which they were justified in their proceedings, and that the defendants have no right now to interfere after that approval has been given, and to do anything in the way of threat, or any act of any kind whatsoever, to testify their disapproval of what they formerly approved, or to interfere with the plaintiffs in re-erecting their building according to the plan which was approved with reference to the line of the street. It has been argued that, although the defendants have insisted upon the line of the new building being set back, they do not threaten to pull it down again if the plaintiffs should proceed to build it; that they do not threaten to exact a penalty, and the whole line of their argument and all that they have been struggling for in this court is, their right to insist upon the plaintiffs setting it back, whether they have the power to do it or not. The injunction which the plaintiffs seek is, to restrain the defendants from interfering in any way, or exacting any penalty; and, in my view of the case, in the present stage of the litigation, the plaintiffs are entitled to the interference of the court to prevent that apprehended interference by granting an injunction according to the prayer of the bill. There is another consideration to which this court has regard in cases of this kind. The court is always tender of the rights of individuals where the employment of bodies of men is concerned, as in the case of manufactories or businesses carried on by the employment of labour. The position of the present plaintiffs seems to me eminently to require the beneficent consideration of the court. In good faith, with an honesty which cannot be impugned, they pulled down their building, relying upon the approval of the committee, and trusting, without the slightest doubt, that when they had pulled it down it would be rebuilt in the same line with reference to the street as indicated in the plan which had been approved by the surveyor of the town council. If I were, by refusing to interfere now, to leave the question in the state in which it would be but for the interference of the court, what would be the present position of the plaintiffs? Their manufactory would remain pulled down, although its immediate re-erection is obviously required for the purpose of continuing the works and setting the business going, which they have been for years engaged in conducting. So that upon the whole, with a full sense of all the difficulties of the question, I do not find myself at liberty upon this interlocutory application to refuse the inter-

ference of the court by an interlocutory order, and I think the proper order to make is to grant an injunction until the hearing of the cause to restrain the defendants from issuing or proceeding, &c. (following the terms of the prayer of the bill). *Ordered accordingly.*

Solicitors for the plaintiffs, *Sleece and Robinson*; for the defendants, *Torr, Jamesway and Taggart*, agents for *Rayner, Bradford*.

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs., Barristers-at-Law.

April 28 and May 25, 1863.

GRIFFIN v. DEIGHTON AND ANOTHER.

*Church chancel—Right of possession of lay rector—Incumbent.*

*Although in contemplation of law the freehold of the church, and therefore that of the chancel, which forms part of the church, as well as the freehold of the churchyard, is in the rector, whether spiritual or lay, this abstract right carries with it no right of possession, the latter being in the incumbent, who is responsible to the ordinary for the celebration of public worship. A lay rector, therefore (though bound by the custom of the realm to repair the chancel), has not as against the vicar any right to the possession or control either of the body of the church or of the chancel.*

The declaration stated that the defendants broke and entered a certain close of the plaintiffs, that is to say, the chancel of the parish church of the parish of Dixon, in the county of Monmouth, and damaged and broke the door of the said chancel, and took away the lock fixed to the said door, and affixed another lock to the said door, and with a key locked the said last-mentioned lock.

Plea to the first count of the declaration, except as to taking away the said lock after the same had been taken off from the said door, that before and at the time of the committing of the trespasses herein justified, the said James Lister Deighton was the vicar and incumbent and the officiating minister of the said parish church in the declaration mentioned, and the defendant James Davies was one of the churchwardens of the said parish therein mentioned; and that before the committing of the alleged trespasses there was only one lock on the said door, and only one key to the said lock, and the plaintiff kept the said key in her possession, and with the same locked and fastened the said door, and, except during the period and between the hours of Divine service on Sunday, kept the said door so locked and fastened, and although requested by the said defendant James Lister Deighton so to do, wrongfully and improperly refused to permit the defendant J. L. Deighton, as and then being such vicar, incumbent and minister as aforesaid, to have a key to the said lock, and thereby prevented him from having access and egress to and from the said chancel through the said door at such reasonable times as he the said J. L. Deighton, as such vicar, incumbent and minister as aforesaid, was entitled to have, and the plaintiff on several occasions whilst the said J. L. Deighton, as such vicar, incumbent and minister as aforesaid, was present in the said chancel on Sundays for the purpose of performing Divine service therein, and during the celebration of Divine service on Sundays in the said parish church, against the consent and will of the said J. L. Deighton, as such vicar, incumbent and minister, any of the said James Davies as such churchwarden wrongfully and improperly opened and kept open the said door of the said chancel, to the great annoyance, nuisance and disturbance of the defendant and others, members of the congregation the assembled in the said parish church for the celebratio

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of Divine service, and against such consent and will as aforesaid, refused to allow the said door to be closed, and prevented the same from being closed; wherefore the said J. L. Deighton, as and then being such vicar, incumbent and minister, and the said James Davies by his command, in order that the said J. L. Deighton, as and being such vicar, incumbent and minister as aforesaid, might have at all reasonable times access and egress to and from the said chancel through the said door, and because he could not otherwise have the same, and in order to prevent a repetition of the said offence and misconduct of the plt. during the celebration of Divine service on Sundays in the said church and chancel, did, as it was reasonable and necessary to do for the purposes aforesaid, take off the said lock, and because it was necessary that the said door should be fastened at such times as it was reasonable and proper to fasten the same, did also affix upon the same the said other lock in the first count mentioned. And the defts. then caused two keys to be made to the said last-mentioned lock; one to be, and the same was, retained by the defts. J. L. Deighton, as such vicar and incumbent as aforesaid, and the other the defts. were always and still are ready and willing to deliver to the plt., if she would accept and receive the same, as the plt. had notice, and the defts., in and about the premises, did to a small and reasonable extent commit the said supposed trespasses to which this plea is pleaded, doing no unnecessary damage in that behalf.

To this plea the plt. demurred.

There were two other counts in the declaration, for conversion and detention of the plt.'s lock; to which the defts. paid 20s. into court in full satisfaction.

*Lusk*, Q. C. (*Bridge* with him) appeared for the plt.

*Phipson*, Q. C. (*Beresford* with him) appeared for the defts.

The following authorities were cited:—

*Jones v. Ellis*, 2 Yo. & J. 265;

*Clifford v. Wicks*, 1 B. & Ald. 498;

*Dimes v. Peasley*, 15 Q. B. 276;

*Com. Dig.* C. 14;

1 Bla. Com. 388;

*Cripp's Ecc. La.* 403, 409;

1 Gib. Codex, 199;

*Burn's Ecc. La.* 350, 364;

*Bulwer v. Bulwer*, 2 B. & Ald. 470;

*R. v. Hickman*, 2 East P. C. 593;

*Rick v. Bushnell*, 4 Hagg. 164;

*Janett v. Steele*, 3 Phill. 167;

*Backwith v. Harding*, 1 B. & Ald. 508;

*Lee v. Matthews*, 3 Hagg. 169.

The arguments sufficiently appear in the judgment.

*Cur. adv. vult.*

*May 25.*—*COCKBURN, C. J.*—This was an action of trespass brought by the plt., as lay rector of the parish of *Dixton*, in the county of Monmouth, against the defts., the vicar and churchwardens of the parish, for taking off the lock of a door leading into the chancel of the parish church, the plt. claiming as lay rector, and without alleging any special title to the possession and control of the chancel, subject to its use and application to the purposes of Divine worship, and the question submitted to us was, whether the lay rector, or the vicar and churchwardens, were entitled to the possession and control of the chancel, and consequently to the control of this door, as well as to the means of access which it afforded? On the argument the case for the plt. was put on two grounds. It was contended that the freehold of a church being in the rector, the right of possession followed; and, consequently that, as against a rector, even the incumbent minister would have no right at common law to the possession of the church, even for the special purposes to which it is appropriated, such use being enforceable in the spiritual court

alone; that consequently a rector has alone the right to the control of the doors of the edifice, and is bound to open them only so far as necessity might require or his own discretion might suggest; and whence it would follow that the minister and churchwardens would be guilty of trespass if, against the will of the rector, they forced open a door of the church even for the purposes of ministration. Secondly, if this position should be found untenable as regards the whole body of the edifice, it was contended that at all events the chancel was peculiarly appropriated to the rector, and that, subject to its use in the administration of the Holy Communion and the celebration of marriage, the possession of this part of the church must be taken to belong exclusively to him. We are of opinion that neither of these positions is tenable, and that a lay rector has not, as against the vicar, any right to the possession or control either of the body of the church or of the chancel. It is no doubt true that, in contemplation of law, the freehold of the church, and therefore that of the chancel, which forms part of the church, as well as the freehold of the churchyard, is in the rector, whether spiritual or lay; but this marked and abstract right carries with it in our judgment no right of possession, the latter being in the incumbent, who is responsible to the ordinary for the celebration of public worship. Where there is a spiritual rector he has when inducted the corporal possession of the church for the use of the parishioners, subject to the control of the ordinary. When there is no spiritual rector the vicar or the perpetual curate has, upon induction, the like possession for the like purposes. See *Jones and Ellis*, 2 You. & Jervis, 265. In the case of *R. S. Hickman*, 2 East's Pleas of the Crown, 593, the prisoner was held to have been properly convicted of stealing lead from a church on a count which laid the property in the vicar. If the lay improprator, by the mere fact of being so, has not only the freehold of the church, but the possession as incident to the freehold, that conviction would have been improper. Independently of these authorities, when it is borne in mind that churches in their origin were dedicated, by those who erected them and gave the sites on which they were built, for the purposes of religion and the worship of God, it would obviously be inconsistent with the object for which they were established to hold that in the case of a lay impropriation the right of possession followed the freehold which in contemplation of law is in the rector. It seems to us, therefore, that the position that a lay rector has, as against the vicar, a right to the possession of the church, is one that cannot be sustained. We are equally of opinion that, in this respect, there is no distinction between the body of the church and the chancel. In the case of *Clifford v. Wicks*, 1 B. & A. 507, Holroyd, J. says, the rector has the freehold in the chancel in the same manner as he has in the church and churchyard, and we are of opinion that a rector has no more right or interest in the chancel than he has in any part of the church. The notion that the chancel is part of the rector's glebe, though entertained by Lord Coke, is now exploded. It is true that the rector is bound to repair the chancel; but this arises, not from his having any peculiar property or interest therein, but by the custom of the realm: (*Com. Dig.* "Eglise" G. 2.) Probably this custom had its origin in the fact that the nave or body of the church was appropriated to the parishioners, while the chancel was appropriated to the performance of the holy offices and the seats of the ministers. Originally, repairs both of nave and chancel were defrayed out of the tithes; but in process of time the clergy succeeded in inducing the laity to take upon them the burden of repairing that portion of the church which was allotted to them. To induce them to undertake to repair the chancel in which the clergy and their

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assistants had their places would of course have been a matter of much greater difficulty; moreover the liability of the rector to repair the chancel is not universal. It is said that where there are both rector and vicar in the same church they shall, there being no custom to the contrary, contribute to the repair of the chancel in proportion to their benefice (Rogers' Ecclesiastical Law, 159, citing Linden, 253); or if there be a perpetual vicar the repairs may be cast upon him: (Com. Dig. "Eglise," G. 2.) Nor does the general right of a rector to have a pew in the chancel carry with it any further consequence as relates to any peculiar right or interest in that part of the church. Originally vicars had the like right. "The right of a seat in the chancel," says Burn's Ecclesiastical Law, tit. "Church" 13, "was originally in every vicar." Further on he says: "It is a very groundless notion with impropiators that they have the same right in the great chancel that a nobleman hath in a lesser. These lesser chancels are supposed by lawyers to have been erected for the sole use of these noble persons; whereas it is clear the great chancels were originally for the use of clergy and people, but especially for the celebration of the Eucharist and other public offices of religion there to be performed by the curate and his assistants. That the persons repairing these great chancels doth not at all prove their sole right to them; for they were bound originally to repair the church as well as the chancel, and of common right the repairs of the church are still in the parson; it is custom only eases them of this burden. The ordinary hath no power to order morning or evening prayer to be said in noblemen's chancels; but he can order them to be said in the great chancel." There appears to be no doubt that the jurisdiction of the ordinary for the benefit of the parishioners extends to the chancel as well as the church. Gibson says, "that the seats in the chancel are under the disposition of the ordinary in like manner as those in the body of the church," which, he says, "needs only to be mentioned, because there can be no real ground for exempting it from the power of the ordinary, since the freehold of the church is as much in the parson as the freehold of the chancel; but this hinders not the authority of the ordinary in the church, and therefore not in the chancel:" (Cod. Jur. Eccl. Angl. 226.) In *Clifford v. Wicks*, Bayley, J. says, "The general rule is, that the rector is entitled to the principal pew in the church; but that the ordinary may grant permission to other persons to have pews there." Mr. Rogers, in his work on Eccl. Law, tit. "Church," p. 187, says: "It seems to be now generally considered that the jurisdiction of the ordinary extends to the chancel as well as to the other parts of the church. The circumstance that the freehold is in the rector would equally be an objection to the power of the ordinary over the other parts; for the freehold of the whole is in the rector, neither does the circumstances of his being bound to repair affect the question, for he is bound to repair the chancel of common right, as the parishioners are bound of common right to repair the nave of the church; but that gives them no right to dispose of seats in the nave, nor in any way out the jurisdiction of the ordinary." In *Rich v. Bushnell*, 4 Hag. 164, it was held that the lay rector is not entitled as of right to make a vault or affix tablets in the chancel without leave of the ordinary, nor is he entitled to a faculty for such purposes, without laying before the ordinary the particulars, so as to satisfy him that the tablets or vaults will not interrupt the parishioners in the use and enjoyment of the chancel. In giving judgment, Sir J. Nicholl observed: "Though the freehold of the chancel may be in the rector, lay or spiritual, as by a sort of legal fiction the freehold of the church is in the incumbent, and though the burden of repairing the chancel may rest on such rector, yet the use of it

belongs to the parishioners for the decent and convenient celebration of the Holy Communion and the solemnisation of marriage, and by the Rubric, that portion of the Communion Service which forms a part of the morning service, is directed to be read from the communion-table, which is appointed to stand in the body of the church, or in the chancel." In the case of *Jarrett v. Steele*, which was a suit instituted in the Archies Court of Canterbury by a vicar against the lessee of the great tithes, for having forced open the door of the chancel, on which the vicar had placed a lock, and pulled down part of two pews, with a view to the erection of new ones, Sir John Nicholl, in giving judgment, said, that "all persons ought to understand that the sacred edifice of the church is under the protection of the ecclesiastical laws as administered in the ecclesiastical courts; that the possession of the church is in the minister and the churchwardens, and that no person has a right to enter it when it is not open for Divine service, except by their permission." It evidently did not occur to the mind of the learned judge to doubt that the vicar was entitled to the possession of the chancel, or that the suit was rightly instituted by him. On these grounds we are of opinion that our judgment should be for the defendants.

*Judgment for the defendants.*

Wednesday, June 10, 1863.

REG. v. JONES.

*Corporation—Charter of—Quo warranto.*

*The court will not grant a quo warranto information against an individual to try the legality of a charter of municipal incorporation.*

Lush, Q.C. moved for a rule calling upon a Mr. Jones to show cause why a *quo warranto* information should not be filed against him for exercising the office of Mayor of the borough of Aberavon, Glamorganshire. It appeared that a charter of incorporation had been granted to the town of Aberavon by the Crown under the provisions of the 7 Will. 4 & 1 Vict. c. 78, s. 49, which enacts that if the inhabitant householders of any town or borough in England or Wales shall petition his Majesty to grant to them a charter of incorporation, it shall be lawful for his Majesty, by any such charter, if he shall think fit by the advice of his Privy Council to grant the same, to extend to the inhabitants of any such town or borough within the district to be set forth in such charter all the powers and provisions of the said Act, &c. It further appeared that in the town of Aberavon there were a great many compound householders whose landlords paid the rates, and it was asserted that if the votes of these compound householders were to be computed as "inhabitant householders," there was a majority against the charter, but if they were not to be computed, the majority was the other way. The same applied to the acceptance of the charter.

Lush now contended that the charter was bad, as having been granted not upon the petition of the majority of the inhabitant householders, and that Mr. Jones, who was elected mayor, had no title to such an office. He admitted that *Reg. v. Taylor*, 11 A. & E. 949, was an authority somewhat against him, but in that case the proceedings were against a coroner, whilst here it is against the head of the corporation, and is, moreover, directed to the question of whether or not the charter has been accepted by the inhabitants: (*Rutter v. Chapman*, 8 M. & W. 1.) [GROMPTON, J.—It is the same practical question, namely, whether or not the charter is valid?] In the case of *Lloyd v. The Queen*, 31 L. J. 309, Q. B., a *quo warranto* injunction was granted. [COCKBURN, C.J.—There was no pretence for saying that there was any existing corporation. The proper mode of repealing a

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charter is by *sci. fa.*] It would be much more convenient to try the right by a *quo warranto* information. *Webby*, who appeared to show cause in the first instance, was not called upon.

COCKBURN, C.J.—You are seeking to repeal a charter not in a question directed to the charter, but in a proceeding against an individual. If, indeed, this were a dispute between individuals as to the fees of office it would be otherwise.

CROMPTON, J.—This is a very different case to the *Bala* case (*Lloyd v. The Queen*), where a party set himself up as mayor without any real pretence.

*Rules refused.*

Tuesday, June 23, 1863.

REG. v. STIMPSON.

REG. v. PEAK.

*Summary conviction—Claim of right—24 & 25 Vict. c. 96, s. 24.*

*When upon the hearing by justices of an information, a claim of right is set up by the defts., such claim, if made bond fide and with some show of reason, will oust their jurisdiction; and, although it is for the justices to determine whether or not such claim of right is made bond fide and with a show of reason, yet, if they determine that it is not so made, this court will review their determination and overrule it if come to upon insufficient grounds.*

These were rules to quash two convictions against the above defts. for attempting to take and destroy fish in a river in which the prosecutor had a private right of fishery, contrary to sect. 24 of the 24 & 25 Vict. c. 96.

It appeared that the prosecutor claimed to have a private right of fishery in a part of the river Waveney, and the two defts. having been found using "nets for the purpose of taking fish therein, they were proceeded against under the foregoing section. When before the justices they set up that the river in question was, at the place where they were found, a tidal navigable river, in which they had a right to fish, and they gave evidence by two witnesses of the exercise of that right for many years without being prevented. The prosecutor on the other hand, gave evidence of his right, and that he had exercised it by prohibiting persons from fishing, and giving public notice thereof. The justices were of opinion that the claim of right set up by the defts. was not bond fide, and convicted them.

*Bulwer* now appeared in support of the conviction, and contended that, to oust the jurisdiction of the justices the claim of right must be a reasonable one, and be made bond fide, and that of this the magistrates are the judges, and that this court will not interfere with their decision upon that point:

*Cornwall v. Sanders*, 32 L. J. 36, M. C.; 7 L. T. Rep. N. S. 356;

*Lout v. Vine*, 30 L. J. 207, M. C.

[WIGHTMAN, J.—The question is, was there a bond fide claim of right? The justices certainly say there was not.] That was for the justices to determine.

[CROMPTON, J.—Not quite so; the case must be such as to warrant that opinion. The real question is, was there evidence fairly before them that the claim set up by the defts. was a reasonable one? If it is merely an idle claim, as where the defts. says, "You can have no right, because this is a tidal river," that would be illusory; because, although it is a tidal river, the prosecutor may have a private right of fishery. But here there seems to be a bond fide assertion, accompanied by reasonable evidence. *H. Lloyd*, for the defts., referred to *Carter v. Murcol*, 4 Burr. 2162, which he said was cited before the justices below.] If parties can oust the jurisdiction of the justices by a mere claim of right, an owner may

never be able to enforce his rights. [WIGHTMAN, J.—He may enforce his right by action, and then it can no longer be questioned.]

*H. Lloyd*, for the defts., was not called upon.

WIGHTMAN, J.—The question is, whether or not the justices had jurisdiction to determine the information notwithstanding the defts. set up a claim of right? It appears that upon the hearing they disputed this jurisdiction, partly by denying the prosecutor's right of fishery and partly by setting up a right in themselves. Now it is clear that if they set up a bond fide claim of right, then the jurisdiction of the justices was ousted. There must, no doubt, be some show of reason in the claim, as was said by the Lord Chief Justice in *Cornwall v. Sanders*, and it must be something more than a bare assertion. In the present case the right set up by the prosecutor is against the common law right, although undoubtedly it may be maintained, and in many of the cases in which the claim of the defts. has been disallowed, it has appeared that the claim has been in opposition to such common right, as where in the case of a man claiming a common right for all persons to sport over another man's land. Here the claim is to fish in a tidal navigable river, and for which there is some evidence of user for a great many years. Now the justices have said that this was not a bond fide claim; but, as far as it is possible for a claim to be bond fide, this appears to be such, and indeed, if it be not, I do not see what sort of claim may not be treated as not being a bond fide one. Whether or not it can be ultimately maintained is altogether another matter. The convictions therefore must be quashed.

CROMPTON and BLACKBURN, JJ. delivered similar judgments. *Convictions quashed.*

## COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYD, Esqrs., Barristers-at-Law.

Monday, June 8, 1863.

MAYHEW v. WARDLEY.

*Game—Trespass in pursuit of—1 & 2 Will. 4, c. 32.*

*Where the app. and another man were seen standing on a highway and looking through a hole in a hedge, no one else being near, and a gun was heard to be fired, and a dead partridge recently killed was found in the adjoining field within eighteen yards of the fence:*

*Held, that the magistrates were right in convicting him for unlawfully committing a trespass on the highway in pursuit of game.*

This was a case stated under the 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law as hereinafter stated.

At the petty sessions holden at Woodbridge in the county of Suffolk, on the 15th Jan. 1863, an information preferred by James Wardley against Stephen Mayhew, under sect. 30 of the Act of 1 & 2 Will. 4, c. 32, was heard and determined, and upon such hearing the defts. was convicted, against which conviction he appealed.

The following is the case as stated for the opinion of the court:—

That on the day and at the place alleged, the defts. and another man (who was subsequently convicted of a similar offence, and whose case is to be governed by the present) were about half-past seven in the morning (being daytime under the 34th section) standing close together on the highway looking through a fence into a meadow occupied by Mr. W. Flate, adjoining the highway; that a report of a gun was heard; only one report was heard by any one of the witnesses; no other person was seen near the spot; that a witness named Savage went towards them, and they

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both ran away together towards Mr. Cockrell's yard. No gun was seen, but Savage stated that he was sure it was fired by one of the two men. Within a few minutes after the gun was fired a boy picked up a partridge quite warm in the meadow within eighteen yards of the fence where the men had been standing. That William Reeve, who was in Mr. Cockrell's yard, heard the report of a gun, and shortly afterwards two men met him (Stephen Mayhew was one), and Mayhew then said to Walter Reeve (another witness), "If you see any one ask about us, don't you know anything." On the part of the deft. it was contended that the informant proved no offence which was cognisable by law; that there could be no trespass on the highway in search of game; that if a trespass at all the trespass ought to have been alleged as being upon the meadow; that the two men ought to have been charged as committing a joint offence; that as they were charged separately it was necessary to prove that one of them fired the gun, and that the other could not then be convicted. And whereas upon the said hearing the justices were of opinion that the deft. was upon the highway in search of game within the meaning of the statute, and gave judgment against the deft. as aforesaid, and therefore the judgment of this court was required as to whether the justices were right in point of law in their decision.

*Marby* appeared in support of the conviction, and cited *Reg. v. Platt*.

No counsel appeared for the app.

**ERLE, C. J.**—I am of opinion that the conviction should be affirmed. Two questions of law arise upon the facts stated. First, was the app. guilty of trespass in being on the highway at the time the partridge was shot? As to this point, I think he enjoyed an easement in the soil of the highway for lawful purposes only, and when he used it for the purpose of game he became a trespasser. Secondly, was there sufficient evidence upon which the app. ought to have been convicted? I am of opinion that there was evidence that the app. was (with others) with the joint and common purpose of killing game, and that game was killed; and that being so, he is liable.

**WILLIAMS and WILLES, JJ.** concurred.

**BYLES, J.**—I concur in this construction of a penal statute, as I feel bound by authority; but I do so with reluctance.

*Conviction affirmed.*

#### LAURENCE v. TODD.

*Master and servant—Conviction of workmen for non-fulfilment of contract—4 Geo. 4, c. 34, s. 3.*

*A skilled workman who has entered into a contract for another by the terms of which the relationship of master and servant is not to be prejudicial, is liable, under the above statute, to be convicted for leaving the service, without permission of the master, before the work contracted to be done is completed.*

This was a case stated by the stipendiary magistrates of Liverpool for the opinion of the court under 20 & 21 Vict. c. 43.

The app. laid an information and complaint under the 3rd section of 4 Geo. 4, c. 34, against the resp., for unlawfully absenting himself from his service. The contract was made between the app., who was an iron shipbuilder, and the resp. with six other persons, all of whom were ironsmiths and skilled handicraftsmen, and was to the following effect:

That Hugh M. Laurence shall employ, and each of them the said Thomas Clarke, James Thomas, Robert Todd, Henry Lloyd, Thomas Quinn, James Davidson, Thomas Boswell, shall exclusively serve, to the best of his ability, the said H. M. Laurence, and subject in every respect to all the rules and regulations of his

yard for the time being for the purposes and on the terms hereinafter mentioned.

The said Robert Todd, &c., shall enter into the service of the said H. M. Laurence, in order to execute the whole of the skilled and unskilled labour requisite in every respect, to complete in every respect of the very best workmanship and to the satisfaction of the said H. M. Laurence, the entire iron hull of the vessel now building in his yard, and known as No. 8 vessel, the keel whereof is at present laid, and the frames in part set up; and for this purpose the said Robert Todd, &c., shall employ such skilled and unskilled assistants as the said H. M. Laurence shall deem requisite, in order to complete the said vessel with all despatch, such assistants to be paid by the said Robert Todd, &c., and to be subject in every way to the rules and regulations for the time being of the yard and of the said H. M. Laurence, including liability to discharge by him, and as if each had entered the service of the said H. M. Laurence.

The said H. M. Laurence shall pay the said R. Todd, &c., or any of them, for their joint account, for each and every ton weight of ironwork executed and entirely completed to the satisfaction of the said H. M. Laurence, by the said Robert Todd, &c., and their assistants, the sum of 5/., and for every fractional portion of a ton a similar rate in proportion, such rate to be calculated on the neat weight of each piece of ironwork after being finished, sheared, drilled and fit to its respective place, and which sum shall be paid on every Saturday, the pay day of the yard, less 10 per cent., which shall be retained by the said H. M. Laurence until the completion of the entire work to his satisfaction, and as a security for the work being duly fulfilled.

That if any one or more, or all of them, the said Robert Todd, &c., or others their assistants, employed by them as aforesaid, shall at any time, in the opinion of the said H. M. Laurence, during the term of his service, be guilty of any neglect or delay in executing the said work, or if such assistants shall be deficient in numbers or ability, it shall be lawful for the said H. M. Laurence, but without prejudice to any other redress arising out of the relation of master and servant hereby created, to employ other hands to complete the said work and charge any one or more of them, the said Robert Todd, &c. with the extra costs thereby incurred.

After the making of the agreement the resp. and the other persons at once commenced to execute the work to be performed by them under the agreement, and continued to perform the same and to work upon the vessel.

On the 6th April the resp. and two of the said other persons, namely, T. Clarke and H. Lloyd, refused further to go on with the said work, and without the consent of the app. wilfully absented themselves from the shipbuilding yard of the app. and did no work upon or to the vessel during the whole of that day.

The said vessel was not at that time completed; there was no lawful excuse for the resp. or the said other persons refusing to go on with the said work or absenting themselves from the said shipbuilding yard.

It was intended by the app. and the resp. and by the other parties to the said agreement, that the resp. and the other parties to the said agreement should themselves do and perform such of the work necessary for completing the said vessel as required skillful hands and craftsmen for its proper performance, and should employ workmen of inferior skill and labourers for the purpose only of assisting them in such portion of the work as required little or no skill, and the resp. and the other parties to the agreement did in fact so work and employ others to assist them.

The resps. and the other parties to the agreement

[Ex.]

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[Ex.]

were under the control and bound to obey the orders of the app.'s foreman.

The magistrate, considering that the contract and the above facts did not constitute such a relation as to bring the resp. within the provisions of the statute, declined to convict.

*R. G. Williams* for the app.—The sole question is, whether the relation of master and servant existed between the app. and resp. The magistrate thought that the resp. served as a contractor. Then there is a contract of exclusive service. [*WILLIAMS, J.* referred to *Hardy v. Ryle*, 9 B. & C. 613.] It was necessary that the resps. should work personally as skilled workmen, and employ unskilled assistants. In the contract the words were "without prejudice to the relation of master and servant hereby created," showing that it was the intention of the parties to create that relation. The three essentials to the relation of master and servant are, exclusive service, payment of wages, contract of master; and these three essentials existed here.

The following cases were referred to in the course of the argument:—

*LANCASTER v. GROVES*, 9 B. & C. 628;

*Ex parte Gordon*, 25 L. J. 12, M. C.;

*LOUTHER v. EARL OF RADNOR*, 8 E. 113;

*BLAKE v. LANGON*, 6 T. R. 221;

*WEAVER v. FLOYD*, 21 L. J. 151, Q. B.;

*BOWERS v. LOWE*, 6 E. & B. 584;

*Taylor v. Carr*, 31 L. J. 111, M. C.; 4 L. T. Rep. N. S. 414.

*ERLE, C. J.*—I am of opinion that the magistrates were wrong in not convicting. It is quite clear that the skill of the resps. was stipulated for. Mr. Lawnes might be under a contract to complete the ship, and therefore it was of importance that he should have the exclusive service of the resps.; I think this is a case contemplated by the Act of Parliament, and that the resps. were liable to be convicted.

*WILLIAMS, WILLES and BYLES, JJ.* concurred.

*Judgment for app.*

## COURT OF EXCHEQUER.

Reported by F. BAXLEY and H. LEIGH, Esqrs., Barristers-at-Law.

Nov. 10 and 12 and April 27, 1863.

HULLS v. ESTCOURT.

*Municipal Corporations Act*, 5 & 6 Will. 4, c. 76—Rights of "old freemen" reserved by sect. 2—Claim of new "statutory" burgesses under sect. 9 to share therein—Sects. 2, 3, 5, 9, 13 and 92 of the Act.

The burgesses and freemen of the city of Gloucester, before and at the time of the passing of the *Municipal Corporations Act*, 5 & 6 Will. 4, c. 76, had enjoyed, from time immemorial, for their own particular benefit, rights of common of pasture in and upon certain lands in the neighbourhood of the city:

Held, that the new "statutory" burgesses created under sect. 9 of the Act were not entitled to participate with the "old freemen" in the above rights of pasturage, inasmuch as sect. 2 of the Act, which expressly enacts that the old freemen are to have and enjoy "the same share and benefit of the corporate property as fully and effectually" as they might have done if the Act had not been passed, would be rendered inoperative, and be defeated by the admission of a large number of claimants of a new class to share such rights with the old freemen:

Held, also (by *Pollock, C. B.* and *Martin, B.*), that to entitle a claimant to share in the rights reserved by sect. 2, to the "old freemen," it was necessary he should be a person who either was a burgess or freeman at the time of the Act, or was entitled to have

been such of right, and not by the mere accident of purchase or gift, if the Act had not been passed; and also (but *dubitante Bramwell, B.*, as to this point) that the merely being a "statutory" burgess under sect. 9 did not fulfil the requisite "condition precedent" to becoming "entitled to the benefit of such rights" mentioned in the proviso at the end of sect. 2.

Demurrer.

Replevin for taking, on the 2nd Aug. 1860, in the parish of St. Catherine, in the city of Gloucester, in a certain close there, called St. Catherine's Meadow, cattle of plt.'s, to wit, two colts, and unjustly detaining same against sureties, &c.

The avowry set forth that the city of Gloucester had been an ancient city before the *Municipal Corporations Act*, and that from time whereof the memory of man is not to the contrary the said close had been and still was a certain common field, formerly called "Archdeacon Meadow," and now called "Saint Catherine's Meadow;" and that from time whereof, &c., the said corporation were accustomed to have and use for every burgess, being an admitted freeman of the said city, and for the particular benefit of every such burgess, common of pasture in the said close every year for a certain number of his own proper beasts, to wit, two horses, or three neat beasts, from such time in every year as the said field should be mown, and the hay thereof carried away, unto the Feast of the Purification of St. Mary the Virgin (2nd Feb.) in every succeeding year. That said deft. was a burgess and admitted freeman of the said city, and as such entitled to have, use and enjoy the said common of pasture; that the cattle of plt., who was not an admitted freeman of the said city, or otherwise entitled to common of pasture in the said close, had trespassed there. Avowry 2 claimed a right of common of pasture during the same time in every year, on behalf of the said mayor and burgesses, under a deed of grant dated 6th Feb., 9 Hen. 8, to the mayor and burgesses, and their successors for evermore, of a right of common of pasture for their own proper beasts and none other, to the number (to wit) of five beasts to each burgess. "And deft. says that the said burgesses mentioned in the said indenture were, at the time of the making of the same, and they and their successors from thence hitherto always have been, and still are, admitted freemen of the said city, and that the said common of pasture has always been, from the time of the making of the said indenture, hitherto, had, used and applied for the particular benefit of such burgesses. And deft. further says that before and at the said time when, &c., he was a burgess and admitted freeman of the said city, and as such entitled, &c., and because the said cattle of the plt., who was not an admitted freeman, &c., or otherwise entitled, &c., were wrongfully, &c., so that deft. could not have or enjoy, &c. in so ample a manner, &c., he well avows, &c., as a distress, &c. Avowry 3 claiming a similar right for the said burgesses being admitted freemen of the said city, and each and every of them, and for their and each of their particular benefit, under an uninterrupted user for sixty years before the commencement of the action.

Cognisances.—Setting up the same title in the corporation as in the avowries, but justifying as a servant of the corporation.

Pleas in bar.—Third plea, that plt. was a burgess of the city, and the cattle were his own beasts, lawfully using the common.

Eleventh plea in bar was to the effect that every burgess was entitled to the common, and not any class of burgesses, and that plt. was a lawful burgess.

The twelfth plea in bar was to the effect that every burgess of the city was a freeman until the passing of the *Municipal Act*, and that if this Act had not passed



[Ex.]

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[Ex.]

he would have been, long before, an admitted freeman, and that he is still a member of the corporation.

Replikations:—3. As to third plea in bar, that plt. was not an *admitted freeman* of the said city. 4. As to eleventh plea, that up to and at the time of the passing of the said Act, and the first election of councillors thereunder, every Burgess of the said city was an *admitted freeman thereof*, and there was no Burgess who was not an *admitted freeman*; and that plt. was not, nor has he ever been, an *admitted freeman* of the said city. 5. Demurrer to twelfth plea, and joinder in demurrer.

Rejoinders:—1. To replication to third plea, that before and at the said times when, &c., plt. was an inhabitant of and a citizen and Burgess of the said city, and a person who might, could and would have been an *admitted freeman* of the said city if the said Act, entitled, &c., had not been passed. 2. Demurrer to replication to eleventh plea and joinder in demurrer.

Sur-rejoinders.—2. Demurrers and joinder in demurrers to first and third rejoinders.

Plt.'s amended points:—1. That by the grant in second avowry the right was given to the Burgesses of Gloucester without any qualification, however they might become so, and usage cannot have limited that right. The plt. being a Burgess, or now a citizen, came within the grant, and the plea to that avowry on this ground is good and the replication bad. 2. That under the Municipal Corporation Act rights were not intended to be taken from any person who could have acquired them but for the Act; that the pleas show that plt. was a person who, but for that Act, could and would have become a freeman, and the power of doing so was only taken away by that Act; therefore, being a citizen, and fulfilling all other qualifications, he is entitled to common. 3. That sect. 2 reserved to persons therein mentioned the privileges they formerly might have acquired and enjoyed, but did not prevent new members from acquiring them also; and this is the more reasonable, inasmuch as the old means of acquiring freedom and citizenship by gift or purchase, which admitted an indefinite number, was taken away by the Act.

Def't. amended points:—1. That plt. not being a freeman of the city of Gloucester, is not entitled to rights of common in the land in question. 2. That the effect of the 2nd section was to reserve the rights of common in the said land for the freemen of the city, and not to extend it to persons who were made Burgesses of the city by reason only of the provisions of the said Act.

The case was argued on two days in Michaelmas Term last (Nov. 10 and 12), before Pollock, C. B., Bramwell and Channell, BB., when the Court reserved judgment, giving leave to the parties to amend the pleadings at any time before judgment, in order to avoid a possible departure, on which a question had been raised during the argument, and to raise the real question on the merits. The pleadings were amended (as shown above in italics), and the case was again argued in Easter Term last (April 27), before Pollock, C.B., Martin, Bramwell and Wilde, BB., (a) when the Court gave judgment at once.

*Dowdeswell*, for the plt., cited

*Hopkins v. Mayor of Swansea*, 4 M. & W. 621;

8 L. J., N. S., 121, Ex.;

*Beardsworth v. Torkington*, 1 Q. B. 782; 10

L. J., N. S., 254, K. B.;

*Mellor v. Spatsman*, 1 Wms. Saund. 343;

*Parry v. Thomas*, 5 Ex. 37; 19 L. J., N. S., 198, Ex.

(a) Points were raised in argument on the first occasion, in Michaelmas Term, as to the right of an individual Burgess to distrain, &c., and also upon the pleadings, and cases were cited; but, as the judgment of the court was not given upon those points, they become immaterial to this report.

*Macnamara* for def't.

*Dowdeswell* in reply.

*Cur. adv. vok.*

The pleadings having been amended as above mentioned, the case was set down for argument again in Easter Term, when, on April 27,

*Dowdeswell* again argued for plt.—The def't.'s construction of the statute would limit this right of common to freemen by birth, servitude, or marriage; but it is vested by immemorial prescription, or by express grant, in the *Burgesses of Gloucester*, and is never could be the intention of the statute to deprive them of it. The Act took away the unlimited power of creating freemen by gift to any extent which formerly existed, and so there was good reason why, with an enlarged area of Burgesses, those rights should be extended to the new class. "Burgess" and "freeman" were synonymous terms under the old system. The grant to the corporate body was clear, and without qualification, and unless the right was taken away by express and exclusive terms in the Act, plt. was entitled. [Pollock, C. B.—Your argument would utterly defeat the purpose of the Act, which was to prevent the newly created Burgesses having any, the least, participation in any profits, benefits, or rights belonging to the old freemen. If you are right, every Burgess under the Act would be entitled to share in this use of the common, and the old ones would be swamped by the new. There would be no reservation of rights at all.] The proviso in sect. 2 is restrictive on the first part of the clause, but plt. does not claim under that section. Before the Act he might have become a freeman, and so, as a Burgess, under sect. 9, he is entitled.

*Macnamara*, for def't., was not called upon.

POLLOCK, C. B.—We are all, I believe, of opinion that the def't. is entitled to judgment. I think there can be no doubt that the 2nd section of the Municipal Corporation Act was introduced before the 9th section expressly for the purpose of meeting a case like the present one. The Legislature must be taken to have said, "Before we legislate on the subject at all, and take away, alter, or affect in any way the rights and privileges of the existing freemen and Burgesses, and create a new right in another class, we will, by this 2nd section, reserve to the present existing freemen and Burgesses, and to all who may become such, and their wives and children, all the rights and benefits in the corporate property which they now enjoy"—meaning all who may become such *by rights*—as by birth, marriage, or apprenticeship, and not by the mere accident of purchase or gift. Accordingly the 2nd section enacted that "every person who had been or might thereafter have been admitted a freeman or Burgess of any borough if the Act had not passed, or who then was, or thereafter might be, the wife, widow, son, or daughter of any freeman or Burgess, &c., should have and enjoy, and be entitled to acquire and enjoy the same share and benefit of the corporate property as fully and effectually as by any statute, charter, bye-law, or custom, they might or could have had, acquired, or enjoyed if the Act had not been passed." And at the end of the section is a proviso that no person was to be entitled to any share or benefit of the rights so reserved without first fulfilling every condition which, if the Act had not passed, would have been a condition precedent to his or her being entitled to the benefit of such rights, so far as the same was capable of being fulfilled according to the provisions of the Act. That being so, it appears to me that a person in the position of the plt., claiming merely as a Burgess by residence and payment of rates under the Act, is not entitled to share with the old freemen in their privileges, and that if he can base his claim to the enjoyment of this right on no other ground, he fails to establish it. If a new class of persons are, under the Act, to have a share in these old rights, the

[Ex.]

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[Ex.]

Act will have failed in its clear and manifest intention of reserving them to the old freemen. It is, I think, an argument against the plt.'s claim that this is the first time during the thirty years since the passing of the Municipal Corporations Act that any such claim has been made by one of the new burgesses created under it.

MARTIN, B.—I am of the same opinion, and think the construction of the Act quite clear. New rights are created by this Act. By the 6th section it is enacted that, after the first election of councillors under the Act in any borough, the future style and name of the corporate body named in the schedules A. and B. to the Act in connection with such borough, shall be "the mayor, aldermen, and burgesses" of such borough; and the 13th section enacts that after the passing of the Act no person shall be enrolled a Burgess of any borough, for the purpose of enjoying the rights conferred for the first time by the Act, in respect of any title other than by co-tenancy and payment of rates within such borough according to the meaning and provision of the Act. Then the 15th section enacts that the overseers of the poor shall every year make out an alphabetical list to be called "The Burgess-list," and by subsequent sections such lists are to be revised and corrected by certain persons appointed for the purpose; and the end of the matter is, that such revised and corrected list is to be copied into a book which is to be "the Burgess-roll" of the burgesses of such borough entitled to vote after the passing of the Act in the choice of councillors and auditors of the borough; that is to say, the list of persons who have rights conferred on them by this Act of Parliament, and they are the persons who are in the Act called "the mayor, aldermen and burgesses" of the borough of Gloucester. But the term "burgess" was a term well known and used before the passing of the Municipal Corporation Act, before which time the title of this particular corporation was "The Mayor and Burgesses of the City of Gloucester," &c. I own that I am clearly of opinion that, to entitle the plt. to the right of pasturage which he here claims, he should be a person who would have been entitled to be a "burgess" of the city of Gloucester" if the Act had not been passed. Looking at the express enactment of the 2nd section in conjunction with the 5th section, I think that the matter is put beyond doubt. By the 5th section a list, to be called "The Freemen's Roll," is to be made out yearly of all persons who, at the passing of the Act, shall have been admitted as burgesses or freemen of the borough, and any person thereafter becoming entitled to be so admitted in respect of birth, servitude, or marriage, shall, upon his claim being established, be added to such roll. Now, with that, what is the meaning of the 2nd section? Let us read it as if it had been enacted expressly for this particular city, and as though it had said, "Whereas, in the city of Gloucester there are certain common lands, &c. which have been held and applied for the particular benefit of the citizens, freemen and burgesses of the said city, and of the widows and kindred of them, or certain of them, and have not been applied to public purposes; now be it enacted, that every person who now is or hereafter may be an inhabitant of the city of Gloucester, and every person who has been admitted, or who might hereafter have been admitted a freeman or Burgess of the said city of Gloucester if this Act had not been passed, &c., shall have and enjoy and be entitled to acquire and enjoy, *the same share and benefit* of the said lands, &c., *as fully and effectually*, and for such time and in such manner as he or she by any statute, &c., at the time of the passing of this Act might or could have had, acquired, or enjoyed *in case this Act had not passed.*" Assuming for argument's sake that Mr. Dowdeswell's client is entitled to be elected a *burgess*

under the Act, that in my opinion gives him no title to the claim of right of common of pasture which he now sets up. To entitle him to that he must show that he was a person who was a Burgess or freeman at the time of the passing of the Act, or that he was entitled to have been such, *of right*, if the Act had not been passed, and that the plt. has not shown himself to be. I am also of opinion that the mere possibility that under the old corporation this right might by gift or purchase have been conferred upon the plt., does not operate to confer it upon him under the Act. Our judgment must be for the deft.

BRAMWELL, B.—I am also of opinion that the deft. is entitled to judgment. There is, I think, no difficulty about the plea in bar. It is said the plea does not show as it should have done that plt. *had a right* to be admitted a freeman at the time of the passing of the Act. But I understood that, when the parties agreed to amend, it was for the purpose expressly of raising the real question, and getting a decision on the merits; and that is what Mr. Dowdeswell says he desires to have. It may very possibly be, as Mr. Dowdeswell has argued, that if deft.'s construction of the statute is adopted, when the old members of the corporation die out nobody will remain to be benefited but the freeholders. Whether or not that was the intention of the Legislature it is not for us now to speculate upon in construing the Act, which we must do strictly according to its language. I go a long way with Mr. Dowdeswell in some portion of his argument. He says the right vested in the burgesses before the Act, and the statute continues it in any new Burgess, however made, provided only he be a "burgess," and provided there is nothing in the Act to prevent it, and that the Act merely increases the number of burgesses. With that argument I go a long way, and I think (with great respect for those who take a different view) that it is doubtful whether the proviso in the last clause of sect. 2 operates as a disqualification of the plt.; for I think that if that proviso were the only disqualification in the Act, the plt. would have fulfilled the "condition precedent" to his being entitled to the right he claims, for he would have been a "burgess." In the early part of that section (sect. 2), it is enacted, "that every person being an inhabitant shall have and enjoy the same share and benefit, &c., as before," and I think the word "condition" in the latter portion of the section means that, where before the Act a person would have had to perform the "condition precedent," he must perform it subsequently to the Act. I think the son of a "freeman" must still perform the "condition precedent;" but that does not apply to the plt., for he fulfils the "condition" by being a "burgess." But the difficulty which I have is this: under the 2nd section the old freemen are to have all their rights reserved to them "as fully and effectually" as if the Act had not been passed; they are to have, in fact, "the same share and benefit," &c. as before the Act. But, if Mr. Dowdeswell's argument is right now, it would have been right when the Act was passed, and then the old freemen would have had a large number of persons added to the list under the Act to participate with them in a share of these old rights, and the words "as fully and effectually" &c., would be useless and inoperative; for it is manifest that the old freemen could not enjoy their old rights "as fully and effectually," nor have "the same share and benefit," &c. as before, if a large number of claimants of a new class were to be allowed a share in them. I think the Legislature meant to prevent the old freemen from being deprived of their rights of property, and that they have done so by the 2nd section of the Act. For these reasons I cannot agree with Mr. Dowdeswell's argument, and on these grounds I think that the deft. is entitled to judgment.

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WILDE, B. had gone to chambers before the conclusion of the argument.

*Judgment for deft.*

Plt.'s attorney, *E. Doyle*, 2, Vennam - buildings, Gray's-inn.

Deft.'s attorney, *J. F. H. Lewis*, 28, Essex-street, Strand, agent for *G. P. Wilkes*, Gloucester.

**EXCHEQUER CHAMBER.**

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

**ERROR FROM THE QUEEN'S BENCH.**

*Monday, May 11, 1863.*

(Before ERLE, C.J., POLLOCK, C.B., WILLES, J., BRAMWELL and CHANNELL, BB., and KEATING, J.)

**TRIMMER v. WALSH AND ANOTHER.**

*Tithe—Commutation—Waste lands—Inclosure—Hop-grounds—Extraordinary charge—6 & 7 Will. 4, c. 71.*

*The tithes of a parish were commuted in 1841, and the commissioner by his award found that certain waste lands were not subject to tithes, and no ordinary rentcharge was apportioned by him in respect thereof. In the schedule to the award they were included with other lands as follows: "The Forest of Alice Holt, 2658a. 3r. 3p.," but under the heading "rentcharge payable to the vicar," a blank was left. The waste lands were afterwards allotted in 1857, under an Inclosure Act, and have since been cultivated as hop-grounds:*

*Held (reversing the judgment of the Court of Q. B.), that, as no rentcharge was payable in respect of these lands, they could not be made liable to the extraordinary or additional charge upon lands cultivated as hop-grounds, by the 6 & 7 Will. 4, c. 71, s. 42.*

Error from the Court of Q. B.

This was an action of replevin for the alleged illegal seizure by the defts. of certain goods under distress for an extraordinary rentcharge for hops in lieu of tithes.

The special case will be found fully set out at 7 L. T. Rep. N. S. 352, to which the reader is referred.

Upon this case the majority of the judges (Cockburn, C. J., Blackburn and Mellor, JJ.) held that the plt.'s land was liable to pay the extraordinary rentcharge for hops. (*Wightman, J. dissente.*)

Against this decision the plt. brought a writ of error, and alleged for ground of error:—1. That the plt.'s land is not subject to the extraordinary rentcharge for hops, inasmuch as it never was subject to the payment of any tithe or ordinary rentcharge, and was not included or dealt with in the tithe commutation; and, 2. That the judgment of the Court of Q. B. is therefore erroneous.

The deft.'s points were:—1. That the plt.'s land is liable to pay to the deft. Walsh the extraordinary tithe rentcharge of 1*l.* per acre when cultivated as hop-ground. 2. That is expressly found by the tithe commissioner, in his award, that the plt.'s land was liable to the payment of all manner of tithes in kind, and after fixing the rentcharge for ordinary tithes, the said award charges plt.'s land, when cultivated with hops, with the additional sum of 1*l.* per acre by way of extraordinary rentcharge. 3. That the fact of no portion of the ordinary rentcharge having been apportioned by the two valuers on the plt.'s land does not destroy its liability under the said award to pay the said extraordinary rentcharge when cultivated with hops.

The following are the material sections of the Tithe Commutation Act, 6 & 7 Will. 4, c. 71:—

Sect. 40. That in case any of the lands in the parish shall be hop-grounds, orchards, or gardens, and notice shall be given by the owner thereof to the commissioners, or assistant commissioner acting in that behalf, that the tithes thereof should be separately valued, the commissioners or assistant commissioner shall estimate the value of the tithes thereof according to the average rate of composition for the tithes of hops, fruit and garden produce respectively during seven years preceding Christmas in the year 1835, within a district to be assigned in each case by the commissioners, or assistant commissioner, and estimating the same as chargeable to all parliamentary, parochial, county and other rates, charges and assessments, to which the said tithes are liable, and shall add the value so estimated to the value of the other tithes of the parish ascertained as aforesaid.

Sect. 42. That the amount which shall be charged by any such apportionment as hereinafter provided upon any hop-grounds or market-gardens in any district so to be assigned, shall be distinguished into two parts, which shall be called the ordinary charge and the extraordinary charge, and the extraordinary charge shall be a rate per imperial acre, and so in proportion for less quantities of ground, according to the discretion of the valuers, or commissioners, or assistant commissioner by whom the apportionment shall be made as aforesaid; and all lands whereof the tithes shall have been commuted under this Act, and which shall cease to be cultivated as hop-grounds or market-gardens at any time after such commutation shall be charged after the 31st day of Dec. next following such change of cultivation only with the ordinary charge upon such lands; and all lands in any such district the tithes whereof shall have been commuted under this Act, and which shall be newly cultivated as hop-grounds or market-gardens at any time after such commutation shall be charged with an additional amount of rentcharge per imperial acre equal to the extraordinary charge per acre upon hop-grounds or market-gardens respectively in that district: Provided always, that no such additional amount shall be charged or payable during the first year and half only of such additional amount during the second year of such new cultivation, and an additional rentcharge, by way of extraordinary charge upon hop-grounds and market-gardens newly cultivated as such beyond the limits of every district in which any extraordinary charge for hop-grounds or market-gardens respectively shall have been distinguished as aforesaid at the time of the commutation shall be charged by the commissioners at the time of such new cultivation upon the request of any person interested therein, if such new cultivation shall have taken place during the continuance of the commission of the said commissioners, and after the expiration of the commission shall be charged in such manner and by such authority as Parliament shall direct, and shall be payable and recoverable in like manner, and subject to the same incidents in all respects as an extraordinary charge charged upon any hop-grounds or market-gardens at the time of commutation.

*Coleridge, Q. C. (Garth with him), for the deft., contended that the judgment of the Court of Q. B. was erroneous. The judgments of the majority of the Court of Q. B. confuse tithe and the liability to tithe. The Act deals with lands paying tithe, and assumes that the lands are cultivated and in respect of which the rentcharge is fixed by the apportionment. And sect. 67 discharges the lands of the parish from all tithes after the confirmation of the apportionment. As observed by Wightman, J., in his judgment in the Q. B., "Sect. 42 contemplates two states of things: first, when at the time of the commutation the land is used as hop-ground, and in such a case makes the provision as to the ordinary charge when the land was in the ordinary state of cultivation, and as to the extraordinary charge when it was cultivated as hop-ground. But the second state of things is the case where after the passing of the Act and after the commutation the land is newly and for the first time cultivated as hop-ground. It is upon that part that the question seems to me mainly to turn, and I think the section contemplates land which at that time was so cultivated as to contribute something towards the payments to be made under the apportionment ordered by the Act." The meaning of the word "tithes" in the interpretation clause, sect. 12 of 6 & 7 Will. 4, c. 71, was cited, as also were sects. 40, 42, 43 and 67. The 23 & 24 Vict. c. 93, s. 42, was also referred to.*

*Mellish, Q.C. (J. J. Aston and F. M. White with*

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him).—The judgment of the Court of Q. B. is correct. If the tithes of the parish had not been commuted, the lands in question would have had to pay tithe now. The lands, though waste lands, were liable to pay tithe whenever brought into cultivation before the Act, and that liability has been commuted. The learned counsel then referred to and commented on sects. 32, 33 and 42.

EARL, C. J.—I am of opinion that the judgment of the court below ought to be reversed. The case turns upon the construction of the 42nd section of the 6 & 7 Will. 4, c. 71; and before I come to the construction of that section, I would say that the general policy of the Act is made apparent from the 67th section, which enacts that after a given day lands shall be absolutely discharged from the payment of all tithes, and instead thereof there shall be payable to the persons mentioned in the apportionment a sum of money issuing out of the land charged therewith. The tithes are put an end to, and instead of the tithes there is payable, issuing out of the lands specified in the apportionment, a separate sum for each portion of land—and one portion of land is not answerable for the sum issuing out of the other—to the persons mentioned in the apportionment, that is to say, the rector, the vicar, or other titheowner. The policy of the Act was to encourage the advancement of agriculture and improvement in cultivation without liability to the increase of tithes; and if that was so in respect of additional produce of lands already in cultivation, it may have some bearing also in encouraging parties to bring land that had never yet been in cultivation at all into cultivation, without any liability to consequences in respect of tithes. The general policy and effect of the Act is stated in section 67: lands are freed from tithes; in room thereof rentcharge is apportioned; and the apportionment appears to be the putting a separate sum on separate lands. Such being the general provisions of the statute, what are the provisions in respect of hop-grounds? The Legislature contemplated that the titheowner might have an interest in the tithe of hops, and the landowner might have an interest in having a sum settled as an additional sum payable for the tithes of hops within a district; and accordingly sect. 40 enables the commissioners, upon the application of the landowners, to appoint and to assign certain districts, and within each district there is an extra charge to be imposed upon the lands within the district in case hops are cultivated. Well, the result of the enactment thus far would be, that any lands in a parish, whether in a hop district or out of such district, upon which by the apportionment no tithe was fixed, are freed from tithes. The proposition is admitted to be so for every produce except hops; and if the owner of the tithes in respect of waste lands brought into cultivation loses all his right to tithes when those lands bring titheable produce, it is difficult to see why the Legislature should have intended to put a special penalty upon the agriculturist who might choose to improve land suitable for hops by growing hops thereon. He may grow any other produce at any rate of profit that can be made, and the titheowner has no right to interfere or go beyond his apportionment. But it is said, if you grow hops on the land, the titheowner has a right to come in and demand the tithe for hops. It would be a strange enactment, and it might be so if the words were so. But it seems to me clear that the 40th and 42nd sections related only to lands liable to the ordinary charge in the apportionment in respect of other produce than hops, and more lands might be liable to the extraordinary charge beyond the ordinary charge if they cultivated hops, and that the extraordinary charge in respect of hops should be put on and taken off according as hops were grown, and according as the landowner ceased to grow

hops thereon. The words of the enactment are all the way through "extraordinary charge for hops," "additional charge for hops," and so on, contemplating lands liable to the ordinary charge, and in respect of hops extraordinary or additional charges. And the first division of the 42nd section makes a provision in respect of lands which at the time of the apportionment were growing hops, that when the cultivation of hops may cease, those lands shall be freed from the extraordinary charge. This is the provision in the first part of sect. 42: "The amount which shall be charged by any such apportionment as hereafter provided upon any hop-grounds in any district so to be assigned shall be distinguished into two parts, which shall be called the ordinary and extraordinary charge;" and when it makes an extraordinary charge for hops, and the cultivation ceases, then the extraordinary charge is to be taken off. That part of the section relates clearly to the lands mentioned in the apportionments which were subject to the additional charge, as well as the ordinary rentcharge in lieu of tithes. Now comes the second portion of sect. 42: "All lands in any such district the tithes whereof shall have been commuted under this Act, and which shall be newly cultivated as hop-grounds, shall be liable to the extraordinary charge." It is said that this portion of the section applies to lands which were virtually tithe-free, and had become exempt because there was no charge put upon them in the apportionment; but if they were in a district which had been liable to tithes before the commutation was made, and before the apportionment was put on, those lands, if hops were cultivated thereon, should be liable to the extraordinary charge in respect of hops. The probability would be against that which is so contended for, and I think the words are against it: "All lands in any such district, the tithes whereof shall have been commuted under this Act." The contest on the part of the claimant is, that the clause relates to lands in respect of which the liability to tithes has been commuted, but we think that that is not the meaning of the clause. It meant the lands in respect whereof the tithes shall have been commuted under this Act; then they would have been liable to the ordinary charge; and the words "extraordinary charge" would have a fair meaning. I think the beginning of the section, taking the words of the Act, "the amount which shall be charged by any such apportionment as hereafter provided upon any hop-grounds in any district," shows that it applied only to lands which were mentioned in the apportionment charged with some sum in that apportionment, and did not relate to lands which were entirely free from the apportionment, and which became, from the time that the apportionment was established, land which was to be exempt from any sum payable in lieu of tithes. If that is the true construction of the word "apportionment" in this section, then the lands here in question would be exempted from its operation. The result is, they were exempt from the extraordinary charge, because they were exempt from the ordinary charge: the one exemption includes the other.

The rest of the Court concurred.

*Judgment reversed.*

Attorney for the plt., *W. H. Withall.*

Attorneys for the defs., *Johnson and Weatherall.*

BAIL.]

REG. v. BOTLER AND OTHERS—HARTNELL v. THE RYDE COMMISSIONERS.

[Q. B.]

## BAIL COURT.

Reported by T. W. SAUNDERS, Esq., Barrister-at-Law.

Thursday, Jan. 29, 1863.

(Before Mr. Justice MELLOR.)

REG. v. BOTLER AND OTHERS (Justices of Glamorganshire.)

*Peer-law—New parish—Annexation to a union—20 Vict. c. 19—4 & 5 Will. 4, c. 76, s. 32.**Where an extra-parochial place has become a parish by virtue of the provisions of the 20 Vict. c. 19, such parish may be annexed to a poor-law union by the Poor Law Board, under the provisions of sect. 32 of 4 & 5 Will. 4, c. 76, without first obtaining the consent of such parish.*

In this case a rule had been obtained calling upon certain justices and a Mr. Carne to show cause why the said justices should not issue their warrant to levy upon the goods of the said Mr. Carne the sum of 2*l.* 11*s.* 6*d.* due from him under a contribution order of the board of guardians of the Bridgend and Cowbridge Union.

It appears that prior to the passing of the 20 Vict. c. 19, a place called Nash, in the county of Glamorgan, was extra-parochial, and was the property of Mr. Carne. There never had been any paupers there nor any poor-rate. By sect. 1 of that statute it is enacted, "That after the 31st Dec. 1857, every place entered separately in the report of the Registrar-General, on the last census, which now is or is reputed to be extra-parochial, and wherein no rate is levied for the relief of the poor, shall, for all the purposes of the assessment to the poor-rate, the relief of the poor, the county police, or borough rate . . . be deemed a parish for such purposes, and shall be designated by the name which is assigned to it in such report, and the justices of the peace having jurisdiction over such place, or over the greater part thereof, shall appoint overseers of the poor therein," &c.

By sect. 32 of the 4 & 5 Will. 4, c. 76, it is enacted that the Poor Law Commissioners may from time to time, as they may see fit, by order under their hands and seals, direct that any parish may be added to any union, "provided always that no such dissolution or alteration of the parishes constituting any such union, nor any addition thereto as aforesaid, shall in any manner prejudice, vary, or affect the rights or interests of third persons, unless such third persons, by themselves or their agents, shall consent in writing to such dissolution or proposed alteration or addition."

In 1863 the Poor Law Board made an order annexing Nash to the Bridgend and Cowbridge Union, the effect of which was to lower the value of the land in Nash. Upon this annexation, the guardians of the Bridgend and Cowbridge Union made a contribution order upon Nash for the union expenses. Mr. Carne was the sole owner of the land in Nash, and neither he nor any of the occupiers under him had consented to the order of the Poor Law Commissioners annexing Nash to the Bridgend and Cowbridge Union. Mr. Carne was the appointed overseer of Nash, and a contribution order having been made upon him he refused to obey it, and upon being summoned before the justices they declined to issue their warrant.

Gifford now shewed cause, and contended that, as the consent of Nash had not been obtained to the annexation to the Bridgend and Cowbridge Union, the Poor Law Commissioners had no jurisdiction to make the order.

Lush, Q.C. (Poland with him) argued that the 32nd section of the 4 & 5 Will. 4, c. 76, gives the Poor Law Board an absolute power to annex parishes to unions without the consent of the owners or occupiers, the proviso being intended merely to protect

parties from being prejudiced by being taken from one union and annexed to another, and so, perhaps, where they may have lent money on security of parochial or union property having that security endangered; and it does not apply to an original annexation.

MELLOR, J.—I think you need not trouble yourself further, Mr. Lush. You have given the true exposition of the statute, and the rule therefore must be made absolute. *Rule absolute.*

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqs., Barristers-at-Law.

Wednesday, June 24, 1863.

HARTNELL v. THE RYDE COMMISSIONERS.

*The Towns Improvement Clauses Act 1847—sect. 18—Non-repair of footway—Accident—Liability of commissioners for damages.*

Under the Ryde Improvement Act 1854, certain commissioners to be elected, were incorporated for the purpose of carrying the Act into execution, which Act incorporated the Towns Improvement Clauses Act 1847, 10 & 11 Vict. c. 34, which, after enacting that the management of the streets shall belong to the commissioners, and that they, and none other, shall be the surveyors of highways, enacts that "the commissioners shall be deemed guilty of a misdemeanor for refusing or neglecting to repair any public highway within the limits of the special Act, and shall be liable to be indicted for such misdemeanor in the same manner as the inhabitants thereof, or of any parish or other district therein, were liable before the passing of the special Act." The *plt.* having sustained a personal injury in consequence of a footway, within the jurisdiction of the said commissioners, being out of repair, he brought an action against them for damages:

*Held, that the action would lie.*

This was a demurrer to a declaration.

The declaration stated that, after the first election of commissioners under the Ryde Improvement Act 1854, and after the coming into operation of the whole of the said Act, and at the time of the committing of the grievances hereinafter mentioned, the *defts.* were the commissioners for the time being duly elected and acting under the said Act, and the pavement and footway hereinafter mentioned were situate within the limits of the said Act, and were under the care and management and control of the *defts.* as such commissioners as aforesaid, and the *defts.* wrongfully suffered and permitted a certain footway, in and being part of a public highway in the town of Ryde, in the Isle of Wight, in the county of Southampton, to be, and continue, and the same was out of repair and in a state and condition dangerous for foot-passengers using or passing along the said highway and footway thereof, and a certain rounded paving, or kerb-stone, was then negligently and wrongfully suffered and permitted by the *defts.* to be at the end of the said footway, so that the said footway terminated abruptly and dangerously to foot-passengers lawfully using and passing along the same. And the same then was left by the *defts.* after daylight had ceased without any sufficient or proper light to warn persons lawfully using the said footpath of the said dangerous state thereof, whereby the *plt.*, while lawfully using and walking upon and along the said highway and the said footway thereof after daylight had ceased, slipped and fell from off the said paving or kerb-stone and the said footway, and broke his leg, and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance, and is otherwise greatly injured; and the *plt.* claims 300*l.* To this the *defts.* pleaded, first, not guilty; secondly, denying

Q. B.]

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that the footway was out of repair, &c., by demurrer to the declaration.

By the Ryde Improvement Act 1854, 17 & 18 Vict. (local), certain commissioners, to be elected, are incorporated for the purpose of carrying the Act into execution, and amongst other provisions it is enacted that from the first election of commissioners the parishes comprised within the limits of the Act shall cease to be under the operation of the Highway Act. By the said Act also the Towns Improvement Clauses Act 1847, 10 & 11 Vict. c. 34, is incorporated, and by sect. 47 of this statute it is enacted that the management of all the streets which, at the passing of the special Act are, or which thereafter become public highways, and the pavements, &c., shall belong to the commissioners. By sect. 48 it is enacted that the commissioners, and none other, shall be the surveyors of highways within the limits of the special Act, and within those limits shall have all such powers and authorities, and be subject to all such liabilities as any surveyors of highways are invested with or subject to by virtue of the laws for the time being in force, &c.

By sect. 49 it is enacted, that "the commissioners shall be deemed guilty of a misdemeanor for refusing or neglecting to repair any public highway within the limits of the special Act, and shall be liable to be indicted for such misdemeanor in the same manner as the inhabitants thereof, or of any parish, township, or other district therein were liable before the passing of the special Act."

*Karslake*, Q. C. now appeared in support of the demurrer, and contended that the commissioners were not liable to be sued in an action for an act of non-feasance; they are in the position of surveyors of highways, and within the ruling in the case of *Young v. Davis*, 7 H. & N. 760; 6 L. T. Rep. N. S. 363. [GROMPTON, J.—There the action was against the surveyor, who was merely the servant of the parish; is that the same case as this, where the commissioners themselves are sued?] The commissioners are performing gratuitous duties, and by sect. 117 of the special Act, they are restricted as to the way in which they are to apply the funds raised under the Act. The declaration is bad for not showing that they have funds to enable them to do the repairs (*Metcalf v. Hatherington*, 11 Ex. 257), and they cannot raise more than 2s. 6d. in the pound.

*Bullen*, in support of the declaration, was not called upon.

GROMPTON, J.—I think our judgment must be for the plt. In this case we must look to the provisions of the Towns Improvement Act, and here we find that we have a body of persons who are a corporation, who are capable of being sued, and who are charged with not performing their duty of repairing a road, whereby an injury was sustained by the plt. Now the case of *Young v. Davis* is not applicable, for there the action was brought against the surveyors of highways who were merely the servants of the parish to do the repairs, and the maxim of *respondet superior* applies. Now upon looking at the Towns Improvement Act, the commissioners are declared to be guilty of a misdemeanor for not doing these repairs, and they are liable to be indicted in the same manner as the inhabitants were liable before. It seems to me that the liability of the parish to repair is taken away, and that the action expressly applies to an omission to repair on the part of the commissioners. But it is said they cannot be compelled to repair without the assistance of the special Act, which limits the rate to 2s. 6d. in the pound, and that it should be shown that they have sufficient funds for the purpose. But I think that is not so, for that when the Legislature says that the commissioners shall be liable in the same way as a parish, they must get funds somehow for

the purpose; and if there is any difficulty, they should apply to the Legislature upon the subject. It would be no answer by a parish to an indictment that they have no funds. Under the 49th section they are guilty of a misdemeanor in neglecting to repair, and being so, a private person who suffers an injury can bring his action against them.

BLACKBURN, J. delivered a similar judgment. (a)

*Judgment for the plt.*

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYN, Esqrs., Barristers-at-Law.

Tuesday, June 23, 1863.

HOWELL (app.) v. WYNNE (resp.)

*Practice—Appeal from justices—Delivery of paper-books—C. L. P. A. 1852—Practice Rules Hil. 1853—Costs.*

*The proper place for the delivery of paper-books for the judges, under rule 16 of the Practice Rules of Hilary Term 1853, prescribing the practice in special cases, demurrers, and appeals from justices, is Judges' Chambers; therefore where a party delivered his paper-books duly as regards the time for delivery, but unduly as regards the place (he delivering them to the judges' clerks at Westminster), the Court visited him with the penalty inflicted by the rule, making him pay for the copies delivered in his default by the other side.*

In this case, which was an appeal from the decision of justices, a question arose as to the delivery of paper-books.

*Hayes*, Serjt. before the argument of the case, prayed the court to order, in terms of rule 16 of the Practice Rules of Hilary Term 1853, that the resp. do pay to the app. the cost of paper-books delivered by app.'s attorney to the two puisne judges, in default of delivery by the resp. It appeared that the case was set down for argument on the 4th May. On the 28th April the app.'s attorney left two copies of the paper-books—one for the Lord Chief Justice and one for the senior puisne judge—at Judge's Chambers in Chancery-lane. On the 30th April he searched the proper books at chambers to ascertain whether the paper-books had been delivered on behalf of the resp., and, finding that they had not been delivered, he left two copies there for the other two judges, as authorised by the above-mentioned rule, and he now insisted on his right to three guineas as costs of the paper-books. On app.'s attorney writing to resp.'s attorney for his costs, he received a letter from Mr. Greenwood, the Solicitor to the Treasury, who is attorney for the resp., stating that the paper-books had been duly delivered to the judge's clerk at Westminster on the 20th April "according to the usual practice," as alleged by him. The proper place, it is submitted, for the delivery of the paper-books, is Judges' Chambers, at the Rolls-gardens, Chancery-lane, where records are kept of such deliveries, and where alone search can be properly made to ascertain whether the directions of the rule have been complied with.

WILLIAMS, J.—Though the Act of Parliament and the rules framed thereunder are silent as to where the delivery of these documents is to be effected, it must surely mean delivery at chambers. It will not do to go to the judges' houses. Besides, as brother Hayes has suggested, a record is kept at chambers showing what they receive. Here that is not the case, and it might depend, therefore, on the memory of the clerk.

*Welsby* for the resp.—These costs should not be

(a) Cockburn, C. J. was sitting at Nisi Prius, and Wightman, J. had gone to chambers.

allowed. How is the public to know the practice in the absence of express directions, either by the statute or the rules of court? Mr. Greenwood here swears he has always delivered the paper-books as he did in this case, to the judges' clerks at Westminster, down to this time, without objection.

WILLES, J.—It must mean that the paper-books are to be delivered at chambers; were this not so, the judges' clerks might have actions brought against them for negligence.

WILLIAMS, J.—The Act of Parliament and the rules of practice do not state where the paper-books are to be delivered. The only direction is, that two shall be delivered to the Lord Chief Justice and the senior puisne judge by the plt.; and the other two copies to the other two judges by the deft. The rule does not say the documents are to be delivered to the judge's clerk. The Court is of opinion that the paper-books must be delivered at the usual place, which is Judges' Chambers, in order that the other side may have means of ascertaining by search or inquiry whether they have been rightly delivered or not, and if not, that he may supply the omission at the cost of the other side.

*Rule absolute to pay costs of paper-books.*

## BAIL COURT.

### LEATT v. VINE.

*Game conviction—Stat. 1 & 2 Will. 4, c. 32, s. 30—Bond fide claim of right to shoot—Jurisdiction of justices.*

*A person charged under the statute 1 & 2 Will. 4, c. 32, s. 30, with trespassing in pursuit of game in the daytime on land in the occupation of a tenant to A. set up a claim of right to shoot over the land, on the ground that he and every one who chose had always shot there till some recent acts of interruption, and declared his readiness to try the right with A.:*

*Held, that the mere assertion of such a general right in himself and every one else, though he really believed it without showing any such claim of right as would be a defence to an action of trespass, did not oust the jurisdiction of the magistrates to convict under the statute in question.*

*R. v. Cridland, 7 Q. B. 853, distinguished.*

This was an appeal from a conviction by certain magistrates under circumstances which, as summed up by the learned judge in his considered and written judgment, were as follows:—

The information and conviction in this case were under the Game Act, 1 & 2 Will. 4, c. 32, s. 30, by which it is enacted, "that if any person whatsoever shall commit any trespass by entering or being in the daytime upon land in search or pursuit of game or woodcocks, &c., he shall, on conviction before a justice, forfeit and pay any sum not exceeding 40s." with a proviso "that any person charged with any such trespass shall be at liberty to prove by way of defence any matter which would have been a defence to an action at law for such trespass." There was evidence before the magistrates that the app. had entered and walked upon land in the possession and occupation of a person of the name of Bastin, who rented it under Lord Rolle, in pursuit of game. The land appeared to be a part of a marsh near the sea, and over which the tide had flowed until a bank was made round it several years ago by Lord Rolle. The app. claimed a right to shoot over the place in question, on the ground that he and everybody that chose had always shot there until some late instances of interruption by the gamekeepers, and he declared his readiness to try the right with Lord Rolle. The magistrates, however, were of opinion that he had not made out such a claim of

right as would oust their jurisdiction, and convicted him in a penalty of 10s., subject to the opinion of the court whether the claim of right was such a *bond fide* claim as to oust the jurisdiction of the magistrates.

*Montague Smith, Q.C. for the resp.*

*Kingsdon for the app.*

*Cur. adv. vult.*

WIGHTMAN, J. (after stating the facts above set forth).—Upon the argument the counsel for the app. relied mainly upon the case of *Reg. v. Cridland*, 7 Q. B. 853. In that case the deft., upon the hearing of an information against him under the same statute, claimed a right to enter and kill game in the land then in question under an authority given by a person who claimed to be the owner of the land, and proposed to set up that title and the authority under it as an answer to the information. The justices, however, convicted him, but the Court of Q. B. were of opinion that a *bond fide* claim of title to the land ousted the jurisdiction of the magistrates. In the present case, however, the app. did not set up any title to the land in himself, or in any person under whose licence or authority he proposed to act, and the case is therefore distinguished from that of *Reg. v. Cridland*. The app. only set up a general right in himself and any one who pleased to shoot over the land in question, without showing or professing to show such a claim of right as would be a defence to an action of trespass. He may have believed that he had a right because he and many others had for many years shot over the place in question. But I am disposed to think that the mere belief that he had a right is not sufficient, under the terms of the statute now in question, to oust the jurisdiction of the magistrates, as it might under the Malicious Trespass Act. At all events that was a point for the magistrates in the first instance to determine, and unless they should clearly appear to be wrong, I do not think that this court ought to interfere with the exercise of their discretion. The claim of right is so vague that the magistrates might well think that there was no legal ground upon which it could be entertained so as to warrant their considering it to be *bond fide* in such a sense as to oust their jurisdiction. I may observe that, in the case of *Morden v. Porter*, 7 C. B., N. S., 641; 1 L. T. Rep. N. S. 403, which was a proceeding under the same Game Act, 1 & 2 Will. 4, c. 32, s. 30, two of the three learned judges of the Court of C. P. who decided the case, were of opinion that the *mens rea* or its absence did not affect the question of liability. Upon the whole I am of opinion that the justices were right, and that the conviction was proper.

## EXCHEQUER CHAMBER.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

### ERROR FROM THE QUEEN'S BENCH.

*Monday, May 11, 1863.*

(Before ERLE, C. J., POLLOCK, C. B., WILLIAMS J., BRAMWELL and CHANNELL, BB., KEATING, J. and WILDE, B.)

### DICKSON v. THE QUEEN.

*Spirit licence—Grocers in Ireland—Duty payable—6 Geo. 4, c. 81—6 & 7 Will. 4, c. 38.*

*By the 6 Geo. 4, c. 81, s. 2, a duty varying from 9l. 9s. to 13l. 13s. according to the rental, is imposed on a duly licensed grocer in Ireland on taking out a licence for retailing spirits; and by sect. 4 the maximum quantity he was empowered to sell at any one time was not to exceed two quartals. By 6 & 7 Will. 4, c. 38, s. 3, the minimum quantity he was empowered to sell at any one time was one pint:*

*Held (notwithstanding a decision of the Ex. Ch. in Ireland to the contrary), that the duty imposed by*

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the 6 Geo. 4 remained unaltered, and was still payable.

This was a petition of right under the 23 & 24 Vict. c. 34, and alleged, that by the statute 6 Geo. 4, c. 81, s. 2, it was enacted that for and upon all excise licences to be taken out by any retailer of spirits in Ireland from and after the 5th July 1825 certain duties therein mentioned should be raised, levied and collected and paid unto his former Majesty King George the Fourth, his heirs and successors.

The licences are of two classes: the one class being the spirit grocer's licence, which entitled the person taking out the same to retail spirits in quantities not exceeding two quarts at one time to be consumed elsewhere than on the premises; and the other class comprehending all licences for the retail of spirits, spirit grocers' licences only excepted. The duties payable on the two classes of licences respectively vary in amount, the first class being charged with a higher rate of duty than the other class, the duty payable on the spirit grocers' licence varying from 9*l.* 9*s.* to 13*l.* 13*s.*, while on the other class it varied from 2*l.* 2*s.* to 10*l.* 10*s.* in each case, according to the value of the premises. By the 6 & 7 Will. 4, c. 38, s. 3, the spirit grocer's licence given by the 6 Geo. 4, c. 81, s. 2, was repealed from the 28th July 1836, and a new and a more restricted licence given in lieu of it; the statute 6 & 7 Will. 4, c. 38, is silent as to the amount of duty payable in respect of such new licence; by this Act the statutable enactments relating to the carrying on the trade of a spirit grocer were done away with and new ones introduced, both with reference to the manner of carrying on the trade and the thing to which the spirit grocer was declared entitled under the 6 Geo. 4, c. 81; consequently the rate of duty chargeable on the spirit grocer's licence under the 6 Geo. 4, c. 81, ceased to be applicable to the new licence given by the 6 & 7 Will. 4, c. 38, and the rate of duty (if any) payable in respect of such new licence was that mentioned in the 2nd section of the 6 Geo. 4, c. 81, as chargeable on every retailer of spirits (except retailers of spirits in Ireland after mentioned), being the lower rate of duty set forth. The officers of excise continued to demand and take on behalf of the Crown the higher rate of duty which had thus ceased to be chargeable on all licences as granted under the 6 & 7 Will. 4, c. 38.

The case was argued before the Court of Ex. in Trinity Term 1843, and decided against the plt., the Chief Baron dissenting.

Thereupon writ of error was brought before the twelve judges in Hilary Term 1845, when the judgment of the Court of Ex. was reversed, and it was decided that the higher rate of duty imposed on the spirit grocer's licence given by the 6 Geo. 4, c. 81, is not the duty legally chargeable on the licence specified in the 6 & 7 Will. 4, c. 38.

In May 1842 the suppliant applied again for a licence, which was refused, except on payment of the higher duty. Thereupon a petition of right was presented, and ultimately there was a demurrer to the replication, which came on for argument before the Court of Q. B. on the 10th June 1862, when that court declined to interfere with the decision of the Court of Ex. Ch. in Ireland, and said that they should, without expressing any opinion on the case, decide in accordance with the decision.

Whereupon the Attorney-General, on behalf of the Crown, brought a writ of error, which now came on for argument.

The Attorney-General (Locke, Q.C., Welsby and Crompton Hutton with him), for the Crown, in support of the writ of error.—The question depends on the construction of the statutes 6 Geo. 4, c. 81, and 6 & 7 Will. 4, c. 38. [ERLE, C. J.—There is a preliminary

question, whether the suppliant had a right to try the validity of the claim by appeal. Is there any jurisdiction in Ireland by which he could try the question whether he was liable to this 16*s.* 6*d.*? If an excise officer demands more than the right sum, is there any appeal against that demand? It was considered that there was not. The question is whether, since the 6 & 7 Will. 4, c. 38, s. 3, Dickson was liable to the higher rate of duty imposed by the 6 Geo. 4, c. 81, s. 2, he being within the description of a grocer retailing spirits. Comparing the two Acts, the only alteration made by the 6 & 7 Will. 4, is this and no more, that grocers shall not take out a licence to sell spirits in quantities not less than a pint at one time, and to be consumed elsewhere than in the house or on the premises, whereas by the 6 Geo. 4 the limit was not exceeding two quarts at any one time; that is to say, the one statute defines the *maximum* quantity, and the other the *minimum*. The distinction between grocers retailing spirits and publicans in Ireland, was recognised in earlier statutes than the 6 Geo. 4, c. 81; *a.g.* 55 Geo. 3, c. 19, s. 3; and 58 Geo. 3, c. 57. There is nothing in the 6 & 7 Will. 4 that interferes with this distinction. On the contrary sect. 26 of 6 & 7 Will. 4 keeps up the distinction and imposes a penalty of 50*l.* only in the case of another person selling spirits without a licence, and 100*l.* in the case of a grocer doing so. The smaller scale of duties for spirit licences enacted in the schedule to the 6 Geo. 4, c. 81, s. 2, is applicable to the persons mentioned in sects. 13 and 14 of the Act; that is, to publicans who are licensed to sell spirits to be consumed on the premises. The 6 & 7 Will. 4, c. 38, was virtually a Police Act, and contains what are in effect police regulations only. No alteration or change is made in the duties payable on licences. The case of *Dickson v. Pope*, 7 Ir. L. Rep. 98, 107, was then commented upon.

*Butt*, Q.C. (of the Irish bar) for Mr. Dickson, in support of the judgment of the Court of Q.B.—It is submitted that the smaller duty 2*l.* 4*s.* 1*d.* was the one to which Dickson's licence was rightly chargeable. The 6 & 7 Will. 4, c. 38, s. 3, changed the character of the licence in some respects. The licence under the 6 Geo. 4, c. 81, s. 4, is not applicable to that required by the 6 & 7 Will. 4, c. 38, s. 3. The fallacy in the argument for the Crown is this, that it construes the duty as imposed upon the person, whereas in fact it is attached to the licence and nothing else. The duty is imposed on the document or instrument, and it is placed under the dominion of the Commissioners of Stamps. When the 6 & 7 Will. 4, c. 38, destroyed the licence created by the 6 Geo. 4, the duty attached to that licence fell to the ground, because the instrument was gone. There is no foundation for the alleged distinction between grocers and publicans, for a grocer might have obtained a publican's licence in the ordinary mode that a publican could.

The Attorney-General was heard in reply.

*Cur. adv. vult.*

June 13.—ERLE, C. J.—By this petition of right the question is raised whether the suppliant ought to recover 16*s.* 6½*d.*, being, as he alleges, a sum paid by him to the collector of excise in excess, beyond the sum due for a licence under the 6 Geo. 4, c. 81, s. 2. In answering that question we confine our attention to the point which has been argued before us, without considering whether the complaint of the suppliant was the subject of a petition of right within the meaning of Mr. Bovill's Act, 23 & 24 Vict. c. 34, and also without being bound by the authority of the Court of Ex. Ch. in Ireland, upon the same question, in the case of *Dickson v. Pope*, 7 Ir. L. Rep. 74. We have often admired the powers of the Irish judges in grappling with a doubt upon the law, and we have read their judgments in this case.



with that feeling, and although we differ from the judgment of the majority of the Ex. Ch., we do so with sincere deference, but with the more freedom, by reason of the balance of opinion which stands recorded in Ireland. As in those judgments all the relevant arguments are clearly and amply set forth, we think that our duty would be best discharged by stating the principles which govern our decision, referring for more full details to the reports of the case there. The question then is, whether the collector of excise was right in demanding this sum for the grant of the licence required by the suppliant. The suppliant, in his capacity of a grocer, required a licence to retail spirits. The collector demanded the amount due for a grocer's licence under the 6 Geo. 4. c. 81, s. 2. The suppliant denied his right to that amount, on the ground that part of the schedule contained in that section relating to licences for retailing spirits to be granted to grocers, was repealed in whole or in part by the 6 & 7 Will. 4, c. 38, s. 3, so that, if any sum was due thereunder, it was a less sum, namely, that which was due for licences to retailers of spirits other than grocers. For the purpose of seeing whether such repeal was made, it may be worth while to advert to some general principles. At common law the right of property in spirits included the same right of alienation as is incident to the right of property in other chattels. By various statutes, that right of alienation has been qualified, and the 6 Geo. 4, c. 81, created the qualification of that right in respect of selling spirits by retail, which has given cause for the present suit. The force of every law is in its sanction. The force of the 6 Geo. 4, c. 81, lies in sect. 26, which gives the sanction to all its provisions; and, in respect of the retailing of spirits, subjects every proprietor of spirits who chooses to sell them by retail to a liability to pay a penalty of 100*l.* if he is a grocer, to a penalty of 50*l.* if he is not a grocer. Supposing the statute had stopped there, and as far as this statute operates, the right of every proprietor of spirits to sell them by retail would have been qualified by the liability to the penalty if he exercised that right. With that qualification his right would remain the same as before in this sense, namely, if, being a grocer, he chose to sell spirits by retail, and pay 100*l.*, every time he so sold he would have conformed to the law. We draw attention to this view, because the licence seems to have been regarded in the light of a grant, creating certain rights of selling, and the duty payable to be in the nature of purchase-money to be paid for the grant of those rights. And from these premises it is supposed to follow, that if any of those rights which are assumed to have been granted by the licence before the 6 & 7 Will. 4, cannot longer be granted since that statute, then it is said that the purchase-money attached by the statute to one kind of grant can no longer be demanded, if that kind of grant can no longer be made. We think that the effect of the licence is not correctly stated in this argument; for sect. 26 imposed a liability to a penalty on all sellers of spirits by retail except those sellers of spirits by retail who should have taken out the licence mentioned in the statute. The licence therefore operates merely to exempt from a liability to the penalty to which the party choosing to sell spirits by retail without a licence is made liable. He acquires the right to sell by the common law, and he acquires merely an exemption from the penalty imposed by the sect. 26, by the licence under sect. 2. Two classes of persons are entitled to obtain licences: the first class are retailers other than grocers, who must be qualified in the manner provided by the statute, of which class it is sufficient to say that the suppliant was clearly not qualified to be classed therein. The other class are licensed grocers, in which class the suppliant was, and

his right to a spirit licence rested solely on his being a licensed grocer. The effect of the licence under the 6 Geo. 4 was not an exemption from the penalty for every sale he might choose to make, but only for sales within prescribed limits. As to quantity, they must be sales of spirits not exceeding two quarts; as to place of consumption, they must be sales of spirits not to be consumed in the house or on the premises of the seller. The words of the schedule do not import a grant of any right to sell within these limits or otherwise. The description is in effect, "every grocer selling spirits in a less quantity than two quarts at one time, &c., to be consumed elsewhere than in the seller's house or premises, shall pay so much." The words of sect. 4 also do not import any grant of a right to sell. The words are, in effect, "Every licensed grocer shall be entitled to take out the licence mentioned in the schedule to retail spirits in any quantity not exceeding two quarts, and to be consumed elsewhere than on his own house and premises. Jackson, J., in reciting this section, according to its effect in his view, says of it at page 113, that the section entitled the grocer to get a licence authorising him to sell under two quarts, if to be consumed off the premises;" and he seemed to consider that the licence was a grant of an authority within those limits for a price, and if a material part of the consideration failed, the duty to pay was at an end. But if the licence is regarded in its true light, as an exemption from the penalty to which all sellers of spirits are liable if they do not obtain by licence an exemption operative for sales within prescribed limits, it may help to the construction of the statute 6 & 7 Will. 4, c. 38, to which we now come. The purpose of this Act was the prevention of disorder from excess in the consumption of spirits. It related to police, and not to revenue, and it subjected the sellers of spirits in small quantities to supervision by the officers of the law. Then the effect of sect. 3 is, that every licence to a grocer to retail spirits granted thereafter should be void unless it prescribed, as one limit to his right of sale, that the quantity must not be less than a pint, and that section assumes that the provisions of the 6 Geo. 4, c. 81, relating to the licences to grocers to retail spirits, are in force, and that the limits prescribed therein are in operation, and enacts that when further limit (in respect of the quantity) shall be prescribed in addition to the two limits that before existed in respect to the quantity and place of consumption, and subject to that alteration, the licences to grocers thereafter to be granted should be the same as they were before the Act passed. No grocer is obliged to retail spirits. If he chooses to do so he may either pay the penalty or take out a licence. If he chooses to take out a licence he must take that which the law allows, and the licence under the 6 Geo. 4 is the only one which the law allows to a retailer in the capacity of a grocer. This licence must be obtained in the manner and upon the terms required by that statute, and, among the rest, on payment of the sum now in question. The suppliant, as a grocer, has chosen to be a retailer of spirits, and he would have been clearly liable to a penalty under 6 Geo. 4, if he had not exempted himself therefrom by the operation of the licence which he obtained. That was the only operation it ever had, and it has had the same operation since the 6 & 7 Will. 4 as before. It is not important to consider what is the effect of this 3rd section, that is, whether it created a new licence under which a grocer retailing at his grocery establishment should be restricted to a pint as a minimum, and that if he had other premises distant a quarter of a mile from the grocery establishment he might have a licence without that restriction, as put by Jackson, J., and whether it takes off the limit in respect of the two quarts as a maximum, or is capable of producing

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the results attributed to it by some other of the learned judges. The notion that retailers of spirits should be exempt from the whole or any part of the duty on their licences imposed by one statute, because a later statute has introduced regulations which diminished their sale, as a general proposition revolts. It would give a right to all publicans to be suppliants for return of duty imposed by a statute prior to statutes containing regulations which diminished their profits, such as those for closing their houses at certain hours of the night. Such a claim we think, would not deserve any judicial support, and yet the principle upon which the suppliant's claim is founded appears to us to be the same. The opinion that statutes passed with the intention of imposing a tax are to be so construed as to defeat that intention, that provided the words admit of a doubt in the mind either of the tax-collector or the taxpayer, the one ought to refuse to collect and the other to pay, appear to us to require limitation. Effect is to be given to the intention of the Legislature to be collected from the context of the whole statute, construed with reference to the purpose expressed therein. It is no part of the duty of the judges to endeavour to defeat the intention of the Legislature either in respect of the imposition of a tax or otherwise. The whole community has an equal interest that every part of it should contribute its quota to the general income derived from taxes, and all statutes are to be construed by the rules that tend to the discovery of the intention of the Legislature expressed therein; and it is only where there is nothing to show which of two constructions is true, that maxims of such dangerous latitude as those which prevailed with the Ex. Ch. in Ireland can be allowed to have any operation. If such maxims had been eliminated, and each judge had been called on to say what was the intention of the Legislature to be gathered from the two statutes taken together, we think that the answer would have been unanimous, and that all would have agreed that judgment should be for the Crown.

Judgment reversed.

## COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK, Esq., Barrister-at-Law.

May 26 and 27, 1863.

(Before the LORDS JUSTICES.)

BIDDULPH v. THE VESTRY OF ST. GEORGE'S,  
HANOVER-SQUARE.*Injunction—Public nuisance—Powers of vestry—  
Bona fide exercise of—Metropolis Local Management Act.*

*Although public bodies acting under the general powers given them by statute have not therefore a licence to do whatever they think right, yet, if the court is called upon to interfere, it is its duty first to consider whether the proposed exercise of the power is or is not bona fide.*

*The defts., acting under the Metropolis Local Management Act, were about to erect a urinal nearly opposite to the plt.'s residence; the 88th section of that Act providing that "it shall be lawful for every vestry, &c., to provide and maintain urinals, &c., in situations where they deem such accommodation to be required, &c., and any damage occasioned to any person by the erection thereof, &c., is to be defrayed under this Act."*

*Their Lordships being satisfied upon the evidence that the urinal intended would not of necessity be a public nuisance, and further that it was neither certain nor probable that the defts. were exceeding or would exceed their powers, and that they were not influenced by any improper motive, dissolved an interlocutory*

*injunction which Stuart, V.C. had issued against them.*

This was an appeal by the defts., the vestry of the parish of St. George, Hanover-square, against an order of Stuart, V.C. granting an injunction upon motion by the plt. The previous hearing is reported *ante*, 44. It will be sufficient here to state that the vestry were about to erect, under the powers given them by the 88th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, a public urinal in Grosvenor-place, about thirty-five yards from the residence of Colonel Robert Myddelton Biddulph, the plt., who instituted this suit to restrain them from so doing, on the ground that the erection in question would be an injury to the plt. in a manner which could not be measured by pecuniary compensation.

A full statement of the circumstances and the negotiations before the bill was filed will be found in the previous report, and the arguments of counsel, especially in support of the injunction, sufficiently appear in the judgment of Turner, L. J.

Bacon, Q.C. and Schomberg moved to discharge the V.C.'s order.

Maites, Q.C., F. O. Haynes and Martindale supported it.

Bacon, Q.C. was heard in reply.

The following were the authorities referred to:—

*Soltan v. De Held*, 2 Sim. N. S. 133.

*The Attorney-General v. The Sheffield Gas Consumers' Company*, 3 De G. M. & G. 304;

*Tinkler v. The Wandsworth Board of Works*, 1 Giff. 412; 30 L. T. Rep. 146; s. c. on appeal, 2 De G. & Jon. 261; 31 L. T. Rep. 27;

*Stainton v. Woolrych*, 23 Beav. 225;

*Austin v. The Lambeth Vestry*, 4 Jur. N.S. 274 and 1052; 30 L. T. Rep. 300; and

*Coats v. The Clarence Railway Company*, 1 Russ. & Myl. 181.

Lord Justice KNIGHT BRUCE.—The evidence as it stands, does not appear to me to show it to be certain or probable that the works intended by the defts. will be, or will create, in point of law, a nuisance, or show it to be certain or probable that the defts. are exceeding, or intending to exceed, the powers conferred on them by Act of Parliament, or to be, or to have been, actuated by any improper motive. So viewing the evidence, whatever it may be fit to do at the hearing of the cause, in consequence of legal proceedings, whether merely civil or otherwise, if any shall be instituted, I think that the order before us, and the injunction, if any, issued under it, should be discharged, and that the costs in the V. C.'s court and here should be costs in the cause.

Lord Justice TURNER.—I agree. Mr. Martindale has put this case in very few words entirely on the right points on which it depends. First, he says, that the vestry can have so greater right than the owner of adjoining lands, and that the owner could not use his land to the damage of his neighbour; secondly, he says that the powers of this Act are being exercised injuriously, and that this exercise of them is not proved to be necessary. Now, on the first point, it is not contended on the part of the vestry that this Act of Parliament does confer upon them the right to create either a private or a public nuisance, and it is impossible to assume that the mere fact of a urinal being erected will of itself be a nuisance, when we find power given by Parliament to erect such accommodation. Certainly, it is not proved that the erection must be such as will constitute a nuisance, either public or private; therefore, the first part of the argument drops to the ground. But then, it is said that the powers of this Act of Parliament are being exercised injuriously to private property, and that the exercise of them is not necessary. Now, I am very far from thinking that this court has not power to

interfere with public bodies in the exercise of powers which are conferred on them by Act of Parliament. I take it, that it would be within the power and the duty of this court so to interfere in cases where there is not a *bonâ fide* exercise of the powers given by Parliament, and I should be very sorry to be supposed to entertain the notion that public bodies under the general powers given them by Act of Parliament can do whatever they think right. But when this court is called on to interfere, I take it to be the duty of this court to consider the question whether there is or not a *bonâ fide* exercise of the power, and on the evidence I can see nothing which would in any way warrant the court in imputing to the defendants that they are not doing so. The question then resolves itself into the construction of the Act of Parliament. It is said that, if the powers be as extensive as contended for on the part of the defendants, they might erect a urinal in front of any gentleman's house. The answer is, that it would be impossible to hold that to be a *bonâ fide* exercise of the powers given by statute. A case was cited in the course of the argument, and relied on by the plaintiffs, which at first sight did make some impression on my mind—*Coats v. The Clarence Railway Company*, 1 Rns. & Myl. But on examining that case I see that there was, in the first instance, an order by consent, referring it to an engineer to say what damage would be sustained by the party; but, independently of that, I think the case must be considered to have proceeded on the ground that there was not a *bonâ fide* exercise of the powers; for what the company in that case were doing was—that having powers to make an arch, they were making an insufficient arch, in order to save themselves the expense of making a sufficient one, and no one can doubt that that was not a *bonâ fide* exercise of the powers of the Act of Parliament. Therefore, that case does not seem to me to affect the present one. The case of the *Attorney-General v. The Sheffield Gas Consumers Company* has nothing to do with the present question, for there the parties who were doing the acts complained of, laying down the gas pipes, had no powers whatever, parliamentary or otherwise, to do the acts they were doing, and the case resolved itself into the question whether the court would interfere to restrain an act which was merely temporary—that of taking up the pavement. I think, therefore, whether we consider the case on the first ground, or on the ground which was secondly put, it is not sufficient to induce the court to interfere, and I am of opinion that the injunction should be dissolved.

Solicitors for the plaintiffs, *Hunter, Gwatkin and Hunter*.

Solicitors for the defendants, appealing, *Capron, Brabant, Capron and Dutton*.

### ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Tuesday, May 5, 1863.

ATTORNEY-GENERAL v. THE PORTREEVE, ALDERMEN and BURGESSES OF AVON AND OTHERS.

*Municipal Corporation Acts—Charter—Old and new corporation property—Parties.*

*A Royal charter must be assumed to be valid, unless proceedings are taken to set it aside; and the Court of Ch. is not the proper court in which to try the validity of a charter.*

*The exercise by the Crown of its own inherent right to grant a charter of incorporation is confined, either to the grant of a charter to a body, which at that time is no corporation, or to the resuscitation of an old corporation which then has, from some cause, become incapable of administering its own duties. In neither case does the exercise of the right affect property belonging to the corporation.*

*Where, however, a new charter was granted to an existing corporation, and such charter purported to be granted under and subject to the above-mentioned statutes, this court assumed it to be valid; but being of opinion that a complete identity existed between the old and new corporations, it was*

*Held, that the property of the old corporation was, by force of the charter, vested in the new one; and that the Attorney-General might interfere to set aside leases or sales made by the corporation subsequent to the time when it was known to them that a new charter was intended to be granted.*

The circumstances under which the portreeve, aldermen and burgesses of Avon, otherwise Aberavon (and hereinafter called the old corporation), became entitled to hold, and until the 2nd July 1861 continued to hold and deal with the property, forming the subject-matter of this suit, are so fully set out in the report of the case of *Evan v. The Portreeve, Aldermen and Burgesses of Avon (otherwise Aberavon)*, Griffith Williams and Her Majesty's Attorney-General, ante, 3 L. T. Rep. N. S. 347, that we refer our readers to them in the first instance.

On the 7th March 1861 the old corporation of Avon held a court, and a resolution was then passed sanctioning a lease of the market-place of the town, and of some slaughterhouses and the stallages, rents and tolls, to the deft. John Jones, one of the burgesses, and formerly portreeve of the borough, for fifty years, in consideration of 500*l.* paid forthwith, and an annual rent of 5*l.*

On the 15th March 1861 an information was filed against the old corporation, John Jones and Griffith Williams (their attorney), praying an injunction to restrain the corporation from granting the above-mentioned lease to the deft. Jones.

On the 16th March an *ex parte* injunction was obtained against the corporation according to the prayer of the information. On the 16th May they moved to dissolve the injunction, when the M. R. refused the motion, on the ground that if a new charter were granted—as was then expected—to the corporation, important questions might arise as to the effect of it on the property of the then existing corporation; and that matters ought to remain in *status quo* till after the granting of the charter and the decision of the anticipated questions.

On the 2nd July 1861 the new charter was granted by the Crown to the corporation. By the charter, after reciting the 1 Vict. c. 78, s. 49, and the proceedings on the petition for the charter, and after defining the limits of the borough for the purposes of the new charter, Her Majesty, as well by virtue of her royal prerogative as of the powers and authorities given to her by the said recited Act, and all other powers and authorities enabling her in that behalf, did grant and declare that the inhabitants of the said borough of Aberavon comprised within the aforesaid boundaries and their successors should be for ever thereafter one body politic and corporate, and should be called the "mayor, aldermen and burgesses of the borough of Aberavon;" that they should have and exercise, do and suffer all the acts, powers, authorities, immunities and privileges which were then held and enjoyed, done and suffered by the several boroughs named in the schedule to the Municipal Corporations Act (the 5 & 6 Will. 4, c. 76), in the like manner and subject to the same provisions as fully and as amply, to all intents and purposes whatsoever, as if the said borough of Aberavon had been one of those named and included in the 2nd section of schedule B. to that Act annexed; and the charter extended to the said inhabitants all the powers and provisions of the Municipal Corporations Act, and of all amending and other Acts relating thereto. It also gave power to the cor-

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poration to acquire lands to a certain value within the borough over and above any real estate they might be entitled to, and also to purchase lands out of the borough to a certain value. Provision was also made as to the number and qualifications of the officers of the corporation. The information charged that the officers of the old corporation had in their hands large sums derived from certain sales (*vide Evans v. Portreeve, &c. ubi sup.*) and mortgages of the rents and tolls. In the course of the year 1861 the new Burgess-roll of the borough was completed, and the officers duly elected.

On the 6th Feb. 1862 the suit and information were amended by adding the new corporation, the mayor, aldermen and burgesses as co-defts., and by inserting a paragraph in the prayer that it might be declared that all the property of the portreeve, aldermen and burgesses in their corporate capacity at the time of the granting the new charter had become vested in the mayor, aldermen and burgesses for the purposes and subject to the provisions of the Municipal Corporations Act and the Acts for amending the same, subject nevertheless to any mortgages, charges, or incumbrances, and to any debts or obligations of the portreeve, aldermen and burgesses lawfully affecting such property at the time when it became vested in the mayor, aldermen and burgesses; that the portreeve, aldermen, and burgesses might be decreed to deliver possession of, and to pay over all such property; and for inquiries and accounts to ascertain what property belonged to the portreeve, aldermen and burgesses at the time of the granting the new charter; and what mortgages, charges, or incumbrances, debts or liabilities then affected the same.

The old corporation, and Griffith Williams, their attorney, by their answer, contended that the charter of the 2nd July 1861 was invalid and void, on the ground of its not having been asked for by a majority of the inhabitant householders of Avon; that if any such corporation as that of the mayor, aldermen and burgesses existed, they had no interest in the property of the old corporation; that if they had any interest, they ought to have joined in the institution of the suit, and not been made defts. in it; and that the suit was otherwise improperly framed as to parties.

*Baggallay, Q.C., Welby and W. Pearson*, in support of the information, insisted that the old corporation was a public one, intrusted with certain property for the benefit of the public of Avon; that the charter of 2nd July 1861 was perfectly valid, or, at all events, this court must so assume; that the present corporation was well constituted by it, and was a corporation in continuation of the old one, and entitled to all its rights, powers, privileges and property. They cited

The Municipal Corporations Act, 5 & 6 Will. 4, c. 76, ss. 1, 6, 71, 92, 94, 97 and 141;

The Municipal Corporations Act Amendment Act, 7 Will. 4 & 1 Vict. c. 78, s. 49;

*Attorney-General v. Kerr*, 2 Beav. 420;

*Attorney-General v. Corporation of Leicester*, 9 Beav. 546;

*Attorney-General v. Wilson*, 9 Sim. 30 and 48; a.c. on appeal, Cr. & Ph. 1;

*Doe dem. Governors of Bristol Hospital v. Norton*, 11 M. & W. 913, 927, 928;

*Attorney-General v. Aspinall*, 1 Keen, 513; s.c. on appeal, 2 Myl. & C. 613.

*Selwyn, Q.C., Speed and Everitt*, for the defts., contended that, independently of any statute, the Crown could not alter the constitution or existence of a corporation, unless it was incapacitated from performing its functions and duties. The statutes referred to were inapplicable to this corporation; and, moreover, the charter of 2nd July 1861 had not been asked for by a majority of the inhabitant householders of Avon; and was therefore invalid. They cited

*Batter v. Chapman*, 8 M. & W. 1.

*Baggallay, Q.C.*, very shortly, in reply.

The M. R., in the course of the argument, referred to *Re The Lords of the Treasury, ex parte The Fishmongers' Company*, 1 My. & Cr. 676; *Attorney-General v. Corporation of Liverpool*, *Ibid.* 171;

*Reg. v. Taylor*, 11 A. & E. 949.

The MASTER of the ROLLS.—There are various points upon which it is not necessary for me in this case to hear a reply. The first thing to be considered is, whether the charter was granted by the Crown under a right inherent in it, or under its parliamentary powers? With respect to the charters granted under the right inherent in the Crown, the exercise of that right is confined either to the granting of a charter to a body which, at the time of the grant, is no corporation at all; or to the resuscitation of an old corporation, which then has from some cause become incapable of administering its own duties. In neither case does the exercise of the right affect property belonging to the corporation. It is clear that if property be given to a corporation without any qualification or limitation, they take it absolutely; and if it be given in trust, they take it in trust, as they would if they were a single individual. I am of opinion that the charter in question is not a charter granted under the powers inherent in the Crown; but that it is, as in fact it professes to be, a charter granted under the parliamentary powers vested in the Crown. The next question which has been very pointedly raised in the argument is, whether the charter now has any validity? It was suggested that it was invalid by reason of its not having been called for by a majority of the inhabitant householders of Avon. But, even so, the Court of Ch. is not the proper tribunal to try the validity of a charter. If a deed is impeached here, the court will still act upon it, unless it appears to be void upon the face of it, or unless some proceedings are taken to set it aside. That rule applies even more forcibly to a Royal charter. Such a document must be assumed to be valid, unless some proceedings are taken to set it aside. I must therefore now treat this charter as a valid subsisting one under 7 Will. 4 & 1 Vict. c. 78. The next question is, what is the effect of the charter? As to that question, I must refer to 7 Will. 4 & 1 Vict. c. 78, s. 49; than which section nothing, I think, can be more clear and distinct. It expressly empowers the Crown to grant a charter to a town or borough, whether already a corporate town or borough or not, and to extend to such town or borough all the powers and provisions of the Municipal Corporations Act (5 & 6 Will. 4, c. 76), in the same manner as if the place were mentioned in the schedules to that Act. Her Majesty has thought fit to grant such a charter to the borough of Aberavon, as fully to all intents and purposes as if it had been one of the boroughs named in the schedules to that Act. What, then, is the operation of the charter with respect to that Act? I dissent from the argument, that there was here an attempt to take property from some body and to give it to another; but I fully assent to the argument, and to the cases cited in support of it, that there exists a complete and perfect identity between what, in this case was commonly called the old corporation, and what is now called the new corporation. It is, in fact, one and the same corporation; regulated, indeed, in a different manner, but just as much the same corporation as the City of London or Westminster would remain the same if an Act were passed to regulate the police, or any other similar matters connected with those cities. It would, in truth, remain the same corporation, even though it were called by another name. It is true, that the persons now entitled to act as burgesses are different, and are to be elected in a very different manner from the former; that the

nomination of the aldermen is now also regulated differently; but the present corporation is, nevertheless, identical with the old one; no species of property is transferred from one body to the other; but the property of the old corporation, at all events that which belonged to it at the time of the grant of the new charter, is merely affected by a different set of rules and obligations. The question then is this: What are the rules and obligations now imposed on this corporation? The statute, and the charter following it, said that all the powers and provisions of the Municipal Corporations Act are extended to this borough. Notwithstanding that, however, it was argued—first, that the 1st section of the Municipal Corporations Act did not apply. But how can the court stop short, as it were, and say that any one particular section does not apply? In *Ex parte Fishmongers Company*, in which the effect of a similar clause containing a general reference to the clauses of another Act had to be considered, Lord Cottenham held that every clause of the Act referred to applied, unless inconsistent. I am also of opinion that every clause must apply which can be possibly be applied. It was also said that this borough was not named in the schedules to the Act; and therefore the first clause cannot apply. But the enactment is, that all the provisions are to extend to the inhabitants of the borough, whether it be or be not a borough corporate; or be or be not named in the schedules. But the first clause cannot extend to a borough which is not named in the schedules, unless in the way I have stated, viz., as if it were named. I must therefore read the Municipal Corporations Act as if Aberavon were named in the schedules to it. The same observations apply to every one of the clauses; and I see nothing inapplicable in them, except in the 97th section, which gives rise to some little difficulty. As it stands, it means that the council may call in in question all purchases, &c. made since the 5th June 1835. It may be a question whether it was intended by the Act to enable the corporation now to impeach sales made so long ago. With respect to that also there is a further question which has been much pressed, as to the frame of the record. It was said that the Act only enables the corporation itself to impeach the sales; and that it must be done at the suit of the town council. On the other hand the case of *Attorney-General v. Aspinall* decided that where a borough is to be made subject to the Municipal Corporations Act the Attorney-General can properly interfere to prevent a sale. I think that that is sufficient to sustain this information, so far as it seeks to set aside any leases or alienations subsequent to the time when it was known that a charter was to be granted, viz., the time when the notice was given. With respect, however, to any leases or alienations before that time, I understand that there is no intention of impeaching any dealings with the property prior to the notice. Without, therefore, at present deciding any question as to the validity of the sales, &c., before the notice made, I will make a declaration that the property belonging to the portreeve, &c. at the time of the granting of the charter has become vested in the mayor, &c. There must be an inquiry of what such property consisted, and what steps ought to be taken with reference thereto, with liberty to serve any persons who may be in possession of such property with a copy of the decree, and with liberty to such persons to come in; and there must also be an inquiry whether any part of the property has been alienated since the 16th Jan. 1861. The name of the old corporation must, however, remain on the record.

Solicitors for the informant, Messrs. *Lofus* and *Young* for Mr. *H. Cuthbertson*.

Solicitors for the defts. Messrs. *Rowland* and *Hucon*.

# COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqs., Barristers-at-Law.

Saturday, Feb. 21, 1863.

PEASE AND OTHERS v. CHAYTOR AND ANOTHER.

*Church-rate—Dispute as to validity—Jurisdiction of justices.*

*Justices are not liable to an action if they honestly, though erroneously, decide that an objection to the validity of a church-rate made at the hearing of a complaint for nonpayment of arrears is not made bonâ fide, and proceed to adjudicate and issue their warrant to enforce payment.*

*In an action against the justices for so proceeding and making an order and issuing their warrant, under which the p'ts. goods were seized, it was held that the proper questions for the jury were: first, whether the p't. bonâ fide disputed the rate when before the justices, and gave notice thereof at the time; and, secondly, whether there was reasonable and probable cause for the justices determining that the rate was not bonâ fide disputed, and whether the justices acted without malice.*

*After the seizure of p'ts. goods they instituted a replevin suit in the County Court, and recovered damages and costs:*

*Held, that the judgment in the County Court was a bar to recovery of damages for the seizure in this action.*

The declaration in substance alleged that the p'ts. were summoned before the defts., justices of the peace, to answer a complaint for nonpayment of a church-rate of 8l. 5s. 4d.; that they appeared, and in good faith intending to dispute the validity of the rate gave the defts. notice that they did dispute it, and required the defts. to forbear and not to give judgment; that the defts. did give judgment and ordered the p'ts. to pay the amount of the rate, and issued their warrant to make a distress of the goods and chattels of the p'ts.; that the goods of the p'ts. were distrained, and that the order of the defts. had been brought up by *certiorari* and quashed.

Pleas:—1. Not guilty. 2. To so much of the causes of action as relate to, or were occasioned by, the seizing, taking, and distraining of the cattle, goods and chattels of the p'ts., the defts. say that the said warrant by virtue of which the said cattle, goods and chattels were so seized, taken and detained, was applied for and was issued on the application, as the instance, and on the behalf of Daniel Vitty and one Thomas Story, then being churchwardens of the said chapelry, and the said warrant was executed, and the said cattle, goods and chattels were so seized, taken and distrained by and by the direction and order and on the behalf of the said Daniel Vitty and Thomas Story, as well as by the command of the defts. And the defts. further say, that after the cattle, goods and chattels were so seized, taken and distrained, the p'ts. commenced and levied a plaint or action of replevin in the County Court of Durham, holden at Bishop Auckland, in the said county, against the said Daniel Vitty and Thomas Story, for, and in respect of the said seizing, taking, and distraining of the said cattle, goods and chattels, and the damages thereby occasioned to the p'ts., and thereupon, by virtue of certain process issued out by the said last-mentioned court, the said cattle, goods and chattels were replevied and redelivered to the p'ts., and such proceedings were thereupon had in the said plaint and action that afterwards it was considered in and by the last-mentioned court, that the p'ts. should recover against the said Daniel Vitty and Thomas Story 1l. 18s. for the said seizing, taking and distraining of the cattle, goods and chattels, and damages, and 2l. 3s. 4d. for the costs and charges of

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the plts. in and about the said last-mentioned suit as by the proceedings in the said last-mentioned court, appears, which said judgment still remains in full force and effect, and not in the least reversed or made void.

Issues were joined on these pleas.

At the trial before Mellor, J., at the Lent Durham Assizes 1862, it appeared that the plts. gave notice to the defts. upon the hearing of the summons, that they *bona fide* disputed the rate, and gave reasons for saying the rate was invalid, but the justices decided that there was no *bona fide* dispute, and made the order upon the plts. The order was made on the 6th Jan. 1859, and the distress-warrant signed on the 3rd Feb. On the 14th March the goods of the plts. were seized. A *certiorari* was obtained, and the order was quashed upon the 9th May.

The learned judge told the jury that if they believed that the plts. *bona fide* intended to dispute and did dispute the validity of the rate in question, and gave notice thereof to the defts., who notwithstanding determined to proceed, the plts. were entitled to recover; but if the jury thought the objections made by the plts. to the validity of the rate were put forward merely as a pretext for the purpose of avoiding payment thereof, and ousting the jurisdiction of the justices, they should find for the defts.

The jury found a verdict for plts. with 70*l.* damages.

Subsequently upon the 16th April 1862,

*Manisty*, Q. C. moved for and obtained a rule calling upon plts. to show cause why the verdict should not be set aside and a verdict entered for the defts. instead thereof, on the grounds, first, that the judgment recovered in the County Court was an answer to the action; secondly, that as to so much of the causes of action as relates to the making of the order of the 6th Jan. 1859, and the warrant of the 3rd Feb. 1859, and the costs of removing and quashing the said orders, the action was brought too late; thirdly, that as to the residue of the causes of action, the judgment recovered in the County Court was a good answer; or why the damages should not be reduced to 1*s.* on the ground that the plts. were not entitled to recover the costs of removing and quashing the orders of the defts.; or why a new trial should not be had on the ground of misdirection.

*Monk, Hindmarch and Davison* showed cause, and *Manisty and Heath* supported the rule.

Cases cited:—

*Rea v. Milnrow*, 5 M. & S. 248;  
*Rea v. Wrottesley*, 1 B. & Ad. 648;  
*Dale v. Pollard*, 10 Q. B. 504;  
*Reg. v. Colling*, 17 Q. B. 816;  
*Reg. v. Nunneley*, E. B. & E. 852;  
*Re Emery*, 4 C. B., N. S., 423;  
*Haggerston v. Dugmore*, 1 B. & Ald. 82;  
*Collins v. Rose*, 5 M. & W. 194;  
*Somerville v. Airchouse*, 3 L. T. Rep. N. S. 294;  
*Mellor v. Leather*, 1 E. & B. 619;  
*Thompson v. Ingham*, 14 Q. B. 710;  
*Ricketts v. Bodenham*, 4 A. & E. 433;  
*Ashby v. White*, 1 Sm. L. C. 105;  
*Tozer v. Child*, 7 E. & B. 377;  
*Banbury v. Fuller*, 9 Ex. 111;  
*Reg. v. Cridland*, 7 E. & B. 853;  
*Reg. v. Bolton*, 1 Q. B. 66;  
*Mennie v. Blake*, 6 E. & B. 842;  
*George v. Chambers*, 11 M. & W. 149;  
*Barton v. Bricknell*, 13 Q. B. 393;  
*Caldar v. Halkett*, 3 Moo. P. C. 23;  
*Medland v. Paine*, 4 Jur. N. S. 1233;  
*Ratt v. Parkinson*, 20 L. J. 208, M. C.;  
*Barnadistone v. Soame*, 1 East, 555 (n. a.)  
*Cur. adv. vult.*

Feb. 21.—WIGHTMAN, J.—The learned judge, upon the trial of this cause, told the jury that, if the plts.

*bona fide* disputed the validity of the rate, and intended so to do, and gave notice to the defts. that they did so dispute it, they ought to find for the plts.; but that if the jury thought that the plts.' assertion, that they disputed the validity of the rate, was a mere pretence for the purpose of evading payment and ousting the jurisdiction of the magistrates, they should find for the defts. The jury, upon this direction, found a verdict for the plts., and it must now be taken, upon this finding, that the plts. *bona fide* disputed the validity of the rate, and did give notice to the defts. to do so. A rule nisi was granted for a new trial on the ground that, in order to maintain an action against the defts. it was not sufficient for the jury to find that the plts. did *bona fide* dispute the validity of the rate and gave notice of the fact to the defts.; but they ought also to have found that the justices, in proceeding notwithstanding the notice, acted maliciously and without reasonable or probable cause, and that the learned judge ought to have so directed them. This raises a question whether the defts. were acting within their jurisdiction when they came to the conclusion, upon the evidence before them, that the plts. did not *bona fide* dispute the validity of the rate, it being assumed that their judgment was wrong, and that the plts. did really *bona fide* dispute it. There can be no doubt but that the defts. had jurisdiction in the first instance to entertain the complaint against the plts. by virtue of the 53 Geo. 3, c. 127, s. 7; but there is a proviso to the enacting part of that section, "that if the validity of the rate or the liability to pay it be disputed, and the party disputing it give notice thereof to the justices, they shall forbear giving judgment thereon." The jurisdiction of the magistrates therefore ceases by this proviso if the party proceeded against disputes the validity of the rate, and gives them notice to that effect; but it is not enough for the party summoned to inform the magistrates that he disputes the validity of the rate: he must satisfy them that he really *bona fide* disputes. This has been determined by several cases that were cited during the argument. Justices are not to try the validity of the ground for disputing the rate, but the *bona fides* of the person making the objection. This is a collateral question, and there is no doubt but that it is a rule that, if the jurisdiction depends upon a collateral question, the magistrates cannot give themselves jurisdiction by a wrong decision upon that question. But, as observed by Lord Campbell, in the case of *Reg. v. Nunnely*, 1 Ell. Bl. & Ell. 852, which is the last case in which this point was much discussed, and in which all the authorities were cited, the justices are not deprived of jurisdiction by preliminary frivolous objections, such as could lead to no other conclusion than that there was no reasonable ground for disputing the rate, or for believing that the person against whom the rate was attempted to be enforced was acting *bona fide* in stating to the justices that he disputed it. If that were not so, it would be useless for the magistrates to consider the question of *bona fides* at all, though it has been decided in the cases cited upon the argument that they are bound to do so. It appears to me that, as it has been considered settled that they have jurisdiction to consider whether the rate was disputed *bona fide*, they can only be liable to this action for acting without jurisdiction in case it should be proved before a jury that they acted without any reasonable or probable cause for the decision they came to that the rate was not *bona fide* disputed; and I think that, as the question was not left to the jury, the defts. are entitled to make the rule absolute for a new trial.

BLACKBURN, J.—A rule in this case was obtained for a new trial, or to enter the verdict differently. It cannot be made absolute in both these forms. The conclusion I have come to is, that the defts. have a

right to elect in which form they will make it absolute. The case was argued in the sittings after Trinity Term 1862, before my brothers Wightman, Mellor and myself. I will first consider whether the defts. are entitled to a new trial. The point upon which there was alleged to be misdirection is one of considerable public importance, and of nicety and difficulty; but after consideration I have come to the conclusion that the defts. are right in saying that the direction was imperfect. The pleadings in this case came before the court, then consisting of my Lord, my brother Wightman and myself, on demurrer. They will be found set out in the report of *Pease v. Chaytor*, 1 B. & S. 658. On the trial it appeared in evidence, that when before the defts. the justices, the plts., by their agents, stated that they disputed the rate; it was asserted on the other side, before the justices, that the now plts. did not really *bonâ fide* dispute the rate. So far both parties were, at the trial, agreed on the facts. There was a conflict as to what was the state of the evidence before the justices, and as to what the defts. had thought and said, but it was agreed what they did. The justices did not hold their hands, but proceeded to make the order, and under the order the plts.' goods were seized. My brother Mellor left to the jury the questions whether the plts. *bonâ fide* disputed the rate, and whether notice of that dispute was given to the justices, the defts.; and I think these were proper questions to be left to the jury. But he did not ask the jury whether the defts., as justices, decided on the evidence before them that there was, in fact, no real dispute which the justices might very possibly have honestly though mistakenly believed, and no question was asked as to malice, nor as to whether the facts proved before the justices were such as, in the opinion of the judge, as a matter of law, would constitute reasonable and probable cause for coming to such a mistaken belief. The jury having found for the plts. on this direction, we must take the facts to be that the rate was really disputed (for we are bound in this action to suppose the jury right and the justices wrong on the question of fact), and that notice of that intention was given; and, if upon those facts alone the action lies, then the direction was right. But unless the action would equally lie against the justices though honestly, on the evidence before them, coming without malice and without the absence of reasonable and probable cause to the mistaken conclusion that the dispute was not a *bonâ fide* dispute, the direction was imperfect, and the defts. are entitled to a new trial to ascertain how these facts were. The position of justices acting under this statute is peculiar; they have jurisdiction to enforce the rate, but if the validity of the rate be disputed and the parties disputing the same give notice thereof, they are to forbear giving judgment, but they are not to forbear merely because the party says he disputes the validity of the rate. This court has in such a case compelled the justices by *mandamus* to hear the matter, Lord Tenterden saying, "If, upon the hearing, this party satisfies the justices that he has a *bonâ fide* intention to contest the rate, the proceeding before them will go no further." (See *Ree v. Wrottesley*, 1 B. & Ald. 648.) So that it is the duty of the justices to form their opinion judicially on the question whether the dispute is *bonâ fide* or not, and act upon that opinion. It is said that they are liable in an action if it turn out this opinion was mistaken; if so, the position of the justices is one of great hardship, for the wisest and most cautious of men are fallible and may come to a wrong conclusion; and even if right the justices would not be safe, for there is a possibility that the jury may honestly and properly enough mistakenly think them wrong, and yet the event of the action must be regulated not by the facts but by the verdict. But I think it will be

found that the law does not cast on the justices this very great hardship. I think that all the numerous cases that were cited in the argument, and all of which, as far as I know, are to be found in the books, may be reconciled by the distinction between questioning the validity of the judgment of a court of limited jurisdiction (on the ground that, in fact, the matter was not within the limited jurisdiction of the tribunal) for the purpose of preventing the enforcement of the judgment, and questioning it for the purpose of maintaining an action against the judge of that court. In the first class of proceedings the law, I think, is accurately laid down in the judgment of the Ex. Ch. in *Bunbury v. Fuller*, 9 Ex. 140. It is a general rule that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limits to its jurisdiction depends; and however this decision may be final on all particulars making up together the subject-matter which is true and within its jurisdiction, and however necessary in many cases it may be for it to make a preliminary inquiry upon some collateral matters which are not within the limits, yet upon this preliminary question its decision must always be open to inquiry in the superior court. Then, to take the simplest case, supposing a judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it, if the party charged contends that it arose in another hundred, this is clearly a collateral matter independent of the merits; on its being presented the judge must not immediately forbear to proceed, but must inquire into its truth or falsehood, and for the time decide it, and either proceed or not on the principal subject-matter, according as he finds upon the point; but this decision must be open to question, and if he has improperly either forbore or proceeded on the main question in consequence of an error, on this the Court of Q. B. will issue a *mandamus* or prohibition to correct the mistake. It will be found that the cases cited in the argument of the present case and relied on by the counsel for the plt. are cases of prohibition and of *certiorari*, in which the object of the proceedings is to prevent the enforcement of the order, and in many, if not in all of them, language is used showing that the judges had in their minds, and distinctly pointed out in the above extract, that such a point must be determined for the time, if not determined conclusively; and such I think would be the rule in any proceedings taken by one party for the purpose of enforcing the judgment of a Superior Court, or by the other for resisting it. But when, as in the present case, an action is brought against the person, who, acting with a limited jurisdiction, has, by mistake, decided the point for the time the wrong way, when, had he known the true state of facts, he ought not, the rule of law is different, and is, I conceive, that laid down by Lord Wensleydale, then Parke, B., in delivering the judgment of the Privy Council in *Calder v. Halkett*, 3 Moo. P. C. 77; he says: "It is well settled that a judge of a court of record in England, with limited jurisdiction, or a justice of the peace acting judicially with specially limited authority, is not liable to an action of trespass for acting within his jurisdiction unless he had the knowledge, or means of knowledge of which he ought to have availed himself, and which constitutes the defect of jurisdiction. Thus, in the elaborate judgment of Powell, B. in *Gwynn v. Poole*, Lut. p. 1556, it is laid down that a judge of record in the borough court was not responsible as a trespasser unless he was cognisant that the cause of action arose out of the jurisdiction, or at least that he might have been cognisant but for his own fault; which last proposition Parke, B. illustrates by a reference to the case of the Marshalsea court, which had jurisdiction only in certain cases where the

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King's servants were parties, who, being all enrolled, the judge ought to have had a copy of the enrolment, and so would have known the character of the parties. "It is true," says Parke, B. (speaking of the case of the borough court), "that the cause of action does not arise within the jurisdiction of the court, as it ought to do; but as the judge cannot know that, except by the plt. or deft., until he knows it the rule should be in this case, as in others, *ignorantia facti excusat*." Parke, B. lays down the same rule as to a party, but his opinion in that respect is disapproved of by Lord Chief Justice Willes in *Moravia v. Sloper*, Willes, 35, but not so far as it relates to the judges or officers. The like rule has been followed in the case of magistrates acting under the special powers of Acts of Parliament, who are not liable as trespassers if they have jurisdiction to inquire into the facts stated before them; and nothing appears on the one side or the other to show their want of jurisdiction: (*Pike v. Carter*, 3 Bing. 78; *Louth v. Earl Radnor*, 8 East, 113.) It is clear, therefore, that a judge is not liable in trespass for want of jurisdiction unless he knows, or ought to have known, of the defect; and it lies on the plt. in every such case to prove the fact. See also Serjt. Williams's note 1 to *Peacock v. Bell*, 1 W. S. 74. In the case of *Caratt v. Morley*, 1 Q. B. 18, the Court of Q. B. entered the verdict against the commissioners who had given judgment against the plt., over whom they had no jurisdiction, on the ground that it lay upon them to show affirmatively that he was within their jurisdiction. The court say: "The doubt as to the commissioners' liability arose from the possibility, as the case was undefended, that there might have been evidence to convince them that the deft. in the suit resided within their jurisdiction." Nothing of this sort, however, appears; nor can we feel justified in inferring it from the mere fact that the court acted in a manner which requires it to warrant the proceeding. This decision was subsequent to *Calder v. Halkett*, which, however, seems not to have been brought to the notice of the court. No question arises in this case on whom the burden of proof lies. If it did, we should be obliged to say whether we followed the authority of *Calder v. Halkett*, or *Caratt v. Morley*, which upon this point seem to be opposed to each other. As it is, we follow both cases in saying that, if a tribunal of limited authority is acting on evidence before them, no action lies. In *Calder v. Halkett*, as also in the cases therein cited, and *Pike v. Carter*, and *Louth v. Earl Radnor*, it was enough for the decision of those cases to show that the action would not lie where it was not shown that the judge knew of the defect. The court in each case guard themselves from saying that an action would not lie at common law where the judge had means of knowledge of which he ought to have availed himself; but they cannot be understood as deciding that the form of action would be trespass. Indeed, in *Louth v. Earl Radnor*, 8 E. 119, Lawrence, J. says, "If the magistrates made an order against the evidence laid before them, the party injured would have another sort of remedy;" pointing, as I conceive, to the action on the case in which malice and want of probable cause would even at common law have been necessary averments. In addition to the cases cited in *Calder v. Halkett*, I may refer to the case of *Ackerly v. Parkinson*, 3 M. & S. 411. There are cases quite consistent with the above view where it has been held that an action of trespass lies where a judge of an inferior tribunal, knowing the facts, mistakes the law, and thinks he has jurisdiction where he has not. Such was the case in *Houlden v. Smith*, 14 Q. B. 841. But there the mistake was not one of fact but of law, and on that ground it is distinguished in the judgment from the cases in which, say the court, it was held that the question as to jurisdiction or not must (that is for this

purpose) depend upon the state of facts as they appeared to the magistrate. I have on this branch of the case only further to observe that before the 11 & 12 Vict. c. 44, the defts. might have been in great technical difficulty, because their order being quashed they would have been deprived of the proper evidence of that which alone could justify their distress-warrant. But, if the real facts whilst the order existed were such as to give the justices so much jurisdiction that before the 11 & 12 Vict. c. 44 trespass would not have lain against them, they are not within the 2nd section of that Act of Parliament, and are within the 1st section; so that, whatever, might have been the case at common law, I think it essential now to prove malice and want of probable cause; that is, assuming the fact to be that the justices proceeded because they adjudged the defence not to be *bonâ fide*. I think it would be otherwise if, finding the dispute real, they erroneously in point of law thought they might proceed because it was in their opinion frivolous though *bonâ fide*. For these reasons I think the defts. entitled, if they choose, to a new trial, but they are not bound to take a new trial; or they may allow the verdict on not guilty to stand, preferring to make absolute so much of the rule which seeks to enter the verdict for the defts. on the second plea, and also that branch of it which seeks to reduce the damages to 1s. If this alternative is adopted the plts. will have the costs of the issue on not guilty, and may, if so advised, go into a court of error to reverse the judgment pronounced in this court on the demurrer in favour of the second plea, and so establish their right to the damages of one shilling. It will be for the defts. and their advisers to consider in which way they think it is for their interests to have the rule made absolute. The court is only to say that they have a right to elect between these alternatives; and I proceed to give my reasons for thinking that they are entitled to make the rule absolute to this extent. The important dates upon this part of the case seem to be the following:—The order was made upon the 6th Jan. 1859; the distress-warrant was issued by the defts. upon the 3rd Feb., but they were not acted on until the 14th March, on which day there was a seizure of the plts.' goods. On the 27th April the plts. obtained a *certiorari* to quash the order, and on the 9th May the order was quashed. The action was commenced on the 13th June, being more than three months after the making of the order and the signing of the distress-warrants, but less than three months after the act of seizure. The action, therefore, was too late as regards the making of the order, and as regards the expense of quashing the order, assuming that these costs might have been recovered as special damage resulting from the making of the order. It is not to be inferred that the costs of quashing the order could be recovered as special damage; all that I say is, that even if they could, the cause of action as to them is too late. But the seizure is in itself a cause of action (*Collins v. Rose*, 5 M. & W. 544), and as far as regards this cause of action, the defts. are not protected by the lapse of time; but the costs of quashing the order are in no sense part of the damage arising from the seizure. The plts. might in a replevin suit show the absence of jurisdiction just as well before the order was quashed as afterwards, and therefore the damages arising from the seizure were only the costs of replevying the goods, and any other damage sustained by being deprived of them. The costs of the replevin suit are certainly covered by the second plea, and the actual damage sustained by the seizure was merely nominal. The question whether a judgment in replevin was a bar to a recovery of damage for the seizure is upon the record, and it must in this court be considered as decided by the judgment on the demurrer to the plea,



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reported in 1 B. & S. On the trial the only question was whether the plea was proved, and the evidence given of an examined copy of the judgment of the County Court was sufficient proof of the substance of the plea. In my opinion, therefore, the defts. are entitled to elect whether they will make the rule absolute to enter the verdict for them on the second plea, and to reduce the damages to one shilling.

MELLOR, J.—This was an action against the defts., justices of the peace for the county of Durham, for granting their warrant to enforce the payment of a church-rate under 10*l.*, the validity whereof was disputed. The cause was tried before me at the last spring assizes for the county of Durham, and the pleadings, so far as they are material, are set out in the report of this case on demurrer. Evidence was given on the trial that several objections were raised before the justices on behalf of the plts. to the validity of the rate, on the ground, amongst others, that certain houses occupied by persons employed at the collieries of the plts. were omitted from it. Several cases were cited for the defts., and amongst others the case of *Reg. v. Nummely*, 1 El. Bl. & El. 852, and a witness was called to prove the facts upon which one of the objections was founded. But the defts. said that the same objection had been overruled by them upon a former occasion, and they overruled the objection, and refused to forbear giving judgment, and made the order, and issued a distress-warrant to enforce payment of the rate. The defts. were called as witnesses on the trial before me, and whilst they stated that they had come to the conclusion that the objections were not urged *bona fide*, one of them, Mr. Chaytor, expressly said, "We held it not to be *bona fide*, because we thought it a bad objection. That was the ground upon which we proceeded." It was further proved that the orders upon the plts. were made on the 6th Jan. 1859, and the warrants to distrain on the 3rd Feb., and the distress on the 14th March. A rule nisi for a *certiorari* was obtained on the 27th April, and was made absolute in the course of May. A rule nisi to quash the orders was obtained in the month of June, and the rule made absolute on the 10th June. I directed the jury that if they believed that the plts. *bona fide* intended to dispute and did dispute the validity of the rate in question, and gave notice thereof to the defts., who determined, notwithstanding, to proceed, the plts. were entitled to recover; but if the jury thought that the objections made by the plts. to the validity of the rate were put forward merely as a pretext for the purpose of evading payment thereof, and ousting the jurisdiction of the justices, they should find for the defts. I declined to submit as a question for the jury the motives which influenced the defts. in their decision. The jury thereupon found their verdict for the plts. with 70*l.* damages, and a rule was subsequently granted by this court, pursuant to leave reserved at the trial, to enter the verdict for the defts., or to reduce the damages to 1*s.*, or for a new trial on the ground of misdirection. Cause was shown against the rule at the sittings after Trinity Term, before my brothers Wightman, Blackburn and myself, and as the propriety of my direction was the only point on which we entertained a doubt, it is to that question alone I propose to address my observations. It is with great doubt and hesitation that I differ from my learned brothers, but after much consideration I cannot come to the conclusion that my direction to the jury on the trial was wrong. The objection to it was not that it was erroneous as far as it went, but that it was defective in not declaring to the jury that it was an essential ingredient in the cause of action that the defts. *malid fide* and maliciously, and without reasonable and probable cause, overruled and disregarded the objections urged by the plts. to the validity of the

rate, and proceeded to make their orders and to issue their warrants notwithstanding the notice which they received. It was urged that a great distinction exists between applications to this court to quash orders of justices under such circumstances, when brought up by a writ of *certiorari*, or in cases of prohibition or replevying, and actions against justices themselves. It is to be observed, that the general jurisdiction over disputes as to church-rates is placed in the Court Christian, and not in justices of the peace, and until the passing of the statute 53 Geo. 3, c. 127, considerable delay and expense was incurred in the recovery of church-rates, which occasioned great hardships not only on the churchwardens, but also to the parties liable to the rate, and the object of the Legislature, as said by Bayley, J., in *Rez v. The Churchwardens of Milnrow*, "was not to draw questionable cases *ad aliud examen*, but to provide a summary remedy in cases where the party did not dispute the obligation to pay. The Legislature never intended to deprive the party of his right to have the validity of the rate questioned in a proper form. Accordingly, this section of the above statute, after providing for the convening before the justices of any one duly rated, &c., and refusing to pay any church-rate, where the sum did not exceed 10*l.*, and authorising them to examine into the merits of the same complaint, provides, that if the validity of such rate, or the liability of the person from whom it is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereupon, and the person or persons demanding the same may then proceed to the recovery of their demand according to the due course of law as heretofore used and accustomed." The language of this proviso is unusually clear and explicit, and its effect appears to have been truly described in the passage already cited from the judgment of Bayley, J., in *Rez v. Milnrow*, as said by Lord Denman in giving the judgment of the court in *Ricketts v. Bodeham*, 4 Ad. & Ell. 443. This proviso applies only to cases under 10*l.*, and the effect of it is, that even in such cases the moment it appears that the question is one not merely of enforcing payment, but touching the validity of the rate, the summary jurisdiction is to end, and that of the Ecclesiastical Court attaches. The justices are by the statute invested with a very special and limited jurisdiction. The amount of the rate demanded must not exceed 10*l.*, and if the validity of such rate be disputed, or the liability of the person from whom it is demanded to pay the same be denied, and the party disputing the validity of the rate or his liability give notice thereof to the justices, they shall forbear giving judgment thereupon. In the present case it must be taken to have been found by the jury, and as conclusively established, that the plts. *bona fide* intended to dispute and did dispute the validity of the rate in question, and did give notice thereof to the defts., who, instead of forbearing to give judgment thereupon, proceeded to make their order, and to issue their warrant to distrain for the amount. The conditions which determine the special and limited jurisdiction of the justices are in terms found by the jury. It is, however, contended that I ought to have told the jury that the defts. were bound to inquire into and to satisfy themselves of the *bona fides* of the objection made by the plts. to the validity of the rate, and that if in so doing they without malice made a mistake, they would not be liable. It is observed that the words "*bona fides*" are nowhere to be found in the statute, and it has never been judicially asserted that the justices had authority under this statute to decide upon the validity of the objections. On the contrary, the decisions are that they have no such authority: (see *Rez v. Milnrow*, 5 Mau. & S. 240; *Dale v. Pollard*, 10 Q. B.

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564.) Yet, if this objection to my direction be well founded, they may, without impeachment, overrule and disregard even a perfectly clear objection to the rate, and give judgment against the party convened before them, and authorise his goods to be distrained, if they do so without malice, and under the belief that the objection is not urged *bonâ fide*. Surely this is a startling result, and gives an extension to the authority of justices in such cases limited not by the conditions of the statute, but by their own belief or disbelieve of the *bonâ fides* of the objection made by the party disputing his liability or the validity of the rate. Some inconvenience may no doubt follow from the strict construction of the statute, as it may enable parties more easily to evade the summary remedy given for the recovery of church-rates. It must not, however, be forgotten that the only effect of the justices forbearing to proceed to judgment in such case would be to remit the parties to the ordinary jurisdiction of the Court Christian; and if the justices do wrongly stay their hands they may be set right by an application to this court, and when acting under its directions they will incur no responsibility. Some of the difficulties which beset this case appear to me to have arisen from the observation of Lord Ellenborough in *Reg. v. Mithras*, "that perhaps if a person was merely to say before the justices that he disputed the rate it would not be sufficient, inasmuch as he ought to show something to manifest that he disputed it *bonâ fide*." These words of Lord Ellenborough are cited in the subsequent case of *Reg. v. Wrottesley*, 1 B. & A. 648, where the party being convened before justices for non-payment of a church-rate appeared by his attorney, who on his behalf stated "that he disputed the validity of the rate, and that for the purposes of trying it a caveat had been entered in the Ecclesiastical Court against the confirmation of any such rate for the parish of Fisbury." He therefore contended that the justices had no jurisdiction, but he did not say on what grounds that rate was objected to. Lord Tenterden, making the rule absolute for a *mandamus*, said, after referring to the statutes "There is therefore no objection to the justices hearing this complaint. Whether ultimately they can go on to judgment is a different question. A *mandamus* may issue commanding them to hear. When they have heard they will be able to see more of the case; but at least it will not come to this strange absurdity, that a man by merely saying, 'I dispute the validity of the rate,' shall put an end to the jurisdiction of the justices. If upon the hearing this party satisfies the justices that he has a *bonâ fide* intention to contest the rate, the proceeding before them will go no further." If the Legislature had intended that to be a condition, that the party summoned before the justices should not only really dispute the validity of the rate, but should also satisfy the justices that he *bonâ fide* intended to contest its validity, it would have been very easy to have said so; and it is to be observed that in the statute 5 & 6 Will. 4, c. 74, s. 1, being an Act for the more easy recovering of tithes, it is expressly provided that the Act shall not extend to any one whose actual title to any tithe, &c., or the actual liability or exemption of any property shall be *bonâ fide* in question. Whether Lord Tenterden ever contemplated such a state of facts as now appears may be very questionable, and construing the expression as to satisfying the justices by the actual facts of that case, and by the other parts of his judgment, it would rather seem that he intended only to decide that the justices had stayed their hands too soon, inasmuch as no grounds whatever had been proved or even stated affecting the validity of the rate. In the case of *Reg. v. Cowling*, 17 Q. B. 828, Coleridge, J. is reported to have said that "the justices are not conclusively judges whether or not the rate was disputed *bonâ fide*."

It would still be for the jury to decide the point if the matter came before them, and if the only reason to doubt the good faith was the nature of the objection, I should think that the jury ought to say that the objection was *bonâ fide*." And my brother Wightman in the same case observed, "many objections are taken which are not tenable where there is no reason to assume the want of good faith." In *Reg. v. Nunnely*, 1 Ell. Bl. & Ell. 852, the justices in their affidavit in opposition to the rule for a *certiorari* expressly state "that they had determined that the objections were not made in good faith, but were made and put forward as a pretext merely for evading the payment of the rate." But Lord Campbell repeated with approbation the passage already cited from the judgment of Coleridge, J., in *Reg. v. Cowling*, and further on in his judgment says, "to show the want of jurisdiction, evidence was given which was uncontradicted, but the justices, by a capricious decision, though it may be on motives highly honourable, chose to say that they did not believe that the objection was taken *bonâ fide*; and Erle, J. cited and adopted a passage from the judgment of the Court of Ex. Ch., in *Bunbury v. Fuller*, 9 Ex. 140, as follows: "It is a general rule that no court of limited jurisdiction can give themselves jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends." And Coleridge, J. says: "Although the jurisdiction is not stopped by an objection, for instance, that the rate was made on a Friday; yet, on the other hand, when the objection is reasonable they are not entitled to say that they choose to disbelieve the *bonâ fides*." Nothing like that will be found in the spirit of any decision which has taken place, and my brother Crompton in the same case said: "This is a case where if the particular circumstances occur the jurisdiction of the justices is entirely gone. It is quite different from cases where the fact which gives jurisdiction is itself an ingredient in the judgment which is to be given if there be jurisdiction: such as in the case of *Reg. v. Dayman*, 7 Q. B. 672, for instance, where the magistrate, if he had jurisdiction, would still have to decide whether the place in question was a new street." In the present case the particular circumstances are expressly found by the jury upon the occurrence of which the jurisdiction was entirely gone. It is, however, said that although the order may be quashed summarily for want of jurisdiction, it by no means follows that an action may be maintained against the justices who made it, and that such a result is prevented happening by the operation of the statute 11 & 12 Vict. c. 44, s. 1, or by the principles of the common law. If the defendants, after the finding of the jury, be considered as having acted in the execution of their duty in proceeding to judgment and overruling the objections of the plaintiffs, they would doubtless be within the protection of the statute, unless malice and want of reasonable and probable cause could be averred and proved, and no action would lie against them; or if they can be brought within the rule laid down by Parke, B. in delivering the judgment of the Judicial Committee of the Privy Council, in *Calder v. Hallatt*, 3 Moo. P. C. C. 28, in which he said: "It is well settled that the judge of a court of record in England, with limited jurisdiction, or a justice of the peace acting judicially with a special and limited authority, is not liable to an action of trespass for acting without jurisdiction, unless he had a knowledge or the means of knowledge of which he ought to have availed himself, of that which constitutes a defect of jurisdiction." For instance, if a justice, having a limited jurisdiction, is deceived by some false assertion of a fact which, if true, gives him authority, but which, if not true, his jurisdiction fails, he would not be liable

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to an action of trespass for having been deceived; and for a *bonâ fide* mistake in a matter within his jurisdiction no action would lie: (*Ackerly v. Parkinson*, 3 M. & S. 311; *Louthier v. Earl Radnor*, 8 East, 119.) The defts. in the present case had, at the time they made the orders, a knowledge of the facts which were afterwards proved before the jury on the trial, yet instead of forbearing to proceed to judgment, as soon as it appeared that the p<sup>l</sup>ts. not only objected to the rate, but stated and proved, in point of fact, the grounds of their objection, they doubtless believing that they were judges of the validity of the objections, determined to overrule them. They cannot say that they had not "knowledge, or the means of knowledge, of which they ought to avail themselves, of that which constituted the defect of their jurisdiction." That was a mistake of law: (*Holden v. Smith*, 14 Q. B. 852; *Watson v. Bodell*, 14 M. & W. 57.) That they acted in deciding against the validity of the objections made by the p<sup>l</sup>ts., and they could not give themselves jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limits of their jurisdiction depended. The case, therefore, falls within the 2nd section of the statute for the protection of justices, and not within the 1st; and the orders having been brought up and quashed by this court, it appears to me the defts. who made them and authorised the distress under them are liable in this action, and that my direction to the jury was correct. The hardship upon justices arising from their liability to an action was strongly insisted on before us; but I think the answer to that observation is twofold. If objections are made and proved before the justices they may forbear to proceed, and if ordered by this court to do so, they will be protected; and in the next place, before an action can be commenced against them the order must be quashed by this court on *certiorari*. And I would further observe, that there is a manifest inconvenience in multiplying the occasions on which it is necessary to put to the jury the question whether the justices have acted maliciously and without reasonable or probable cause in the execution of their office. I therefore come to the conclusion that the rule, so far as it regards a new trial and the entering of the verdict for the defts., ought to be discharged; but that, on the grounds urged at the trial, the rule must be made absolute for reducing the damages to one shilling.

*Judgment accordingly.*

Saturday, June 27, 1863.

REG. v. SCOTT.

*Profane cursing—Conviction—Duplicity—19 Geo. 2, c. 21.*

*Under the 19 Geo. 2, c. 21, the offence of profanely cursing and swearing may consist of a volley of oaths uttered at one and the same time, and the penalty may be a cumulative one for each oath.*

*A conviction in this form, "did profanely curse one profane curse, to wit (specifying the curse) twenty times repeated," and that the justices adjudged the offender to pay a cumulative penalty, was held good.*

Rule nisi calling on two justices of the county of Bucks to show cause why a conviction under the 19 Geo. 2, c. 21, s. 1, for profane swearing, should not be quashed.

By the 19 Geo. 2, c. 21 (An Act more effectually to prevent profane cursing and swearing), s. 1, it is enacted that, "If any person shall profanely curse or swear, and shall be thereof convicted before any one justice of the peace, he shall forfeit and lose the respective sums hereinafter mentioned, i.e., every day labourer, common soldier, common

seaman, or common sailor, 1s.; every other person under the degree of a gentleman, 2s.; and every person of or above the degree of a gentleman, 5s. And in case such person shall after conviction offend a second time, every such person shall forfeit and lose double, and for every other offence after a second conviction, treble the sum first forfeited by any offender for profane swearing and cursing as aforesaid."

John Mason Scott was a mealman, and it was admitted that 2s. was the proper tariff for profane swearing in the case of a mealman.

If the penalty be not paid or security given for it to the satisfaction of the justice, then, if the deft. be a seaman or soldier, he shall be set in the stocks for one hour; or for two hours, for any number of offences at the same time (sect. 5); or, if he be not a seaman or soldier, he shall be committed to the house of correction for ten days, and for six days further if he do not pay the charges of the information and conviction: (sect. 4.)

Sect. 8 gives the form of conviction in these terms:—

"Be it remembered, that on the day of in the year of His Majesty's reign, A. B. was convicted before me (one of His Majesty's justices of the peace for the county, riding, division, or liberty aforesaid, or before the mayor, justice, bailiff, or other chief magistrate of the city or town of within the county of (as the case may be), of swearing one or more profane oath or oaths, or of cursing one or more profane curse or curses, as the case shall be.

"Given under my hand and seal the day and year aforesaid."

Which said form of conviction shall not be liable to be removed by *certiorari* into His Majesty's Court of K. B., but shall be deemed and taken to be final to all intents and purposes whatsoever, &c.

The 11 & 12 Vict. c. 43, s. 10, enacts, that every complaint in cases of summary conviction shall be for one matter of complaint only, and not for two or more matters of complaint, and every information for one offence only, and not for two or more offences.

*D. D. Keane* showed cause.—The conviction is good. It is said that it is bad, and that it is a conviction for several offences. The penalty imposed does not so treat it, for the Act provides for a second offence the penalty is to be double, and for every offence after a second conviction treble the sum first forfeited. The form of conviction given by sect. 8 is most general, and is for "swearing one or more profane oaths." The word "offend" used in the Act is sufficient to include a volley of oaths. Sects. 3 and 5 show that a number of oaths at one and the same time may constitute but one offence. In the decided cases the convictions have been in a similar form to the present:

*Rea v. Sparling*, 1 Stra. 497;

*Rea v. Roberts*, 2 Ld. Raym. 1376.

Then 11 & 12 Vict. c. 43, s. 10, is satisfied, because there is but one offence consisting of so many oaths.

*Holl* in support of the rule.—The statute 19 Geo. 2, c. 21, requires that there should be a conviction for each profane curse and a separate penalty. Under the Gaming Acts it has been held that a party cannot be convicted of several offences on the same day. In the cases cited this objection was not taken. Moreover the 11 & 12 Vict. c. 43, s. 10, shows that the conviction could only be for one penalty of 2s.:

*Newman v. Bendyshe*, 10 A. & E. 11.

WIGHTMAN, J.—It appears to me that the conviction was right. I shall consider the case, in the first instance, without reference to the 11 & 12 Vict. c. 43. This was an information under the 19 Geo. 2, c. 21, s. 1. The form of conviction given by that statute evidently contemplates swearing more than one oath, and that several oaths may be contained in one

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conviction. This conviction follows the form given by the statute. It is said that this is a conviction for several offences, and that it is bad on that ground. Several cases have been before the courts for convictions under this statute, and in each case there has been a repetition of oaths; and the conviction alleged that, by reason of his offence, the offender had forfeited so much. Down to this time no objection has been taken to a conviction on the ground that it was for several offences. In terms this is a conviction for cursing and swearing several oaths, and it is said, that that would warrant the infliction only of one penalty of 2s. But looking at the form given by the 19 Geo. 2, it is clear that the conviction may be for one or more oaths, the offence being the cursing and swearing, and the penalty 2s. for each time; the whole offence being the cursing and swearing. It seems to me that the penalty is so much *pro rata*, the offence being the swearing of a volley of oaths. This has never been considered as a good ground of objection before, and the court has always said that the conviction in substance was right. Independently, therefore, of the 11 & 12 Vict. c. 43, s. 10, I think that the conviction could be sustained. Then it is said, that since the 11 & 12 Vict. c. 43, s. 10, the conviction is a bad one, because it enacts that every such complaint shall be for one matter of complaint only. Now the complaint here is one only; there is but one subject matter of complaint. The offence is cursing and swearing so many oaths at such and such a time, every swearing being subject to a 2s. penalty. Although the offence is one, it has always been considered that the party swearing is liable to a penalty of 2s. for each oath. Jervis's Act does not apply to a case like this, the offence being the swearing, and the penalty the amount of the number of oaths. I therefore think that the conviction was proper.

BLACKBURN, J.—I am of the same opinion. The conviction is under an Act by which the removal of it by *certiorari* is taken away. It therefore stands good unless it is shown that the magistrates had no jurisdiction. Now I think not only that the justices had jurisdiction, but, looking at the Act of Parliament, that the conviction as it stands is quite right. That depends on the construction of the Act. Sect. 5 shows that it was intended that justices, so far as regards punishment, might investigate any number of curses and oaths uttered at one and the same time, but should as regards the offence consider all together. If each oath is to be treated as a separate offence, I cannot imagine how the magistrates could make out the conviction in one instrument. The form of conviction given in the statute plainly shows that it was intended that a party might be convicted of swearing one or more oaths at one time, and in one and the same conviction. The decided cases show also that that has been understood to be the meaning of the statute of William, which is similar to the 19 Geo. 2, c. 21. Then the next question is, whether Jervis's Act made any difference. I agree with my brother Wightman that that Act applies to one ground of complaint, and that in this case one ground of complaint only was investigated, viz. the swearing of many oaths.

*Conviction affirmed.*

O'NEILL AND GALBRAITH (apps.) v. LONGMAN (resp.)

*Trade unions—Threats—Attempting to force journey-men to leave their employ—6 Geo. 4, c. 129, s. 3.*

*L., a member of a society, was told by members to leave off working for K. his master; he refused. O'Neill, the president of the society, said that he, as president, ordered him to come out, and then abused L. and said, if he had been working at K.'s he would have pulled him out, and that he would use*

*his influence to have him turned out of the society. Galbraith and others went to K.'s as a deputation to point out to K. what they objected to. After this, L. was summoned by the society, O'Neill being in the chair, and the business was, whether L. was going to leave K.'s or be turned out of the society. Galbraith reported to the meeting the result of the deputation to K.'s. L. was then asked by O'Neill whether he would leave K.'s, or stay there and be despised by the society and have his name sent round all over the country in the report, and be put to all sorts of unpleasantness:*

*Held, that this was evidence of a threat by O'Neill under 6 Geo. 4, c. 129, s. 3, and an endeavour to force L. to depart from his employment.*

Case stated under 20 & 21 Vict. c. 43, for the opinion of this court, upon a conviction of two persons named O'Neill and Galbraith upon an information under the 6 Geo. 4, c. 129, s. 3, charging that they "unlawfully, by threats and intimidation, did endeavour to force William Longman, who was hired as a boiler-maker by H. R. Kruger, to depart from his said hiring, contrary to the said statute."

#### CASE.

Messrs. Kruger, Dannatt and Co., who are boiler-makers at Hull, some time ago contracted with the Manchester and Lincolnshire Railway Company to make two boilers. Having on a former occasion employed a man named Garvin to execute a similar contract, Messrs. Kruger applied to him again as to making the two boilers. The negotiations however failed, and they declined to accede to Garvin's terms as to the time and mode of payment for the work.

Garvin is a member of the United Boiler Makers and Iron Shipbuilders Society, a society or club not registered, but having branches in every place of importance in England, Scotland, Ireland and Wales, the executive committee of the society being stationed at Manchester. The executive at Manchester, deriving information at the local boards, issue a printed circular periodically on various matters connected with the society, and if a member is expelled his name is inserted in such report of the executive committee.

The apps. O'Neill and Galbraith are members of the society, O'Neill being president of the Hull branch, and Mr. Roberts being the local secretary.

The negotiations with Garvin having gone off, Messrs. Kruger's foreman of boiler-makers (Longman) communicated, on the 6th March, with the secretary of the Hull branch of the Boiler Makers' Society, with a view of obtaining men to perform the work. It would seem, the boiler makers belonging to the society have divided themselves into three classes of workmen, "holders up," "rivetters" and "platers," the latter being the highest class, and comprising those who are supposed to be skilled in bending angle iron for the boilers; though it is proved that, in many very large establishments, angle iron bending is performed by the blacksmiths, and not by those calling themselves exclusively boiler makers, the boiler makers in reality having sprung from the blacksmiths, and following one branch only of the blacksmiths' business. Longman is a member of the society, or what is called a club man, and there were at that time three other members of the society, Jordan, Bell and Loughthorne, in the employ of Messrs. Kruger.

On the 12th March all attempts to obtain men from the club having been unsuccessful, Messrs. Kruger ordered their foreman blacksmith (Norfolk), who is not a club man, to commence work on the boilers by bending angle iron, Norfolk having on former occasions performed similar work, and being fully competent as an angle iron smith, though not ordinarily employed in such a way. Norfolk continued his work of bending angle iron from the 12th without intermission.

On the afternoon of the 12th Longman was summoned to attend a meeting of the society, the object of the meeting, as stated in the summons, being "to stop an encroachment." Longman attended the meeting, and found the encroachment to be "Norfolk's working at the angle iron." O'Neill was in the chair, and a resolution was passed that the men belonging to the society should not be allowed to work at Messrs. Kruger's, if Norfolk was allowed to work at angle iron work. A resolution was then proposed by Longman and carried, that two deputies should be sent to Mr. West, Messrs. Kruger's foreman, to speak to him in reference to knocking off Norfolk. One deputy was to be a rivetter (Fairfield), the other an angle iron worker (Beaumont). O'Neill then told Longman, Jordan and Bell, all being present, that being club men working in Kruger's yard, they would have to come out if Norfolk was not knocked off angle iron work. Beaumont and Fairfield went from the club to the house of Kruger's foreman, Mr. West. Beaumont offered his services as an angle ironsmith, stating he was a club man, and had come from the club and was going to return there again. He was told that Norfolk had been set to work, but was promised a job if he came next day.

On the 13th Beaumont went to Kruger's and had some conversation with Longman and the other club men in Kruger's employ. He was told by West to begin angle iron turning, and replied that he understood the club to say that he was not to work unless Norfolk gave over working at the angle iron work. He then went away without working. After dinner on the 13th Jordan, Bell and Longthorne did not return to work, but Longman continued to work as usual. On the 14th Beaumont came to work for a few hours, and bent one bar of angle iron, but the work was so badly done that it could not be used, and Jordan, Bell and Longthorne also came to work on the 14th as usual.

On the evening of the 14th there was another club meeting, and after the 14th neither Beaumont nor Jordan, Bell, or Longthorne ever came to work again; Longman, however, continued to work as usual.

The 16th March was the anniversary of the society, and there was a dinner at 7 p.m. Longman and Longthorne went in the evening and called O'Neill out from the dinner, and Longthorne asked him, as president of the Hull branch of the society, why they should leave Kruger's work. O'Neill replied: "I, John O'Neill, as president of the society, order you (meaning Longman and Longthorne) to come out," and he called Longman "a damned thief," and other abusive names, and said that "if he (O'Neill) had been one of the men working at Kruger's premises, previous to this occurrence, he (O'Neill) should certainly have pulled Longman out." O'Neill also said that "he would use his influence to have Longman turned out of the society."

Longman, however, did not leave his work at Kruger's.

On the 17th Galbraith and others came to Kruger's works as a deputation from the club, as to the difficulty that had arisen as to the club men working if Norfolk was allowed to continue his work at angle iron bending. Mr. Kruger told the men at this interview that forbearance would not last for ever, and Norfolk was continued at his work. After this Longman received a summons to attend a meeting of the club on the 28th, "on important business." Longman attended the meeting, at which there were fifty members present, and among the rest Galbraith, O'Neill being in the chair. Longman found that the important business was, whether Longman was going to stop in the society and leave Kruger's employ, or remain at Kruger's and be turned out of the society. Galbraith made a report of the proceedings of the deputation to Kruger on the 17th, and the report was

put to the meeting, received, and adopted. Longman was afterwards asked by O'Neill, from the chair, whether he intended to remain an honourable member and leave the shop (meaning Kruger's), or stay in the shop (meaning Kruger's employ), and be despoised by the club and have his name sent round all over the country in the report, and be put to all sorts of unpleasantness. Longman told O'Neill that if there was anything to undergo, he would bear the consequences, but several of the members having come round Longman, a resolution was passed, giving him till Monday, the 30th, for consideration, and Longman said he would duly consider it. The result of which was, he wrote to the secretary a letter declining to leave his employment.

It was stated at this meeting that they could not legally turn Longman out of the society then, but would have to write to Manchester, and a resolution was passed that Norfolk's case and the master's case should be determined according to the rule, and Longman's case also, the rule being that club men shall not use their influence to obtain work for non-society's men. Longman asked O'Neill what the rule was, and O'Neill replied they should refer to Manchester. Longman, at the time I heard the case, could not say whether he had been turned out of the club or not, but had received no notice to that effect.

It was contended in defence by the attorney for the apps., that in what has occurred there has been no breach of the law; that O'Neill, Galbraith and other members of the club have merely told Longman that they would carry out the rules of the club, and that the decision of the case would be determined at Manchester; that there was no immediate threat or intimidation; that Longman admitted he had made no complaint himself that the rules had been departed from, and that Longman was not aware that there had been any departure from the rules; and lastly, that O'Neill and his companions had been actuated by a *bona fide* belief that it was for the interests of society at large that they should carry out the leading principles of the club, that each class of workmen ought to go through a regular course of instruction in its particular branch, that the various stringent rules of the club for the separation of the workmen into different classes, and for the keeping up of such separation, was beneficial, and that the club will not allow club men to work with any but skilled workmen who have satisfied the requirements of the club.

I found each of the defts. guilty, being of opinion, after carefully perusing the rules of the club, that they did not contain anything that would afford any sanction for what had been done by the apps., or offer any explanation of their conduct consistent with their innocence. It appeared to me, therefore, that the defence, so far as it rests upon the conduct of O'Neill and Galbraith being a mere carrying out legally of the rules of the society, in which Longman was bound to acquiesce, wholly failed; and the only other question was, whether the evidence in this case satisfactorily showed that there had been such an endeavour to force a man to depart from his hiring by threats and intimidation as constituted the offence contemplated by the Act of Parliament under which the information was laid. I have expressed an opinion that what took place on the 28th March, looking also at the spirit previously evinced, did constitute such an offence. O'Neill, as the mouthpiece of the meeting, sanctioned in what he said by Galbraith and each of the fifty members present, put the alternative to Longman whether he would remain an honourable member and leave his employ, or remain in his employ, be despoised by the club, have his name handed round all over the country in the report, and be put to all sorts of unpleasantness. I expressed an opinion that this was endeavouring to coerce Longman to depart from his hiring by threats and intimidations within the

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meaning of the Act of Parliament. It appeared to me that to a man differently constituted the alternative of being despised and being put to all sorts of unpleasantness, coming as it did from fifty of his fellow club men, and that his name would be handed all over the country in the report (independently of the loss on being turned out of the club of all club benefits), might have easily resulted in making Longman feel that if he did not comply with the wishes or orders of the club he would be a marked man for life, and that he must of necessity leave his employment, although as it happened the deliberation given the matter by Longman induced him to remain faithful to his employers. It is proved by the evidence that the leaving work of the three other club men was very inconvenient and calculated to injure Messrs. Kruger, and had Longman, who was the foreman boiler maker, followed the example of the rest, the injury and inconvenience to Messrs. Kruger would have been much greater. I was of opinion that there was a combination not for the purpose *bona fide* of carrying out the rules of the club, but with the object of coercing Longman to depart from his hiring against the wish and also to the injury both of himself and Messrs. Kruger, and with the intention thereby of coercing Messrs. Kruger to comply with the wishes of the club as to Norfolk. In coming to this conclusion I have found that Norfolk was a perfectly skilled workman as an angle ironsmith, and I have taken into consideration the circumstances that occurred both before, on and after the 28th, in coming to a decision as to the motives which animated O'Neill, Galbraith and the rest of the club.

I therefore now respectfully have to ask the opinion of the Court of Q. B. whether, from the facts stated in this case, and referring more particularly to the occurrence at the meeting of the 28th March, I was entitled to find that such an endeavour on the part of each of the apps. to force Longman to depart from his hiring by threats and intimidation as constitutes the offence contemplated by the Act of Parliament referred to has been made out.

If the court should be of opinion that the said conviction was legally and properly made, then the said conviction is to stand; but if the court should be of opinion otherwise, then my said judgment to be reversed.

T. H. TRAVIS, Police Magistrate, Hull.

*Macnamara* for the apps., and *Tisdal Atkinson* for the resp.

Cases cited:—

*Ex parte Perham*, 29 L. J. 33, M. C.; 1 L. T. Rep. N. S. 91;

*Walsby v. Anley*, 30 L. J. 121, M. C.

WIGHTMAN, J.—In this case the 3rd section of the 6 Geo. 4, c. 129, is, "if any person shall by violence to the person or property of another, or by threats or intimidation, or by molesting, or in any way obstructing another, force or endeavour to force any journeyman, manufacturer, workman, or other person hired or employed in any manufacture, trade, or business, to depart from his hiring, employment, or work, or to return his work before the same shall be finished, he shall be liable to be imprisoned and kept with or without hard labour for any time not exceeding three calendar months." Now the question is, whether such a threat has been used by O'Neill and Galbraith, or either of them, as would warrant a conviction of them or either of them. It seems that a person was sent to the employers of Longman, who was to report as to the state of the work on which Longman was engaged with the employers, he having been only engaged by his employers as a foreman, but not for the purpose of executing a particular work, and it seems to have been the object of the society in question to prevent Longman being engaged. Upon the report of the person sent, who was Galbraith, the other deft., it appeared that

Longman was engaged in this employment, which was certainly obnoxious to the feelings of the society of which he was a member; and then, at a meeting of the society where he was present, and O'Neill being in the chair, O'Neill asked him whether he meant to remain there, and continue a member of the society of which he was then a member, or leave the shop, that was, the employment in which he was then engaged, or whether he would stay at the shop and be dismissed by the club, and have his name sent round all over the country in a report and be put to all sorts of unpleasantness. He told O'Neill, if there was anything to undergo he would incur all the consequences. Several members having spoken, a resolution was passed, the result of which was, that he was turned out of the club. The question is, whether that was such a threat as would bring the case within the meaning of the Act of Parliament. Now, Longman was a member of the society; it was a society beneficial to those interested in it; no rule was infringed, and none was referred to as having been infringed by Longman remaining in the employment of his master; therefore, the effect of the threat was this: "If you do not leave the employment of Mr. Kruger, in which you now are, you shall cease to have the benefit of this club." The sending round to the club was to be by a report to the head officers all over the country, and to the place where Kruger was; At this meeting it was said it would be sent round to the society, and he would be put to all sorts of inconvenience. It seems to me that this would operate most formidably on the mind of a person who felt that he would be deprived of all the benefit he would otherwise obtain from the club, to be dismissed from and put to all sorts of unpleasantness. I hardly know what sort of threat can be intended to come within the meaning of this Act of Parliament, short of personal violence, if this was not such a threat. But it does not appear to me that the case is so satisfactorily made out against Galbraith, for all that he did was to ascertain from the master whether he would allow Norfolk to remain at his work, and then he was to report to the society what he had heard from the master. He merely does that; he uses no threat whatever; he does not say a word, nor does he in terms, nor as it appears in any way, assent to what was said, except as being present. Therefore it appears to me there is hardly a sufficient case against Galbraith. With respect to O'Neill, I think there is.

BLACKBURN, J.—I come to the same conclusion that there was a threat within the meaning of the Act of Parliament, and that the conviction was right as against those who used that threat. That O'Neill himself was the man who spoke there can be no doubt. My own opinion, on looking at the whole case, is, that the magistrate was justified in drawing the conclusion that Galbraith and O'Neill were acting together, though O'Neill was the spokesman, that Galbraith was joining him, and that the conviction against both is good; but as that is a matter entirely on the weight of the evidence, I would not act on my own opinion against my brother Wightman's impression. I am content to join in the judgment that, as far as regards Galbraith, the evidence was not sufficient to justify the magistrate in drawing the conclusion that he was a party to the threat, and consequently that the conviction should be affirmed against O'Neill alone. In the Act the words are "threats or intimidation to cause a workman to leave his work," and there was at one time a different opinion as to those threats, which it was thought must be in the nature of threats to do some violence. But the case of *Walsby v. Anley* decides clearly the principle we are bound to apply in the present case. There, two men, who did not belong to a mason's society and had signed a declaration, were at work for their master. The

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persons who were convicted came in a body, and the words they used were, "You must discharge these men who are working under the declaration, and if you do not, we will leave the work." The prosecutor refused to be dictated to, and then it seems that the other workmen, thirty in number, following out what they said they would do, left the work. The question was whether a threat, "if you do not discharge such and such workmen, we will leave the work," was a threat within the meaning of the Act of Parliament. The decision was that it was such a threat, for though there need not be violence, there must be a threat, as all the three judges who decided it (the Chief Justice, and Crompton and Hill, JJ.) agreed, and it was sufficient if a threat of anything unlawful, or any act of combination or conspiracy was made, such as, "we, in a body, will combine and act against you if you do not discharge a particular workman. Taking that to be the rule of law, was there evidence here to justify the magistrate in deciding that there was a threat that he (O'Neill) and others would do that which would amount to an unlawful conspiracy against these men unless they left their work? As to that we must look at the facts. [His Lordship then recited the facts as stated in the above case, and concluded thus:] I think the magistrate might fairly draw the inference that Galbraith was acting in concert with O'Neill, and that what O'Neill said and did in Galbraith's presence afterwards, and what was said and done by Galbraith before, is evidence against him. There was no right under the rules of the club to turn Longman out. I dare say that the unwritten understanding was that they were to turn him out if he did not strike when they struck; but no such rule exists, and it would be illegal to turn him out. Still, if they honestly thought they were a society that had a right to turn him out, perhaps that might not have amounted to a threat. But when you look to what is said—that if he does not leave he will be dismissed by the club, have his name sent over the country, and be put to all sorts of unpleasantness—and knowing what was meant by the sort of unpleasantness—for during the time Norfolk was working for Kruger the body was confederating and employing all their influence to make a combination to deprive Norfolk of his work—I think that the magistrate might not unreasonably draw the conclusion that O'Neill was threatening. "If you do not leave your employment, we will leave," and that is an unlawful threat, "we will in confederation strike against you," as they were doing against Longman. The statement that "we will act in combination with reference to the employment in which you are," comes to the same kind of threat as was used in *Walsby v. Anley*, which was simply this: "If you do not dismiss the men we will leave work;" but far stronger in degree. But we are not here to draw inferences of fact; we have to see whether the magistrate was justified on the evidence. I cannot say it was unreasonable; if it were for me to say whether it was properly drawn, I should say I agree with the magistrate, and draw the same inference. Neither can I doubt that any reasonable being would draw the same inference. But that is not the ground on which I decide, which is simply this—there is evidence here from which the magistrate might draw the inference. It is said that these people thought they were acting legally; if that is so, it is highly desirable that they should be made aware of their mistake. Every man has freedom for himself to work where he pleases, but that is not to extend to giving him liberty to coerce another, or to combine to deprive others of that freedom. O'Neill was guilty of the crime of which he was convicted, and though jointly acting with Galbraith, may be convicted separately, and therefore, as against him, the

conviction should be affirmed. I will not differ with my brother Wightman, who thinks that the evidence against Galbraith was not sufficient, though I should entertain a different opinion.

*Judgment accordingly.*

*Friday, June 26, 1863.*

LLANGENY (apps.) v. MERTHYR TYDFIL (resps.)  
Removal—Amendment of grounds—Adding new—  
11 § 12 Vict. c. 31, s. 4.

*The Court of Quarter Sessions has power to amend the statement of grounds of removal by the addition of a totally new one: (11 § 12 Vict. c. 31, s. 4.)*

This was an appeal against an order of two justices of the county of Glamorgan, dated 19th May 1862, for the removal of the pauper Thomas Winstone and Elizabeth his wife and their five children, from the parish of Merthyr Tydfil to the parish of Llangeny. The Court of Quarter Sessions confirmed the order, subject to the following case:—

It was objected at the trial on the behalf of the apps. that the order of removal was bad in that it did not set out the cause of the pauper's removal, namely, sickness, such as to produce permanent disability.

Upon the application of the resps. the Court of Quarter Sessions amended the said order by inserting in the said order, after the words "are now receiving relief therefrom," the words "such relief being made necessary by sickness of the said Thomas Winstone such as to produce permanent disability."

The evidence was, that the pauper was, and had for many years been, totally blind, and it was proved that there was evidence of this fact before the justices who made the order.

In the course of the trial it was proposed on behalf of the resps. to give in evidence a former order of removal made by the resps. on the apps. parish of the same pauper and his family unappealed against.

The inadmissibility of the said order was objected to on behalf of the apps. on the ground, amongst others, that there was not a ground of removal under which such evidence would be legally admissible.

The Court of Quarter Sessions held that the evidence was inadmissible.

The resps. then applied for leave to add a ground of removal setting forth this fact. This was objected to by the apps on the ground that it was beyond the jurisdiction of the Court of Quarter Sessions to add entirely new matter.

The Court of Quarter Sessions, however, allowed such new ground of removal to be added in the following terms:—"That on Aug. 25, 1859, an order was made under the hand and seal of John Coke Fowler, Esq., a stipendiary magistrate for the said borough of Merthyr Tydfil, acting at the Merthyr Tydfil police-court, and having by law the power to do alone acts which may be done by two justices of the peace for the removal of the said pauper and his family from our parish to yours, and a copy of such order was duly posted to you, and such order was never appealed against, and is still valid."

The order was then admitted in evidence, and it was then objected, on behalf of the apps., that the order was bad, as not showing that the pauper had received relief, on account of either accident or sickness, such as to produce permanent disability, and that the Court of Quarter Sessions had no power to amend such order, and that the apps. had a right to treat such order as a nullity, as the fact that the pauper's blindness was within their knowledge, and they ought not to be concluded, by such defective order, from going into evidence in support of the merits of the case generally.

The Court of Quarter Sessions decided that the

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order was good on the face of it, and that the apps. were concluded by it, and could not be allowed to give any evidence on the merits of the case generally.

No evidence was tendered invalidating the order of 25th Aug. 1859.

The Court of Quarter Sessions, however, upon the application of the apps., reserved a question for the opinion of the Court of Q. B. as to whether they had jurisdiction to add an entirely new ground of removal.

If the Court of Q. B. should be of opinion that the Court of Quarter Sessions had no jurisdiction, then the order of sessions to be quashed, otherwise to stand confirmed.

*Poland* for the resps.—Under the 11 & 12 Vict. c. 31, s. 4, the Court of Quarter Sessions had power to add another ground of removal, and that court having exercised its discretion by so doing, the Court of Q. B. has no power to review their decision: (*Reg. v. Bayton*, 30 L. J. 229, M. C.) Their decision is final: (11 & 12 Vict. c. 31, s. 7.)

*C. E. Coleridge* for the apps.—This was not an amendment of the grounds of removal in the proper sense of that term; it was an addition of matter entirely new; it was like the statement of a new ground of action. Sect. 4 refers to amendments of grounds of removal or appeal imperfectly or incorrectly set forth, but here there was no statement at all of the ground of appeal added.

*WIGHTMAN, J.*—Here by mistake the resps. omitted one ground of removal in the statement of the grounds of removal delivered. The statute enables the Court of Quarter Sessions to amend the statement of the grounds of removal, and the court does so, and adds another ground to those already stated. I am of opinion that they had power to do so. It is just like allowing an item to be added in a particular of demand in an action.

*CROMPTON, J.*—To construe the statute in the way contended for by the apps. would shut out nearly all amendments.

*BLACKBURN, J.*—I am of the same opinion. If the apps. had thought it necessary they might have asked for an adjournment, or for the costs occasioned by the amendment. *Judgment for the resps.*

## COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYD, Esqrs., Barristers-at-Law.

Monday, June 8, 1863.

EARLE v. MAUGHAN.

*Landlord and tenant—Metropolitan Building Act.*

*A tenant who has been compelled to pay money to the adjoining owner of premises under the Metropolitan Building Act, 18 & 19 Vict. c. 122, may recover the same from his landlord by an action at law.*

Declaration, that the plt. before and at the times hereinafter mentioned was and still is the occupier of certain premises, being situate within the limits to which the Metropolitan Building Act 1853 is applicable, and adjoining to other premises within the said limits, and divers expenses were incurred by the owner of the said last-mentioned premises for and in respect of work executed to and in respect to a party-wall or structure by which the said several premises were separated, he being the building owner and the deft. being the adjoining owner within the meaning of the said Act, a proportion of which expenses was, by and according to the said Act, to be borne by the deft. as such adjoining owner, and the plt., as occupier of the said first-mentioned premises, was obliged to pay and did pay to the said building owner a certain sum of money, to wit, 126*l.* 10*s.* 11*d.*, as and for the said proportion, and all things were done by the plt. and all things hap-

pened, and all times have elapsed necessary to entitle the plt. to be paid by the deft. the said sum of money; yet the deft. has not paid the same, and the plt. also sues the deft. for money payable, &c.

Plea, never indebted, and demurrer.

The plt.'s points were:—1. That although the plt. is, according to stat. 18 & 19 Vict. c. 122, s. 97, entitled to deduct the expenses paid by him for the rent payable by him to the deft., there is nothing contained in that Act which prevents the plt. from suing the deft. for recovering the amount of such expenses. 2. That if the plt. cannot sue for recovery of the money so paid by him for the deft., and has no other remedy than by deducting against the rent as it accrues due, the plt. would necessarily be without the use of, or interest upon, his money whilst it was thus being repaid by instalments. 3. That by the 6th rule in the 97th section it is expressly provided that such expenses and moneys may be recovered as a debt in due course of law.

The deft.'s points were:—1. That the amount sought to be recovered under the first count was not recoverable by action at law, having regard to the rules contained in the 97th section of the Metropolitan Building Act 1855, and especially the 5th of those rules. 2. That the 6th of those rules was confined to cases between owner and owner, or between occupier and adjoining owner. 3. That the liability for the expenses mentioned in the first count is a new liability, the creature of the statute, and the same statute gives a specific remedy.

*Heath* was heard in support of the demurrer.

*Mellish, Q. C.*, contra, was not called on.

*ERLE, C. J.*—I am of opinion that our judgment should be for the plt. It appears that a building owner incurred some expenses under the Metropolitan Building Act 1855, in respect of repairs to premises adjoining those of which the deft. was owner and the plt. occupier; and the question for us to decide is, whether the 97th section of the Act prevents the plt. from recovering this money, which is payable by the deft. as adjoining owner? By rule 6 of that section it is provided, that "if default is made by an owner or occupier in payment of any expenses hereby made payable by him in the first instance, or if default is made by any owner in payment of any other expenses or moneys due from him by way of contribution or otherwise, in pursuance of this Act, then, in addition to any other remedies hereby provided, such expenses and moneys, if arising in respect of any matter within the provisions of the third part of this Act, may be recovered as a debt in due course of law." And I think by this rule, and from an examination of other sections of this Act, that it is quite clear that the deft. is liable in an action by the occupier.

*WILLIAMS, J.*—I am of the same opinion. And I also think that the present case comes within the rule laid down in *Stubbs v. Parsons*, referred to in the note to *Lampligh v. Braithwaite*, 1 Sm. L. C. 76, where it is held that where a tenant is entitled to deduct from his landlord's rent any payment which he may have made, if he neglects to do so he may still recover the amount as money paid.

*WILLES and BYLES, JJ.* concurred.

*Judgment for plt.*

Jan. 26, 28, and July 6, 1863.

ELLIS v. THE MAYOR AND CORPORATION OF BRIDGNORTH.

*Removal of market—Right of stallage—Rights appurtenant—Local Government Act 1858, s. 50.*

*The plt. claimed a prescriptive right as appurtenant to the ownership and occupation of his house, which was situate in the Market-place, to erect a stall in front of his house on market days, and sell goods*



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thereon himself, or let it to others for hire. The defts., who are owners of the market and lords of the manor and of the soil, removed the market to another part of the town under the powers of sect. 50 of the Local Government Act 1858, but without the consent of the plt. In an action to recover damages for the injury caused by such removal to the plt.'s right of stallage:

*Held*, that the enjoyment of the stall by the plt. or his licensee was sufficiently connected with the enjoyment of his house to satisfy the rule of law that no right can be annexed to a house or land which is unconnected with the enjoyment or occupation thereof; and that, whether the right of the plt. had its origin in a grant from the owners of the market, or in a condition contained in the grant by the Crown of the franchise, the removal of the market was an unlawful interference with a right enjoyed by the plt., and he could, therefore, maintain this action.

This was a special case, stated by an arbitrator for the opinion of the court. The cause was tried at the Shropshire spring assizes 1862, when a verdict was entered by consent for the plt. subject to a special case, the court to draw the inferences of fact, &c.

The case found that the town of Bridgnorth was and is an ancient borough and market-town; that the corporation are lords of the manor of Bridgnorth (which includes the borough) and subject to any rights which may be found to be in the plt. are lords and owners of the markets and of the soil of the streets, including High-street; that from time immemorial, until the year 1838, a market for the sale of horses, cattle, sheep, pigs, corn, and all kinds of provisions and merchandise, has been held weekly on Saturdays in the High-street. In the year 1650 the corporation erected a market-hall in the High-street, over which and the standings in it they have ever since exercised the entire and sole control. The market continued to be so held till the year 1838, when the corporation removed the pig and cattle market. They formerly took tolls in kind of corn, grain, fruit, nuts, and other like produce, but the taking of these tolls was suspended in 1817, and they have never since been collected. The plt. is owner and occupier of a house in High-street, and the owners and occupiers of his house and several other houses in High-street have from time immemorial erected on market days wooden moveable stalls or standings opposite their respective houses, and have either used those stalls themselves for the sale of goods and merchandise, or let them to others, and no tolls were ever taken for goods sold at these stalls. That the plt. let his stall for 13s. a-year; that the user was as of right; and that the plt. has never used such stall for the sale of his own goods. That the stalls occupy part of the highway, and to that extent obstruct the passage of the public; that the corporation have never interfered with these rights of stallage; that in the year 1854 a joint-stock company was formed for the purpose of erecting and did erect new market buildings in Bridgnorth out of High-street, but within twenty yards of it and 150 yards of the plt.'s house; that this market was opened in the year 1856, and afterwards closed in consequence of the failure of the speculation.

That the Local Government Act 1858 (21 & 22 Vict. c. 98) took effect on, and has been in force since the 1st Sept. 1858 in the borough of Bridgnorth, which is a corporate district. Sect. 50 gives power to the local board to provide a market-place, and construct a market-house and other conveniences for holding markets. . . . To purchase or take on lease land, and public or private rights in markets and tolls for any of the foregoing purposes. To take stallage, rents and tolls in respect of the use, by any person, of such market-house; but no market or slaughterhouse shall be

established in pursuance of this section so as to interfere with any rights, powers, or privileges enjoyed within the district by any person, chartered joint-stock, or incorporated company, without his or their consent.

On the 14th Dec. 1860 the local board hired the new market-house of the company on a lease (subject to a mortgage by the said company to one John Henry Cooper, of Bridgnorth) for a term of twenty-one years. That the legal estate in the Newmarket-buildings was and is vested in the said J. H. Cooper. That the defts. prepared and issued a table of tolls to be taken in the new market, and the same was approved by one of Her Majesty's principal Secretaries of State.

Pursuant to resolutions of the local board, the town council and local board, on the 8th Feb. 1861, issued a notice that they had provided a covered market-place in the said borough for the purpose of holding the market heretofore held in High-street, which was duly certified by two justices of the peace, and would be opened, and the old market would be removed, and held there on the 23rd Feb., and every succeeding Saturday, but so as not to interfere with any rights, powers, or privileges within the said borough, which, under the 50th section of the Local Government Act 1858, ought not to be interfered with, and that after such opening any person other than a licensed hawk or any person entitled to such rights and privileges, who should sell in the old market would be liable to a penalty not exceeding 40s. And further, that although it was not then intended to prevent the occupiers of houses in the High-street, who had been in the habit of erecting on market days standings opposite their houses, from erecting the same for the display and sale of their own goods, other persons could not be allowed to display or sell their goods in such standings. They then opened the new market, and have continued it from that time, taking tolls and rent of persons using it. The defts. in no way interfered with the plt.'s stalls, except as hereinbefore appears, but the effect of opening the new market was to withdraw from the old one many of the public who would otherwise have attended it. The plt. never gave his consent to the establishment of the new market, nor has he received any compensation from the local board.

The question for the opinion of the court is, whether the plt. has, under the circumstances above stated, a right to maintain this action against the defts. in respect of any one or more, and which, of the counts in the declaration subject to amendment as aforesaid.

*Huddleston, Q. C.* (Gray with him) for the plt.—The plt. says, "Here is a market, and in that market I had a certain privilege of erecting a stall and letting that stall to other persons, and you the defts. have disturbed me in that right or easement." This is an action by a person who has a prescriptive right derived from the owners of the soil, and the owners of the soil, have wrongfully removed the market. We say we have a right first at common law and then by statute. [ERLE, C. J.—If the statute granting the market was producible it would show the limits within which you might hold the market; but if no charter is producible the market being always held in one place would be evidence that you could not hold it elsewhere.]

*Dixon v. Robinson*, 3 Mod. 108;

*Curwen v. Salkeld*, 3 East, 538.

The grantor of a market cannot change it unless the public are as well provided for in the new one as in the old one; nor can he change it to a place not on his own soil: (*Rex v. Starkey*, 7 Ad. & E. 95.) [ERLE, C. J.—Does it not follow from that case that your client has a right to keep his stall where it was?] That is not disputed, but when the market is removed the advantage of that is nil. I say, first, you have removed the market to a place not on your own soil,

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and therefore the removal is bad; and, secondly, the public have not the same advantages in the new market as in the old one, as in the new one they have to pay toll, while the old one was substantially toll-free, and therefore the removal is bad for that reason: (*Carroen v. Salkeld*.) The case finds that the corporation are lessees of the mortgagor, and that the legal estate was and is vested in Cooper, the mortgagee; they have no right at common law to remove the market to a place where they have only an equitable interest in the soil. Then they say they have power to remove by the Local Government Act 1858 (21 & 22 Vict. c. 98). [He read the 50th section as set out in the case.] Here, on the finding of the case, is a right and privilege enjoyed by the plt., viz. to erect a stall and let it out to others. This is a real and solid privilege: (*Rose v. Groves and another*, 5 Man. & G. 613.) [ERLE, C. J.—If you obstruct a highway and private injury results, an action lies. A navigable river is a highway.] Yes; but in that case it was found that it did not necessarily obstruct the highway. Here the plt. is found to have had a substantial and solid interest in the market. [ERLE, C. J.—The whole of the public had a right to go to this market before it was removed and sell their goods there. The plt. had only a greater right.] The plt. had a direct interest in the market. In the case of the *Hungerford Market Company*, 2 Bing. N. C. 281, the public did not complain, but the plt., from whose shop the public were kept away. [WILLES, J.—It is like a grant of salmon fishery without a grant of the soil. Then the owner of the oil drains the water off. Would that be actionable?] this is a very peculiar privilege, by which the owners of houses have a right to erect a stall in the highway and impede the passage of the public, and take rent which would otherwise belong to the owners of the market. [WILLIAMS, J.—Is there any case of an action for removing a market?] I cannot find any. [WILLIAMS, J.—You might say it is not so much an action for removing a market as for setting up a rival market.] There is a case of *Dent v. Oliver*, Cro. Jac. 122; and *Fyson v. Smith*, 9 Ad. & E. 406, where the right to erect a stall in a market was held an answer to an action of trespass. This is a right which has been exercised from time immemorial with the knowledge of the corporation and against their interest, and must be taken to have been granted by the owners of the market.

*Phipson, Q. C.* (*Dowdersonell* with him) for the defendants.—The plt. says this right of selling goods and having a stall erected is a right appurtenant to his house. I shall submit that this is not a right in point of law. Then we say, first, that the market has been rightfully removed; secondly, that the plt. is a party who cannot sue for the removal of the market; he merely has a right as against the owner of the soil, and no franchise in the market. [WILLES, J.—Franchise to sell in the market.] That arises from his right to a stall. [WILLES, J.—Right to sell without paying tolls could only come from the owner of the market.] There never was any toll for meat, butter, &c. which was sold here; it was only for vegetable products. Thirdly, if such an action, could be framed at all, it could only be for some special damage sustained by the plt. There is an allegation in the declaration that he let this stall, but no averment that he has lost the rent or that the stall lets for less than it did. The plt. never sold his own goods there. If I establish that there was a good removal, the ground of the plt.'s claim fails. The plt. had no right which prevented the local board acting under the 50th section of the Local Government Act 1858 (21 & 22 Vict. c. 98). The local board gave notices by which they assumed to act under that section as well as under their common law right to remove as lords of the market. The lord of a market

has a right to remove unless there are some limits within which the market is to be held:

*Rea v. Cotterill*, 1 B. & Al. 67;

*De Rutzen and Wife v. Lloyd*, 5 Ad. & E. 456.

[WILLIAMS, J.—That is a curious case, as it appears that the lord of the market had from time immemorial held the market on Lloyd's land, and therefore it seems opposed to the proposition of Mr. Huddleston, that the lord cannot hold the market off his own soil. I think that what Littledale, J. meant in *Rea v. Starkey*, 7 Ad. & E. 95, was, that the lord must have the control of the soil at the time.] I submit, then, that there is nothing to prevent a common law removal of the market, and that the opinion of Littledale, J. has been wrongly stated: *Lockwood v. Wood*, 6 Q. B. 31; see pp. 46, 47, where the court recognised the principle that the lord having a right to remove, might hold the market on the soil of any person if he had his permission. The only difficulty, then, that I should have to contend with in establishing the common law right to remove would be the imposition of tolls, which I apprehend would, on the authority of *Rea v. Starkey*, 7 Ad. & E. 95, vitiate the removal: (*Fyson v. Smith*, 9 Ad. & E. 406.) The lord of a market granting a right to erect a stall does not lose his right to remove. If he removes he does not destroy his grant; all he grants is, that when he holds a market in that place, the grantee shall have a stall; he does not say that he will hold his market there for ever, in order that the grantee may have the benefit of his stall: (*Mayor of Northampton v. Ward*, 1 Wilson, 107, where the whole question of stalls is gone into.) It seems clear, then, that if this had been a good common law removal the plt. could have no right of action; and here the case of *Fyson v. Smith*, 9 Ad. & E. 406, is important. I now come to the statute. [He read the 50th section.] That must mean some legal easement or privilege which would have been interfered with if this Act had not been passed; but if I can show that he had no rights as against the lord, if there had been a good common law removal, he can have none under this statute. There is nothing, then, to prevent the local board acting under this statute, and imposing tolls, unless the plt. have such a right as I have referred to. I submit, then, that the lord had a right to remove the market, and that it was properly removed. I now come to my second proposition, that the plt. had no franchise or interest in the market *quod* market. Suppose the old market had remained, and some stranger had established a market in this new market-house, could the plt. sue the stranger? The lord might, perhaps, but the plt. could not. The plt. has simply the right of others to come to the market to sell, only he has a right to sell on a stall, while others must sell out of baskets. [WILLIAMS, J.—If you can assume that the owner of the market covenanted with the owners of the houses that they should have the stalls and then took away the market, it would be derogating from his grant. It is like a person granting estovers, and then cutting down the wood.] The plt. had no exemption from tolls, and it does not appear that anything more was granted than a right to put up a stall. He has no interest in the market itself. If there had been no good removal, even then the plt. has no right of action. The plt. has no such right as he alleges in his declaration, nor can he have such right in point of law. The right is very peculiar—a right appurtenant to his house to have a stall, and let that stall to others. The user of the plt. is only to have the stall and let it out to others; there is no evidence that he ever sold his own goods there. The grant to be assumed is this, as stated in the declaration—a right to have the stall for the sale of other persons' goods, and that is an entire grant; now can there be such a grant

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appurtenant to his house? [WILLES, J.—I go by steps; could he have a right appurtenant to his house to sell his own goods?] I should apprehend that he could, to sell such goods as were sold in his house; but without admitting that. [ERLE, C.J.—Could he have a right to a bench outside his shop for customers to sit on, which would be an obstruction to the highway?] I should apprehend that that could not be the subject of a grant. A privilege could not be the subject of a grant which was unconnected with the enjoyment of his house: (2 Bl. Com. 21st ed. 265.) Could the owner of land grant a right of way to a person's house to get water and sell it to all the world? If I have a spring I could grant him a pipe to have water in his house as appurtenant to his house, but not to sell it. I could grant it to him and his heirs, but not as appurtenant to land: (*Ackroyd v. Smith and another*, 10 C. B. 164.) The marginal note to that case expresses concisely my argument. Then if I grant you a right of way for your neighbour to use it would be bad for excess, and what is the difference between that and the grant of a stall for your neighbour to sell on? Then there can be no grant of common as annexed to land, to turn other people's cattle on; that was discussed in *Jones v. Richard and others*, 6 Ad. & E. 530; 1 Wms. Saund. 6th ed. 346. This is a right to relet this stall to any person in this land; the user of the stall is a user of the grantor's land, and he cannot grant land, as appurtenant to a house, for the use of any person in the world. Again, the grant is void for uncertainty; the claim in the declaration is to have a stall, the evidence is. to have several stalls:

*Clayton v. Corby*, 5 Q. B. 415.

*Huddleston*, Q.C. in reply.—Whatever rights the lord had over the whole market, the plt. had over that part of it on which he had a right to place a stall. If a person wrongfully establishes a market near an existing market an action lies:

*Yard v. Ford*, 1 Mod. 69; 2 Wms. Saund. 171; 2 Roll. Abr. 140, tit. "Nuisance."

And as to the incongruity:

1 Co. Lit. 207, n. 17;

Co. Lit. (Coventry) c. 11, s. 184.

*Cur. adv. vult.*

*July 6.*—WILLIAMS, J. now delivered the judgment of the court.—We are of opinion that our judgment ought to be for the plt. He claims the right of placing a stall for the sale of goods by himself or his licensees on market days in front of his shop in a market held in the High-street of the borough of Bridgnorth as appurtenant to his house situate in that street, and his complaint is that he has been disturbed in the enjoyment of this right by the defts. holding on market days another market near the market in which the right is claimed by the plt. The facts are, that from time immemorial till lately a weekly market has been held in the High-street of Bridgnorth. The market belongs to the corporation of Bridgnorth, who are also lords of the manor in which the borough is situate. The plt. is the owner and occupier of a house in the High-street, and he and the previous and owners and occupiers of this house as well as several other occupiers of houses in High-street have from time immemorial erected on market days stalls opposite their respective houses, and have exposed thereon goods for sale in the market, or let the stalls for hire to others who have done so; and no payment has ever been made or claimed by the corporation for stallage or for tolls of things sold at such stalls, though they took tolls of similar produce exposed in the market elsewhere. The defts. have moved the market to another place within the town at some small distance from the High-street, which would be necessarily injurious to the old market, if it was continued, and to the right claimed by the plt. therein. But the demand for com-

pensation in respect of this alleged injury is resisted, first, on the ground that the moving of the market was justifiable under the Public Health Act 1848, and the Local Government Act 1858; secondly, that there is no legal foundation for any right of the plt. which is interfered with by the removal of the market from the High-street to its new site, and no cause of action in respect of such removal. It appears to us that, inasmuch as the power as to providing market places conferred on the local board by sect. 50 of the Local Government Act 1858 is expressly qualified by the provision that no market shall be established so as to interfere with any rights enjoyed by any person without his consent, the two questions raised on the part of the defts. may be narrowed to the single one whether the plt. has shown that the removal of the market was an unlawful interference with any right then enjoyed by him. No authority in any way referring to such a right was cited by counsel on the argument of this case, nor has the court been able to discover any. It is necessary, therefore, to consider on principle whether such a right is maintainable. On the part of the plt. the argument rests on the long-established rule as mentioned by Lord Hobart in *Slade v. Drake*, Hob. 297, that "antiquity of time fortifies all titles and supposeth the best beginning the law can give them." And it is argued that the immemorial enjoyment in the present case may well have had a legal origin, on the supposition either that at some former period the then owners of the market granted to the respective owners of the houses abutting on the High-street and their heirs, as a right annexed to their estate in the houses, that the occupiers thereof might on market days respectively erect stalls in the Market-street opposite their houses, for the exposure of goods free of all toll and stallage; or that the original grant of the franchise from the Crown to the corporation was expressed to be on the terms or condition that the owners of these houses should enjoy that right. We think these arguments are well founded, and ought to prevail. This right was probably conferred in consideration that the holding of the market must necessarily diminish on market days the trade and custom of the shops kept in such houses, and the shopkeepers were therefore privileged to advance, as it were, their shops into the market itself by having stalls in the street commensurate with the fronts of their houses, and in this point of user the enjoyment of the stalls by them and those licensed by them appears to us sufficiently connected with the enjoyment of the houses to satisfy the unquestionable rule of law which was acted upon by this court in the case of *Ackroyd v. Smith and Bailey v. Stephens*, 12 C. B., N. S., 91; 6 L. T. Rep. N. S. 356, that no right can be annexed to a house on land which is unconnected with the enjoyment or occupation thereof. On the part of the defts., besides denying that any such right could have a legal existence, it was urged that even if the right existed in respect of erecting such stalls in the High-street as long as the market was held there, yet that they, as owners of the market, might legally remove it to any new place within the manor, and that in respect of such new site the right was annihilated. The cases of *Curwen v. Salkeld*, *R. v. Cotterill*, and *De Ruizen v. Lloyd* certainly justify the proposition that if nothing further appeared in the case the presumption would be, that the original grant from the Crown was for the holding of the market at any convenient place in the manor, and that accordingly the owners of the franchise in the present case might change the site of it, as they have in fact done. But the answer to this argument is, that if the right of the plt. had its origin as suggested in a grant from the owners of the market, their successors cannot be allowed to derogate from that grant by changing the site of the market-place; or if

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the right had its origin, as further supposed, in a condition contained in the grant by the Crown of the franchise, the terms of that condition would, in effect, amount to a grant of a market to be held in the High-street, and in no other place, and consequently the removal of it by the defts. to the new site would be illegal. If this be so, then, according to the case of *R. v. Starkey*, the High-street continues to be, in point of law, the site of the market, and the plt. may maintain this action for setting up a new market to the injury of his right in the ancient market. Our judgment for these reasons must be for the plt.

### EXCHEQUER CHAMBER.

Reported by T. W. SAUNDERS, Esq., Barrister-at-Law.

#### ERROR FROM THE QUEEN'S BENCH.

(Before ERLE, C. J., POLLOCK, C. B., WILLIAMS, J., BEAMWELL, B., WILLES, J. and CHANNELL, B.)

#### GAY v. MATHEWS.

*Costs—Appeal—Poor-rate—Mode of enforcing recovery of costs—11 & 12 Vict. c. 43, s. 5—12 & 13 Vict. c. 45, s. 27.*

*When, upon an appeal to the quarter sessions against a poor-rate, the court, under the provisions of sect. 5 of the 12 & 13 Vict. c. 45, directs the party against whom it is decided to pay to the other party his costs, such costs are to be recovered in the manner pointed out by sect. 27 of the 11 & 12 Vict. c. 43, and an order of quarter sessions directing such costs to be paid to the clerk of the peace, to be by him paid over to the party entitled to them, is good.*

This was a writ of error from the decision of the Court of Q.B. upon a demurrer to the replications to the third and fourth pleas.

The declaration stated that the plt. sued the defts. for that the defts., on certain land in the occupation of the plt. in the parish of Whiteparish, in the county of Wilts, called Brickworth Farm and Whelpley Farm, took the goods of the plt., that is to say, six wheat ricks, two barley ricks, two oat ricks and one bean rick, and unjustly detained the same against sureties and pledges until, &c., whereby the plt. has sustained damages, and claims 100l.

The 3rd plea stated, that at the general quarter sessions of the peace, held at Devizes, in and for the county of Wilts, on Tuesday, Jan. 1, in the 24th Vict., it was ordered as follows:—"Wiltshire, to wit. Whereas, at the General Quarter Sessions of the peace, held at Warminster, in and for the said county of Wilts, on Tuesday the 3rd July last, Alfred Gay entered his appeal against a rate or assessment, made for the relief of the poor of the parish of Whiteparish, in the said county of Wilts, dated the 21st May then last past, and allowed the 22nd day of the same month of May, the hearing and determination of which said appeal was adjourned to the then next sessions, at which last-mentioned, held at Marlborough, in and for the said county, on Tuesday, the 16th Oct. now last past, on hearing counsel on both sides, and by consent of the said app. and resp., the court did further adjourn the hearing and determination of the said appeal unto the then next and now present quarter sessions; and by the like consent did order that it be referred to Mr. William Thomas Buckland, of Windsor, in the county of Berks, land surveyor, to survey the several properties in respect to which the app. and the several resps. were respectively rated, and to report to the then next and now present sessions the proper rateable value at which the app. and the said resps. should be respectively rated according to law, and relatively towards each other and the general assessment in the said parish; and the said court of quarter sessions should there-

upon make such order in the premises as it should deem fit, and should thereupon award and apportion such costs and expenses to either party or parties respectively as, having regard to the several grounds of appeal, and such order so to be then made thereupon as aforesaid, should seem fair and just. And whereas the said William Thomas Buckland accepted such reference and, in pursuance of such agreement and order, made such survey and valuation, and ascertained the proper rateable value of the several properties in respect of which the said app. and also the several resps. ought to be respectively rated according to law, and relatively towards each other, to the best of his knowledge and judgment, and reported the same to this court upon oath. Now, this court having heard the said William Thomas Buckland, and duly considered the said report, doth approve of and confirm the same, and doth find, adjudge and determine that the said app. had no grounds for appeal against the said rate or assessment, inasmuch as according to the said report the proper rateable value of the property in respect of which the said app. is rated therein, is rated at a lower sum than the same ought to have been rated, and that the proper rateable value of the several properties in respect of which the several resps. are respectively rated therein, are rated at higher sums than the same ought to have been rated according to law, and in relative proportions to each other, and doth therefore order and direct that the said assessment be amended according to the report of the said William Thomas Buckland, and doth award and order the sum of 21l. 15s. 2d. to the said resps. for their costs in and about the said appeal, and the further sum of 98l. 10s., by them paid to the said William Thomas Buckland for his costs and charges in making such valuation and report and attendances thereon. And this court doth further order and direct that the said app. Alfred Gay do pay the said sum of 21l. 15s. 2d. and 98l. 10s. for costs to the clerk of the peace of this court, to be by him paid over to the parties entitled to the same within three weeks after service of this order or a copy upon the said Alfred Gay. John Swayne, clerk of the peace. By the Court." That notice of the said order by serving a copy of the same upon the plt. was given to the plt. on the 9th March 1861, and that the plt. did not pay the said sum for costs or any part thereof; that after three weeks had elapsed from the time of the said service and notice, the clerk of the peace of the said county of Wilts duly certified that the said sums of 21l. 15s. 2d. and 98l. 10s. for costs, had not nor had any part thereof been paid in obedience to the said order. And that therefore one of the justices of the peace acting in and for the county of Wilts, on the 6th April 1861, duly issued his warrant under his hand and seal, directed to the constable of Whiteparish in the county of Wilts, and to all other peace officers in the said county, and by which said warrant the said constable was commanded forthwith to make distress of the goods and chattels of the plt., and that if within five days and after the making of such distress, the said two last-mentioned sums, together with the reasonable charges of taking and keeping the said distress, should not be paid, then the said constable should sell the said goods and chattels so distrained, and pay the money arising from such sale to the clerk of the peace for the county of Wilts. That the defts. are one of the peace officers in the said county, to whom the said warrant was directed, and that in pursuance of the said warrant, and in exercise of his duty thereunder and not otherwise, and as in the declaration mentioned and therein complained of, as he well might.

The fourth plea was similar to the third, justifying under another similar order the court of quarter sessions for the payment of costs to amount of 420l.

Demurrers to these pleas.

By the 11 & 12 Vict. c. 43, s. 27, it is enacted that after an appeal against a conviction or order shall be decided, if the same shall be decided in favour of the respa., the justice who made such conviction or order, or any other justice of the peace, may issue such warrant of distress or commitment, &c.; "and if upon any such appeal the court of quarter sessions shall order either party to pay costs, such order shall direct such costs to be paid to the clerk of the peace of such court, to be by him paid over to the party entitled to the same, and shall state within what time such costs shall be paid; and if the same shall not be paid within the time so limited, and the party ordered to pay the same shall not be bound by any recognisance conditioned to pay such costs, such clerk of the peace or his deputy, upon application of the party entitled to such costs or of any person on his behalf, and on payment of a fee of one shilling, shall grant to the party so applying a certificate (R.) that such costs have not been paid; and upon production of such certificate to any justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, it shall be lawful for him or them to enforce the payment of such costs by warrant of distress (s. 1) in manner aforesaid," &c.

By the 12 & 13 Vict. c. 45, s. 5, it is enacted, "that upon any appeal to any court of general or quarter sessions of the peace, the court before whom the same shall be brought, may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such court appear just and reasonable, such costs to be recoverable in the manner provided for the recovery of costs upon an appeal against an order or conviction by an Act passed in the twelfth year of Her Majesty's reign, intituled "An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales, with respect to summary convictions and orders" (11 & 12 Vict. c. 43).

*H. James* now appeared for the plt., and argued that the order of quarter sessions set out in the pleas was bad for directing the amounts to be paid in the first instance to the clerk of the peace instead of to the parties themselves, for that sect. 27 of the 11 & 12 Vict. c. 43, which only applies to appeals upon convictions and orders, and does not apply to appeals against poor-rates, is not entirely incorporated in sect. 5 of the 12 & 13 Vict. c. 45, but only so much of it as applies to the actual process of recovery of the costs; that the costs in the present case are recoverable only under the authority of the last-mentioned Act, which contains no directions as to their being paid in the first instance to the clerk of the peace, and which only incorporates so much of sect. 27 of the 11 & 12 Vict. c. 43, as relates to the mode by which the amount is to be recovered, leaving the law as it stood originally as to the person to whom in the first instance such costs were to be paid. [BRAMWELL, B.—But is not the warrant to be granted upon the certificate of the clerk of the peace?] Yes; but the party entitled may go to the clerk of the peace and inform him that the costs are unpaid, and then get a certificate from him, or he might go at once to a justice. [BRAMWELL, B. Does not the whole course of the recovery of the amount begin with the certificate of the clerk of the peace, and is not that certificate founded upon the non-payment to him?] That cannot be the meaning of the 5th section. The order is wrong in form in directing that the money is to be paid to the clerk of the peace instead of to the party as directed by the 5th section:

*Reg. v. Huntley*, 3 Ell. & Bla. 172.

*Milward*, for the defts., was not called upon.

ERLE, C. J.—We are of opinion that the judgment of the court below should be affirmed. The statute directs the losing party to pay the costs (if so directed)

to the other party, and the order directs that the costs are to be paid to the clerk of the peace in the first instance, and to be by him paid over to the party entitled ultimately to receive them. The Act says, "Such costs to be recoverable in the manner provided for the recovery of costs upon an appeal against an order or conviction" by the 11 & 12 Vict. c. 43, and that statute directs that the costs are to be paid to the clerk of the peace, to be by him paid over to the party entitled to the same, and that will be a way by which the costs can be enforced. If the costs are paid to the clerk of the peace, they will then be paid over to the party entitled to them. *Reg. v. Huntley* is in point, in confirmation of this view. It is certainly not without great regret, considering the heavy amount he is called upon to pay, that we are compelled to fix him with it; but upon a proper construction of the statute we think that the order is good.

*Judgment of the court below affirmed.*

### ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Thursday, May 7, 1863.

COWEN v. PHILLIPS.

*The Metropolitan Building Act 1855—The 18 & 19 Vict. c. 122, ss. 3, 85 and 86—Adjoining owners—Agreement for a lease—Injunction.*

*The above-stated Act and sections of it are not to be restricted in their construction to persons who have bare legal interests in the premises in question.*

*Where, therefore, the plts. claimed as "adjoining owners" of premises which they held under an unsealed document purporting to be a lease for more than three years, to be entitled to an injunction to restrain the defts., as "building owners," from entering the plts.' premises, it was Held, that the plts. were "adjoining owners" within the meaning of those words in the 3rd section of the statute, and had a right to receive the notice prescribed by the 85th section of it.*

*The defts. had served the lessee of the premises, from whom the plts. obtained their alleged lease, with the prescribed notice. It was also*

*Held, that the plts. had a right to say the requisitions of the 85th section of the Act had not been complied with; that the case was one for an injunction; and that under all the circumstances of it the defts., the building owners, must be restrained from proceeding with their works on the plts.' premises, and must pay the costs of the suit.*

This cause came on upon a motion for a decree. The plts. in it were the occupiers of a shop and kitchen in a house in the city; and were in such occupation by virtue of a written agreement, not under seal, between them and a Mr. Baker, who was lessee of the house for an unexpired term of twenty-one years. The agreement purported to be a lease by Baker to the plts. of that part of the premises occupied by them for a period of more than three years. The defts., the Messrs. Phillips, were the owners of the premises adjoining those of the plts. In the summer of last year the Messrs. Phillips proposed to exercise certain rights as "building owners," under the Metropolitan Building Act, 18 & 19 Vict. c. 122, s. 85, and having ascertained that Mr. Baker was the lessee of the adjoining premises, they gave him the notice (mentioned in the 85th section of the Act) of the nature of their intended works, and of the time at which they proposed to commence operations. An award was afterwards made under the same section as between Messrs. Phillips and Mr. Baker, determining the mode in which the works should be carried out. In the course of those proceedings Mr. Baker informed Messrs.

Phillips of the nature of the p<sup>l</sup>ts.' interest in the premises; but they were not served with a notice as required by the Act. On the 21st Aug. the Messrs. Phillips entered the premises of the p<sup>l</sup>ts., with the view of carrying out their works. Under those circumstances the p<sup>l</sup>ts., on the 23rd of the same month, filed their bill in this suit against the Messrs. Phillips and Mr. Baker, praying for an injunction to restrain them from pulling down a certain wall until a proper screen had been erected for the protection of the p<sup>l</sup>ts.' property.

An *ex parte* injunction was afterwards obtained accordingly; but the defts. did not move to discharge it.

The p<sup>l</sup>ts. applied to the defts. to submit to the injunction being made perpetual, with costs of suit; but the defts. refused to accede to that application; and the cause was therefore brought to a hearing upon the motion for a decree.

C. Swanston appeared for the p<sup>l</sup>ts., and contended that they were the proper parties to have been served with the notice prescribed by the 85th section of the statute, and not Mr. Baker; that, as the defts. had not served the p<sup>l</sup>ts. with the proper notice, the requisitions of the 18 & 19 Vict. c. 122, ss. 3, 85, 86, had not been duly complied with; but until that had been done, the Messrs. Phillips could have no right to enter on the p<sup>l</sup>ts.' premises. The defts., moreover, had rendered it necessary to bring the cause to a hearing, by not moving to dissolve the injunction; and by refusing to allow it to be made perpetual. They must therefore pay the costs of the suit.

*Burgess v. Hills*, 26 Beav. 244.

Schrym, Q. C. and Renshawe, for the defts., insisted that the word "owner" in the statute meant, "legal owner." But the agreement under which the p<sup>l</sup>ts. were in the occupation of their premises was void at law as a lease, under the 8 & 9 Vict. c. 106, s. 3, and created only "a tenancy from year to year;" wherefore, also, they were not "adjoining owners" of the premises, within the definition of that word in the Act. That being so, the defts. were not bound to give them the notice required by the 85th section, but might treat with Mr. Baker the lessee of the house, and enter upon the premises under the 86th section. Mr. Baker was, as between the p<sup>l</sup>ts. and Messrs. Phillips, an unnecessary party to the suit; and the p<sup>l</sup>ts. ought, therefore, to pay his costs. They cited

*Tress v. Savage*, 4 Ell. & Bl. 36;

*Stratton v. Pettit*, 16 C. B. 420.

Hobhouse, Q. C. and Freeling, for Mr. Baker, claimed his costs from the p<sup>l</sup>ts.

The MASTER of the ROLLS.—I am of opinion that the p<sup>l</sup>ts. are entitled to a decree; and with costs. The question is, whether they have a right, as "adjoining owners" within the meaning of the 18 & 19 Vict. c. 122, s. 3, to receive notice, under the 85th section, of certain works proposed to be executed by the defts. Messrs. Phillips under that Act. It is clear that the document under which the p<sup>l</sup>ts. claim, although not an instrument under seal, and although void at law under the statute 8 & 9 Vict. c. 106, s. 3, as a lease, can be specifically enforced in equity as an agreement to grant one. But if that is correct, the p<sup>l</sup>ts. are more than tenants from year to year; and unless the Act is to be construed as applying only to persons who have bare legal interests, the p<sup>l</sup>ts. are entitled, as "adjoining owners," to receive from the building owners the notice required by sect. 85. No case has been cited in support of the more restricted construction of the Act of Parliament, and in my opinion the whole scope of the Act is against such a construction. If it were to be construed otherwise, the result would, in my opinion, be that if the legal estate in a house was vested, say in

trustees of a marriage-settlement, and if the husband or wife (as tenant for life) was in possession, during the absence of the trustees, the husband or wife so in possession would not be entitled to notice of the works proposed to be executed by the building owners. Service of the notice would have to be effected upon the trustees, who might at that time be in some remote place. It was admitted in the argument that Mr. Baker told Messrs. Phillips of the p<sup>l</sup>ts.' interest, but instead of dealing independently with the p<sup>l</sup>ts. they choose to deal with Mr. Baker alone. An award was made which, as between them and Mr. Baker, is binding; but which in my opinion has no operation against the p<sup>l</sup>ts., who are "adjoining owners." The Act of Parliament (sect. 86), says in effect that any building owner may enter on any premises to execute his work, when he has become entitled to execute the same in pursuance of the statute, i. e., when he has complied with the requisitions of it. When, therefore, Messrs. Phillips entered upon the p<sup>l</sup>ts.' premises, the latter had a right to say the provisions of the Act had not been complied with. It was indeed the very case for an injunction; but the injunction having been obtained, the defts. submitted to it, and took no further steps. The p<sup>l</sup>ts. were then obliged to bring the cause on, so as to get the costs; and the defts. having forced on the hearing, the p<sup>l</sup>ts. are in my opinion entitled to a decree, with costs. With regard to Mr. Baker's costs, I think that they ought to be paid by the defts. the Messrs. Phillips, and not by the p<sup>l</sup>ts. The case of those defts. is, that the p<sup>l</sup>ts. have no interest in the matter; that the sale in question is one between them and Mr. Baker; and that the award was made on that footing. That being their contention, the p<sup>l</sup>ts. cannot help bringing Mr. Baker before the court; he says, however, that he does not claim any right against the p<sup>l</sup>ts.; and that he always told the other defts. so. The Messrs. Phillips having thus occasioned the suit, must pay the costs of it. The p<sup>l</sup>ts. must pay Mr. Baker's costs, and have them over again from the other defts.

Solicitor for the p<sup>l</sup>ts., J. F. Davies.

Solicitor for the defts., Cuff.

### COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barrister-at-Law.

Jan. 27 and July 6, 1863.

THE ATTORNEY-GENERAL v. THE EARL OF SEFTON.

*Succession duty*—"Annual value"—Sect. 21 of 16 & 17 Vict. c. 51—Land unproductive and of no value at the time of the succession becoming subsequently valuable for building.

The "present actual annual value," and not the annual value which the owner of the property might obtain from it were he to apply it to a different purpose, or the possible prospective value which there may be every reason to suppose he will obtain in a few years, is the basis on which the succession duty is to be calculated under sect. 21 of the Act; and therefore land, incapable of being used productively for agricultural or other purposes, and which at the time of the succession was not in demand or marketable for building purposes, or capable of being sold or let profitably for such, and from which no income or annual profit of any sort was derived, is not chargeable with succession duty upon its subsequently becoming of value as building land, and being sold by the successor at a high price for that purpose.

So held by Pollock, C. B. and Wilde, B., assentiente Channell, B. Aliter per Martin, B.

Per Martin, B.—The 39th section shows it was the intention of the Legislature that all real property,

*however disposed or circumstanced, should be subject to the duty; and therefore, if a person becomes beneficially entitled to property, although there be no annual income, there is conferred upon him a succession for which he is liable to duty under sects. 2 and 10, which duty is either to be calculated under sect. 37 on the value to be obtained from time to time, or to be assessed by the commissioners under sect. 39.*

This was an information, at the suit of the Attorney-General on behalf of the Crown, against the deft., to recover succession duty from him under the following circumstances:—

Upon the death of the late Earl of Sefton on the 2nd Aug. 1855, and under the disposition made by his will, the deft. became entitled to certain real property, in respect of the greater part of which he admitted that he was liable to pay, and actually did pay, succession duty; but in respect of the residue of the said real property, consisting of certain plots of land, part of the Toxteth-park estate at Liverpool, amounting altogether to 48,000 square yards and upwards, he declined to pay duty, and denied that any such was payable. The deft. in 1862 sold some part of this land, at 16s. per square yard; and a second portion at 6s. per square yard; and the object of the information was to recover payment of succession duty in respect of the land so sold. It is alleged by the deft., and not disputed by the Attorney-General, that, at the time of the death of the deft.'s father, and of his becoming entitled as aforesaid to the land in respect whereof he so declined to pay succession duty, the same was not in demand or marketable as building land, nor was it capable of being sold or let profitably as such, and that the custom in Liverpool is for the owner of land which is building land to sell it absolutely for building on, and not to let it upon long leases or otherwise for building, and that the said land was not, at the time of the deft.'s becoming entitled thereto, capable of being used productively for agricultural or other purposes, and that such land was then, and had been for ten years previously, and (except that portion thereof which has been sold as before stated) has ever since been wholly unoccupied and unproductive, and that during no part of that time has any income or annual profit been derived from it. And the portion thereof which has been sold as before stated, had, ever since the deft.'s becoming entitled thereto, up to the times when the same was sold, been wholly unoccupied and unproductive, and that during no part of that time was any income or annual profit derived from such portion.

Subsequently to the death of the late Earl of Sefton some discussion took place between the deft.'s solicitors and Mr. Trevor, the comptroller of legacy and succession duties, with reference to the land in respect of which the deft. so declined to pay duty, and ultimately the deft. delivered to the Commissioners of Inland Revenue an account for assessment, which was accompanied by a notice in the following terms, that is to say:—"I hereby give you notice that the several plots of land specified in schedule E hereto annexed, forming part of the Toxteth-park estate devised to me by the will of the late Charles William Earl of Sefton, deceased, are not comprised in the return this day made by me pursuant to the Succession Duty Act 1853, inasmuch as the same plots of land being wholly unoccupied and unproductive, and not capable of yielding income, fluctuating or otherwise, I am advised that no succession duty is or will be payable thereon.

"Dated this 2nd day of April 1857. SEFTON.

"To the Commissioners of Inland Revenue."

The schedule E referred to in such notice comprises various plots of land, containing altogether a quantity of 48,272 square yards.

Having recently sold a portion of this land for building, the deft. informed the Commissioners of Inland Revenue of the fact, and delivered an account of the quantity sold and the price obtained, but declined to pay duty thereon. Whereupon it was agreed that the opinion of the court should be obtained, and the present proceedings were consequently adopted.

The Attorney-General, the Solicitor-General, Locke, Q. C., and A. Hanson (of the Chancery bar) for the Crown, cited

*Asbury v. Henderson*, 24 L. J. 20, C. P.

*Mellish*, Q. C. and *C. Hutton* for the deft.—Sects. 2, 5, 6, 10, 20, 21, 22, 23, 24, 25, 26, 37, 39 of the Succession Duty Act, 16 & 17 Vict. c. 51, were referred to and relied on by each side in the course of the argument, the scope and nature of which will sufficiently appear in the judgments.

*Cur. adv. vult.*

July 6.—MARTIN, B.—This is a question of considerable importance. The late Earl of Sefton died on the 2nd Aug. 1855. He was the owner of land in Toxteth-park, Liverpool. This land then, and for ten years previously, had been wholly unoccupied and unproductive, and was incapable of being used productively for agricultural or other purposes, and no income or annual profit had been derived from it. It was not then in demand or marketable as building land, nor capable of being sold or let profitably as such, and it is stated, that by the custom of Liverpool owners of such land sell it absolutely for building, and do not let it upon long leases or otherwise dispose of it. It is not stated whether the land was of value on the 2nd Aug. 1855, when the deft., the present earl, became possessed of it; but it must have been of great value, for in 1862 he sold part of it at the rate of upwards of 4000*l.* an acre, which is forty times the value of the best agricultural land. The question is whether he is liable to succession duty, and it is of importance, for a great quantity of by far the most valuable land in the kingdom is similarly circumstanced. When noblemen and gentlemen are owners of land in the immediate neighbourhood of large towns, and new streets and buildings come close to it, it is liable to constant and perpetual trespasses; people walk over it, carpets are beaten upon it, children play on it, and except a wall be built round it (which is frequently of little avail), or constant and perpetual legal proceedings for trespass be kept up, it gets into the condition in which the deft.'s land was. The present income is *nil*, but the land is of enormous value, thousands of pounds per acre more valuable than the very best agricultural land. The contention is, that the succession to such land is not liable to succession duty. This depends upon the construction of the Succession Duty Act, the 16 & 17 Vict. c. 51. It may be that the case is one omitted, but I cannot believe it was the deliberate intention of the Legislature to relieve such land from the payment of duty. The Act enacts that the term succession shall denote property chargeable with duty, and by sect. 2, a devolution of property, by reason whereof any person shall become beneficially entitled to property, or the income thereof, shall be deemed to confer a succession. If, therefore, a man becomes beneficially entitled to property, although there be no annual income, there is conferred upon him a succession. Now, the deft. became entitled to the property. It is true that it would not have been wise or prudent in him to have sold it immediately upon his father's death; but, nevertheless, it could have been sold, and many successors to it, by reason of their pecuniary circumstances, would have been compelled to sell it, and it would, in comparison with ordinary land, have produced an enormous money price. The succession to the property was, therefore, a benefit, and a great one, to the deft. The 10th section imposes the duty,

[Ex.]

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[Ex.]

and enacts that there shall be paid in respect of every succession, according to the value thereof, a duty upon such value. Now, as regards individual cases, except in the cases specially provided for, as timber by the 23rd section, and advowsons by the 24th, the duty is to be calculated upon the value of an annuity, and there must, therefore, be an annual sum for the basis of the calculations, and, unless one can be attained to, the taxation cannot be effected. The argument on the part of the deft. was, first, that such property as the present was intended by the Legislature not to be subject to the tax; but in this I cannot concur. It was said to be like an unopened mine, which, it was said, is not to be considered in the value for the purpose of taxation; but I think this is not so. By the 21st section, the interest of the successor to be taxed is the value of an annuity equal to the annual value of the property. Now, suppose land containing coal, which the owner did not think fit to let, was situated in a district where the landowners generally let their coal at rents, which is usually the case; I think, in estimating the annual value, the rent which the owner could get for the coal ought to be taken into consideration, although the mere circumstance of there being coal under land in the neighbourhood of which no coal was being worked might be considered as not materially adding to it. If this were otherwise, the consequence would be that one owner of land, precisely similarly circumstanced, who let his coal, would pay a higher tax than another who, for his own convenience and possible future benefit, at his own mere will, did not let it. Mines may afford a fluctuating yearly income in two ways: first, to the person actually working the mine; and, secondly, to the owner of the mine who does not work it himself, it being a very frequent practice for the owner of land under which there is a mine to let it at a minimum rent certain, but to increase according to the quantity of mineral got. I do not think that any inference could be drawn from this, that an unopened mine is to be excluded from the calculation of value under the 21st section. The 26th section was relied upon to show that this was so; but I do not think it does. That section deals with property of a fluctuating yearly income, and the first instance is a manor which is clearly of that character; the second instance is an opened mine. It was argued that the 22nd and 26th sections showed that real property to be taxed, except that in respect of which express provision was made, must be capable of yielding yearly income either certain and not of a fluctuating character, or uncertain and of a fluctuating one; but the 39th section, in my opinion, conclusively shows that it was the intention of the Legislature that all real property, however disposed or circumstanced, should be subject to the tax, and the inference from it seems to me irresistible that all beneficial succession to real property should be subject to the duty. It was secondly contended on the behalf of the deft., and that, in my opinion, is the real difficulty in the case, that the statute has not expressly provided for it. If the 39th section had been framed like the 26th, there would be no difficulty, for the latter (the 26th sect.) provides, first, for an agreement between the commissioners and the successor, and if this cannot be done it enacts a very reasonable rule, viz., that the principal value of the property shall be ascertained, and the annual value shall be considered to be 3 per cent. on the amount of principal value. The result of the argument is that, in my opinion, the Legislature did not intend that property circumstanced like the present should be free from the tax. It would be most unjust and unfair to owners of agricultural or grazing lands, which constitute the great bulk of the land of the kingdom, that a tax should be imposed upon them in respect of land not one-hundredth part of the value of

the land alleged to be free; and in order to prevent such injustice I am prepared either to apply the 37th section and hold this case to be within it, viz., that the deft. did not at the time of his father's death obtain the whole of his succession, and that he is chargeable with duty on the value of the property or benefit from time to time obtained by him, to be calculated according to the mode prescribed by the 26th section, that is, at the rate of 3 per cent. upon the amount of the sales; or that the word "compound" in the 39th section means to fix, or assess, and gives the commissioners authority to impose a duty, which of course must be done in conformity with the spirit of the Act of Parliament. I am therefore of opinion that the Crown is entitled to our judgment.

POLLOCK, C. B.—In this case I am of opinion that the deft. is entitled to our judgment: first, because I think, on the true construction of the Act, under which the claim of the Crown is made, that the present actual annual value is the basis on which the succession duty is to be calculated, and not possible or prospective annual value; secondly, because the special provisions made in certain cases, such as timber, trees and wood, advowsons, fines on beneficial leases and opened mines, afford, in my judgment, strong evidence that such a case as the present was not to be dealt with in the way proposed, without some clause in the Act to authorise it; and lastly because, if the principle on which the present claim is made be a sound one, it must apply to cases where the present annual value is less than prospectively it will probably become, as well as to cases where it is absolutely nothing, and it is to my mind perfectly clear that the Act was not framed with any such intention. The real question before us is, what is the meaning of "annual value" in the 21st section? Does it mean present actual annual value, or does it mean the annual value which the owner might immediately obtain from the property were he minded to apply it to a different purpose? or the possible prospective value which there is every reason to suppose he will obtain in a very few years? I am of opinion that it means *present actual annual value*. The 23rd section makes especial provision for timber, trees, or wood, which timber is to be paid for when sold. The successor to timber is not bound to sell it; he may, if so minded, allow it to stand as an ornament to his estate till it has lost all value as timber, and then he will pay nothing. The 24th section makes a similar provision as to an advowson. A successor to an advowson is chargeable only for any profit he may make by selling it or selling a next presentation, but he is not chargeable on account of the possibility of profit if he does not avail himself of it by disposing of either the advowson or the next presentation. The 25th section provides for fines on beneficial leases. The 26th section gives the rule for manors, opened mines and other real property of fluctuating value; but a successor having valuable mineral property is not bound to open mines, or to pay for their value, if for any reason he determines not to open them. When opened and worked, they would come into charge as part of the succession, and may have an annual value, or be wholly unproductive; but if they are to be charged with succession duty, every time there is a succession, whether they are opened or not, the effect may be, that in the result they would be paid for ten times over. The value of timber when actually sold, of an advowson turned into money or money's worth, of a fine on renewing a beneficial lease, of the income of an opened mine, after deducting all necessary outgoings, are easily ascertained; but the possible future demand for land as building land not, at the time of the succession in respect of which the duty is claimed, in demand at all, which is the case here, is utterly incapable of present appreciation, and there are obvious



reasons why the fluctuating value of real property should not be an element in fixing the amount of duty to be paid by a successor. If the probable increase in value were to be estimated, the probable decrease ought to be taken into account. If increased duty is to be paid when land rises in value after a successor has obtained possession of it, duty ought to be returned should its value fall. But if the principle of this claim be correct, the successor to a mansion and park close to a large town, and adapted immediately for building purposes, ought to pay, not according to the fair rental of the estate as it is, but according to the increased value, if it were sold for building land—a claim which I think could not be made, and if made, could not be supported. The proprietor of property in this country has, in my judgment, a right to make what reasonable use of it he pleases, and sometimes even an unreasonable use; and he is not bound so to use it as to yield the largest revenue to the Government, or to pay taxes as if he did. A landed proprietor whose park is over the most valuable mineral property has a right, in my judgment, to say, "I prefer living where my ancestors have lived to obtaining the wealth which opening the mines would afford;" and on a succession to such property, in my judgment, the duty ought to be calculated on the fair rental which such a residence and park would command, and without any reference to the value of the undisturbed minerals. The last consideration which I shall present is this: according to the principle involved in the present claim, if the proprietor of a large estate did not make the most of it, and exact the largest rent that it was capable of affording, on a succession the successor might be called upon to pay according to a valuation to be made, not of what its annual value actually was, but upon that which it might be made to produce—a proposition which I think wholly untenable. For these reasons I think our judgment should be for the debt. My brother Wilde, who is not here, concurs in the judgment I have just delivered. He has sent a written judgment, which I do not think it necessary should be read.

CHANNELL, B.—I was obliged to leave the court in the course of the argument to attend chambers, so that I heard only part of Mr. Mellish's argument, and no part of the reply on the part of the Crown. Under these circumstances I take no formal part in the judgment delivered by the court; at the same time, I beg leave to say that I have carefully read and considered the judgments prepared by my brother Martin, by the Lord Chief Baron, and by my brother Wilde, and, as far as I can properly take any part in the decision, I agree in the result at which the Lord Chief Baron and my brother Wilde have arrived.

*Judgment for debt.*

Attorney for the Crown, the *Solicitor for Inland Revenue*, Somerset-house.

Attorneys for debt, *Field and Roscoe*, Lincoln's-inn-fields, agents for *Eden, Stanistreet and Pears*, Liverpool.

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs., Barristers-at-Law.

Friday, May 22, 1863.

THE SHEFFIELD GAS COMPANY (apps.) v. THE OVERSEERS OF SHEFFIELD (resps.)

*Poor-rate—Gas works—Principle of rating to the poor-rate.*

*The principle on which the stations, works, buildings, &c. of a gas company are to be valued, is laid down correctly in Reg. v. Mile-end Old Town, 10 Q. B. 210, and Reg. v. The West Middlesex Waterworks Company, 1 E. & G. 716; 28 L. J. 135, M. C., viz., that*

*they are to be valued as fixed property deriving some additional value from their capacity of being used as part of the gasworks.*

This was a case stated under the 12 & 13 Vict. c. 45, s. 11, upon an appeal by the Sheffield Gas Company against a poor-rate made by the township of Sheffield on the 11th Nov. 1859. The case stated as follows:—

The apps. are a gas company incorporated by an Act of Parliament. The property in respect of which the apps. are liable to be rated to the poor lies in five different townships, of which the resp. township is one, forming part of the manufacturing town of Sheffield, in which there are other large manufacturing works. The apps.' property consists of land and buildings, with retorts and furnaces and pipes attached, used for the making or manufacturing of gas, of buildings used as storehouses, of buildings used as offices, and of land occupied by mains and pipes for conveying the gas to the company's customers. Of these different kinds of property the first, second and third are situated in the resps.' and in one of the other townships, but the mains and pipes extend through the resps.' and partly into each of the other four townships. The mains and pipes are laid partly in land belonging to the company; and partly, in pursuance of the provisions of the company's Act of Parliament above referred to, under the streets and highways in and about the town of Sheffield. Some of the mains are used to convey the gas from the works where it is manufactured and stored to the streets and localities where it is to be distributed, and the rest of the mains and pipes are used for distributing the gas through the streets to the company's customers in the town of Sheffield. The former of these divisions, if it were thought expedient, might be laid in other places; it is in part laid in the places which the company have considered as most convenient. The other division is necessarily laid in the streets and places where the customers receive and use the gas. The superficial area of the land occupied by mains and pipes which might be in other places as above mentioned is 997 yards; the superficial area of the land occupied by mains and pipes which must necessarily be in the streets and places where the customers receive and use the gas is 16,000 yards. The cubical contents of the divisions of land respectively are 149 yards and 2390 yards. By means of these several kinds of property the company carry on a large business in the manufacture and sale of gas, and also in all the aforesaid five townships. The gas sold by the company is paid for by the customers at rates depending on the quantity used by the customers. It makes no difference to the customer whether the gas is brought to him from a longer or shorter distance. The resps. have ascertained the net annual rateable value of the apps.' property in their township by the following process:—The rateable value of the whole of the apps.' works lying in all the above five townships through which they are dispersed, was first determined by taking from the company's printed accounts published for the information of the shareholders for the year ending the 30th June 1859, being the last published accounts immediately preceding the making of the rate appealed against, the sum of the annual gross receipts for sale of gas and of the residuary products from the materials after the gas had been made, and for the hire of gas-meters and fittings and work done, deducting from this sum the gross expenditure for the same year incurred in producing such receipts; and the sum of 26,716*l.* remaining after that deduction was taken to be the net receipts for that year. From these net receipts the following deductions were then made, viz.: first, the sum of 3064*l.* for tenants' profits and interest on capital, being at the rate of 20*l.* per cent. on the sum of 15,322*l.*, the capital required to carry on the business of the gasworks during the same year;

Q. B.]

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[Q. B.]

secondly, the sum of 2080*l.* on account of tenants' rates and taxes, and the annual average cost of the repairs and the renewal and insurance of the buildings of the stations and of the plant as necessary to maintain them in a state to insure the above receipts; thirdly, the sum of 500*l.* on account of the renewal of the whole of the mains; and after the above deductions had been made from the net annual receipts there remained a sum of 21,072*l.* arising from receipts of the works in the hands of the company, which was taken to be the rent for which the same works might reasonably be expected to let from year to year, and the true estimate of the net annual value thereof. From this net annual value was then deducted the sum of 4246*l.* on account of the net rateable value of the stations, works and buildings, and wholly lying within the resp. township, and as contributing indirectly to the profits rateable only to the poor within the township in which they lie. The remainder after this last deduction was to be distributed amongst the several townships into which the mains extended, by apportioning to each of them so much as represented the extent of the mains they contained. The sum of 4157*l.* 5*s.*, being the amount thus apportioned to the resp. township, was added to the above sum of 4246*l.* from the rateable value of the stations and land lying within it, and the total of these sums was taken to be the net annual value of the several hereditaments belonging to the apprs. lying within and rateable to the poor-rate of the resp. township. The apprs. contend this method of arriving at the net rateable value of the rateable property in the resp. township is contrary to law and the principle of the Parochial Assessment Act, 6 & 7 Will. 4, c. 96, and that that statute should be applied, and the net rateable value ascertained, by the following method:—They contend that the resps. should have first ascertained the quantity of land and the size and class of the buildings and fixed machinery, if any, at each of the different stations of the company in the resp. township, and the class of each station in the town of Sheffield, and then as to each station used for manufacturing, they should have considered it as land and building with machinery, employed as a first-class and lucrative manufactory in the populous manufacturing town of Sheffield; that they should have then ascertained whether there were any, and if any, what other localities than the one in question available for such a station for this company as the one in question; that they should then have ascertained the actual rental of other stations consisting of land and buildings and machinery employed in the largest manufactories in Sheffield; that then, having regard to the quantity of space occupied by the station in question and to the size and class of the buildings and machinery, and to the possibility if thought expedient of obtaining a competing locality, and to the fact of such station being fit for and used as the manufacturing station of a first-class manufactory in such a manufacturing town as Sheffield, the resps. should have fixed the rental of the station in question by comparing it with the other manufacturing stations above mentioned and the actual rental paid for them, and the resps. should then have made for such rental the deductions pointed out by the statute, and should so have obtained the rateable annual value of each such station, and the resps. should have followed a similar course as to each station used, as for storing and as for offices, by comparing them respectively in a similar manner with the storehouses and offices used in the large manufacturing businesses in Sheffield; that as to the land occupied by mains and pipes, the resps. should have divided it into two classes, viz., that occupied by mains and pipes which might if it had been found expedient have been laid in other localities, and that occupied by mains and pipes which must

necessarily be laid in the localities in which they are actually laid. As to the first, the resps. should have ascertained the quantity so occupied, and whether there were any other, and if yes, what other localities available in which the company might have placed them if they had thought fit; and then they should have ascertained the actual rental obtained for land in such localities in Sheffield when used and paid for without buildings, but for manufacturing purposes, and when used and paid for with machinery attached, but without substantial buildings, and used and paid for as building, or otherwise improved land; and then, having regard to the quantity of land so occupied by the company, and to the different situations of such land in such a town as Sheffield, and to the fact that the occupation by mains and pipes is not a surface occupation, but one which leaves the surface available and rateable either in the hands of the company, if it be in their occupation, or in the hands of other occupiers, if it be occupied by others, the resps. should have fixed the rental of such land by comparing it with the rentals actually paid for the other lands above mentioned, and should then have made the statutable deductions, and so have obtained the annual value. And as to the other class of lands occupied by mains and pipes, the resps. should have proceeded by similar method, only allowing an increased rental for the consideration that the company must necessarily obtain the particular locality, and might therefore be forced, by the owner of the land, to pay an increased rent for it; and the apprs. contend that, if such method had been followed, the rateable value of their property in the township upon which they have been rated would have been shown to have been much less than it appears to be when ascertained by the erroneous method followed by the resps.

If the court be of opinion that the method above applied by the resps. of fixing the net annual value of the apprs. rateable property in the resp. township was not according to the Parochial Assessment Act, and was contrary to law, then the court was prayed so to declare. If the court should be of opinion that neither of the methods above stated was correct according to law, then the court was prayed to declare what was the right method by which the net annual value of the apprs. rateable property in the resp. township should be ascertained.

And the parties agreed that when the right principle of ascertaining the net annual value was pronounced by the court, the rate and all questions arising thereon should be referred to an arbitrator to determine according to such principle what was the amount of the net annual value of the rateable property of the apprs. in the resps. township, and determine at what amount that annual value should stand in the rate appealed against.

*Maule* appeared for the resps.

*Brett*, Q.C. and *West* appeared for the apprs.

Cases cited:—

*Reg. v. The West Middlesex Waterworks Company*, 1 Ell. & Ell. 716; 28 L. J. 135, M. C.

*Reg. v. The Birmingham Gas Company*, 1 B. & C. 506;

*Reg. v. The Cambridge Gas Company*, 8 A. & E. 73;

*Reg. v. Mile-end Old Town*, 10 Q. B. 210.

*Cur. adv. vult.*

May 22.—BLACKBURN, J.—In this case the sessions state the mode adopted by the parish officers of the resp. township to ascertain the net annual value of that portion of the rateable property of the apprs. which lies within the resp. township, and the mode which the apprs. contended ought to have been adopted, and then asked three questions. First, whether the method adopted by the resps. is contrary to the Parochial Assessment Act? Secondly, whether, if this be so,

the method proposed by the apps. was correct, and ought to have been applied. Thirdly, in the event of this court being of opinion that neither mode is correct, then what is the right method, according to law, by which the net annual value of the apps.' rateable property in the resps.' township should be ascertained? This question being answered, the rate was to be referred to an arbitrator to apply the principle thus laid down by us. The case came on for argument some time since, when the latest decisions on this subject in the cases of *Reg. v. Mile-end Old Town*, 10 Q. B. 210, and *Reg. v. West Middlesex Waterworks Company*, 1 E. & E. 716, were brought to our notice. We fully concurred with what was observed by Wightman, J. in the latter case, that "there appears so much difficulty in satisfactorily applying the parochial principle of rating by estimating the rent which a tenant would give for the subject-matter in such a case as the present as practically to amount nearly, if not entirely, to an impossibility of doing so satisfactorily;" and also, "that it may well be doubted whether the distinction which has been taken between direct and indirect sources of profit as applied to the mains and pipes of a water company running through different parishes is well founded, more especially in cases where the mains belong to the company, and not the service pipes." Indeed, the whole subject-matter appears to be involved in so much difficulty and uncertainty that we have taken much time in considering whether, notwithstanding these decisions, we could not place the rules as to rating these companies on more intelligible and satisfactory principles, and which should be capable of uniform application. We have not, however, succeeded in laying down a rule which would be consistent with the existing legislation and decisions on this subject, and would, at the same time, be capable of being satisfactorily worked; we are strongly impressed with the importance of not unsettling the law as established by past decisions where we cannot lay down a rule which is open to exception. On the whole, therefore, we feel that our only course, until the Legislature shall think fit to interfere, is to adhere to the case of *Reg. v. West Middlesex Waterworks Company*, and in answering the questions put in this case to confine ourselves to inquiring whether the principles laid down in that case have been properly applied in the present. The resps. in the present case have begun by endeavouring (in the mode stated in pars. 4 and 5) to ascertain the rent for which the whole rateable property of the company might be expected to let. This sum they estimate at 21,072*l*. They then deduct from that amount the net rateable value of the stations, works, &c. contributing indirectly to the profits, which they value at 4246*l*., and the residue they treat as the net rateable value of the residue of the apps.' rateable property, consisting of the mains and pipes, which mains and pipes lie in five different parishes. Then, assuming that they have thus obtained the correct rateable value of the residue, they proceed to apportion it amongst the five townships in proportion to the extent of the mains and pipes situated in each. The apps. object both to the mode by which the resps. have arrived at the net rateable value of the entire subject which they apportion amongst these townships, and to the mode in which it is apportioned. As to the first point, namely, the mode in which the resps. have arrived at the value of the entire subject, it seems to us that, if the proper allowance for expenses and for tenants' profits and interest on capital has been made, and the proper value is put upon the stations, works and buildings, &c., a proper mode has been adopted for obtaining the rateable value of the remaining property; for we think that what is left after these allowances is the rent which the hypothetical tenant (to adopt the

phrase used in *Reg. v. The West Middlesex Waterworks Company*) would give for the rest of the apparatus. We must observe, however, that we have no information before us as to the mode in which the resps. have arrived at the amounts which they allow. The proper rate to be allowed for tenants' profits and interest on capital, is entirely a question of fact, and in making future rates, or if the present rate is sent to an arbitrator, it must be ascertained as a fact. The principle on which the stations, works, buildings, &c., are to be valued, as laid down in *Reg. v. Mile End Old Town*, and *Reg. v. West Middlesex Waterworks Company*, is that they are to be valued as fixed property, deriving some additional value from their capacity of being used as part of the gasworks—a rule which, in practice, it is found not difficult to apply, though it is not, theoretically, very definite. We mention this, because, if we understand the apps. correctly, they contend for a different principle. But on the remaining point, namely, the mode in which the entire subject-matter is to be apportioned amongst the different townships, we think the mode adopted by the resps. is not correct. It is very true that the mode they propose of dividing according to the extent of the portion in each township has the great advantage of simplicity, and when applied to such a homogeneous subject as the present it probably brings out a result not far from the true one. It is worth noticing that the Legislature have adopted it as a rule in the valuation of land (Scotland Act, 17 & 18 Vict. c. 91), and may possibly hereafter adopt it in this country; but we cannot say that it is the rule given by the Parochial Assessment Act. The subject-matter which the resps. have apportioned amongst the five townships consists of mains and pipes, part of which, according to *Reg. v. West Middlesex Waterworks Company*, must be considered as directly and not as only indirectly contributing to the profits; yet the resps. have made no distinction between them. We think that we must refer to the judgment in the case of *Reg. v. West Middlesex Waterworks Company*, as giving the last exposition of the Parochial Assessment Act to which, as already said, we must adhere, and require these parties to apply the rule as there laid down as well as they practically can. If this is found not practically possible, as it certainly seems not strictly theoretically right, application must be made to the Legislature to interfere, and relieve the parish officers and justices from the obligation to apply the Parochial Assessment Act to such cases as this, which we agree with my brother Wightman in thinking it practically impossible to do satisfactorily. We therefore answer the question by saying, first, that the mode adopted by the resps. is in part contrary to the Parochial Assessment Act; that the apps.' mode is not correct, and ought not to have been adopted; and lastly, that the method which must be adopted is to apply the principles explained in the judgment in *Reg. v. West Middlesex Waterworks Company*.  
*Judgment accordingly.*

Saturday, June 27, 1863.

MORRISH (app.) v. HALL (resp.).

Poor-rate—Occupier—International Exhibition building—Refreshment department.

*Under an agreement a certain space in the International Exhibition building was allotted to M. with power to him to erect necessary fittings and make excavations for cellars for the purpose of the sale of refreshments during the time the Exhibition was open to the public. The consideration for the agreement was a premium and a royalty in the shape of head-money. The admission of M. and his servants into the building was to be regulated by the commissioners, and they were to be subject to the bye-*

Q. B.]

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*laws of the commissioners as to orderly conduct. In certain events the commissioners had power to put an end to the agreement and to re-let the refreshment department:*

*Held, that M. was not an occupier of the portion of the building allotted for the sale of refreshments therein liable to be rated to the poor-rate.*

Special case on an appeal against a poor-rate for the parish of St. Mary Abbott's, Kensington, and confirmed on appeal by the trustees of the said parish, under 7 Geo. 4, c. cxiii. s. 57.

The poor-rates of that parish are made under a private Act of Parliament, 7 Geo. 4, c. cxiii. s. 57, twice in the year. The rate appealed against was made on the 2nd April 1862, for the relief of the poor to Michaelmas 1862. The rate did not include the name of the app.; but on the 11th Aug. the trustees of the parish amended the rate and inserted the app.'s name as the occupier of the Western English Refreshment Department of the International Exhibition, of which they estimated the rateable value at 14,217*l.* and assessed upon him the sum of 533*l.* 2*s.* 9*d.* in respect thereof.

On the 25th Jan. 1862 an agreement was entered into between the Commissioners of the International Exhibition 1862 (who were incorporated by Royal charter), and the app., of which the following are the material provisions:—

1. In consideration of 500*l.* to be paid by the contractor, one half on the 28th Feb. and the other half at the time of the execution of this agreement, and of the royalty rent or head money agreed to be paid to the commissioners as hereinafter mentioned, the commissioners agree that the contractor shall have the right of selling refreshments on and from the day on which the Exhibition shall be open to the public until the closing thereof on and at the portion of the exhibition buildings now in course of erection which is called or known as, or intended to be called, the Western Section of the Refreshment Department, and which portion so to be appropriated to the contractor is to consist of a space of 40,000 square feet at the least, but the exact site and boundaries thereof shall be fixed and determined by the commissioners, and which portion of the exhibition so allotted to the contractor is hereinafter referred to as the said refreshment-rooms.

2. The contractor shall, at his own expense, do as follows:—Firstly, fit up the area allotted, or to be allotted to him, as hereinbefore mentioned, with such fittings, counters and ornaments, as he may require for carrying on his business; secondly, provide on such sites and places therein as shall be appointed by the commissioners, such kitchen and cellarage accommodation as the contractor may require; lastly, lay on gas and water from the mains, and make the necessary communication with the main drains.

3. The plans of all fittings, counters and ornaments proposed to be erected by the contractor, shall be submitted to the commissioners and approved by them.

6. The contractor and his servants shall be subject to all bye-laws and regulations that may be made by the commissioners for the orderly conduct of the exhibition, and of the persons employed therein.

8. The admissions into the building of servants and other persons on business connected with the refreshment department, shall be regulated by the commissioners; but no provisions or materials for cooking will be allowed to be introduced into the building except between the hours of five and eight a.m., unless in special cases, and then only with the written permission of the secretary or general manager of the commissioners.

9. The refreshment-rooms shall be kept open throughout the whole of the hours during which the public are admitted to the Exhibition, and the contractor engages to keep therein on every day on which

the Exhibition is open a sufficient supply of all refreshments specified in the schedule hereto annexed, and to sell such refreshments to all persons desirous of purchasing the same at the prices therein specified, and that all such refreshments shall be of the best quality.

12. On every day on which the Exhibition is open the commissioners are to cause an official return to be made of the number of visitors admitted to the Exhibition on the preceding day; and the contractor, in addition to the premium mentioned in clause 1, is to pay (specifying certain sums) in the nature of a royalty rent or money calculated upon the number of visitors to the Exhibition.

16. The contractor shall keep the refreshment-rooms clean and in a proper state for the use of visitors, and shall remove every night from the building all fragments, stale provisions, dust and rubbish that may have accumulated.

17. Any questions that may arise as to the fulfilment and mode of carrying out this agreement shall be referred to the commissioners, and their decision shall be final; and if the contractor do not obey the directions of the commissioners in (mentioning certain particulars), the contractor shall forfeit all his rights under this contract; and the commissioners shall be at liberty to relet the said refreshment-rooms without any hindrance or interference whatsoever by the forfeiting contractor or his servants, and without prejudice to the recovery by the commissioners of any moneys due or damages recoverable by the contractor.

18. All fittings, counters, ornaments and other works erected by the contractor in or about the said refreshment-rooms shall become the property of the commissioners, and shall be held by them as part security for the fulfilment of this contract by the contractor, and in the event of the contractor forfeiting the benefit of this contract he shall be divested of all reversionary or other interest in such fittings, counters, ornaments and works. On the other hand, if at the close of the Exhibition the commissioners shall be of opinion that the contract has been satisfactorily carried out, then in a certificate from the officers appointed on that behalf by the said commissioners, the contractor will be allowed to remove such fittings, counters and ornaments as aforesaid, but without having any claim for detriment or dilapidation, from whatever cause arising, but all fittings of whatever kind which may be put in the kitchens or store rooms, and all cellarage, gas-pipes, water-pipes and drains below the level of the ground-floor of the refreshment-rooms will remain the property of the commissioners.

21. The contractor shall not sublet this contract, or any part thereof, unless with the written consent of the commissioners.

22. The commissioners will at any time between the 13th Feb. 1862 and the 30th April 1862, on the contractor proving to them that he has sufficiently completed the arrangements undertaken by him to be performed before the opening of the Exhibition, consider the propriety of granting to him the privilege of supplying refreshments to the persons employed in the Exhibition building.

23. Such licences as may be necessary to enable the contractor to sell the refreshments offered (including wine, spirits and beer) are to be obtained by the contractor at his own cost, the commissioners agreeing to do any reasonable acts that may be required on their part to facilitate the obtaining of such licences by the contractor.

The site and boundaries of the said western section having been fixed and determined by the said commissioners, in pursuance of the said agreement on or about the 15th March 1862, the app. commenced the necessary excavations previously to fitting up the same as refreshment-rooms. He began supplying

refreshments to the workmen employed in the building under clause 22 on the 24th March 1862, and continued so to do until the 1st May 1862, and after the 1st May 1862 the said western section was appropriated to the app., under the said agreement, and the app. exercised the rights and privileges conferred upon him by the said agreement.

The keys of the doors of the said western section leading therefrom into the Exhibition building were always kept by the police officers employed on behalf of the said commissioners in the said Exhibition, and the said officers at a certain time every evening, usually between six and nine o'clock, locked out the app. and his servants from the Exhibition, and re-admitted them each morning, but the app. had an entrance to the said western section from the outside of the building, made shortly after the 1st May 1862.

The app. obtained admission to the Exhibition building by means of a season ticket, previously to the 1st May 1862, procured from the commissioners, for which he paid five guineas, and without which he could not have gained access to the said western section.

By the local Act, 17 Geo. 3, c. lxiv., s. 30, the rates authorised by the Act were to be levied upon every person who should "inhabit, hold, occupy, or enjoy any land, house, shop, warehouse, storehouse, stable, cellar, vault, or any other building, tenement or hereditament within the said parish;" and by sect. 35 lodgers are made liable to the payment of rates.

By 7 Geo. 4, c. cxlii., s. 7, persons removing and persons coming in are to pay rates in proportion; and by sect. 9 of that Act it is provided that if empty or unoccupied houses shall become occupied by any person or persons, or any alteration or amendment of the said rate or assessment might in the opinion of the trustees be made, then it should be lawful for the trustees to add or insert the names of such occupiers, &c.

The question for the court was whether upon these facts the app. was liable to be rated to the poor's rate.

*Prentice*, for the resp.—Although the commissioners were not liable to be rated, the Exhibition building having been erected for public purposes, yet, if any portion of it was occupied for the purpose of private profit, the occupier of such portion was rateable, as in the case of canteens in barracks, and of the private apartments in Hampton Court Palace. In this case the commissioners allotted to Mr. Morrish a certain portion of the building for their refreshment-rooms, the site and boundaries being fixed, and he was the occupier of that portion for his private profit. Here it is not necessary to establish that the agreement of the commissioners was a lease; but if it were, there are good grounds for contending that it amounted to a lease: (*Bac. Abr. tit. "Lease" K.*) A certain space was allotted to him, with a power of building on it, and he had a private entrance for himself and servants. He has the power of using it in a particular way, subject to the bye-laws of the commissioners. This amounts to a lease: (*Shep. Touch. tit. "Lease."*) This is like the case of the demise of a box at Drury-lane Theatre, for which the lessee was held liable to be rated: (*Reg. v. St. Martin's-in-the-Fields*, 3 Q. B. 204.) [*BLACKBURN, J.*—It is more like the case of market stalls for which the lord of the market is liable to be rated, but not the stall-keeper.] The Kensington Local Acts, 17 Geo. 3, c. xiv. ss. 30, 34, 35; 7 Geo. 4, c. cxlii. ss. 7, 9; 3 & 1 Vict. c. 61, s. 1, were referred to, and the following cases cited:

*Reg. v. Mayor of London*, 4 T. R. 21;

*Reg. v. Chelsea Waterworks Company*, 5 B. & Ald. 156.

*Tindal Atkinson*, for the app. was not called upon.

*WIGHTMAN, J.*—The great question in this case is, whether the app. had such an occupation in the tenement or premises in question as would render him

liable to be rated. That depends upon the agreement. Now, what did the commissioners give to him by the agreement? They gave to him the right of selling refreshments in the building from the day of the opening of the Exhibition until its close. That is the foundation of the agreement. That licence to sell refreshments would not of itself confer such an occupation as would make him liable to be rated; but it is said that the agreement goes further, and because the licence is to be exercised in a particular portion of the building, to be allotted for that purpose, therefore the app. is to be considered the occupier of that portion within the meaning of the decided cases. It is said, moreover, that by the agreement he is to be at liberty to erect buildings for the purpose of exercising that that licence. It seems to me that those erections are really subordinate to the exercise of the licence, and that they carry the case no further than the mere granting the licence. I think, taking the whole agreement together, it was never contemplated to give the app. the exclusive possession or occupation of that portion of the building within which the licence was to be exercised. An analogous case was put to Mr. Prentice during his argument, to which no satisfactory answer was given—the case of a licence to use a field for the purpose of playing cricket, with the liberty of erecting a booth for the sale of refreshments in the field, and of selling refreshments while the game was being played, and of putting on the ground the various things that might be necessary for the purpose. It can hardly be said that an agreement of that kind would give such an occupation within the meaning of the legislation for the purpose of rating. Neither, as it appears to me, had the app. such an occupation in this case. If the commissioners had thought fit to come at any time with their friends within the 40,000 square feet within which Mr. Morrish had to exercise his licence, Mr. Morrish would have no right to turn them out. It was a mere grant of a licence to him to exercise the right of selling refreshments within that space, with the liberty, for the purpose of exercising that licence, of making erections in that space to enable him conveniently to do so. The case of *Rez v. St. Martin's-in-the-Fields* is clearly distinguishable from this case. In that case there was a demise of the opera-box to Miss Countess; at certain times she had an exclusive right of occupation, though at other times the right remained in the lessor. This agreement does not profess to demise or lease any part of the building, but merely to give a licence to exercise a certain privilege within a certain limited space.

*CROMPTON, J.*—Looking at the whole of the agreement, I am disposed to take the same view as my brothers, that it is merely a licence to sell liquors and other refreshments in this particular space, and does not give any exclusive possession, by way of demise, to the party rated, of any part of the building.

*BLACKBURN, J.*—I am also of opinion that, by this agreement, nothing passed to Mr. Morrish for which he was liable to be rated under the local Act of this parish. It is contended, that the words of the Kensington local Act being nearly the same as those in the local Act in *Rez v. St. Martin's-in-the-Fields*, that case is an authority in his favour. But that is not so. In that case the opera-box was demised in these terms [his Lordship then read the terms from the case], giving the exclusive enjoyment thereof to the lessee at particular times. The decision in that case was, that it was a tenement for which the lessee could be rated. So in this case, if there had been an exclusive enjoyment given to Mr. Morrish of any portion of the building, it might have been said that it came within the words of the Act; but, looking at the agreement, I can find no words giving such an exclusive enjoyment.

*Rate quashed.*

V.C. K.]

TUCKNISS V. ALEXANDER.

[V.C. K.]

## V. O. KINDERSLEY'S COURT.

Reported by JOSEPH MITCHELL, Esq., Barrister-at-Law.

June 8 and 9, and July 14, 1863.

## TUCKNISS V. ALEXANDER.

*Parish churches—New districts—Right to solemnise marriages—Licence—Banns—Church Buildings Acts.*

*A parochial chapelry was, in 1834, by an order in council, divided, under the Church Building Acts, into six districts, one being assigned to the ancient chapelry itself. Ten years afterwards, by a second order, another district was carved out of one of the above. On the question arising whether the incumbent of the ancient chapelry had the exclusive right to publish the banns and solemnise marriages between two persons resident in the other districts :*

*Held, that the incumbent of each district parish, including the incumbent of the one carved out of the originally created districts, had the exclusive right to publish the banns and celebrate the marriages of two persons resident in such district parish, and retain the fees for the same :*

*Held, also, that where a licence to marry at a particular church is in proper form, the incumbent of such church is not only entitled, but compellable, to perform the ceremony.*

This was a special case, between the Rev. Richard Austin Tuckniss and the Rev. James Bumstead, plts., and the Rev. David Mitchell Alexander, deft.

The special case stated that the parish of Prestwich-cum-Oldham, in the county of Lancaster, and formerly in the diocese of Chester, but now in the diocese of Manchester, was an ancient parish within which there had been, from time immemorial, a parish church and churchyard, and within the said parish there had been, from time immemorial, a parochial chapelry commonly called Oldham Chapelry, and within the said chapelry there were and had been, from time immemorial, a church or chapel called Oldham Church, and a church or chapelyard thereto annexed, and that the said chapelry was called a parish in the Ecclesiastical Survey, and the said church or chapel, and church or chapelyard, were, and had been from time immemorial, used as and held to be the parish church and churchyard of such chapelry or parish ; that the said church or chapel of the said Oldham chapelry had been, from time immemorial, a perpetual curacy, and the right of presentation thereto was, and had been from time immemorial, vested in the rector of the parish of Prestwich ; and at the said church or chapel of Oldham, banns of marriage had been published, and marriages, christenings, churchings and burials were and had been immemorially solemnised and performed, and the fees paid in respect thereof had been immemorially received and retained exclusively for his own use by the incumbent for the time being of the said Oldham church or chapel. It appeared that five chapels of ease had been built in Oldham chapelry.

By an order in council dated the 4th March 1835, on the representation of His Majesty's commissioners for building new churches, in pursuance of the statute of the 59 Geo. 3, c. 134, district chapelries were assigned to each of the aforesaid chapels in the aforesaid ancient parochial chapelry of Oldham, and by the said order it was ordered that marriages, baptisms, churchings and burials should be performed in each of these chapels, and that the fees for the same should, from and after the next avoidance of the rectory of Prestwich-cum-Oldham, belong to and be received by the minister of the said chapels respectively. The plts., the Rev. Richard Austin Tuckniss, was duly instituted into one of the said district chapelries,

called St. James's, and is now the incumbent thereof.

By an order dated the 7th Oct. 1844, and made by her present Majesty in council, on the representation of the Ecclesiastical Commissioners for England, and with the consent of the bishop of the diocese in which the said parish of Prestwich was then situate, and in pursuance of the statute of the 6 & 7 Vict. c. 37, five new separate districts, called respectively St. Matthew's Chadderton, St. John's Chadderton, Old-hurst, Glodwick, and Werneth, were constituted within the aforesaid ancient chapelry of Oldham as it originally existed out of the district chapelries assigned as aforesaid to the church or chapel of the said parochial chapelry of Oldham, and to the chapels of St. Margaret-in-Hollinwood and St. Peter's-in-Oldham. This order was duly advertised in the *London Gazette* of the 22nd Oct. 1844. In each of the said five last-mentioned districts a church had been built and the plts., the Rev. James Bumstead, had been appointed perpetual curate of the said new parish at Glodwick. Since the making of the aforesaid orders, there had been an avoidance of the rectory and of the parochial chapel of Oldham. The deft. had recently been presented to and is now the incumbent of the parochial chapelry of Oldham, and questions having arisen between the deft. as such incumbent and the plts. with reference to the right of the deft. to publish banns of marriage and to solemnise marriages in Oldham church between persons residing within the limits of the said district chapelries and new parishes respectively, and with reference to the deft.'s right to retain for his own use such fees as he might receive in respect of the publication of such banns and the solemnisation of such marriages.

The following were the questions the parties prayed the opinion of the court upon :—

1. Whether the deft. was entitled to publish banns of marriage and to solemnise marriages in Oldham church between two persons both resident within the limits of the "district chapelries," or "new parishes," formed as aforesaid, out of the said ancient chapelry of Oldham ?

2. Whether the deft. was entitled to retain for his own use the fees which he might receive in respect of the publication of such banns and solemnisation of such marriages at the said Oldham church ?

3. Whether, if a licence had been obtained from the bishop of the diocese in which the said ancient chapelry was situate for the marriage at the said Oldham church of such persons as aforesaid, the deft. was entitled to solemnise at the said church a marriage between such persons, and to retain for his own use the fees which he might receive in respect of such marriages.

*Glassey, Q. C. and Lindley* appeared for the plts.

*Dr. Stephens, Q. C. and Trail* for the deft.

*Glassey, Q. C.* in reply.

The following authorities were referred to in the course of the argument :—

- St. Giles's Codex, 235 ;
- Degg's Parl. Com. 227 ;
- 1 Burn's Eccl. Law, 300 ;
- 3 Geo. 4, c. 72, ss. 12 and 17 ;
- 4 Geo. 4, c. 76, ss. 22 and 26 ;
- 5 Geo. 4, c. 64 ;
- 7 & 8 Geo. 4, c. 72 ;
- 1 & 2 Will. 4, c. 78 ;
- 3 & 4 Will. 4, c. 61 ;
- 1 & 2 Vict. c. 78 ;
- 3 & 4 Will. 4, c. 61 ;
- 1 & 2 Vict. c. 107 ;
- 2 & 3 Vict. c. 49, s. 52 ;
- 2 & 3 Vict. c. 60 ;
- 6 & 7 Vict. c. 37, ss. 11, 12 and 15 ;
- 7 & 8 Vict. c. 56, s. 1 ;

- 8 & 9 Vict. c. 70;  
 9 & 10 Vict. c. 68, s. 88;  
 11 & 12 Vict. c. 71;  
 14 & 15 Vict. c. 97;  
 19 & 20 Vict. c. 55;  
 19 & 20 Vict. c. 104, ss. 5, 29 and 33.  
*Attorney-General v. Brereton*, 2 Ves. sen. 425;  
*Fuller v. Lane*, 2 Add. Ecl. Rep. 419;  
*Craven v. Sanderson*, 7 Ad. & Ell. 880;  
*Hornby v. Toxteth-park Burial Board*, 31 Beav. 52; 6 L. T. Rep. N. S. 146;  
*Fitzgerald v. Champneys*, 5 L. T. Rep. N. S. 233, and 2 J. & H. 31;  
*Vaughan v. The South Metropolitan Cemetery Company*, 3 L. T. Rep. N. S. 727, and 1 J. & H. 256;  
 1 Stephens' Laws of the Clergy, 255, note;  
 2 Stephens' Laws of the Clergy, 1161.

The VICE-CHANCELLOR.—This is a special case for the opinion of the court upon certain questions that have arisen between the incumbents of certain ecclesiastical districts in Oldham. One of the p'ts., Mr. Tuckniss, is the incumbent of a district named St. James's, and the other, Mr. Bumstead, of the district of Glodwick, the deft. Mr. Alexander being the incumbent of the chapel of Oldham, and the principal question is, whether Mr. Alexander, as incumbent of the parochial chapel of Oldham, is entitled to publish banns and celebrate marriages between two persons, both of them resident within the district of St. James, and so with regard to Glodwick. The first statement of the special case did not strike me during the argument; but on consideration I hesitated whether I should not require it to be modified or expunged, to make it what it ought to be. The interpretation I should put upon it is, that the ancient chapel has been used in the same manner as if it had been a parish church, whereas it is stated as a fact that there is a parish church of a parish church, which is an impossibility; and that it is held—that is not decided, but popularly supposed—to be the parish church and churchyard of Oldham parish; that is, popularly supposed to be the same as the parish church and churchyard; otherwise the passage has no meaning. This enunciates a proposition to the effect that the chapel of Oldham has enjoyed and exercised, and the church has had performed within it and within the churchyard rites and ceremonies as if it had been a parish church and churchyard. Let it be assumed in its largest sense. The deft. having been recently presented to the chapel of Oldham, the question has arisen between him and the p'ts. with respect to the right of the deft. to publish banns and solemnise marriages, and perform burials within the districts or new parishes, and to retain the fees for his own use, there being no compensation except a small grant. The first question was, whether the deft. was entitled to publish banns or solemnise marriages in Oldham church between two persons resident within the limits of the district chapelries or new parishes, or any of them, formed out of the said ancient chapel of Oldham. This question applies to all the district chapelries or new parishes, although the incumbents of two only are before the court, namely, those of St. James and Glodwick; but it is impossible to avoid expressing an opinion as to all. The second question is as to fees, and the third as to marriages by licence. The questions turn chiefly upon some of a considerable number of Acts of Parliament, ill-drawn and obscure and extremely difficult to assign a meaning to, commonly called "The Church Building Acts;" the first being dated so long since as 1818, forty-five years ago, in the course of which time twenty-five Acts at least have been passed on this one subject, or more than one in every two years, presenting a labyrinth of ambiguity rendering it difficult to the last degree to

discover the intention. I have endeavoured to give to them such interpretation as I can, and for that purpose have gone through them all, the great majority having no direct bearing on these questions. It is necessary to refer to 58 Geo. 3, c. 45, to see what was the effect of the 59 Geo. 3, c. 134. It appears that the commissioners were to perform three operations. Under the 16th section the order in council of 1835, creating the district of St. James, was made. I presume that what is meant is, that the commissioners shall recommend to the Crown the various matters, although it is not expressed, and they professed to do so with respect to that part of the parish of Prestwich which formed the ancient chapel of Oldham, and assigned one portion to such ancient chapel. The 17th section of the 59 Geo. 3, c. 134, is the same *mutatis mutandis* as the 27th and 28th sections of the 3 Geo. 4, c. 72, by which it is enacted that it shall be lawful for the commissioners, with the consent of the ordinary, patron, or incumbent, or of the incumbent with such consent, to make a separate and distinct parish. The 17th section enacts that in every case where a marriage, &c., where the parties resided in the district, the banns of marriage should be published in the chapel of each of the districts. What was the intention of the Legislature? It might have been plainly expressed, but that was not the course pursued, it is left to be discovered by deduction. It appears to me that the 17th section of the 59 Geo. 3, c. 134, has a strong bearing in favour of the exclusive right of the incumbent of one of these districts to celebrate marriages, &c. within the district, excluding the right of the incumbent of the ancient chapel of Oldham. It is the same as the 28th section of the 58 Geo. 3, as to new parishes, in every case where marriages were allowed to be solemnised under the Acts, whether in a chapel or in a district chapel (under the former Acts), and in which the parties, or either of them, were resident within the district, that all Acts of Parliament, laws and customs relating to publishing banns of marriage, marriages, christenings, churchings and burials, and the registering thereof, and to all ecclesiastical fees, oblations, or offerings, shall apply to all districts and consolidated or district chapelries of any parishes and divisions whereof the boundaries shall be enrolled in the Court of Ch. under the 58 Geo. 3, c. 45, or of that Act, and in the churches and chapels wherein banns of marriage shall be allowed to be published, and marriages, christenings, churchings and burials, or any of them shall be allowed to be solemnised, and to the churches and chapels thereof, and to the ecclesiastical persons having cure of souls therein, or serving the same, in like manner as if the same had been ancient, separate and distinct parishes and parish churches by law. I do not know how to get over this. "All laws, customs, &c., relating to ancient parish churches shall apply to the new districts and churches and chapels, and to the incumbents." Clearly, as between any two ancient parishes, say A. and B., the law is distinct that the minister of parish A. has no right to celebrate a marriage between two persons not resident in his own parish but in parish B. In the case of *Nicholson v. Squire*, 16 Ves. 259, Lord Eldon, in the case of the marriage of a ward of court, summoned before him the incumbent who had published the banns, and thus expressed himself: "It is true that a marriage is good, though neither party was resident within the parish; but if a clergyman, not using due diligence, marries persons neither of whom is resident within the parish, he is liable at least to ecclesiastical censure, perhaps to other consequences." In other words, the minister of each ancient parish had exclusive rights. Now the section enacts that all laws, customs, &c. relating to an ancient parish shall apply to district parishes, and therefore it appears to me that the district of St. James

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must have the exclusive right to celebrate marriages between persons, both of whom are resident in the district; in other words, the minister of the district chapel of Oldham has no more right to celebrate a marriage between parties resident in the district of St. James, than between parties resident in Durham or Cumberland. This is corroborated and strengthened by the 17th section of the 3 Geo. 4, c. 72, ill-constructed and badly worded as it is. This proceeded on the assumption that the district of St. James was duly constituted; but it is contended not to be so, on the ground that the order in council, made in 1835, creating this and the other districts, was invalid. The ground of this contention is, that although the Legislature has given to the King in council power to sever and divide districts from parishes, and assign them to others, it has not given power to divide the whole of a parish, and assign one district to the parish church as if it was a district. That is the major proposition, the minor being that Oldham was a parish and Oldham church a parish church, and therefore the King in council has no power to do so in the parish of Oldham; which is in fact a syllogism. The plea deny that Oldham was a parish, or the church a parish church, and therefore, assuming the major proposition, the minor is false. It is clear of course that unless the assumption that Oldham is a parish, and the church or chapel a parish church, is well founded, the argument cannot prevail, and therefore the question is, was that the fact? The statement in the special case is, that from time immemorial there had been a "parochial chapelry," commonly called "Oldham Chapelry," &c. Can it be contended that that which was a parochial chapelry within a parish can itself be a parish with a parish church? It is impossible. Oldham church had been always used as a parish church, and marriages, &c., had been solemnised there, and the incumbent had exercised parish rights; but the fact is unshaken, that it was only a parochial chapel. But one of the local Acts (5 Geo. 4, c. 64) dealt with it, calling it the ancient chapel of ease of Oldham, and the 9 Geo. 4, an amendment Act, confirmed that. It is also said, that it was called a parish in the Ecclesiastical Survey. But whatever the commissioners of Hen. VIII. did erroneously, that did not make it what they by mistake have called it. There was nothing about it in the Acts of Parliament. The object of the survey was only to ascertain the position of the ecclesiastical bodies, from archbishops to small chapels or chantries, if they existed, that they might be what they ought to be according to the rights to which they were subject. There is nothing but the simple occurrence of the word "parish" instead of "chapelry," and therefore what the Crown has done on this recommendation is, that finding in the parish of Prestwich the ancient parochial chapelry of Oldham, with its ancient parochial chapel, and in the parish of Prestwich other chapels, it had divided—not the parish of Prestwich, but the ancient chapelry of Oldham—into districts, and assigned one portion to each, and one to the ancient parochial chapelry itself. It might be justly said, when the incumbent of a benefice, with the exclusive right of property in an ancient chapelry, is constituted a mere stipendiary curate under the control of a minister, that is an improper proceeding, and taking away vested rights. I felt the force of that argument, but this parochial chapelry comes within the provisions of the 16th section, giving the commissioners power to assign particular districts to any chapel of ease, or parochial chapel; and the commissioners only did what a section of an Act of Parliament authorised in terms to be done. It might be monstrous injustice; but was the order in council invalid by reason of doing something which the Act did not authorise? Assume that it ought not to operate so far as it assigned a district to the ancient

church or chapel of Oldham; why is this to invalidate that which the order in council had rightly done with respect to the other districts? How could the order be partially invalid, as though it was contaminated by the poison of apparent injustice as to a portion? For a quarter of a century the public have proceeded upon the footing of the order in council under which the deft. himself was appointed incumbent of the district assigned to the parochial chapel, and therefore, if it is invalid, he has no *locus standi* in this court. It was likewise said that the order in council did not order marriages to be performed in the district chapels, and therefore the incumbents had no right, in the respective chapels, to perform marriages at all. No doubt great ambiguity was shown in the language of the Acts, and negligence in the framing the order in council, the officials probably using some old form, for, professing to proceed under the 59 Geo. 3, they referred to the 2nd section of a prior Act, which had nothing to do with it. The word "accordingly" meant according to the recommendation, part of which was that, after the avoidance, ceremonies should be performed in the district chapels, and the fees received by the minister. The wording is most clumsy and careless; but a construction has been put upon it by a quarter of a century's usage. There is, however, sufficient without this to preclude the argument, for in the statement of the case there is this: "And by the said order it was ordered that marriages, baptisms, churchings and funerals should be performed after such avoidance and the fees received by the ministers of the six chapels respectively." Here the parties have agreed by this special case that it was ordered in the above terms. Therefore on all these grounds the incumbent of Oldham within the ancient chapelry (there being within it new districts) had not the right to publish banns or perform marriages in public between two persons, both of whom were dwelling within the district of St. James, and the right to the fees must follow that decision. With regard to Glodwick, that was created by a distinct order in council, and was constituted a new parish, which might be called a fourth operation which the commissioners had to perform. That was under the 6 & 7 Vict. c. 37 (known as Peel's Act), sect. 9, by which the commissioners (now represented by the Ecclesiastical Commissioners) were empowered to set out by marks and bounds a district, such district not containing any consecrated church or chapel for divine worship, and to fix the name of such district, with a map to be annexed where no plan of the chapel existed, when the district became a new parish. By the 11th section licence might be granted and a nomination of a minister; and by the 15th, when the church or chapel was built, it might be consecrated, and the district was constituted a new parish, and it was competent to publish banns, solemnise marriages, perform churchings, christenings and burials. And this Act was not the same as the 58 or the 59 Geo. 3, it not being declared as in those Acts that all laws, customs, &c., were to apply to the new parishes as if distinct ancient parishes; but that when any such church or chapel should be built or acquired and consecrated, such district should from and after the consecration of such church or chapel be and be deemed to be a new parish for ecclesiastical purposes known by a particular name; that such church or chapel should become the church of such new parish, and it should be lawful to publish banns, to solemnise therein marriages, baptisms, churchings and burials, and require and receive such fees as should be fixed by the chancellor of the diocese; and the several laws, statutes and customs in force relating to the publication of banns, the solemnisation of marriages, baptisms, churchings and burials, and the registering thereof respectively and recovering the fees should apply to



the church of such new parish, and the perpetual curate thereof for the time being. This section is distinct, that where there is no place of worship, when built it shall constitute a new parish; that is, while it is in its chrysalis state it shall not interfere with the rights of the incumbent to publish banns, which if such district had not been constituted he might have done, and with the fees until it is constituted a new parish. It might naturally have been expected that the Act would have gone on to say what was to be done when the creation of the new parish had taken place. But that was left to conjecture, and it is contended that it is not provided that after the constitution of the new parish the incumbent of the mother church should not publish banns, solemnise marriages, &c., and receive the fees. What did the Legislature mean? Why, it must be taken for granted that when a new parish was thus created, the rights of the incumbent of the mother church must be limited, and the incumbent of the new parish, almost *ex vi termini* and of course, would have the right to solemnise marriages, publish banns, receive the fees, &c. No doubt there is a difficulty, where nothing is said, in coming to any conclusion; but there are other grounds upon which the minister of Glodwick had, as it appears to me, the exclusive right to publish banns, solemnise marriages, &c., and receive the fees. It appears that the district of Glodwick was carved out of a district chapel called St. Peter's, created under an order in council made in 1835, contemporaneously with that of St. James's, and when St. Peter's was created according to the decision as to St. James's district, the minister of Oldham had ceased to have rights to perform ceremonies in the other districts. But it was argued that when another district was carved out of the ancient chapel, that restored the rights of the minister of Oldham. That was not so; the effect was, that whatever questions might arise between the minister of Glodwick and St. Peter's, the minister of Oldham had no right to celebrate marriages or publish banns between two persons resident within the new parish of Glodwick. With regard to the other Acts of Parliament which have been cited, I abstain from expressing any opinion upon them, as they do not appear to me to touch these questions. With respect to the other questions as to marriages by licence, and whether they stand on the same footing as marriages by banns, I am of opinion they do not, but on a distinct footing. This subject is not dealt with in express terms, but under the Marriage Act, 4 Geo. 4, c. 76, it depends on the principles of canonical obedience and the rights of persons requiring the minister to perform the different ceremonies. The 10th section enacts that "no licence be granted by any archbishop, bishop, or other ordinary, or person having authority to grant such licences to solemnise any marriage in any other church or chapel than in the parish church or some public chapel of or belonging to the parish or chapelry within which the usual place of abode of one of the persons to be married should have been for the space of fifteen days immediately before the granting of such licence." Therefore, the responsibility on the officials was only with regard to the fifteen days. It might be in a metropolitan district or large town, and the officials might have no means of finding out where the parties lived, they must act according to the licence of their diocesan; although, of course, if a clergyman knew a fact, and chose to take the responsibility not to marry any person by reason of it, the bishop might say, "I am much obliged to you, I was misled." But, suppose it turned out to be correct, he ran a great risk. The question of the bishop's rights and duties is not before the court. The case of *Fitzgerald v. Champneys* has been referred to, but that is not applicable here, although very much the same question was raised,

because it was a question of construction, which the court did not entertain, because it held the statutes in force. Here the court cannot refuse to exercise the jurisdiction, which in that case the judge considered he ought not to exercise, because the former Act was not repealed.

Solicitors for all parties, *Hilliard, Dals and Stretton.*

## Ireland. (a)

### COURT OF COMMON BENCH.

Reported by J. FIELD JOHNSON, Esq., Barrister-at-Law.

Jan. 29, 30 and 31, 1863.

BENNETT v. BARRY.

*Libel—Demurrer—Plea of privileged communication—Plea of want of statutable notices of action.*

*A., a commissioner of fisheries in Ireland, in a meeting of proprietors and persons interested, convened under the 5 & 6 Vict. c. 106, to inquire into all matters relating to certain fisheries, charged B., a neighbouring magistrate, with a violation of the fishery laws:*

*Held, that the occasion was privileged:*

*Held, also, that the utterance of the words in question was not such a thing done by virtue or in pursuance of the "Act to regulate the Irish fisheries," the 5 & 6 Vict. c. 106, as entitled the deft. to twenty-one days' notice of action under the 110th section.*

The first count of the summons and plaint complained that the plt., before and at the time when deft. spoke and published the words hereinafter complained of, was a justice of the peace for the county of Cork, and during the time that plt. was such justice, it was unlawful to take or kill salmon in a certain river called the Arrigadeen River, in the county of Cork, during a certain period of time in each year, said period being called and known as the close season, and any person or persons violating the laws in force in relation thereto, by taking or killing salmon in said river during the period fixed as the close season in and on said river, were liable to be brought before certain justices of the peace of the said county (of whom plt. was one), and by said justices to be summarily punished according to the law, and the plt., as such justice, was in duty bound himself to observe the laws in force, in relation thereto, and also to see that others observed same, and in every respect to aid and assist in preventing salmon from being killed or taken by any person or persons in or from said river during the said close season, and in and on said river; and in the present year said close season commenced with respect to said river on the 15th Oct. last past, and continued up to the present time, and plt. was such justice of the peace during all said month of October, and still is such justice; and the deft. after the time when said close season had commenced, that is to say, on the 29th of Oct. last past, at a certain meeting held in the grand jury room in the city of Cork, and in the hearing and presence of divers persons, falsely and maliciously spoke and published of and concerning the plt. as such justice of the peace, and with the intent and object of bringing the plt. as such justice into great disrepute and infamy, the false, slanderous and defamatory words following, that is to say: "A gentleman of considerable position in the county and a magistrate, Mr. Thomas Hungerford, met me this day and told me that there is a dreadful slaughter going on in the Arrigadeen river, salmon being killed in immense quantities (meaning an un-

(a) From the *Irish Jurist*, by permission.

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lawful slaughter of salmon during the close season). Mr. Carleton, in order that no mistake should arise, put the time when the season closed on the back of the licence, but the public, I am sure, will be surprised to hear that this Mr. Bennett (meaning the plt.) actually wrote to the commissioners (meaning the Commissioners of Fisheries in Ireland), asking them more than a month ago for permission for himself to fish with a rod, and to alter the period then fixed upon by the regulations of the commissioners. He (meaning the plt.) was told it was utterly impossible to do so. What the inference is I shall leave to the public, that is, whether Mr. Francis Evans Bennett (meaning the plt.) is one of those persons referred to by Mr. Hungerford in his statement of to-day. If persons of that class of life would not aid the commissioners by observing the law, to say nothing of enforcing it, it is hard to expect that they could punish a poor man for committing a breach of that law which a rich man himself will not observe. This gentleman (meaning the plt.) should be cautious in what he does. He is a gentleman of considerable standing in the county, and a magistrate besides, and he ought to know well what ought and what ought not to be done. He was, at a not very remote period, a magistrate of the county of Cork, and he was removed from the commission of the peace because of its having been proved that he was engaged in transgressions of the fishery laws. He was for a considerable time out of it, but through the intercession of some friends, he was again restored to it. If he does not aid in upholding the laws it is hard to expect that they can be enforced," the deft. meaning thereby that the plt. was one of those persons who killed salmon in the said river during the close season, and was thereby guilty of a crime punishable by law, and that as such justice of the peace he did himself wilfully violate those laws which he was bound to observe and enforce, and was unfit to hold or enjoy such commission of the peace as he (plt.) did then enjoy; and that as such justice he did not and would not observe or enforce the laws he was bound to observe and enforce, and that as such justice he did not and would not aid in upholding those laws which as such justice he was in duty bound to uphold, and by reason of his wilful misconduct in violating said laws and neglecting to uphold and enforce them, he was unfit to be a justice of the peace. The second and third counts charged the utterance of the same words with the immoderation slightly varied. To the three counts the deft. pleaded the two following pleas:—1. That before and at the time of the speaking of the said alleged slanderous words, the deft. was a commissioner of fisheries in Ireland duly appointed pursuant to the statutes in that behalf, and that under the provisions of a certain Act of Parliament passed in the sixth year of her present Majesty, and the Acts for amending and regulating the said Act, it was and is unlawful to kill salmon in Ireland with the rod or otherwise at certain periods of the year hereinafter called the close season, and that upon the Arrigadeen river in the said first count of the summons and plaint mentioned, it was at the time of the speaking of the said alleged slanderous words, and is unlawful, under the provisions of said Acts, to kill salmon at any time in the interval between the 15th Oct. and the 1st Nov. in the said Arrigadeen river, in the neighbourhood of which the said plt. resides, and that the said Arrigadeen river was and is situate within the Cork fishery district, and that for said district conservators of fisheries had been duly elected and appointed for the protection of the fisheries within the said district, pursuant to the provisions of an Act passed in the twelfth year of her present Majesty, entitled "An Act for the protection and improvement of the salmon, trout, and other inland fisheries," and

that before and at the time aforesaid, J. P. Carleton, Esq. had been and was the inspector of fisheries, and also secretary to the conservators within the said district, duly appointed by the said board of conservators for the protection of fisheries in the said district, and for generally enforcing the fishery laws within the same, and that it is and was the duty of the deft. as such commissioner of fisheries, and within the scope of his authority as such, to enforce the provisions of the fishery laws, and in particular to enforce the observance by the plt. and all other persons of the regulations in said Acts contained and made in pursuance thereof, prohibiting fishing for salmon during the said close season, and that it was also the duty of the said J. P. Carleton, as such inspector as aforesaid, to report to the deft. all instances of infraction of the fishery laws within his said district, and to bring under the notice of deft. the names of all persons whom he believed to be in the habit of violating or to have in fact violated the said fishery laws, and that before the speaking of the alleged slanderous words in the said first count of the summons and plaint mentioned the Commissioners of Fisheries duly published in pursuance of the Fishery Acts notice of a meeting to be held by the deft. as such commissioner within the said district in the county Cork court house, Cork, on the 29th Oct. 1862, for the purpose, amongst other things, of inquiring into all matters relating to the fisheries within the said district, and that prior to the convening of said meeting applications had been made to the said commissioners for permission to fish on the said Arrigadeen river after the period permitted by the fishery laws, and that before the said meeting was held deft. was informed by one Thomas Hungerford that a great slaughter of salmon was going on in said Arrigadeen river, that is to say, during the said close season, and was also informed by the said J. P. Carleton, as such inspector and secretary as aforesaid, that several of the gentlemen resident in the neighbourhood of the said Arrigadeen river were desirous of obtaining permission to fish in the said river for salmon after the period permitted by law, and that several persons were in the habit of illegally fishing in said Arrigadeen river during the close season without permission, and that an association had been formed of certain persons, of whom the plt. was one, for the purpose of protecting the fish in said river, and that the water-bailiff appointed by the board of conservators for the Cork district at the nomination of the said association had received orders from the said association not to prosecute, as was his duty under the Fishery Acts, any persons fishing for salmon between the 15th Oct. and 1st Nov. on the said river, although such fishing was in fact illegal, and that the plt. had applied to him for permission to fish on the said river during the period in which it was by law unlawful to fish, as he, the plt., well knew, founding such application on an alleged concurrence of the deft. therein, although none such had been given, as he, the plt., well knew; and the statements made by the said J. P. Carleton induced this deft. to believe, and deft. did in fact believe, that plt. was one of the persons who had by fishing on said river during the close season being guilty of a breach of the fishery laws. That plt. during all the time aforesaid was a justice of the peace in and for the county of Cork, and that he was bound to observe the fishery laws then in force, and as such justice to enforce the observance of those laws by others. That the deft. afterwards by virtue of his office presided at said meeting, and that the alleged illegal fishing upon the western rivers of the Cork district of which the Arrigadeen river was one, became and was the subject of discussion at said meeting, and that there were present at said meeting divers members of the said

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board of conservators for the Cork district, and also certain members against whom charges had been made of illegally taking salmon during the close season in other places within the said district, and that all said persons were interested in this, that said laws should be observed and enforced and all persons deterred from violating or continuing to violate the same; and deft. upon said occasion, in discharge of such his duty as such commissioner of fisheries, and acting as he *bonâ fide* believed within the scope of his authority as such and with a view to the better observance of said laws and regulations and the deterring the plt. and all other persons from violating same, spoke the words in the first count of the summons and plaint complained of, believing same as in said count explained to be true, and without malice in fact, as he lawfully might for the cause aforesaid, which is the speaking and publishing in the first count of the summons and plaint complained of. 2. That the several matters and things complained of were done by the deft. by virtue of a certain Act of Parliament passed in the 6th year of her present Majesty's reign, entitled "An Act to regulate the Irish Fisheries," and the Acts for amending the said Act, and that this action was commenced against deft. before twenty-one days' notice thereof in writing had been given to deft. or left at his usual place of abode. The plt. demurred to the first of these defences on the following grounds: That said defence does not show that the slander spoken of plt. by deft. was uttered under such a state of circumstances as rendered same privileged; and does not show any facts that justified deft. in speaking and publishing same as complained of; and does not show any facts that warranted deft. in arriving at the conclusion he says he arrived at as to plt.'s guilt, and does not state that any person had in fact told deft. that plt. was guilty of the offence which deft. said he (plt.) was guilty of; and does not show how it was deft.'s duty by virtue of his office to utter such slander against plt.'s character at said meeting. To the second plea the plt. demurred, because that said defence does not at all show how the publication of slander was or could be a matter or thing done under the Act or Acts of Parliament referred to, and because the said Act or Acts do not nor does any of them directly or indirectly sanction the publication by deft. as such commissioner of false and malicious slander, or in any way make it a matter or thing that could or might be done under said Act or Acts.

*James Murphy* (with him *Sullivan*, Serjt.) in support of the demurrer.—The first of these defences does not disclose a privileged occasion. Under the old system, which allowed the general issue, when the circumstances were proved, it was for the presiding judge to decide whether these circumstances constituted a privileged occasion, and if he so decided it lay on the plt. to prove express malice. In *Toogood v. Spyring*, 1 Cr. M. & R. 193, Parke, B., in giving judgment, lays down the rule thus: "The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned." *Toogood v. Spyring* and *Wallace v. Carroll*, 11 Ir. C. L. R. 485, have extended the protection of privilege to the furthest limits, but the principle of them will not embrace this case. The 11th section of the "Act to regulate the Irish Fisheries," the 5 & 6 Vict. c. 16, which is relied on, enacts "that it shall and may be lawful to and for the said commissioners to hold general meetings of proprietors of fisheries in any district, on giving due notice by advertisement or otherwise of the time and place when and where such meetings are appointed to be held, and to inquire into

the state of the fisheries in each such district, and the best means to be adopted for the regulation, improvement, or protection thereof." [MONAHAN, C.J.—Does the plea state that there were none but conservators of the fisheries present?] No; nor is there any particular class to which the meeting was restricted. There is not anything in the Act to prevent any member of the public from walking into the meeting, nor anything in the plea to show that a special class was present; a defence that the deft. spoke the words believing them to be justified, would not be sufficient, because the circumstances would not appear which showed that it was so. [MONAHAN, C.J.—In *Murphy v. Kellett* we held that it was not necessary to show what was the information, or where the deft. got it, if he stated he had information.] The deft. may not be bound to state the person from whom he received the information; but if this case were tried before the new system of pleading, and the deft. swore he spoke the words believing them to be true and without malice, that would not be held a justification, for the presiding judge should tell whether the facts present to the speaker's mind at the time constituted a privileged occasion. In this plea it is never stated that either Hungerford or Carleton mentioned the plt.'s name, or suspected the plt. to have been guilty. [MONAHAN, C.J.—Is there any case in which it was decided that the court must be satisfied from the pleadings that the party had grounds for uttering the words? Is there any case deciding that the particulars of the information must be set out? In considering *Murphy v. Kellett* we were unable to find any. That was an action against the medical officer of a workhouse for saying of the plt. that if the poor-law guardians gave him their custom he would supply the inmates with African sherry, and we held that the position of the party as a medical officer, and the meeting in which the words were spoken being one of guardians, together constituted a privileged occasion.] Particulars have never been held to be complied with by deft.'s saying, "I heard so and so;" and in this plea it is not stated that any person even told the deft. he suspected the plt. If the plt. goes to trial on these pleadings what fact can be dispute? What question can he raise about the insufficiency of these facts? Or, if it is his right, then it is his right to raise that question now. [CHRISTIAN, J.—It seems to me that there are two conditions to be complied with: first, a privileged occasion; secondly, that the party brings himself within the privilege.] When is it to be decided if he has brought himself within the privilege if not now? MONAHAN, C.J.—Is there any case deciding that if a master be charged with giving a bad character to his servant, he must have reasonable and probable grounds? The relation of master and servant is peculiar. [CHRISTIAN, J.—There is this difference, that in the case of master and servant the opinion of the master is a fact which it is material for the party making the inquiry to know.] It is not stated that it was a part of the business of the meeting to stigmatise absent men. Upon the principle of this plea a deft. might justify a slander, on the ground that a number of ticket-of-leave men were present, and were interested in the matter:

*Glavin v. Fowler*, 9 Ex. R. 615;

*Ede v. Scott*, 7 Ir. C. L. R. 607;

*Martin v. Strong*, 5 A. & E. 535.

As to the second defence, *Cook v. Leonard*, 6 B. & C. 351, shows that a notice is only necessary where the deft. had reasonable grounds for supposing the thing done was done under the authority of the Act.

*Samuel Walker* (with him *H. E. Chatterton*, Q.C.) in support of the pleas.—The functions of the court and of the jury in reference to a plea of privileged

[IRELAND.]

BENNETT V. BARRY.

[IRELAND.]

communication are distinct. I need only show that there was here such an occasion as will rebut the legal inference of malice, and it will then be for the plt. to make out that it is not privileged either from the words used themselves or from extrinsic circumstances: (*Cooke v. Wildes*, 5 El. & Bl. 328.) In *Amason v. Damm*, 8 C. B., N. S., 600, Willes, J. says, "It matters not how harsh or how hasty the deft. may have been, or how untrue the charge, if he *bond fide* made it." With the reasonableness or unreasonableness of the deft.'s belief, with the prudence or imprudence of uttering these words, the court has no concern: (*Maitland v. Bramwell*, 2 F. & F. 623; *Humphreys v. Stilwell*, 2 F. & F. 590.) The 33rd section of the 5 & 6 Vict. c. 106, gives the commissioners power to alter the close season, and with that view to call a meeting of persons possessed of or interested in the fisheries. The plea does not turn upon this section; but it is material to show that the commissioners can only summon proprietors or persons interested. The 89th section gives them the power to apprehend offenders. The 111th section gives the power to hold meetings for inquiring into the state of the fisheries in each district, and the best means to be adopted for the regulation, improvement and protection thereof. [BALL, J.—This section only mentions proprietors of fisheries, whereas the 33rd includes persons interested.] The plea states that the meeting was advertised to be "for the purpose, amongst other things, of inquiring into all matters relating to the fisheries." [BALL, J.—It does not state exactly who were summoned.] No; but it must be assumed that the deft. did his duty in that respect under this section. The 38th section of 11 & 12 Vict. c. 92, empowers the commissioners to attend and advise at meetings of conservators. There is only one commissioner in Ireland now; but originally there were more than one. The plea states that the deft. was a commissioner of fisheries. It then states that the time of the speaking of the words was the close season. It then states that the district was under the conservators elected to protect the fisheries. It then states what Carleton was. It then states that it was the deft.'s duty to enforce the observance of the regulations contained in the Fishery Acts. It then states that it was Carleton's duty to bring under the deft.'s notice the names of all persons whom he believed to be in the habit of violating, or to have in fact violated the fishery laws; that there was a desire existing to fish in the close season; that the deft. was informed that a great slaughter was going on in the Arrigadeen river, and that Carleton stated the plt. had applied for permission to fish in the close season. [BALL, J.—Is there any power in the commissioners to grant this?] No; except by a bye-law, of which notice should be given. The plea charges a wilful falsehood upon the plt. in alleging a concurrence by the deft. in his application to fish in the close season. It states that the deft. had received intelligence from Carleton respecting the plt. before he used the words in question. [CHRISTIAN, J.—Assume so much. Suppose the meeting duly summoned; suppose that those entitled to be there were there, and no one else, and the deft. duly proceeding—show that his duties include a right to hold up to the meeting an individual as having committed a crime against the fishery laws, and as having been dismissed from the magistracy previously on account of that same crime. MONAHAN, C. J.—If a meeting of magistrates were convened to consider the state of crime in the country, any one of them might describe the general state of the neighbourhood, but would be justified in saying that an individual had committed crime and had been dismissed from the commission of the peace for such crime?] The question is this: was there an occasion? The meeting was not

a public meeting; and the season was the close season. The deft. is told that there was a great slaughter going on. He honestly believes that the plt. is guilty. This was one of the best means for attaining the purpose of the meeting (at least it is not unnatural that the deft. should think so) that the parties present should know who had been guilty. He had a duty and an interest to consult with the members of the meeting respecting the plt. as to the best means of protecting the fisheries. It was of vital importance to the conservators to know that a magistrate had been acting in this way, and the poor were interested in not being wrongfully suspected or punished. "Duty" will include duties of imperfect obligation:

*Harrison v. Bush*, 5 El. & Bl. 344;

*George v. Goddard*, 2 F. & Fin. 689;

*Bealson v. Skene*, 5 H. & N. 838; 2 L. T. Rep. N. S. 378.

It was natural that the deft. should think it reasonable that the persons present should know who had been reported to have broken the fishery laws. [CHRISTIAN, J.—It might be strongly argued that imparting to each other their information regarding persons came within the scope of the purposes for which the meeting was called.] It is enough to show anything which rebuts the *prima facie* inference of malice. [CHRISTIAN, J.—The position of the party accused might be a fact to be taken into consideration in consulting as to what measures should be taken.] And the plt. was a magistrate whose duty was to protect the fishery. [MONAHAN, C. J.—The words "what the inference is I shall leave to the public," might merely mean the public who were present.] *Ruckley v. Kiernan*, 7 Ir. C. L. R. 75, decided that the court upon demurrer will give to the pleading demurred to the meaning that will support it. In England a question like this cannot come upon demurrer, it must come before the court after trial upon a motion relating to the judge's charge or some such thing, and it would be going far in a judge at Nisi Prius to exclude the parties from submitting this whole question to the jury. [MONAHAN, C. J.—But the judge at Nisi Prius, taking into regard the nature of the meeting and the duties of the deft., would decide whether these constituted a privileged occasion.] But the judge could not anticipate, nor can the court here, the duty of the jury in saying whether the deft. had grounds for his belief. The words were relevant to the occasion, which was the convening of a meeting under the 111th section. Everything connected with the fisheries in Ireland is subject to the commissioners. [MONAHAN, C. J.—It may be very material, in deciding the question of privilege, to consider if a stranger could have attended this meeting. CHRISTIAN, J.—Or would the presence of a person who had not a right to be there alter the character of the meeting, or change the occasion?] Considering that it had been stated that the plt. had discouraged prosecutions against those who violated the statutes, it was not improper for the deft. to state what he did to the persons interested. The fishermen who were present were interested. [MONAHAN, C. J.—If a man charge another before a magistrate with a crime, he must have reasonable and probable grounds for doing so, and it will not be sufficient for him to state that he has, but he must satisfy the judge at the trial that he had. CHRISTIAN, J.—If you unnecessarily set out the grounds of your belief, which are more properly for the jury, does the appearance of that matter upon the record withdraw the consideration of it from the jury. MONAHAN, C. J.—That, I conceive, depends more upon the form of the plea than upon abstract reasoning. It is conceivable that at the trial a party might give many things in evidence which a judge

could not withdraw from the jury. CHRISTIAN, J.—Surely the judge at the trial might say that there was no case to go to the jury; and if we, upon the argument of this demurrer, where the deft. has set out most particularly in his plea the grounds of his belief, should hold that they made no grounds for believing, what would be the result? Yet he would be a very courageous judge who would withdraw from the jury all that is stated in this plea.] As to the second plea, *Read v. Coker*, 13 C. B. 850, decided that, where a statute gives protection, it is not necessary that the party should be aware of the existence of the statute:

*Booth v. Clive*, 10 C. B. 827;

*Kirby v. Simpson*, 10 Ex. 358;

*Hazeldine v. Grove*, 3 Q. B. 997;

*Horn v. Thornborough*, 3 Ex. 846;

*Garton v. Great Western Railway Company*,  
El. Bl. & El. 837;

*Aceland v. Buller*, 1 Ex. 837.

*Sullivan*, Serjt. in reply.—Until the judge decided the occasion privileged, it remained unprivileged; nor until then could any case go to the jury. What the judge decided at Nisi Prius, the court have now to decide upon demurrer. The learning on this subject is almost exhausted in *Coxhead v. Richards*, 2 C. B. 569, in which case, though the court differed in opinion, they all agreed that the question of privileged occasion lay at the bottom of the whole. The use of deciding that the occasion is privileged is to rebut the *prima facie* inference of law, that there was malice, and shift upon the plt. the onus of showing malice in fact. The first of these defences does not disclose a privileged occasion. It is almost admitted that unless the meeting was such as the Act of Parliament authorised, the occasion was not privileged. The plea states the meeting to have been convened for the purpose of inquiring into all matters relating to the fisheries, and the words "all matters" are put in with the express purpose of covering the words used by the deft. The 5 & 6 Vict. c. 106, gives no jurisdiction to convene a meeting to inquire into "all matters." The 33rd section authorises meetings to be held to alter the close season. The 111th section, which is relied on by the deft., is peculiar, and authorises meetings of proprietors only, and not of persons interested. Meetings under this section relate to the ownership, and not to the fisheries being open or close. I test their power to enter into all matters by this question—Could the commissioners under the 111th section alter the close season? [CHRISTIAN, J.—Are not all fisheries proprietary?] The only power given to the commissioners in relation to the law being violated is by the 89th section, which empowers their officers to apprehend offenders. [CHRISTIAN, J.—The words in the plea are, "as such commissioner." I see no objection to their combining in one meeting the purposes of both the 33rd and 111th sections.] The deft.'s duty was to hear evidence at the meeting. *Gilpin v. Fowler*, 9 Ex. 615, is a stronger case than the present. The deft. uttered these words without hearing evidence. [CHRISTIAN, J.—The meeting had a right to discuss what course was advisable.] This was not a private meeting. [CHRISTIAN, J.—It was a general meeting of proprietors. MONAHAN, C. J.—If once we are obliged to admit that such words as these, "I believe A. B. and C. D. have been violating the law" were justifiable, then, though in this instance the deft. went very far in the words he used, we should hold the occasion privileged. Is he not to speak at all?] He had no right to name any one. [BALL, J.—Is he to sit and say nothing? He is chairman and sole chairman, but we know that a sole chairman takes a part in the discussions, and does not resemble the Speaker of the

House of Commons.] The true rule is stated in *Too good v. Spyrring* in felicitous language. [MONAHAN, C. J.—In language so good that it has been used by every judge since when dealing with the question.] I admit that excess in the language will not take away the privilege according to *Cooke v. Wilder*, and I admit that, if the words used had been "from statements I have heard it is likely that A. B. is implicated," they would be privileged, but here the deft. prejudices the plt. in the van of his inquiries. No portion of the words was "fairly warranted," to quote the language in *Too good v. Spyrring*. A commissioner sent down by the Crown to inquire into the conduct of a Lord Mayor and town council, would not be justified in commencing his inquiries by stating that the Lord Mayor and council were guilty of all that had been alleged against them. This occasion, irrespective of the language used, was privileged; but it is not privileged when the words themselves are taken into account. There is no authority that I know of, laying down that in a plea of privileged communication the grounds of the information ought to be set out; but it was done in every case that I ever saw. [CHRISTIAN, J.—This case differs from *Murphy v. Kellett* in this, that the plea in that case did not profess to set out the grounds. MONAHAN, C. J.—Was there ever such a question left to a jury as, whether the grounds of information were sufficient? Is not the question this, if the deft. honestly and *bona fide* believed, &c.?] Upon the second plea *Cook v. Leonard* is a strong authority. The things authorised by the Act are to seize nets and stakes and to assess boundaries. It must come to this, that the deft. is to get notice of action for everything done, privileged or not privileged. Does a man open his mouth under an Act of Parliament? Does this deft., because a commissioner, speak under the Act of Parliament every time he speaks?

MONAHAN, C. J.—We think that this was a meeting convened under the 5 & 6 Vict. c. 106, and that the deft. was justified in inquiring into the state of the fisheries; that all attending the meeting had a right to communicate to each other such information as they had received, and that the occasion was privileged. We must assume, upon the first of these pleas that the deft. *bona fide* believed in the truth of the statement made by him. The reasonableness of that belief will go to show *bona fides* in fact. I do not wish to bind myself by saying that the evidence will be sufficient. We do not think that the deft. was entitled to notice of action.

*Judgment for deft. upon the plea of privilege.*  
*Judgment for the plt. upon the plea of want of notice of action.*

## MIDDLESEX SESSIONS.

Friday, May 22, 1863.

(Before the ASSISTANT JUDGE.)

BUFFHAM v. TRUSTEES OF THE POOR-RATES OF BROMLEY ST. LEONARDS.

*Important Judgment as to the Electoral Franchise.*

At the sitting of a former court an appeal was entered of considerable importance as regarded the admission of occupiers of houses on the rate-books for which the rates had been compounded by the landlord, for the purpose of obtaining the elective franchise. The house in which the appellant lived was compounded for by the landlord on the basis of two-thirds of the annual value. The appellant, Mr. Buffham, desiring to possess the elective franchise, sent in a claim to the parish of Bromley St. Leonard, to have his name inserted in the list as the rated occupier, to give him the right of voting, and this claim was admitted; but, when another rate was

made, he was rated for the full annual value, and that without any notice having been given to him that such would be the case. The question here arose as to the right of the parish to raise the rating, and whether, having once allowed a composition for the house, they were at liberty arbitrarily to raise the amount, merely because the occupier wished to avail himself of his constitutional right to possess the elective franchise.

This question was argued at considerable length; and to-day,

The ASSISTANT JUDGE delivered the following judgment:—The question in this case appears to me to depend entirely upon the nature and extent of the authority given to the trustees for carrying into effect an Act 61 Geo. 3. c. 125, for the management of the poor rates raised in the parish of Bromley St. Leonard, in this county. The Act provides that the minister, churchwardens and overseers of the poor, with 21 inhabitants to be annually chosen and appointed by the inhabitants rated at the sum of 10*l*. a year and upwards, should have the general control and application of the rates raised for the relief of the poor of the said parish. By the 17th section it is enacted, "That where the yearly rent or value of any house, tenement, or hereditament, within the said parish did not exceed 10*l*. net rent, exclusive of such parochial rates and taxes as the tenants by law were liable to; or where any house, tenement, or hereditament, should be let to weekly or monthly tenants, or in separate apartments, furnished or unfurnished, or where the rent of any house, tenement, or hereditament, should become payable at any shorter periods than quarterly, it should be lawful for the said trustees at any meeting holden under that Act, if they should think proper, to compound with the landlords or owners for the payment of the poor-rates at such a reduced yearly rental as the said trustees should think reasonable, so that such houses, &c. were not rated at less than one-third, or more than three-fourths of the rack-rent, and whether such houses should be occupied or not." And the clause then goes on to empower the trustees to rate the landlords or owners, as if they were the occupiers, in case they refused to compound for the rates in manner before provided. By several statutes passed subsequent to the Act above recited, viz., the 2 & 3 Will. 4. c. 45; 11 & 12 Vict. c. 90; and the 14 & 15 Vict. c. 14, provisions are made in respect of persons whose houses may be compounded for, and who are desirous of voting in the election of borough members to serve in Parliament. By these statutes it is enacted, that such persons may lawfully claim to be rated to the relief of the poor for premises in their occupation, whether the landlord shall or shall not be liable to be rated; and by the last-mentioned Act it is provided that in cases where by any composition with the landlord a less sum shall be payable than the full amount of rate, the occupier claiming to be rated shall not be bound to pay more than the amount payable under such composition. The appellant in the present case is the occupier of a house in Bromley St. Leonard, which had, down to Oct. 1862, been compounded for by the landlord under the local Act, and by a rate then made the appellant was rated upon the net annual value of 12*l*., the trustees having previously to such rate resolved to terminate the composition with the landlord in respect of the house in the appellant's occupation. There were two grounds of appeal: first, that having once entered into a composition with the landlord, the trustees could not discontinue it; secondly, that if they could do so the rating on the annual value of 12*l*. was too high. The case was ably argued, and the first ground strongly urged by Mr. Rudge for the appellant, and I have taken time to consider the judgment which ought to be pronounced, in consequence of it being stated that it is a question which affects a large class of voters. It is not without some regret that upon this objection I feel constrained to decide in favour of the respondents. I am of opinion

that the local Act gives to the trustees an absolute discretion upon the advisability of compounding for houses of this description in their parish, and that if an injudicious exercise of that discretion is productive of hardship the only remedy is by an appeal to the Legislature. Upon the second point it was proved that some time since the respondents gave notice to the appellant that the rate would be reduced from 12*l*. to 9*l*., and no further reduction was contended for by the appellant. The decision therefore being in favour of the respondents, Mr. Poland, according to the practice of the court, applied for payment of the respondents' costs. I find, however, that an application was made by the appellant, on the 6th of this month, for an admission as to the weekly rent or value of the house in question, and that on the 7th such admission was refused by the respondents. The appellant, therefore, considered it necessary to come to the court on the question of value; and for this reason, and because I do not think it was contemplated by the Legislature that occupiers of houses compounded for should be made liable to any additional pecuniary burden in consequence of their claiming to be rated, in order to obtain the privileges of voting, I make no order for the payment of costs. The rate is to be amended by inserting the net rateable value at 9*l*. instead of 12*l*., and a case granted for the opinion of the Court of Queen's Bench, if desired by the appellant.

Mr. HARVEY LEWIS, M.P., said, as this was a matter deeply affecting a large class of persons who ought to be on the list of voters, he would take immediate steps to bring the subject under the notice of Parliament.

## HOUSE OF LORDS.

Reported by JAMES PATTERSON, Esq., of the Middle Temple, Barrister-at-Law.

Tuesday, July 28, 1863.

### REG. V. SADDLERS' COMPANY.

*Corporation—Bye-law—Admission by fraud—Removal—Reasonableness of bye-law—Insolvency of member.*

A bye-law of a corporation, dated 1799, enacted that no person who has been a bankrupt or become otherwise insolvent shall be admitted a member, unless he shall have afterwards paid all his debts or established an honourable character for seven years subsequently. D. was formally elected a member of the corporation by resolution, but before it was communicated to him, he, in answer to a question put by the clerk, but without authority, said he was solvent, which was untrue in the sense of his being able to pay his creditors in full. D. was then admitted and acted as a member, but a month afterwards was removed without an opportunity of being heard.

Held (reversing the judgment of the Ex. Ch.), 1, that the word "insolvent" in the bye-law meant a public or notorious insolvency, such as stopping payment or calling creditors together and obtaining time, and therefore the bye-law was valid; 2, that D. was not removable by the corporation after being once admitted; 3, that if removable D. ought to have been heard previously to such removal; 4, that a peremptory mandamus ought to issue to the company to restore D. to the office.

This was a suggestion of error on a judgment of the Ex. Ch.

The object of the proceedings was to try the right of Kay Dinsdale to be an assistant of the Saddlers' Company, he having been in form elected by the Court of Wardens and Assistants of the said company, whilst he was in insolvent circumstances and unable to pay his creditors 20*s*. in the pound, and he having procured himself to be treated as such assistant by alleged false and fraudulent representations that he the said Kay Dinsdale was quite as solvent as any man of the said

court and able to pay his creditors 20s. in the pound, although, as the defts. contended, he was not qualified to be such assistant by reason of the following bye-law of the company, made on the 23rd April 1799:—

“Resolved that no person who has been a bankrupt or become otherwise insolvent shall hereafter be admitted a member of the court of assistants of this company unless it be proved to the satisfaction of the court that such person after his bankruptcy or insolvency has paid and satisfied his creditors the whole of their debts, or shall have established a fair and honourable character for seven years subsequent to such his bankruptcy or insolvency to the satisfaction of the court or the majority of them.”

A writ of *mandamus* had issued calling on the Saddlers' Company to restore Mr. Dinsdale to the office of assistant of the said company. The writ, after stating the charter of Car. 2, and that a vacancy had occurred in 1849 in the number of assistants when Mr. Dinsdale was on 20th Oct. 1849 duly elected, nominated and constituted an assistant, but that on 20th Dec. 1849 he was without reasonable cause removed, called on the company to restore him.

The return was made and pleaded to and issue joined, after which, on trial, a special verdict was returned as follows:—After stating that Mr. Dinsdale was duly elected by resolution on 25th July 1849, but the resolution was not communicated to him till after certain representations had been made as to his insolvency when he was summoned to attend a court as assistant on 16th Oct. 1849; that at the time of the passing of the said resolution he was in insolvent circumstances; that he attended two courts and acted as an assistant, but that he was removed from the said office on 20th Dec. 1849; that the bye-law was then in full force, and a person holding the office of assistant might be elected to the office of renter warden, which was an office of trust, and the person holding it might receive large sums of money belonging to the company;

“That the said Kay Dinsdale did, after the making and passing of the resolution of the 23rd April 1849, but before the same was communicated to him, or he was so summoned and admitted to the said office on the 24th Sept. 1849, in answer to an inquiry which the said Giles Clarke, then being the clerk and agent in that behalf of the said wardens or keepers and assistants, made of him as to his said Kay Dinsdale's solvency, represent and state to the said Giles Clarke that he the said Kay Dinsdale then was quite as solvent as any man of the said court and able to pay his creditors 20s. in the pound; whereas in truth the said Kay Dinsdale then was, and he thence hitherto has been insolvent, and he was then largely indebted to divers persons in large sums of money and was wholly unable to pay his creditors 20s. in the pound, as the said Kay Dinsdale then well knew, and the said creditors never were paid their said debts, or any part thereof, except a small dividend of 2s. 8d. in the pound, which, and no more, after great delay, was paid to the said creditors under the bankruptcy of the said Kay Dinsdale in the said return referred to, and by means of the said false and fraudulent representations the said Kay Dinsdale induced and procured the said then wardens or keepers and assistants to admit him to the said office as aforesaid; that the said Giles Clarke, as such clerk and agent, after the making of the said representations, and in consequence thereof, caused the said Kay Dinsdale to be summoned as aforesaid to attend the said meetings, which it is alleged the said Kay Dinsdale attended as aforesaid, and caused the fact of the said election to be communicated to him the said Kay Dinsdale. That the said representations were not communicated by the said Giles Clarke to any court of the wardens and assistants until the 20th Oct. 1849, which was the first court of the wardens and assistants held after the said representations were so

made. That afterwards, on the 30th Nov. 1849, the said Kay Dinsdale did become and was declared bankrupt as in the said return alleged. That he was entitled to be summoned to the meeting of the 20th Dec. 1849, and to attend the same. That he had no notice of the said meeting or assembly until after the same had been held. That he did not attend the same, and had no opportunity of attending the same. But whether or not the said objections were valid and ought to prevent the jurors from finding as they found, they prayed the advice of the court.”

The Court of Q. B. gave judgment for the prosecutor. This judgment was reversed by the Court of Ex. Ch., whereupon the present suggestion of error was made, and the learned judges attended the argument.

*Gibbons, Laurie and Sewell*, for the plt. in error, contended that the plt. was duly elected; that the misrepresentation alleged was not a fraud, but whether it was or not, it did not avoid the election or admission; that the bye-law was not valid, because it limited the number of those who by the charter were eligible to election. Even if valid, the bye-law did not disqualify the plt., for he was not insolvent within the meaning of the bye-law. Besides, he was not summoned to show cause against the said removal.

*R. v. Lyme Regis*, 1 Doug. 85;

*Clarke v. Dickson*, 1 E. B. & E. 148;

*Ferret v. Hill*, 15 C. B. 85;

*Phillipson v. Earl of Egremont*, 6 Q. B. 587;

*Earl of Brandon v. Beecher*, 3 C. & F. 479;

*Fermor's case*, 3 Rep. 77 a;

*Doe v. Rees*, 4 Bing. N. C. 384;

*Biddlecombe v. Bond*, 4 A. & E. 332;

*Bayley v. Schofield*, 1 M. & S. 338;

*Shaw v. Lucas*, 3 D. & R. 218;

*Poulterers' Company v. Phillips*, 6 Bing. N. C. 314;

*City of London v. Vanacre*, 1 Ld. Raym. 497;

*R. v. Griffiths*, 2 B. & Ald. 731;

*R. v. Mayor of London*, 2 T. R. 177.

*Knowles, Q. C.* and *R. Clarke*, for the deft. in error, contended that the bye-law was good and reasonable, that the plt. was properly removed, that he had procured his election by fraud, and that even if restored he would be instantly removed again.

At the conclusion of the argument the following questions were put by the House to the learned judges:—

1. Is the bye-law good in law?

2. Regard being had to the facts stated in the verdict, was the plt. removable under the bye-law, assuming it to be good in law?

3. Ought the plt. to have been heard previously to removal?

4. Having regard to the facts stated in the verdict, ought the court below to have granted a peremptory *mandamus*?

After time taken to consider, the Judges answered as follows:—

1. Blackburn, Crompton and Williams, JJ., and Cockburn, C. J. held the bye-law was bad; while Willes, J., Martin, B. and Pollock, C. B. held it good.

2. The first-named judges (except Williams, J.) held that the plt. was not removable; while the other four judges held that he was removable.

3. Blackburn, Crompton, and Williams, JJ. and Cockburn, C. J. held that the plt. ought to have been heard before his removal, while the other four judges held he was not entitled to be heard.

4. Blackburn, Crompton and Williams, JJ. and Cockburn, C. J. held that a peremptory *mandamus* ought to have been granted; while the other judges held that it ought not.

The following are the opinions of Crompton, J. and Cockburn, C. J.

H. OF L.]

REG. v. SADDLERS' COMPANY.

[H. OF L.]

CROMPTON, J.—My Lords, in answer to your Lordships' first question, I say that, in my opinion, the bye-law is not good. I think that the making of bye-laws, by which the governing part of a corporation restricts or puts a qualification upon the persons who are to be elected beyond what the charter has pointed out, ought to be looked at narrowly. The present bye-law disqualifies, subject to certain exceptions, every one who has ever been unable, at any time, to pay his creditors 20s. in the pound; and although he has got his certificate in the most honourable way, or his creditors have given him the most complete and creditable discharge, he is still within the operation of the bye-law, unless he is proved to have paid his creditors subsequently in full. The disqualification does not depend on any act of bankruptcy, or on any fiat, petition, or definite legal proceeding in bankruptcy or insolvency, but might have to be ascertained from a laborious and painful inquiry into the state of the candidate's circumstances at any particular anterior time, and after the lapse of many years. The bye-law must be taken to extend to the not being able to pay the creditors in full at any time, or else its operation would not extend to the present case, in which the prosecutor has not committed any act of bankruptcy or insolvency previous to his admission. The exception of having established a fair and honourable character for seven years subsequently to the insolvency, to the satisfaction of the court or a majority of them, seems to me very loose, uncertain and unsatisfactory, and to give far too wide a discretion to the court of electors, or the subsequent court. A bye-law of this nature ought to be certain, and it seems to me extremely loose and uncertain to leave it to the judgment of the elective body to say whether there has been an honourable character satisfactory to them. If the insolvency is intended as a disqualification against being elected, the bye-law would seem very objectionable, as it would appear to imply that the electors before they record their votes are to come to a decision whether there has been a subsequent honourable character to their satisfaction. If the true construction of the bye-law were that the disqualification is a disqualification against being elected, great difficulties might arise as to whether a notice of the disqualification to the voters before voting might not cause their votes to be thrown away, and the adverse candidates to be elected. I do not, however, think that this is the real meaning of the bye-law, as it would seem impossible to be acted upon, especially in an election for several vacancies, where there are several candidates. I think that the bye-law has the meaning put upon it in the Court of Q. B., and that its true construction is not that the body of electors at the time of election are to see to the qualification, but that it is to be a disqualification against the admission as distinguished from the election. The charter obviously points to a distinct period for admission and election; it requires some things to be done before election, and some after election, and before admission; and it might happen, as it seems to have done in the present case, that the party might not know of his election, and might not have had an opportunity of being prepared with proof of his payment of his debts, or his good character to satisfy the electors. The charter, as before pointed out, requires several things to be done before admission and after election, and in corporation law the distinction was perfectly well known, and I do not see why the word "admission" in the bye-law should not be read in its plain ordinary sense, especially where it is several times used in the same document, as contradistinguished from election. On this, which is, I think, the true construction of the bye-law, it seems to me very objectionable that a subsequent court, perhaps not consisting of the same members, should have the

power of confirming or vacating the prior election on an investigation, for instance, whether the party has established what the court should think an honourable character. This is very loose and uncertain, and practically would leave far too much in the discretion of the body. A candidate might succeed at the election by one vote, and it might be voted afterwards at the subsequent court by a majority of one that at some distant period the party had not been able to pay the whole of his creditors 20s. in the pound, and that he did not appear to the satisfaction of the court to have established an honourable character for seven years subsequently. It is obvious what a different view might be taken by different members of the court, as to "an honourable character," and I cannot but think that so loose a provision might lead to unfairness and mischief. There is another point of view in which also the provision seems to me very objectionable; such a disqualification against admission as is pointed out in the charter, *exempli gratia*, for not taking the oath of supremacy, &c. depends on a fact which is capable of proof, when the question of title comes before the proper legal tribunal, as upon a *mandamus* the party so refused admission might allege and prove, that he had taken the oath; but this could not be so on such a discretion as is vested in the body by this bye-law. They are to have the decision whether the party has established such "honourable character," for it is to their satisfaction that the bye-laws refers; and it seems to me very objectionable that the bye-law should make a disqualification, and afterwards give a discretion of dispensing with it if the court of assistants are satisfied with the honourable character. I speak of this power as discretionary, because I think that if there were a return to a *mandamus* to admit, that the party had not been at a certain time able to pay 20s. in the pound, and the prosecutor were to plead to this return that he had established a fair and honourable character to the satisfaction of the subsequent court, he would be told that the question was for their decision. It would hardly be a matter for a traverse and for the decision of a jury whether he had done so; and if it were, it would only show more clearly the loose and dangerous nature of the bye-law. The consideration of the mode in which this power and discretion is to be exercised seems to me to show still more clearly that the decision is to take place after the election; as the question as to whether the discretion is to be exercised according to the facts in any particular case can only arise after the electors have selected the particular persons. It would seem impracticable, if not impossible, to exercise this power at the time of the election; and if it could be done, it would, I should think, be very objectionable; and I think the real meaning is, that the subsequent court is to have the discretion and power of dispensing with the disqualification; but whichever be the construction in this respect, I think the bye-law bad. Secondly, I am of opinion that the party being actually in the office, the court of assistants had no power to try his title, and that the proper course of removing him would be by *quo warranto*. Where the office was full, the Court of Q. B. could not, in case of an alleged disqualification, proceed except by *quo warranto*; and they could not, according to a well-established rule of law, grant a *mandamus* to proceed to a fresh election; and it would seem strange in such a case to allow the corporate body so to interfere. I agree with the observations of my brother Wightman in the Court of Q. B., in this respect. I do not look at this question as depending merely on the formal act of admission, but on the fact of the office being full of the party. The question of title in such case is, I think, always for the court of law, and not for the corporation, who cannot try the original title when the office is full of the party: (*Rex v. Lyme Regis*, 1 Doug. 85.) The



general rule of law being admitted, the answer offered, that the election or formal act of admission was obtained by fraud, and so was to be regarded as never having taken place, and therefore that the court of assistants might treat a party actually in the office as never having been in it, does not appear to me satisfactory. If the doctrine be pushed to its length, it would show that years after the party had been in the office he might at once be turned out by the corporation; and in cases where the enjoyment of the office for a certain length of time prevents the party from being removable by *quo warranto*, and so gives him a title, it might still be said that he never was elected or admitted, and never was in the office, because fraud renders all these things as if they never were. In any case where an election is alleged to have been obtained by bribery or by personation of voters, such an argument would equally prevail; and, in effect, title would constantly be tried, not by the established courts, but by the corporation authorities; and the greatest abuses might take place in corporations if, shortly before the elections, the majority might disqualify a large portion of the electors at once by saying, "You only got to be members of the corporation by trick or falsehood or bribery, and your acting as corporators by means of such fraud is null; you have never therefore been members of the corporation, and so we strike you off the rolls." In all cases of *quo warranto* the supposition is that there has been a wrongful assumption of the office as against the Crown; and I think it would be very dangerous to introduce any such qualification on the general rule as to the trial of such title, as that where the title is sought to be invalidated by fraud, the body themselves may try it. Understanding your Lordships' second question to mean whether the prosecutor was removable by the court of assistants? I answer your Lordships' question in the negative. And with reference to your Lordships' third question, I answer that I am still more strongly of opinion that the court of assistants could not legally remove the prosecutor without his having an opportunity of being heard. This, I think, was the part of the case which particularly struck the late Lord Chief Justice of the Court of Q. B. in the earlier proceedings in that court. For any sufficient corporate offence committed after the party is in office there is often a power of annulment in the corporation; and in such case it can hardly be disputed that the party must have an opportunity of being heard. Supposing this a case of annulment, the law is, I think, too clear to admit of a doubt; and if this be taken as a case in which the court of assistants might assume to themselves the jurisdiction of trying the title, I cannot see how, on any principle of justice, they can dispense with calling on the party and hearing what he had to say. The argument the other way would not only give the court of assistants the jurisdiction of the Court of Q. B., but would enable them to act as no court could act without giving the party an opportunity of being heard. I answer, therefore, the third question in the affirmative. As to your Lordships' fourth question, I think that the Court of Q. B. ought to have granted the peremptory *mandamus* as they did. Where a party has been turned out improperly, I think that he ought to be placed in the same situation as he was before the improper removal took place; and I think the Court of Q. B., on the removal not being supported by the facts stated on the record, were right in ordering him to be restored. How far any discretion in the Court of Q. B. in such case has been taken away by the statutes giving a writ of error in such cases, if any discretion previously existed as to awarding a peremptory *mandamus*, need not, I think, be discussed, as the state of the record in my opinion warranted the judgment, if it did not

necessitate it, according to what was thrown out by my brother Blackburn in the Court of Q. B., which may probably be the correct view of the case; and even if there were any discretion, and if the exercise of such discretion were ground of error, in my opinion the discretion was properly exercised; for I think it a much greater mischief that bodies of this nature should exercise the right of trying such title without hearing the party than that there should be the inconvenience pointed out in the Ex. Ch. that a party should be restored by *mandamus* where he might probably be subsequently ousted by *quo warranto*. I answer your Lordships' last question, therefore, in the affirmative.

COCKBURN, C. J.—My Lords, I am of opinion that the first question put by your Lordships in this case should be answered in the negative. I must begin by observing that I have always had considerable difficulty in understanding how, when the constitution of a corporation is fixed by charter, a power to make bye-laws "for the good rule and government" of the body could ever properly be held to carry with it a power to limit the number either of the electors by whom the members of any constituent part of the corporation are to be chosen, or the number of those from whom the election is to be made, by superinducing any new qualification or ground of disqualification as to which the charter is silent. I should be disposed to consider a power to make bye-laws "for the good rule and government" of the body as relating rather to matters of an executive character, connected with the government, discipline and management of the corporation, and the conduct of its affairs, than to alterations in the constitution established by the charter of the Sovereign, or in the mode of filling up the component parts of the corporate body thereby prescribed. Without, however, dwelling on this debatable ground, or further troubling your Lordships on this subject, I will content myself with saying that any bye-law, the effect of which is to modify the constitution given by the charter, should be looked at with jealousy, and upheld in a court of law only if it manifestly appears to be necessary and conducive to the well-being of the corporation; if, to use the words of this very charter, it shall be proved to be "good, useful, honest and necessary." Now, this bye-law, as it seems to me, is plainly unnecessary, and—worse than useless—is positively mischievous. It is unnecessary, because the body in the corporation in whom the power of making bye-laws is vested, is the very same body by which the election of an assistant is to be made; so that, if the principle upon which the bye-law is based be sound, they can give practical effect to it by rejecting any one labouring under the disqualification, whether the bye-law exist or not. So long as the bye-law remains unrepealed, it must be taken that the legislative body in the corporation are of opinion that its principle is good. If so, it is to be presumed that, in their character of electors, they would give effect to it. The bye-law is, therefore, plainly superfluous. Let us see whether it be useful and good. Now the grounds on which this bye-law has been said to be reasonable are, that the office of assistant is in itself one of trust and confidence; that it leads, if the ballot shall so determine, to the office of renter warden, an officer who is the treasurer of the corporation, and keeps its funds; that bankruptcy and insolvency in the great majority of instances arise from misconduct or imprudence; that the corporation is justified in taking measures for ensuring that its government, and especially the management of its pecuniary affairs, shall be in the hands of solvent and respectable persons. While the force of this reasoning may be admitted, it is, on the other hand, to be observed that the effect of such a rule must necessarily be in some instances to exclude persons upon whom

bankruptcy or insolvency may have come from circumstances involving no imputation either of misconduct or improvidence. The vicissitudes of fortune, the fluctuations of trade, the uncertainty of commercial speculation, the failure of others, causes which sometimes prove "enough to press a royal merchant down," may occasion bankruptcy or insolvency, without leaving the shadow of a reproach on the character of the individual. Why should a man thus circumstanced, on whom no suspicion or imputation rests, be excluded till he has established a fair and honourable character for seven years, when, to say nothing of the hardship and injustice done to him, his admission into the governing body might, during all that time, be highly advantageous to the corporation? The answer which has been given is, that laws should be adapted to cases of ordinary, and not of exceptional occurrence, and that, if general good result, individual hardship or partial inconvenience must be submitted to. I should feel all the force of this argument if this bye-law were necessary to secure the advantage which it is designed to effect. But, as I have already shown, for this purpose it is altogether unnecessary, and its practical working is, therefore, this: while unnecessary to exclude those whom it may be desirable to exclude, it only operates to exclude those whom it is acknowledged it would be desirable to admit. The law is, therefore, not only useless, but mischievous. But, my Lords, even if this bye-law could be taken to be good in law, I am of opinion that the prosecutor was not removable under it. When the bye-law in question speaks of bankruptcy or insolvency it must, I think, be taken to refer to something more than a mere inability to meet pecuniary liabilities or engagements. "Bankruptcy," in the meaning of the bye-law, must, I think, be taken to mean the legal status in which a man becomes placed when he has committed an act of bankruptcy, and is thereupon adjudicated a bankrupt; "insolvency" a man's position when he becomes subject to the laws relating to insolvents, and is brought within the jurisdiction of the insolvent laws; for, although at the time of the making of this bye-law the insolvent court of modern times had not been called into existence, yet there were statutes relating to insolvent debtors, and the term was one known to the law. How, unless some such positive standard is taken, can the period be fixed from which the seven years are to run, during which the good character required by the bye-law is to be maintained? The fact that this latter period is made to date from the bankruptcy or insolvency is strong to show that these terms are used in the sense I have ascribed to them, and not as importing a mere inability to meet pecuniary liabilities, the precise date of which it may be difficult to ascertain, which may exist to-day and be removed to-morrow. But, if this be so, Mr. Dinsdale was not ineligible at the time of his election; he was elected on the 23rd April; his election was confirmed at a meeting of the 25th July; he was admitted on the 16th Oct.; he was not declared bankrupt till the 30th Nov. It does not appear that he had even committed an act of bankruptcy prior to his election and admission. In my opinion, therefore, even supposing the bye-law to be good, he was not disqualified under it. And even if this were not so, I am still of opinion that it was not competent to the depts. to remove Mr. Dinsdale. He had been elected by the proper electors. His election had been duly confirmed; he had been admitted; he had been twice summoned to attend and discharge the duties of his office, and had done so, and had partaken of its emoluments. Under these circumstances, he was to all intents and purposes in the office; and, if removable at all, on the ground of having been ineligible under the bye-law, could only be removed by proceedings in the nature of *quo warranto* in the Court of

Q. B. But his removal is said to have been warranted on the ground of misconduct, in making a false answer to an inquiry by the officer of the corporation touching his solvency, prior to his admission. To this it appears to me that more than one answer may be given. In the first place, although the effect of the prosecutor's statement was his admission, it does not appear that the answer was made with any reference to admission to the office, or was intended as a fraud on the corporation. It is found expressly as a fact in the case that Dinsdale, at the time of making this statement, was not aware of his having been elected. The inquiry may have presented itself to his mind simply as an impertinent one. The answer may have been given with the design of protecting himself from the injurious consequences to his position as a trader, which the disclosure of his pecuniary circumstances might bring upon him. Secondly, the inquiry was one which neither the depts. nor their officer on their behalf had any right to make, and by the answer to which the prosecutor, therefore, ought not to be prejudiced. If the bye-law be, as I think it, bad, the inquiry was irrelevant and unwarranted. If the bye-law was good, the inquiry came too late: it should have preceded the election; for when an election has once been made by those to whom it appertains to make it, the admission to the office becomes a purely ministerial act. It would be an additional reason for holding this bye-law to be bad, as unreasonable, if upon an election made by competent authority, it superinduced a new qualification as the condition of admission. The depts. are, therefore, under the necessity of contending, that though the bye-law speaks of admission, the disqualification is carried back to the period of the election. If so, this question as to solvency, if it could be legitimately put at all, should have been put antecedently to the election. Once elected, Mr. Dinsdale might have declined to answer such an inquiry, and yet have been entitled to insist upon being admitted. But a short and conclusive answer to this alleged ground of removal is to be found in the affirmative answer which must necessarily be given to the question put thirdly by your Lordships. No proposition on the law relating to corporate offices can be more clear or indisputable than that a man liable to removal from an office for misconduct is entitled to be heard in his defence, and must have an opportunity of being so heard before he can be removed. It is unnecessary to trouble your Lordships with authority on a proposition which needs only be stated to command assent. The cases will be found collected in Wilcocks on Corporations, pars. 691 to 702. Being, on these grounds, of opinion that the removal of Mr. Dinsdale was unwarranted, and that he is entitled to a peremptory *mandamus* to restore him, I have no hesitation in answering your Lordships' fourth and last question in the affirmative.

*Cur. adv. vult.*

The LORD CHANCELLOR.—My Lords, the question in this case depends almost entirely on the validity of the bye-law, and again, the validity of the bye-law appears to me to depend on the meaning of these words, namely, "or become otherwise insolvent." With respect to the construction of these words, I think they must be held to mean notorious or avowed insolvency, such as would be the consequence of a public stoppage in business, or of a trader calling his creditors together and obtaining time or terms of indulgence, or of his entering into a deed of composition. These and other modes of avowed insolvency were common at the time of the passing of this bye-law, although no statute relating to insolvent debtors as contradistinguished from bankrupts was then in existence. This construction of the word "insolvent," as meaning avowed or notorious insolvency, is consistent with the provision for restoring the competency

of the trader if he has established a fair and honourable character for seven years subsequent to his bankruptcy or insolvency, where the word insolvency must mean a fact ascertained at some period of time from which the seven years may be computed. Thus fairly construed, I think the bye-law is good and reasonable, and that it does not contain any element of uncertainty. If this be the meaning of the bye-law, Mr. Dinsdale was not insolvent within such meaning at any time before the date of his election or admission, and was not, therefore, in my judgment, disqualified by the operation of the bye-law. It is unnecessary to consider the case of fraud alleged in the return, because I understand the return and finding of the jury to be intended to state that Kay Dinsdale, being ineligible within the true meaning of the bye-law, did by means of false and fraudulent representations of his solvency induce or procure the wardens or keeper and assistants to admit him to the office. But if it had been necessary I should have been of opinion that the answers given by Mr. Dinsdale on the 24th Sept. 1849 to the questions put to him by Mr. Clarke (who was not directed or authorised by the court to make any such inquiries) were not such false and fraudulent representations as the court of wardens and assistants could allege were made with the view of inducing or procuring them, and by which in fact they were induced and procured, to admit Mr. Dinsdale. He was elected in the month of April 1849, and his election was confirmed in the month of July 1849. He was admitted to the office on the 20th Oct. 1849, and the return states, that on the 20th Dec. 1849 the court of wardens and assistants did resolve and determine that Mr. Kay Dinsdale should be removed and discharged from being, and should no longer be, one of the assistants of the said art or mystery. Mr. Dinsdale was not summoned, nor was any opportunity afforded to him of being heard against this order of removal, which does not treat the original election as void on the ground of Mr. Dinsdale being ineligible. Under these circumstances I am of opinion, that even if my construction of the bye-law be not the right one, and if Mr. Dinsdale was disqualified by insolvency, yet that, as he was admitted to the office without fraud, he could not be legally removed from it without being heard in his defence. I am therefore of opinion that the judgment of the Court of Ex. Ch. ought to be reversed, and that of the Court of Q. B. affirmed, and that a peremptory *mandamus* should issue.

LORD CRANWORTH.—My Lords, in this case the learned judges whose assistance we had at the argument, are divided almost equally in opinion as to the judgment which your Lordships ought to pronounce. Three of them think judgment ought to be given for the plt. in error; four that the judgment below ought to be affirmed. I have given careful attention to their able and well-considered reasoning, and have arrived at the conclusion that the judgment of the Court of Q. B. was right, and so that judgment ought to be given for the plt. in error. On the question of the validity of the bye-law, I concur with the judgment of the Ex. Ch., and the four judges who think that judgment right. I think the bye-law is good. I think so, because I interpret the word "insolvency" to mean, not mere inability of the person to whom it refers to pay his debts in full, but inability proved by some outward act, such as stopping payment, or compounding with his creditors. That such is the meaning seems to me clear from the provision that the disqualifying effect of the insolvency may be removed by fair and honourable conduct continued for seven years after the insolvency. This necessarily points to some specific act from which the seven years may be counted, and this interpretation is strongly confirmed by the word "insolvency" being coupled with bankruptcy. Upon any other interpretation of the word, I should not think the bye-

law good. If the insolvency contemplated by the bye-law was mere inability to pay his creditors 20s. in the pound at any time within seven years next before the election, a door would be opened to inquiries which it might be impossible to answer, and which it would be impolitic to permit. On the question of the validity of the bye-law, therefore, I concur with the judgment of the Court of Ex. Ch.; but I do not think that the special verdict finds any such insolvency as is contemplated by the bye-law. It finds, indeed, that from the time of the passing of the resolution of the 23rd April 1849, electing the app. to be an assistant, up to the meeting of the 20th Oct. following when he was admitted and sworn in, he was in insolvent circumstances and unable to pay his creditors 20s. in the pound, and that he was indebted on judgments and otherwise in large sums of money to divers persons. This, however, does not show that he was insolvent within the meaning of the bye-law. It does, indeed, show that when on the 24th Sept. he represented to Mr. Clarke, the agent of the company, that he was as solvent as any man of the court, and able to pay his creditors 20s. in the pound, he was stating what was untrue and what he must have known to be untrue. But I cannot think that the mere statement of a falsehood, even though it has been made with the intention of thereby inducing, and has in fact induced, the company to elect him, can have the effect of making the election a nullity. If he had been bankrupt within seven years previously to his election, and had falsely represented to the company that he had never been bankrupt, that would have been a false representation that he was eligible when in truth he was ineligible, and I will assume that such a falsehood would have rendered his election a nullity. But a mere false representation not affecting his eligibility would not have that effect. If, for instance, being solvent, he had falsely represented himself as worth 10,000*l.*, when in truth he was worth only 100*l.*, this false representation might have led to his being elected, but it would not have made the election a nullity. And the representation that he was not insolvent, using that word in a sense different from that in which the word insolvency is used in the bye-law, is merely the statement of a falsehood not material to the question whether he was or was not eligible, and therefore, even if it would afford ground for setting aside the election, it did not, in my opinion, make it absolutely null and void *ab initio*. This view of the case makes it unnecessary for me to consider the other questions raised in the argument. It is impossible to contend that a person validly elected and admitted a member of the court could, behind his back and without notice, be removed from his office. And it seems necessarily to follow that judgment must be given for the plt. in error, and that a peremptory *mandamus* ought to issue. I ought to state that my noble and learned friend Lord Brougham, who is unable to be present here to-day, has authorised me to say that he concurs with us in our view of this case.

LORD WENSLLEYDALE.—My Lords, the first question in this case is, whether the bye-law upon which the case principally depends is reasonable and therefore valid or not. The company have a power by their charter to make bye-laws, which they shall think fit in their sound discretion, for the good rule and government of the wardens, or keeper, or treasurer and commonalty of the mystery of saddlers. Under that power I do not feel the difficulty which has presented itself to the minds of some of the judges, that the body could not limit the number of the persons to be elected by superinducing new qualifications as to which the charter is silent. To secure the good government of the company it might be proper to make fit provision that those who have the rule and management of

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the affairs of the company should be well qualified, and it is very reasonable that those who are to have the care and custody of the money of the company should be trustworthy and respectable. I think, therefore, that there is no objection to a bye-law requiring that those elected and admitted to be assistants, who may, and in the ordinary course will, become renter wardens, and as such have the custody of the money of the company, should not be persons who have been bankrupts, unless it be proved that after their bankruptcy they have paid their creditors in full, or established a fair and honourable character for seven years after their bankruptcy to the satisfaction of the court or a majority of them. In this respect I have no doubt as to the validity of the bye-law. Whether it is equally valid in the case of insolvency is the question, and that depends upon the meaning of that term in the place in which it occurs. If it means only secret insolvency—that is, if at any time, in case a person's liabilities and assets were reckoned up and compared together, in that comparison he was found to be incapable of paying all his creditors—I must think the bye-law is invalid. There would be great inconvenience from such an inquiry into private affairs. It is clear besides that the bye-law means such an insolvency as is manifested publicly; for from a secret insolvency the period of seven years cannot be well calculated, and therefore there is good reason for saying that a different kind of insolvency is intended. I cannot help thinking it is quite clear that the term “insolvent” means public insolvency—not necessarily taking the benefit or being made liable to the Insolvent Act; but being incapable to pay his debts in ordinary course, or, in other words, having stopped payment. In that sense I think the bye-law perfectly reasonable, and the seven years may be easily calculated from such an insolvency. Willes, J. has referred to several cases to show that such is the true meaning of the word. It may at least mean not paying as well as being incapable of paying. As in one sense of the word a bye-law is good, and in the other not, the rule is that it ought to be construed so as to make it valid, and not to defeat it, according to the principle laid down in the *Poulterers Company v. Phillips*, 6 Bing. N. C. 314. I think, therefore, that the bye-law is good in law on the supposition that public insolvency is meant by it. Was the plt. then removable under the bye-law (which I am satisfied is good) upon the facts stated in the return, and found by the special verdict? I think there is no substantial difference for this purpose between being admitted or elected and admitted. The bye-law in substance forbids him from being permitted to be a member of the court of assistants. If the office had been full he could not have been removed without a *quo warranto*. That is perfectly clear. But the ground upon which the defts. appear to have intended to proceed, is that the relator was elected and admitted by means of a fraud committed by himself upon the company; that the office was never full, but was voidable by reason of the fraud, and that fraud makes all the transactions voidable at the election of the party defrauded, as long as the parties remain in the same condition, though not when new interests are acquired; and that here there are no new interests so acquired, and that if there was a fraud and the transaction was avoided on that ground, a notice would be unnecessary to the fraudulent party to come and defend himself in order to make the avoidance operative, and I am clearly of opinion that it would. The fraud meant to be relied upon in the return is a false and fraudulent statement by the relator as to his solvency. He is alleged to have falsely and fraudulently stated, both before his election and his admittance, that he then was solvent and able to pay his creditors 20s. in the pound, whereas he was then insolvent and unable to do so. The allegation that

such statement was made before his election, is not attempted to be proved. There is nothing in the special verdict to support it. But that allegation may be rejected, and if the statement of a fraud as alleged before the admittance according to the true meaning of the allegation is made and proved, the return would be sufficient. In order, however, to make this a valid objection to the admittance after election, the return should state an insolvency within the true meaning of the bye-law. If a false and fraudulent statement, perhaps on any subject, had been made, which had caused the election to take place, probably the election might have been avoided by that fraud. But a fraudulent statement after election, in order to avoid the admittance made on that election, on the ground of insolvency, must be a statement of such insolvency as to create a disqualification under that bye-law. That insolvency must be not a private and secret insolvency, not a mere incapability on the full statement of his affairs to pay, but a public one, a stoppage of payment in the ordinary course, or a similar act. I have had a good deal of doubt on the point. After much consideration I have come to the conclusion that the return does not state that there ever was an insolvency of that character. I think it probable that the framer of it had no notion that a public insolvency was at all necessary in order to bring the case within the prohibition of the bye-law. The allegation is that the relator falsely and fraudulently stated to the wardens and keepers that he then was solvent and able to pay his creditors 20s. in the pound, whereas he then was insolvent and unable to pay his creditors 20s. in the pound, and that they never have been paid. That he was solvent at the time of making the statement does not, in the ordinary use of language, appear to mean that he had not then ceased to pay in the ordinary course, or stopped payment, or become insolvent, within the meaning of the bye-law; but merely that he was then capable of paying in full, and the proof of that representation which is stated in the special verdict confirms that view of the meaning of the allegation in the return, for it is said that it was made on the 24th Sept. 1849, in answer to an inquiry which was made by Clarke, the agent of the court, as to the relator's solvency, and was a statement that he then was as solvent as any man of the court, and able to pay his creditors 20s. in the pound; whereas he then was and has hitherto been insolvent. He was not asked whether he had ever become insolvent or stopped payment. On the ground that the return does not allege a case of public insolvency and a fraudulent statement on that subject, I think it is bad, and therefore that the judgment of the Court of Ex. Ch. ought to be reversed, and a *mandamus* ought to go. It is unnecessary to consider whether the special verdict finds sufficiently that such statement was made to the wardens, keepers and assistants, as it is alleged in the return as being made only to Clarke, or that they removed the relator for that cause. It is sufficient for the decision of the case that the return is bad.

LORD CHELMSFORD.—My Lords, the question in this case turns upon the validity of the bye-law; for if that is invalid, all the proceedings founded upon it must necessarily fail. This question entirely depends upon the meaning which is given to the words “or become otherwise insolvent.” If they mean that no person shall be a member of the court of assistants who at any previous time, if called upon suddenly by his creditors, had been unable to pay them 20s. in the pound, a state of circumstances scarcely capable of being reduced to precision, always fluctuating and uncertain, and not necessarily determining the solvency of a tradesman according to the notions of the commercial world, then the bye-law would be unreasonable

and void. This would of course not be the case if the words are to be understood as importing insolvency in the strictest acceptation of the term, either by taking the benefit of the Insolvent Act, or by compounding with creditors; but if this is the proper interpretation of the bye-law, it would not have been applicable to Mr. Dinsdale at the time of his admission. But I think that a reasonable construction may be adopted which will both establish its validity, and bring Mr. Dinsdale's case within it. The words are not "has been a bankrupt or insolvent," but "has been a bankrupt, or become otherwise insolvent," which appear to me to point with sufficient precision to a state of circumstances which in a popular sense implies an insolvent condition, as where a person, to use a familiar expression, is unable to pay his way or to discharge his debts in regular course according to the habits of business of solvent tradesmen. This is an overt act of insolvency which is capable of distinct and definite proof as occurring at any particular time. The bye-law, therefore, is not objectionable on account of uncertainty, and this construction of it gives a precise period from which the inquiry by the court of assistants may commence, whether the person seeking admission to the court has paid and satisfied his creditors, or has established a fair and honourable character for seven years subsequent to his bankruptcy or insolvency. This provision, intended to mitigate the rigour of the bye-law and to allow a failing man, even where he has not paid his debts in full, the benefit of the favourable consideration of the court of assistants after a period of purgation, is thus cleared of all difficulty, and the inquiry has a certain and definite range and object. The bye-law, therefore, appears to me to be valid, and if the fact of such insolvency as it contemplated had been established against Mr. Dinsdale at the time of his election, he would not have been eligible to the court of assistants. But, assuming him to have been ineligible, was it in the power of the court of assistants, by their resolution of the 20th Dec. 1849, after his election and admittance, to remove him from his office? I think it was not. I do not understand the word "admitted" to be used in the bye-law to signify admission as contradistinguished from election, but as a general and comprehensive word, equivalent to "become or be" a member of the court. Now, suppose Mr. Dinsdale to have been in insolvent circumstances within the meaning of the bye-law, but to have concealed the fact, and to have been admitted in ignorance of it, it can hardly be contended that upon a subsequent discovery of the state of his affairs he could have been removed. The case against him is put upon the ground of fraud. It is alleged in the return, and found by the jury, that by means of the said false and fraudulent representations of his solvency, the said Kay Dinsdale induced and procured the wardens, or keeper and assistants, to admit him to the office. Now, the false and fraudulent representations referred to are those which are found to have been made to Mr. Clarke, clerk of the company, on the 24th Sept. 1849, long after the election of Mr. Dinsdale, which was on the 23rd April 1849, and confirmed on the 25th July 1849, and before it was communicated to him, or he was summoned or admitted to the office. It is not even positively and directly alleged that Clarke communicated Dinsdale's representation of his solvency to the wardens and assistants of the company before his admission. But the special verdict states argumentatively that the said representations were not communicated to any court of the then wardens and assistants until the 20th Oct. 1849, which was the first court of the said wardens and assistants held after the said representations were so made as aforesaid. But suppose it to be sufficiently averred that Clarke informed the court

of wardens and assistants of the representations of Dinsdale before he was admitted on the 20th Oct. 1849, how would this justify the finding of the jury, that Dinsdale by his false and fraudulent representations induced and procured the wardens and keepers and assistants to admit him to the office? The representations to Clarke might be false, but they could not be called fraudulent, unless a misrepresentation of his circumstances by a tradesman, in answer to unauthorised inquiries, deserves that designation, or unless Dinsdale made the statement to Clarke in order that it might be communicated to the court of wardens and assistants, which, as the fraud charged, is one upon which the court ought not to have been left to conjecture, however probable, but should have been distinctly alleged. The mere communication of the fact therefore by Clarke to the court, though he is clerk to the company, goes no further to the establishment of a fraud upon the court by Dinsdale than if a stranger had repeated what he had heard from Dinsdale in the course of a casual conversation. The wardens and assistants might have been induced by the representations communicated to them to admit Dinsdale to the office; but it cannot with propriety be said that he induced and procured them by his representations so to admit him. But let it be assumed that Dinsdale made the communication to Clarke in order that it might be communicated to the wardens and assistants with the view of deceiving them, and obtaining his admission to the office of assistant, and that his election was therefore void *ab initio*. What course ought the court of wardens and assistants to have pursued? There can be no doubt that they should have treated the election of Dinsdale as a nullity, and have refused to recognise him for a single instant as an assistant, and have proceeded at once to a fresh election. Instead of adopting this course, they treat him as a person actually elected and admitted, and by their return state that, on the 20th Dec. 1849, at a meeting of the wardens, or keepers and assistants, they did resolve and determine that the said Kay Dinsdale should be removed and discharged from being, and should no longer be, one of the assistants of the said art or mystery—words which necessarily import that he had been admitted, and that he was actually one of the assistants at the time of the resolution. But, even assuming that the court of assistants were entitled to annul the election and admission on account of Dinsdale's insolvency, yet, according to the allegation in the return, they did not proceed at all upon this ground, but upon his bankruptcy afterwards. They might have treated the bankruptcy, and the insignificant dividend which he paid upon it so soon after his admission, as proof of his insolvent circumstances at the time; but in itself it was no ground of removal under the bye-law. It appears to me to be clear, from the language of the return, that the bankruptcy was the real cause of Dinsdale's removal. It states that, after his election and admittance, he was adjudged a bankrupt; that assignees of his estate and effects were appointed, and the said adjudication and bankruptcy have thence hitherto remained in full force and effect, and the said wardens or keepers and assistants did thereupon, and whilst the said Kay Dinsdale was such bankrupt aforesaid, and wholly insolvent, resolve and determine that he should be removed and discharged from being, and should no longer be, one of the assistants of the said art or mystery. I cannot understand this in any other way than that, upon his becoming bankrupt, the court resolved that Dinsdale should be removed from being an assistant. Now it is unnecessary to say that under the bye-law the court had no power to remove for bankruptcy or insolvency subsequent to admission. And if they removed him for this cause, which was clearly illegal, I do not think they could set up the previous

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insolvency as a justification, on the ground of its rendering the election altogether void; or, if they could, they should have distinctly averred it for cause in their return, in order that it might be traversed and tried. As I am so clearly of opinion that the removal of Dinale cannot be justified, it seems unnecessary to consider the other questions; but I cannot forbear one or two remarks upon the arguments as to the supposed right to remove without previous summons and hearing. If Dinale's election was void *ab initio* on the ground of fraud, no doubt his case might have been summarily dealt with, and his admission cancelled without a hearing, because he would never have been a member of the court, and would have had no *locus standi* to be heard. But if he were actually in office as the return admits, and was to be removed from it for cause, it seems to be an invariable rule of justice that he should not be condemned unheard, and the court had no right to assume that he would have had no cause to show against his removal. I think that in this respect the proceedings of the court of assistants are open to objection. I agree, therefore, with the Court of Q. B. that a peremptory *mandamus* ought to issue in this case. I admit the good sense of the remark in the case of *Re v. Griffith*, that it is idle to grant a *mandamus* to restore where the party could be removed again immediately. But I do not see how this could be the case with Mr. Dinale under the bye-law either upon his subsequent bankruptcy or insolvency, or on account of his insolvency if existing at the time of admission, there being no proof of any fraud designed or practised by him on the court of assistants, the only ground upon which he could have been deprived of his office after a regular election and formal admission. I agree with my noble and learned friends that the judgment of the Ex. Ch. ought to be reversed and that of the Q. B. affirmed, and that a peremptory *mandamus* ought to issue.

*Judgment reversed.*

*Pt. in error's attorneys, Keighley and Bull.*

*Def. in error's attorney, G. Clarke.*

### Ireland. (a)

#### COURT OF QUEEN'S BENCH.

Reported by WILLIAM WOODLOCK, Esq., Barrister-at-Law.

Tuesday, June 3, 1862.

REG. v. THE TOWN COUNCIL OF DUBLIN.

*Certiorari—3 & 4 Vict. c. 108—Right of a corporation to apply borough funds to oppose a bill which would affect their property.*

*Application for certiorari against Corporation of Dublin, who had applied borough funds to oppose a bill before committee of the Lords. It was shown that the provisions of the Bill would have the effect of reducing the income of the corporation:*

*Held, that the certiorari should not issue, as the corporation were justified in opposing the bill, and applying the borough funds for that purpose.*

This was a motion to make absolute a conditional order for a *certiorari*, directed to the town council and town clerk of the borough of Dublin, directing them to return into this court certain orders made by said council, whereby certain sums were ordered to be paid out of the funds of said borough for the purpose of defraying the expense of opposing a certain bill then being promoted in Parliament, said bill being for the purpose of providing and constructing a new cattle market, market-places, slaughter-houses, and all necessary approaches and conveniences in the city of Dublin, and all orders made by said council for

any payment out of said fund for any purpose touching said bill, and for certain resolutions, reports of committee, &c., having reference thereto, in order that same, or such of them as are illegal, may be quashed, upon the ground that same are illegal and void, and affect and attempt a disposition and application of said borough fund not authorised or warranted by law. It appeared from the affidavits of the prosecutors, on which the conditional order had been obtained, that the bill was promoted in consequence of the insufficiency of the existing cattle market accommodation, the increasing requirements and the frequent complaints made on the subject; that the site proposed for the new cattle market was chosen by G. W. H., a civil engineer, at the request of influential persons, and for the public benefit alone. It was also alleged that the provisions of said bill did not injuriously affect the Smithfield market, or the interests of the corporation of Dublin, or of any persons therein, or in the property adjoining, nor the privileges of the lord mayor or corporation with reference thereto. That the present market at Smithfield was monopolised unjustly and illegally by salemasters, and was not an open market as it ought to be; that as a cattle market it is not under the control of the corporation, nor do they derive any revenue from it, but that they do receive tolls for hay and straw sold therein, and that the bill did not propose a new market for these commodities. It further appeared that said bill had been twice read, and was then referred to a committee of the House of Commons; that the proposed bill was referred to a municipal committee by the town council of Dublin, who recommended a petition against it; and said committee were authorised to draw to the extent of 500*l.* on said borough fund for the furtherance of said petition, which was laid before the select committee of the House of Commons, who, nevertheless, declared the preamble proved; that subsequent to the proving of said bill a special meeting of said corporation was held for the purpose of authorising the application of the borough funds to the purpose of opposing said bill; and though notice of the illegality of such application of said fund was served on them, they passed a resolution authorising the city treasurer to pay a further sum of 500*l.* for that purpose; that said borough fund consists of the moneys specified in 3 & 4 Vict. c. 108, sect. 126, whereof provides that said fund is only to be applied to the purposes specified in the Act, said purposes being set out in the 131st section; and that the orders complained of are unauthorised by said 3 & 4 Vict. or by any other statute. The town clerk being absent made no affidavit; but that of the solicitor to the corporation contained the facts relied upon as cause. They were, that the city estates called "ancient revenue," (including lands and tenements in the neighbourhood of Smithfield) were, in 1809, conveyed by the corporation to trustees for certain trusts, the first being "to take the rents and profits thereof upon trust, to pay thereout all costs which may at any time be necessarily incurred for the purpose of recovering and protecting the said estates or any of them, and all other charges connected with the due execution of said trusts," &c.; and that the rents of these estates are portion of the borough fund under the 3 & 4 Vict. c. 108. That the preamble of the bill and the 134th section provided for the erection of a new market, and that the market company shall be empowered to levy tolls and sell shires thereat, the corporation having incurred considerable expense in fitting up a "green hide crane," and keeping it in repair, though it was a free and open market. Under certain circumstances the Recorder of Dublin was to have the power of making rules and regulations for the management of the new market instead of the lord mayor, who at present had that privilege. Certain houses

(a) From the *Irish Jurist*, by permission.

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and premises in the neighbourhood of Smithfield, the leases of which would fall in in 1863 and 1881, would produce then an increased rental to the corporation as a portion of the "antient revenue" of about 5000*l.* per annum in case the proposed bill was not passed; that the bill came before the select committee on the 18th March; the evidence given against it on behalf of the corporation was produced, the promoters having concluded theirs, and the corporation now relied on an opposition before the Lords. That the majority of the corporation believed the proposed bill to be detrimental to the interests of the ratepayers, and of the property held by the corporation in trust for the citizens, subversive of their own statutable rights; and that a public nuisance would be created by the passage of cattle through the city if it should pass. And further, that G. W. H. was engineer to the Great Southern and Western Railway Company, whose traffic would be much increased by the establishment of the proposed market; that the ratelors were unconnected with the cattle trade, and that the present market was sufficiently commodious; or if any alteration were needed in it, that the corporation would carry them out according to plans already prepared by their engineer for that purpose.

*Armstrong*, Serjt. (with him *Malley* and *O'Driscoll*), moved to make absolute the order.—By the 131st section of the 3 & 4 Vict. c. 108, any surplus funds that may remain in the hands of the corporation after defraying all necessary expenses, are to be applied to the improvement of the city. This enactment is explicit and peremptory; and it is no matter with reference thereto whether the revenue of the corporation is likely to be lessened, or any inconvenience occasioned to others by reason of the passing of the bill. The real and only question before the court is can the corporation travel out of the words of the Act? Counsel relied on

*Rothwell v. The Borough of Dublin*, 12 Ir. L. Rep. 206.

*Lawson*, Q. C., *Solicitor-General* and *C. Barry*, Q. C. contra.—The corporation in this case are only opposing a bill which, if it pass, will reduce their revenues considerably: and in so doing they are only protecting their property. They are acting just as they might in case they proceeded by ejectment against anyone who held possession illegally of their property, and they are obliged to preserve the property entrusted to them:

*Reg. v. The Commissioners of Sewers for Norfolk*, 15 Q. B. 549;

*The Attorney-General v. Eastlake*, 11 Hare, 205;

*The Attorney-General v. The Mayor of Norwich*, 2 Myl. and Craig;

*The Attorney-General v. Andrews*, 2 M'N. & G. 225.

LEFROY, C. J.—We are all of opinion that we should not make absolute the conditional order. The corporation have voted money to oppose a bill which was being promoted in Parliament. It appears they, or a majority of them, believe it to be detrimental to their interests that it should become law, and we must be satisfied that the orders they have made with reference to it are invalid before we can issue the *certiorari*. There was no deceit in these orders, and there was nothing on the face of them to render them invalid as orders to oppose a bill brought into Parliament. The gist of the bill was to obtain a new cattle market, and a new crane for the sale and weighing of hides; with respect to the market, they were, by the course they took, only exercising their common law right. It was their duty to oppose the bill, as it was attended with prejudice to the interests of the citizens of Dublin, inasmuch as the property of the corporation itself would be seriously injured; and is

it to be said that, under these circumstances, they were to be precluded from appearing before Parliament to oppose the bill? What could be more fair and just than that they should appear before the House of Lords? The dread of injury to their property appears to me a fair ground for their raising a sum of money to protect it. This is not a job of the solicitor; there is nothing suspicious on the face of it. With respect to the crane, the bill goes to the length of abolishing it; the corporation derived a revenue under it, and they would have been deprived of this as well as of a considerable part of their property. If the reversion in expectancy which the corporation were entitled to were not to fall in for a great number of years, the opposition to the bill prejudicing such reversion might be considered a speculation; but that is not the case here. Some of the leases will fall in next year, and there is a sufficient and substantial ground for justifying the corporation in taking measures to resist this bill in passing through Parliament. On the whole there appears, in my opinion, sufficient reason for refusing to make absolute the conditional order.

O'BRIEN, J.—I am also clearly of opinion that the order should be refused. The 3 & 4 Vict., under the authority of which the corporation disposed of the rents and profits of their property, provides that the parties to whom the property of the corporation are entrusted as trustees, shall refund themselves all expenses they incur in protecting such property; and I think we should be slow in putting a construction on the Act which has not yet been put on it. The decision in the case quoted does not affect this case. Where it is not a speculative opposition, but that a serious injury is apprehended from a bill passing through Parliament, the opposition given to it by the corporation is a legitimate exercise of their powers. It is sufficient, for this purpose, to show that it was the interest of the people of Dublin that they should resist the bill. The question is with respect to the protection of the Smithfield property, and is not a speculative one; not that the property is to become theirs in 1881, but the result of the opposition will affect their property next year. If this bill passed, the Recorder might take the place of the Lord Mayor, who now makes rules and regulations for the carrying on of all the markets in Dublin. Is it not consistent with the provisions of the Act of Parliament that they should protect the property left to them?

HAYES, J.—The decision of this court is not final; but the Act gives us the authority to decide the question here at issue; and all that we have to do is, to see whether in administering the rights bestowed on the corporation, this may be a proper application of the funds placed at their disposal. Many reasons have been given why it should be considered so, but I hold by their right to protect their property. Where a public body gets property for public purposes, they have a right to protect and defend that property; and if it were shown that that property was likely to be injured by any measure this would be sufficient indication to them that they should, by opposing it, protect and defend that property. Some of the corporation property will fall out of lease next year, and more of it in nineteen years; and, on the principle of universal benevolence, I hold that it should be preserved. If this court does not give satisfaction to the ratelors, they can go elsewhere.

FITZGERALD, J.—We are satisfied that the intended bill was likely to injure the property of the corporation, and that they opposed it in the legitimate exercise of their privileges.



[IRELAND.]

GRAHAM V. THE MAGISTRATES OF BALLYCASTLE.

[IRELAND.]

Jan. 24 and 25, 1863.

REG., AT THE PROSECUTION OF DUNCAN GRAHAM V. THE MAGISTRATES OF BALLYCASTLE, IN THE COUNTY OF ANTRIM.

*Certiorari*—*Fishery Act*, 5 & 6 Vict. c. 106; 11 & 12 Vict. c. 92; 13 & 14 Vict. c. 88—*Jurisdiction of magistrates when a claim of title is put in by deft.*

Duncan Graham had been summoned for trespass upon a several fishery. The *plt.* gave in evidence the record of the court showing former convictions for similar offences, and certain patents whereby a several fishery in the neighbourhood was granted to the party through whom he claimed, but whether it was the several fishery in question did not thereby sufficiently appear. The *defts.* put in evidence of long user, and claimed a right to fish therein, and offered security for costs in case *plt.* would institute a civil action:

*Held*, that this was such a *bonâ fide* claim of title as ousted the jurisdiction of the magistrates.

In Hilary Term a conditional order for a *certiorari*, directed to the justices in and for the county of Antrim, had been obtained, for the purpose of having removed into this court all and singular the convictions, together with all things touching the same, for fishing in a several fishery in the bay of Ballycastle, in the county of Antrim, whereof, at a petty sessions in said county, on the 4th Nov. 1861, Duncan Graham and seven others were, on the complaint of one George Morton, convicted, in order that such convictions may be quashed, on the grounds that such convictions are irregular, "illegal, and void," and that same are illegal and void on the ground that no such several fishery as is, by the said conviction supposed, was proved, or in fact existed; that a right exists in the public to fish in the *locus in quo*, and was insisted on at the investigation of the complaint aforesaid; that the jurisdiction of the justices to hear such complaint or make such conviction was ousted by reason of the accused parties insisting on a *bonâ fide* right to do the acts complained of; that they insisted on that right at the investigation of this complaint aforesaid, and that the justices exceeded their jurisdiction therein. The summons on which the case was tried before the magistrates at Ballycastle, was for entering upon a salmon fishery in the sea, in the bay of Ballycastle, in the county of Antrim, under the pretence of taking fish therein, said fishery being a several fishery within the meaning of the 11 & 12 Vict. c. 106, not having been authorised by the owner, occupier, or lessee thereof. The affidavits filed by Duncan Graham and the other convicting parties were to this effect, that the public had fished in the *locus in quo* since 1808. At the trial there were only two witnesses for the *plt.*, and the only other evidence he produced was a lease made to John McGildowney by the Court of Ch., *Re H. Bush, a lunatic*, for twenty-one years from 1852, in which there was no reference whatever to a charter or patent granting a several fishery in the *locus in quo*. While the affidavits were being prepared for the purpose of procuring a prohibition, the arrests were made of this accused. The warrants purported to be signed by C. Hunt, but were not signed by him, or only signed in blank no committals were made out, and the warrants were handed to the jailer. At the trial the *plt.* had produced evidence of convictions for similar offences in the month of October next previous, and of another in 1850, also a patent granting a several fishery to Sir R. MacDonnell, which he alleged to be the fishery in question, and to which he deduced title through Sir R. MacDonnell. The *defts.* produced no evidence of title on their part. The parties were convicted, when, in course of suing out a writ of prohibition,

they were imprisoned for four days, and then liberated. The *locus in quo* was nearly two miles from shore. At the trial the attorney for the prosecutor swore that the attorney for the convicted parties had admitted in conversation that the prosecutor was entitled to a several fishery in the *locus in quo*.

MacDonough, Q. C. (with him E. P. Levinge) moved that the above-mentioned conditional order be made absolute.—In order to obtain a conviction before the magistrates, the existence of a several fishery must first be established. A party may have a several fishery a little way from land, but the *locus in quo* here was nearly two miles out to sea, where there cannot be a several fishery. There was no evidence given by the prosecutor at the trial that the *locus in quo* was part of a several fishery, and no title on his part was produced by grant or prescription. And even if there were evidence of a several fishery existing in the *locus in quo*, the convicted parties had insisted on a *bonâ fide* right to fish there for herrings and other fish. There was nothing more proved against the parties convicted, than that they had been guilty of an alleged trespass, and yet the magistrates refused to dismiss the case on the prisoner's application though they offered to give security for costs, and to defend a civil action if the prosecutors would so proceed against them. The allegations of prosecutor's attorney has been contradicted. What a several fishery is, is defined by 5 & 6 Vict. c. 106, s. 94, and the penalties for infringing on the rights of other parties to such several fisheries, are enacted by 11 & 12 Vict. c. 92, s. 41, and the only way that the alleged offence can be brought home to anyone, is by reference from the latter to the former section, and so far there is no doubt as to inland fishery; but the 13 & 14 Vict. c. 88, raises doubts as to fisheries in the sea, and if any several fishery existed in this case, it was a sea fishery. The 13 & 14 Vict. c. 88, s. 1, gives a further definition of a several fishery. But the penal provision can only be enforced under the 11 & 12 Vict. in case the 5 & 6 Vict. is read with it, for there is no new penal provision referable to the altered definitions in the 13 & 14 Vict. The magistrates had no jurisdiction, when there was a *bonâ fide* claim, as to title made by the persons prosecuted.

Paley on Convictions, 188;

*Reg. v. Dayman*, 7 Ellis & Bl. 672;

*Gwynne v. Knight*, Cox's C. C. Cas. 47;

*Reg. v. Justices of Donegal*, 5 Ir. Jur. N.S. 185.

Chatterton, Q. C. (with him F. Fulkner) contra.—The question is, whether the magistrates had jurisdiction. It has been already decided that there was a several fishery in the *locus in quo*, and this is not the place to inquire into the propriety of that decision. By the Fishery Act, complaints of this kind are to be brought in the first place before the petty sessions, 5 & 6 Vict. c. 106, s. 99; and if the parties are dissatisfied with the rule made by the magistrates, they may appeal to the quarter sessions. Other parties were convicted on the same day of a similar offence, and, in addition to this, there was quite evidence enough produced at the trial that the prosecutor had a good title to said several fishery; there was the patent to the Boyd family, the lease, the affidavits, and the previous convictions to establish the jurisdiction, and the assertion of title on the part of the defendants, as against the prosecutor, was only for the purpose of ousting the jurisdiction:

*Brittain v. Kinnaird*, 1 Brod. & Reg. 432;

*Reg. v. Bolton*, 1 Q. B. 66;

*Reg. v. Dayman*, 7 El. & Bl. 672;

*O'Neil v. Allen*, 9 Ir. Com. Law, 132.

The COURT was unanimous in their judgment, which was delivered by the C. J., to the effect that they



believed the convicted parties had acted in the exercise of a *bond fide* claim to a right to fish in the *locus in quo*, and they directed the *certiorari* accordingly.

### ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

May 22 and 23, 1863.

THE ATTORNEY-GENERAL v. CLIFTON.

*Church of England general educational charity—Trustees—Schoolmaster—Dissenters—Pupils.*

*Where a foundation deed of a charity is silent as to the question of the religious qualification on the part of the trustees of it, but the court sees clearly that the charity is a Church of England one, it will appoint as the trustees, members of that Church; and it does so in order to prevent, so far as it can, any possible perversion of the objects of the charity. At the same time the court, in so doing, endeavours to ensure to persons who are not members of the Church of England, any advantages of the charity to which they may be entitled.*

*It does not, however, necessarily follow that the schoolmaster in a Church of England general educational charity must be a member of that Church: ceteris he ought to be; but the trustees of such a charity paribus, would not commit a breach of trust if, for a proper and sufficient cause, and under proper circumstances, they appointed as schoolmaster a person who was not a member of the Church of England.*

*The Court decided that, under the circumstances of this case, neither Dissenters nor non-inhabitants of the parish were proper trustees of a Church of England general educational charity, and that a Dissenter could not act as a schoolmaster in it; but that persons of all religious denominations were entitled to be instructed by the charity.*

This was an information praying the settlement by the Court of Ch. of a scheme for the management of an educational charity at Broughton; a declaration that the trustees of the charity, or such of them as were not duly qualified to act as trustees of it, might be removed from their office; that new trustees might be appointed, and an injunction to restrain an intended appointment of a new schoolmaster.

The facts of the case were shortly these:—

By an indenture, dated the 24th April 1601, and made between Thomas Dowse of the one part, and eight persons, "inhabitants of the town of Broughton," of the other part, reciting that there were very many people dwelling within the town and manor of Broughton and Bassington, and many children and youth did there daily increase, which, for want of teaching and instruction, were bred up in rudeness and ignorance, it was witnessed, that for the maintenance and continuance for ever thereafter of a schoolmaster for the instruction and teaching of the children and youth of the inhabitants within the said parish to read, write, and cast accounts, to the intent thereby that they might be the better enabled to know and serve Almighty God, and to obey their Sovereign Prince and parents, and might be more apt and readily prepared either for schools of higher learning, or otherwise to serve and be bound as apprentice in some laudable trade and science, or else be employed in husbandry or other good labour and course of life for getting their living, the said Thomas Dowse granted certain lands to the trustees, upon trust "to receive the profits thereof for the maintenance and continuance of such a meet and fit schoolmaster as the trustees for the time should limit or appoint, to be resident and abiding within the town of Broughton, for the teaching and instructing of the children of such as should

inhabit within the town of Broughton, to read, write, and cast accounts." The deed then directed, that when the said trustees should "grow old or few in number," that then, and before the same lands should come or happen to survive to one sole person, new trustees should be appointed, "of good credit, trust, and honesty, of the said parish of Broughton." The founder further directed, that one part of the deed, which was to be executed in duplicate, should be committed to the custody and safe keeping of the churchwardens for the time of the parish of Broughton, to be there entered and remain for memory in the book of the said parish, commonly called "the book of christenings and burials;" and the other part was to be in the possession of the trustees. The deed provided, that if the trustees should fail to appoint a schoolmaster upon any occasion, and due notice thereof should be given in the parish church after divine service, then, after the expiration of one month, the heirs of the founder should enter on the lands, and receive the rents thereof, until a schoolmaster was duly appointed. The deed also contained various references, in other parts of it, to the Church of England.

The present trustees of the charity were only six in number, and were the defts. in this suit. It appeared from the evidence that one of them was a Dissenter; that another never had been an inhabitant of Broughton, and was now residing nine miles from the parish church, and that three others resided out of the parish, at distances varying from two to twelve miles from it. Thirty-eight years ago the trustees appointed a schoolmaster who was a Dissenter. He made a rule that no boy should be admitted to the school who could not read, the enforcing of which rule had reduced the school to one-third of the number of pupils who were in it when he was originally appointed. He died in 1862, and there was now a vacancy in the mastership. It further appeared that, with respect to the discharge by the trustees of their other duties, they had regularly attended the meetings for the management of the charity and its property, the value of which was about 80*l.* a-year. There were never fewer than three trustees at a meeting, generally four, and sometimes five.

The parish of Broughton contained about 900 inhabitants, of whom about one-half were Dissenters.

The questions to be decided by the court were the following:—

1. Whether the charity was a Church of England charity?
2. Whether the benefits of it were to be confined to members of the Church of England?
3. Whether the trustees of it must be members of the Church of England; or whether Dissenters might act as such?
4. Whether the schoolmaster must be a member of the Church of England; or, whether a Dissenter might be appointed to that duty? and
5. Whether, under the circumstances above stated, the defts. were fit and proper trustees of the charity, duly qualified in all respects to act as such, and whether they had so acted?

*Cole*, Q.C. and *Kay* appeared in support of the information.

*Selwyn*, Q.C. and *Townsend* for the trustees.

*Cole*, Q.C. in reply.

The following authorities were cited in the arguments:—

- Attorney-General v. Calvert*, 23 Beav. 248;  
*Re Ilminster School*, 2 De G. & J. 535; on app. 8 H. of L. Cas. 495; s. c. 2 L. T. Rep. N. S. 701;  
*Attorney-General v. Lord Stamford*, 1 Phil. 737;  
*Re Chelmsford Grammar School*, 1 K. & J. 543;  
*Attorney-General v. Governors of Sherborn Grammar School*, 18 Beav. 256;

ROLLS.]

Re PARKER'S TRUSTS.

[ROLLS.]

*Re Stafford Charities*, 25 Beav. 28;*Attorney-General v. Cullam*, 1 Y. & C. C. C. 411.

The MASTER of the ROLLS.—I have carefully read the deed of endowment of the charity in question in this case, and I am satisfied that it was, and is, properly a Church of England charity. The founder was clearly a member of that Church, and intended to promote, by his foundation, the cause of education. He intended, however, to do that generally. I deduce that conclusion from the consideration of the time when the deed was executed by him, viz., in 1601; a time at which, in consequence of the enforcement of the Act of Uniformity which had then recently been passed, there was probably but little dissent in Broughton; and from the fact, that the deed makes frequent mention of the Church of England. In the case of the *Attorney-General v. Calvert*, I drew a distinction between religious charities, educational charities and eleemosynary charities, so far as regarded the attention which the court pays to the religious opinions of the founders. To that distinction I still adhere. In every educational charity there are three persons, or classes of persons, to be considered: the trustees, the instructors and the instructed. The charity now in question before me is an educational one. I have said that it is a Church of England charity, and I am also of opinion that the benefits of it are not to be confined merely to members of that Church. I think that persons of all religious denominations should be at liberty to reap the advantage of the instruction afforded by it. Different considerations, however, exist with respect to the appointment of the trustees of it. Where the court sees that a charity is a Church of England charity, it appoints as trustees of it members of that Church, and it does so to prevent, so far as it can, any possible perversion of the objects of the charity; at the same time the court, in so doing, endeavours to ensure to persons who are not members of the Church of England, any advantages of the charity to which they may be entitled. I am therefore of opinion that the trustees of this charity ought to be members of the Church of England. At the same time, however, I am also of opinion that the scholars or pupils who attend the school need not be members of the Church of England; and provision must be made in the scheme to be framed for the management of the charity for affording religious instruction in such a manner as not to exclude persons who are not members of the Church of England. With respect to the master, it does not necessarily follow, although it would *prima facie* appear to do so, that he should be a member of that Church. Still I think that, *ceteris paribus*, he ought to be a member of the Church of England; but the trustees would not commit a breach of trust if, for a proper and sufficient cause, and under proper circumstances, they appointed as schoolmaster a person who was not a member of the Church of England. The circumstances, however, must be peculiar to justify such an appointment. That is all I need say upon that subject. With regard to the trustees, there is a great distinction between appointing improper persons to be trustees in the first instance, and removing them when appointed. Lord Cottenham drew that distinction very strongly in the case of *The Attorney-General v. Stamford* (the Manchester School), and I intend to follow his ruling in that respect upon the present occasion. I think that one of these gentlemen, who is a Dissenter, ought not to have been appointed. I also think that another of these gentlemen, who was not at the time an inhabitant of the parish, ought not to have been appointed, as the deed expressly provides that they shall be inhabitants of the parish. If the other trustees, who were originally inhabitants of the parish, have removed to such a distance as to be unable to attend the meetings

of the trustees, I should consider that they have brought themselves within the provision for filling up vacancies, and should construe the words "grow old" as equivalent to "incompetent properly to attend." But, upon looking at the evidence, I cannot see that there has been any want of proper attendance. The trustees appear to me to have duly attended to the charity, for I find from the books, that there are never less than three present at the meetings, usually four, and occasionally five. I see no reason, therefore, for saying that they have not to the best of their ability performed the trust conferred upon them, with the exception that they were certainly very neglectful with respect to the schoolmaster. They appear, some thirty-seven or thirty-eight years ago, to have appointed a schoolmaster who was an improper person. They appointed him apparently because his father had been schoolmaster before him, and they allowed him to make rules for his own convenience, contrary to the express directions of the founder; for, although the object of the foundation was to teach boys to read and write, he laid down a rule that no boy should be admitted into the school who could not already read. The result of that improper conduct was to reduce the number of scholars to one-third of what it was at the time when he took the school. He is dead, and no new schoolmaster has been appointed. I do not think, however, that upon that ground alone it would be proper to remove the deft. from the trusteeship. I propose to fill up the original number of trustees, and I shall direct that, in filling up the number, regard shall be paid to the deed of endowment, which provides (as I take it) that they shall be members of the Church of England, and also resident within the parish. I shall also direct a reference to chambers to settle a scheme for the future government of the charity, having regard to the instrument of foundation, and to the state and population of the parish, and any other existing means of instruction in the parish. I shall give the costs of all persons to this information out of the funds of the charity; as I see no reason for making the defts. pay the costs. I shall direct the costs to be taxed at once, but not to be paid till I see how the parties conduct themselves with respect to the further proceedings for the settlement of the proposed scheme.

Saturday, July 4, 1863.

Re PARKER'S TRUSTS.

*Endowment of vicarage—Bequest in augmentation of—Commemorative sermon—Sequestration—Insolvency—Costs.*

A testatrix in 1763 bequeathed the residue of her personal estate to trustees, "for the sole use and benefit of the vicar for the time being of the vicarage of N. . . . such vicar for the time being, in the forenoon of every 21st June for ever, preaching in the parish church of N. aforesaid, immediately after divine service, an anniversary sermon in commemoration of her, and of that her bequest." The testatrix also directed that the "yearly or other dividends or proceeds of the whole of her said residuum should from time to time for ever be received and paid to the vicar of the said vicarage of N. in augmentation thereof."

In 1841 the present vicar of N. was duly instituted; but he was ignorant of the existence of the bequest, and of the duty thereby imposed on him, and no sermons were preached by him. In 1847 a sequestration was issued against him. In 1852 he took the benefit of the Insolvent Debtor's Act, and an assignee of his estate and effects was duly appointed.

In 1858 the vicar became aware of the bequest, and the preaching of the sermons was resumed.

*In 1863 there was a sum of 447l. 19s. 9d. in the hands of the trustees, representing arrears of the dividends on the testatrix's estate, accrued from 1841 to 1858. Upon the question who was entitled to such sum of 447l. 19s. 9d., it was held, that the present vicar of N. was entitled to so much of the sum as represented the arrears accrued prior to 1847, and the sequestrators to that which represented the arrears accrued subsequent to that period; and that the costs must be paid out of the fund, and be apportioned between the parties.*

Mary Parker, the testatrix in this matter, by her will, dated the 3rd May 1763, and duly executed and attested, bequeathed the residue of her personal estate as follows: unto Thos. Adderley, his executors and administrators, in trust "to be by him or them within six months next after my decease invested in the public funds, in the best, safest and most beneficial manner, in the name of him the said Thomas Adderley, or of his executors or administrators, for the sole use and benefit of the vicar for the time being of the vicarage of Newton, near Swaffham, in Norfolk (which is a very small and poor vicarage), whereof my late deceased husband was vicar, for ever, such vicar for the time being, in the forenoon of every 21st day of June for ever, preaching in the parish church of Newton aforesaid, immediately after divine service, an anniversary sermon in commemoration of me and of this my bequest. And I do hereby will, order, and direct that the yearly or other dividends and proceeds of the whole of my said residuum shall from time to time for ever be received and paid to the vicar of the said vicarage of Newton for the time being, in augmentation thereof, which is agreeable to the intent and desire of my said late dear husband deceased, who had but very small preferment himself in the church; and that the said Thos. Adderley, his executors and administrators, and every of them, shall from time to time, as occasion shall be or require, declare the trusts thereof accordingly." The testatrix appointed Mr. Adderley the sole executor of her will, and he duly proved the same.

The testatrix died some time prior to the year 1776, and the residue of her estate was duly invested by her executors in the purchase of 827l. 8s. 9d. Reduced Bank Annuities in the joint names of the then Bishops of Ely and Norwich and Mr. Adderley. By an indenture dated the 11th April 1776, and made between the Bishops of Ely and Norwich and Mr. Adderley of the one part, and the Rev. Joshua Crofts, then vicar of Newton, of the other part, those parties accepted the trusts of the testatrix's will; the trusts of the said bank annuities were declared accordingly, and the Bishops of Ely and Norwich for the time being were constituted the trustees thereof.

By an indenture dated the 25th Jan. 1839, and made between the then Bishops of Ely and Norwich of the one part, and the Rev. Thos. Watson, then vicar of Newton, of the other part, the trusts of the said bank annuities were again declared; and in that indenture mention was made of the condition that the vicar of Newton for the time being should yearly preach a commemoration sermon, as directed by the will of the testatrix. That indenture was not executed by Mr. Watson; but it appeared that he was fully cognisant of the preparation of the deed, and that he received, by himself or his sequestrators, the dividends on the trust-funds.

In 1841 the Rev. John Hague Bloom was instituted vicar of Newton; but it appeared that he was not then informed of the bequest made by the will of the testatrix, or of the sermon to be preached in commemoration of her.

On the 11th Jan. 1847, a Mr. Stepping entered up a judgment against Mr. Bloom, and a sequestration was, on Mr. Stepping's death, duly granted to his executors.

In 1852 Mr. Bloom took the benefit of the Act for the Relief of Insolvent Debtors, and an assignee of his estate and effects was duly appointed.

By an indenture, dated the 28th July 1858, and expressed to be made between the present Bishops of Ely and Norwich of the one part, and the Rev. J. H. Bloom of the other part, the trusts of the said bank annuities were again declared, and mention was made of the condition as to the commemoration sermon. That indenture was prepared without the knowledge of Mr. Bloom, and he never executed the same. In Sept. 1858 the bishop's registrar informed him of the bequest in the will, and at the same time told him that the sermon was to be preached on St. Thomas's-day, the 21st Dec. It was so preached in that year, but upon its being ascertained that it ought to have been preached on the 21st June, the mistake was rectified, and the sermon had been preached on the last-mentioned day since the year 1859.

No sermons had been preached from 1841 till the year 1858 as aforesaid, and the dividends on the trust-fund had been received by the Bishops of Ely and Norwich during that period. There was now in their hands a balance in respect thereof amounting to 447l. 19s. 9d.

Mr. Bloom alleged that, when he was instituted to the vicarage, he was not aware of the existence of the bequest in the testatrix's will, or of the duty imposed upon him of preaching the commemoration sermon, and that he only became acquainted therewith in the month of Sept. 1858. He now claimed so much of the 447l. 19s. 9d. as represented the arrears of the dividends accrued prior to 1847. The sequestrators claimed so much as represented what had accrued subsequent to that date; and the assignee of Mr. Bloom also claimed the latter amount. The opinion of the court was now, therefore, sought as to the rights of the several parties.

*Speed* appeared for the Bishops of Ely and Norwich. *Erskine*, for the Rev. Mr. Bloom, submitted that "wilful default" and neglect of the testatrix's directions could alone disentitle him to the amount of the dividends which he claimed. But he was ignorant of the bequest till informed thereof by the bishop's registrar in 1852. He cited

*Re Conington's Will*, 2 L. T. Rep. N. S. 535.

*Dickenson and Phear* (of the common law bar) for the sequestrators.

*Jessel*, for the assignee in the insolvency, contended that the sequestrators were only entitled under the sequestration to whatever formed part of the endowment of the benefice; the dividends now in question, viz. those accrued since 1847, formed no part of it, for to make them such there ought to have been a deed of endowment or annexation, coupled with the consent of the patron and the acceptance by the ordinary. Here there were no such formalities, and therefore the assignee in insolvency was entitled to the share of the dividends which he claimed. He cited

3 Burn Eccl. Law, 390;  
1 & 2 Vict. c. 110, s. 55.

THE MASTER OF THE ROLLS.—I am of opinion that the sequestrators are entitled to the dividends which have accrued on the funds in question in this matter since 1847. No doubt a gift to provide a fund for the purpose of having a sermon preached in a parish church on a certain day in the year, is not in itself an augmentation of that ecclesiastical benefice; but it is open to any person to augment any benefice in the country, provided that in making such augmentation by means of land he complies with the provisions of the Statutes of Mortmain. It is also open to any person to annex any condition which is not illegal in its character to his grant or gift, if the ordinary thinks fit to accept it. In the present case I will assume that,

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as the gift in question has been so long acted upon, the consent of the patron and the acceptance of the ordinary have been duly signified and given. That being so, the only question is as to the construction of the testatrix's will. If the bequest had stopped after the words "for the sole use and benefit of the vicar for the time being of Newton, which is a very small and poor vicarage," it would have been clearly an augmentation of the benefice. But the testatrix then goes on to direct the sermon to be preached. The preaching, however, of the sermon was not the real object of her bounty. Her real object was to augment the living. She annexed a certain condition to the bequest, the compliance with which was to entitle the vicar to obtain each particular dividend on the fund as it accrued. If in any year the vicar had wilfully failed to comply with the condition, the dividends would then probably have been administered and applied by the court *cy pres*. The testatrix further directed that the dividends on the residue of her estate should "from time to time for ever be received by and paid to the vicar of the same vicarage of Newton *is augmentation thereof*." The question is, whether such gift is illegal, or whether it requires any particular formalities in order to carry it out? I am of opinion that no particular formalities are necessary beyond the assent of the patron and the ordinary. The fund forms a part of the endowment, and is applicable in the same way as the produce of the small tithes. The sequestrators are therefore entitled to so much of the arrears as accrued since the sequestration in 1847; and the vicar is entitled to the arrears accrued before the sequestration. The costs of the present application must come out of the arrears of the dividends; and must be apportioned between the parties.

Solicitors for the parties: *Burder and Dunning; Treherne and White.*

### V. C. WOOD'S COURT.

Reported by W. H. BENNET and EDWARD LLOYD, Esqrs.,  
Barristers-at-Law.

June 4, 5 and 8, 1863.

THE ATTORNEY-GENERAL at the instance of THE CONSERVATORS OF THE RIVER LEA v. THE METROPOLITAN BOARD OF WORKS.

*Metropolitan Board of Works—Nuisance—Injunction—Pollution of river—18 & 19 Vict. c. 120, s. 135—21 & 22 Vict. c. 104, s. 31.*

*The Act incorporating the Metropolitan Board of Works does not empower them to create a nuisance. Nor does it take away the right of any person to prosecute them for a nuisance created in the execution of the works authorised by their Act, but gives an easier remedy to persons unwilling to prosecute at their own expense, by applying to a Secretary of State to direct proceedings to be taken.*

*Where a nuisance is only temporary, the court will hesitate to grant a mandatory injunction on an interlocutory application before the hearing.*

*General remarks upon the proceedings of public bodies, in communicating and dealing with parties whose interests are affected by the execution of their legislative powers.*

This was an information and bill filed by the Attorney-General at the instance of the Conservators of the river Lea near London, against the Metropolitan Board of Works, to restrain them from causing or permitting any sewage to pass or flow down through or from the high-level sewer and middle-level sewer, or either of them, into the river Lea; that they might be ordered to take out from that river between the Old Ford locks and the entrance into Limehouse-cut and the branches and reservoirs, all the solid sewage, filth and mud deposited or accumulated in said river,

between the points aforesaid by the effect of their works; and for compensation for the damage done.

By several Acts of Parliament, the first passed in the reign of Queen Elizabeth, and the last "The Navigation Improvement Act 1850," the relators were constituted trustees of the river Lea.

The defts. were incorporated by the Act of the 18 & 19 Vict. c. 120, "For the better local management of the metropolis."

The 135th section of this Act was the one upon which the main question turned, and it may be stated generally to have vested in the defts. all the sewers of the metropolis, with their appurtenances, and to have empowered them to make other sewers and works, as they should see fit, for preventing all or any part of the sewage within the metropolis from flowing or passing into the river Thames. [The clause is fully set out and commented upon in the judgment of the V. C.]

By 21 & 22 Vict. c. 104, to amend that Act, the board were empowered to commence and prosecute works for the improvement of the main drainage of the metropolis, and for preventing as far as might be practicable the sewage of the metropolis from passing into the river Thames within the metropolis.

The 24th section enacted that the Metropolitan Board should cause all works to be executed under said Act to be constructed and kept so as *not to be a nuisance*, and should, in deodorising any sewage and disposing of any sewage or refuse from sewers, act in such manner as not to create a nuisance.

The 31st section enacted that it should be lawful for one of Her Majesty's principal Secretaries of State, at his discretion, on representation or complaint made to him of any nuisance committed in execution of any works, or in deodorising any sewage, or in disposing of any sewage or refuse from sewers, or in any other manner under the Act, to cause inquiry to be made into the matter represented or complained of to him, and to direct such prosecution or prosecutions, or to take such other proceedings, as he might think fit in order to ensure the prevention or abatement of such nuisance as aforesaid.

The 32nd section puts a construction on the word "deodorise."

According to the plans, &c., it appeared that the metropolis north of Oxford-street was intended to be drained by two large sewers called the Northern or High Level Sewer and the Middle Level Sewer. These were to unite at a place called "the Sluice-house," which stands about 450 yards from the right bank of the river Lea, near Old Ford.

From that point it was intended to convey the sewage brought by these two sewers from the Sluice-house in two culverts across the river Lea, and over the Plaistow marshes, to a point in the river Thames at Barking-reach.

The high-level sewer, which passed through Hampstead, Holloway, Stamford-hill, Dalston and Hackney had been completed as far as the Sluice-house (about eight miles), but the lower level sewer for a distance of three miles only from the Sluice-house. The defts. had also made two large drains from the Sluice-house underground, entering into the river through the pier of the intended bridge for carrying the culverts over the river Lea. These drains were to carry off the "storm water" which, after heavy rains, descended from the high grounds, and so to relieve the main sewers. The contract to complete the works called the "northern outfall," being that portion from the Sluice-house to Barking-reach, was to expire in the month of Feb. 1863, but in consequence of the failure of one of the sub-contractors for portions of iron work, the contractor had been unable to complete the whole according to the contract.

In March 1863 the board, without having required

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the acquiescence of the conservators of the river Lea, had connected with the middle-level sewer an old drain called the Hoxton sewer, the contents of which had formerly fallen into the river Thames, and commenced discharging the sewage from it through the storm water outlets into the river Lea. The Hackney-brook sewer, which had always fallen into the river Lea, they had also previously diverted into the high level sewer, and discharged the sewage from it through the storm water outlets into the Lea in like manner.

Immediately on the opening of the middle-level sewer the plts. complained, and some correspondence ensued, the general effect of which is stated in the judgment, but without any offer on the defts.' part to check the nuisance or remove the additional obstructions to the navigation of the Lea caused by the middle-level sewer having brought down the fresh sewage matter.

The other facts and the evidence are fully stated in the V. C.'s judgment.

The plts. now moved for an injunction in the terms of the information and bill.

The defts. offered to continue certain dredging operations which they had commenced to remove the obstructions caused by the opening of the high-level sewer, and to deodorise the sewage of the middle-level sewer.

*Giffard, Q.C. and J. Pearson*, for the complainants, contended that a nuisance having been created by the defts., which they were not authorised to do by their Act of Parliament, the plts. were entitled to their injunction. Such injunctions had been frequently granted by the court before the hearing of the cause where the damage was immediate. The plts. had come to the court at the earliest possible period, for, although portions of the works had been completed, they had had no knowledge of what the effect would be. They referred to

*Rankin v. Huskisson*, 4 Sim. 13;

*Lane v. Newdegate*, 10 Ves. 192;

*Robinson v. Lord Byron*, 1 Bro. C. C. 588;

*Manchester, &c. Railway Company v. Worksop Board of Health*, 23 Beav. 198;

*Attorney-General v. Borough of Birmingham*, 4 K. & J. 528.

*Roll, Q.C., Sir H. Cairns, Q.C., and Chas. Hall*, for the board of works.—What the defts. had done they had fairly done, and in the exercise of great public duties reposed in them by the Legislature. They had not exceeded the powers of their Act of Parliament, and could have had no possible improper motive in constructing their works. The works had been completed; and the discretion vested in the Secretary of State by the 31st section of the 21 & 22 Vict. as to nuisances, had not been put in motion. Although what the board had done might amount at common law to what constituted a nuisance, still they were compelled by their Act to do what they had done, which was precisely the case in the *Attorney-General v. Borough of Birmingham*, quoted on the other side.

The VICE-CHANCELLOR.—In that case a pier was to be erected, which might be a nuisance. The power to erect such involved the power of creating that which was a nuisance.

*Chas. Hall*.—It was not possible for the defts. to exercise the powers under the 135th section of their Act without doing so. There was no instance of the court granting a mandatory injunction on an interlocutory application in a cause of such magnitude and importance as the present. He cited

*Attorney-General v. Borough of Birmingham (ubi supra)*;

*Attorney-General v. Sheffield Gas Consumers Company*, 3 De G. M. & G. 304;

*North London Railway Company v. Metropolitan Board of Works*, John. 405;

*Attorney-General v. Conservators of the River Thames*, 8 L. T. Rep. N. S. 9;

*Biddulph v. Vestry of St. George's*, 8 L. T. Rep. N. S. 44 and 558.

*Giffard, Q.C.* in reply.

*June 5.*—The VICE-CHANCELLOR said:—I cannot help saying it is much to be regretted that the Metropolitan Board of Works should have exercised their office as it has been exercised in the present instance. I quite agree with all the observations made by their counsel in the opening of his address, that the court should give great weight and consideration to the circumstance that these are gentlemen intrusted with very important public duties in carrying into effect works of great magnitude, of extreme difficulty, and of very great public import, and that every consideration should be paid to the circumstance that it is not a speculation which they are carrying on for their own benefit; that no advantage is to be derived by them from any particular course of conduct they may pursue; and therefore that it must be presumed that they would only do that which at all events in their own judgment is a right and proper course, and for the public benefit. But there is also this observation—and I have had occasion to make it more than once since I have been sitting here—that there is frequently a disposition in public boards to exercise their jurisdiction in a manner which is not conciliatory, which does not evince a due regard for the interests of those who may be affected by their acts; in fact, to assume a sort of judgment and an exercise of power which they would think an impertinence on the part of others, and therefore they do not adopt that reasonable course of conciliation, and free and frank communication, which it appears to me gentlemen who are entrusted to exercise these public duties ought, before all others, to adopt. Now certainly in this case, beyond referring to the construction of this Act of Parliament, I think these gentlemen must have been advised that it was extremely doubtful whether they could do such an act as they have done in the present case: namely, whether they could turn the whole of the sewage of a district, which had never yet found its way into the river Lea, into that river, of their own free will and pleasure, without any communication with the persons interested as conservators of the river. I think they could hardly have been advised that that was so clear and indispensable a right that they would be justified in exercising it, I must say clandestinely, without any previous communication with those who were interested in the preservation of the river Lea. I say "clandestinely," for this reason, that it is quite clear to my mind on the evidence that the outfalls (as they are called) were never intended to pass any sewage through them into the river Lea. They were intended to be storm outfalls, which I understand to mean outfalls which would on an emergency let off those large floods of water which have on a former occasion broken up the crown of the sewer, and done considerable damage; that it was intended that there should be a mode of relief found by which, on such extraordinary occasions, those floods of water might come into the river Lea. When those who were interested in the navigation of the river Lea in Aug. 1860 noticed the sewage works then in course of erection by the defts., intended to cross the navigation of the river Lea at Old Ford, a communication is made to Mr. Bazalgette on the subject, and Mr. Bazalgette's statement is clear on this point. His representation was this: "Our storm outfalls (for that is what they are) provide for an emergency of storm water, and storm water is not like emptying a drain into your river; it will come down, and be poured into your river on those emergencies; it is not like sewage, and therefore you need not be

alarmed at what is taking place." That is evidently the nature of the representation made, because Mr. Bazalgette meets a statement to that effect made by Mr. Beardmore by saying, "I did not assure him, or guarantee to him, that storm water would contain no sewage matter." Of course Mr. Bazalgette could not say so, because, when there is a grand confusion in the sewers, and a mass of water is mixed up together with the sewage, it will come out in a large mass, and will be comparatively innocuous, and will not be a thing of which reasonable men (as the trustees of the river Lea seem to have conducted themselves generally throughout) would be inclined to complain. After that, the first thing that takes place is a connection with the high level sewer, which originally included the drainage of the Hackney-brook, and which certainly in itself might not be a thing to be complained of, although it might also be used as a storm outfall. The River Lea Trustees could scarcely complain of Hackney-brook being brought to them, because it always had brought the sewage there, and they did not seek to prohibit its going into the high-level sewer; and although it was found by experience that some great degree of additional sewage was coming in—as experience had shown that the shoals began to rise in the river where they had not existed before—still, having made a communication to the Metropolitan Board of Works on that subject, the board did what was right and reasonable. They said they would undertake to remove, and would pay the expense of removing, the deposit by dredging, and they made preparations for any future inconvenience that might arise from the same source. Having, from all this, clear knowledge that the trustees of the river Lea strongly objected to anything in the shape of additional sewage coming into their river, and the Metropolitan Board having, as I must consider from their mode of doing it, doubts whether they would be justified in aggravating the evil, they clandestinely (for they certainly had no communication whatever on the subject with the river Lea trustees), in the month of March 1863, opened an entirely new district—a district of about thirty miles of sewerage—known as the "Hoxton sewer," into the middle-level sewer which they are making, and poured that into the river Lea which had never before found its way there. But the case, I am sorry to say, does not quite rest there; for, upon the evidence before me, it is quite clear and admitted that there was a communication in February on the part of Mr. Beardmore with the engineer and other officers of the Metropolitan Board of Works, in which Mr. Beardmore's statement is, that he was distinctly assured no further connection should be made at all with the middle-level sewer, and that there was no intention to do anything of the kind. The answer to that is, "There was no talk about the Hoxton sewer, and the only thing that we were thinking about was *any new sewers of our own which we might be making, and we did not consider the matter to have reference to any old sewer which we might pass in the course of our work, and might therefore find necessary to introduce into the middle-level sewer.*" I am quite willing to take it on their evidence that the defendants might have got some strange notion that such was the exact question put to them; but on the slightest reflection they must have seen it was a matter of pure indifference to the inquirer, who was endeavouring to shield the river Lea from any nuisance or pollution; they must have seen it was a matter of pure indifference to him whether the nuisance was occasioned by new drains or by an old drain of great magnitude being turned into the river, which had never been turned into it before. If anything, the large and old drain must be the greater evil of the two, and having had that previous communication with regard to what was

done by the board, and by which the river Lea trustees considered that the additional quantity of sewage thrown in by the previous operation would create a great evil, and should then, without any communication whatever with the parties so deeply interested as the trustees of the river Lea were, turn this large body of sewage in the Hoxton sewer into the middle-level sewer. I do not think it was their original intention to do this, because it appears to me clear, on the evidence, that they intended to bring the high-level and middle-level sewers down to the Snaice-house, and to do the whole thing in a workman-like manner in the way Mr. Bidder has described. I should not presume to set my opinion against that of Mr. Bazalgette in a matter of this kind, but it was the way that Mr. Bazalgette himself proposed to have that work completed, for it is clear upon the contractor's evidence that he intended to have the work completed in two years from the time notice was given to him, and the notice was so given that the two years would have expired in February of this year, and if the work had not been stopped in consequence of the failure of some persons who had the contract for the iron, the thing might have been done, and this nuisance which has resulted from turning the Hoxton sewer into the middle-level sewer would not have happened in March, because in February the whole thing would have been completed. As to any difficulty about the matter, I must say that, supposing the Metropolitan Board Works not to have the power of doing this act, what they have done is in the highest degree unjustifiable, not merely from the mode in which it has been done, but that it is manifest to me upon the evidence that it is nothing but a question of expense. When they talk of difficulty and so on, one knows what engineers mean by difficulty—they mean want of money. They say now it can be done in two months. They should have waited, if it was necessary, and not have constructed their middle sewer at all, rather than injure their neighbour's property. They seem to have said: "Here is a neighbour's river. It will be very handy to throw all our rubbish into that; it will be cheaper for us to do so than to carry on the works in the usual way." Of course that could not be justified in this court; and if the court had been applied to earlier, my impression is, there would have been quite sufficient upon the Act of Parliament to say, "You have no authority to do this;" and if it were shown you were about to do it, to say, "It shall be stopped." I come now to the Act of Parliament, and to consider the meaning of the 135th section. It contemplates two things: it vests in this new board all the existing sewers of the metropolis, and then says the new board shall within a given time "make such sewers and works as they may think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the river Thames in or near the metropolis (which is defined afterwards), and shall cause such sewers and works to be completed on or before the 31st Dec. 1860," which has since been extended to the end of the present year by a subsequent Act. Then there is a second part of the clause, which says, "And shall also make all such other sewers and works, and such diversions or alterations of any existing sewers or works vested in them under this Act, as they may from time to time think necessary for the effectual sewage and drainage of the metropolis, and shall discontinue, close up, or destroy such sewers for the time being vested in them under this Act as they may deem necessary, and such board shall from time to time repair and maintain the sewers so vested in them." That second clause seems to me, as at present advised, to be a general clause, for all time authorising them to make alterations in sewers from time to time, and among other things to divert

them, and that seems to be the strongest clause that could be adduced in their favour for doing what they have now done. It has been argued that, under those words, the board might have diverted the Hoxton sewer for ever into the Hackney sewer, and have thrown for ever the whole of the Hoxton sewage into the river Lea, because the Hackney brook has always run into the river Lea, and if they had been minded in the exercise of their duty to make a diversion of the sewage, they could have done it in that way, and therefore they had a right to do the particular act in question. A good deal might be said for that view, if it was not governed and limited and expounded in fact by the Legislature by what follows, for they explain what are the powers for this purpose. You have powers to divert sewers, but it goes on and says, "For the purposes aforesaid such board shall have full power and authority to carry any such sewers or works" (those purposes aforesaid being all the purposes there mentioned, both those limited to time and those which are permanent) "they shall have full power and authority to carry any such sewers or works through, across, or under any turpits-road, or any street or place, or street laid out as or intended for a street, as well beyond as within the limits of the metropolis, or through or under any cellar or vault under the carriage-way or pavement of any street, and into, through, or under any lands whatsoever, within or beyond the said limits, making compensation for any damage done thereby as hereinafter provided." Now, that appears to me to point out the powers they have for the purpose of carrying into effect the particular works that are to be done, and there is no power which in any way seems to point to turning the sewage into any navigable river, or canal, or watercourse, or stream. They may carry their works into or through lands, not for the purpose of emptying them into the river Lea, but for the purpose of constructing them, that is obviously what is here provided; and then they are to make compensation for any damage, as therein-after provided. Now, unless the powers include the power of turning this sewage into the river Lea, the clause for compensation as to any subsequent damage would not apply, and you would have them, under the general power of making diversions, able to do that act without any obligation as to compensation for damage being so done. It is true that the Lands Clauses Act is incorporated in this Act, and it is just possible that the general clause, the 85th (which is called "the injuriously affected clause"), which provides that any person injuriously affected by the operation might have an action for damages, might be put forward as something that would give a remedy. I think, however, the better construction is, that it was intended by the Legislature to point out by these particular words what was the exact class of things to be done, and which the Metropolitan Board of Works were authorised to do, and for which they were to give compensation, and that nothing so vast as the destruction of the river was intended; for I must observe that, upon their construction of the Act, it would be destruction to the river, for they might pour the whole sewage of the metropolis into the river Lea, and create an absolute destruction of that river. Nothing of that kind could have been contemplated by the Act. It is then said, that this, after all, is only a nuisance; and if you are to say that in the execution of these works the Metropolitan Board may not commit a nuisance, you stop the works altogether, and there was cited the conclusion I came to in the *River Thames* case, where there being an Act expressly creating a power of putting piers in the river Thames, and the damage complained of was the damage done by the piers, I held that the necessary power was given to the conservators in that particular case of

putting out a pier, which must be a nuisance. Now every pier, at common law, projecting into a navigable river, is a nuisance to that navigable river, and therefore I must hold that if the Legislature gave the power of erecting a pier, they had given in the present case the power of creating a nuisance. But that is not a necessary result (and it appears to me that, so far from being a necessary result, it was only an accident, that in consequence of the contractor for the iron having failed, this sewage should be turned in the river Lea), or that the nuisance complained of is covered or authorised by anything in the Act of Parliament before me. Certainly I do not think that subsequent clause in the 21 & 22 Vict. to be read with this Act, which enables the Secretary of State, on remonstrance being made to him, to direct actions to be brought in case it is represented to him that any nuisance has been occasioned, can be held as authorising a nuisance. It appears to me it would have the directly contrary effect. It is to be represented to him that a nuisance has been occasioned. If so, persons may be in a condition in which they do not wish to prosecute at their own expense, and in order to assist persons who are so situated, a power is given by the Legislature to the Secretary of State to undertake the prosecution at the public expense if he thinks fit. But what is he to do? He is not to pronounce it a nuisance. It would be an important argument for the defendants if the Secretary of State were to say whether it was a nuisance or not; but he is only to authorise a prosecution—the law must deal with it, and must say whether it is a nuisance or not. It seems to imply this, that nuisances might arise in the course of the execution of the Act, and that nuisance not authorised by the Act would be likely to arise in the course of the execution of the works, and if so, there shall be an easier remedy than that which the present bills have taken upon themselves at their own instance as relators, setting in motion the Attorney-General; that is all that can be raised on that clause, and if so, it is rather adverse to the contention of the Metropolitan Board of Works than favourable to them. I think, therefore, upon these grounds, that this is an act that cannot be authorised, and although this is an interlocutory application, if it had been to stop a work about to be done, I should have arrested that work until the hearing of the cause, and should have said that the work ought not to be done. But the court is put in some difficulty in a work of considerable magnitude such as is here in hand, by reason of the circumstance of this work being actually done, although, as I hold, most improperly done, and done in a way against which the promoters of the present proceeding, the trustees of the river Lea, could not take any steps towards remedying at any earlier period than they have done. In truth, they did not know of it until it was done; therefore the objection of delay scarcely arises under such circumstances. They complain of it the moment they find it is done; their complaint is not listened to for a fortnight—a course of proceeding which I hope will not be pursued in future. Courtesy, if nothing more, required an earlier reply in such an aggravated case as this. The new trustees do not get an answer for a fortnight, a general correspondence then goes on, and it ends by no admission of the right at all on the part of the plaintiffs to make a complaint, simply stating that they are sorry the thing is done, and that they do not know how to help it. In that state of circumstances I cannot doubt the propriety and justice of the bill being filed, and even if I had not the statement that the defendants are quite willing to undertake that it shall go no further, and that no further connection shall be made with these sewers, either the high-level or middle-level sewer, till the hearing, I should have thought myself in a condition, after what has been done, to grant an injunction

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to restrain any such further connection being made. The question then is, whether I ought to issue an injunction which would in effect be mandatory, and which would compel the restoration of the Hoxton sewer, which is the one that is principally complained of, or whether things should remain as they are at the present time, the motion standing over with liberty to apply? Now here the defts. are in the position, not unreasonably of appealing to the discretion of the court, and this is a case which requires that the discretion of the court should be exercised with considerable latitude. I am not at all pressed with this, that any very great difficulty would arise in putting things exactly as they were; I do not think there would be any very great difficulty about that—it is more a question of time than anything else. I think there might be some expense, and I think there would be some risk of damage to the existing work, to this large drain which has been formed, and which damage of course would have to be repaired, and some delay and inconvenience and expense would be incurred in the whole proceeding. As to the time necessary for doing that work, the plts.' witnesses say it can be done in a certain time and at a certain expense. All that can be matter of arrangement. Then again there is this to be considered on the balance of convenience and inconvenience. Undoubtedly wrong as I have held the defts. to have been throughout the whole of their proceeding, there is an additional grievance not occasioned wholly by the defts., and which had existed from the end of last year, namely, the state of this Hackney-brook pouring into the river Lea. [His Honour then commented on the accidental increase of the nuisance by reason of the draught.] When I have to consider a case of that kind, it does become a consideration whether or not this was a new nuisance altogether, and as being altogether occasioned by this particular act, or whether they were the parties subject to them before, and are only going to have them in an aggravated degree for five or six weeks longer. I must also consider the expense I should occasion by any mandatory order for the stoppage of the sewage, and that I could not possibly force it on the defts. to be done in a less time than some six or eight weeks at least, with liberty even then to apply in the meantime, and I have it positively sworn that in double that time the whole thing will be completed, and that when the works are really done the river Lea will be in a far better condition than the conservators themselves have ever known it, because then the Hackney-brook and Ratcliffe sewers will be carried out into the Thames at Barking-creek, and that it would occasion additional delay in the completion of the work at the very outfall; taking all this into consideration, although objecting as I do to all that has been done, and the mode in which it has been done by the defts., yet I think, for the benefit of the plts. themselves, justice will be secured if I make an order of the description which I am now about to dictate.

Minute:—Restrain the defts. from making any further connection of any drain with either the middle level or the high-level sewers until the hearing of the cause of further order, defts. undertaking by dredging or other proper means to keep the river Lea free from all obstacles to the navigation caused by any increase of sewage matter arising from the connection since the month of February last, of the middle-level and high-level sewers with the river Lea. Let the rest of the motion stand over, with liberty to apply, especially with reference to any unhealthy effluvia of any sewage matter brought down the middle-level sewer.

Solicitors: *Marchant and Pead* for complainants; *W. W. Smith*, for Board of Works.

## EXCHEQUER CHAMBER.

Reported by F. BAILLY, Esq., Barrister-at-Law.

## ERROR FROM THE EXCHEQUER.

Friday, May 15, 1863.

(Before COCKBURN, C.J., CROMPTON, WILLES, BYLES, KEATING, BLACKBURN and MELLOR, JJ.)

YOUNG v. DAVIS AND ANOTHER.

*Highway—Surveyor's liability for accident caused by non-repair—Stat. 5 & 6 Will. 4, c. 50.*

*A surveyor of highways appointed under the 5 & 6 Will. 4, c. 50, is not liable to an action for damages in consequence of an accident caused by his neglect to repair the highway.*

This was an action against surveyors of highways, appointed under the 5 & 6 Will. 4, c. 50, for damages resulting from an accident caused by the non-repair of the highway.

The declaration stated that before and at the time of the happening and committing of the grievance thereinafter mentioned, the defts. were the joint surveyors of highways of and for the parish of Alkerton, in the county of Oxford (a parish maintaining and liable and bound to repair and keep in repair its own highways) duly appointed in that behalf; nevertheless, the defts., not regarding their duty in that behalf as such surveyors, conducted themselves so negligently, improperly and wrongfully in that behalf, that by and through their (the defts.) said negligence, improper and wrongful conduct as such surveyors in that behalf, a certain common and public highway, called and known as Alkerton-hill, of and in the parish aforesaid, in the county aforesaid, which the said parish was then liable and bound to repair and keep in repair, and whereof the defts. then had, as such surveyors, the survey, care and superintendence, and which it was then their duty as such surveyors to repair and keep in repair, was negligently and wrongfully suffered and permitted by the defts., before and upon the 19th Nov. 1860, to be and become, and continue, and the said highway did then become, and then was, and continued out of repair and foundered, and in a state and condition dangerous for foot passengers passing along the said highway and the footpath thereof, and a certain hole dangerous to foot passengers was then negligently and wrongfully suffered and permitted by the defts., as such surveyors, to be, and the same then was, in the said highway, and uninclosed and open at the end of the footpath of the said highway, so that the said footpath terminated abruptly and dangerously to foot passengers at the said hole, and the said hole was then negligently and wrongfully suffered and permitted by the defts., as such surveyors, to be, and the same then was, left after daylight had ceased without any light or other means whatsoever, although means were necessary, to warn passengers along the said footpath of the said hole, and without any inclosure of the said hole, or any other means whatsoever, although means were then requisite and necessary, to prevent passengers from stepping, slipping, or falling from off the said footpath into the said hole, by reason and in consequence whereof the plt. on the said 19th Nov. 1860, whilst lawfully walking upon and along the said highway and the said footpath thereof, after daylight had ceased, and without any want of due care on his part, stepped and slipped from off the end of the said footpath into the said hole, and fell into the same and broke his leg, and was otherwise greatly injured, whereby the plt. sustained damage, &c.

Pleas:—1. Not guilty (by statute 5 & 6 Will. 4, c. 50, s. 109). 2. That the defts. were not the joint surveyors of highways of and for the parish of Alkerton, as alleged.



Issues thereon.

The cause came on for trial before Keating, J., at the Oxford summer assizes 1861, when evidence was given of the appointment of defts. as surveyors of highways for the parish of Alkerton; that at a place called Alkerton-hill, which was a public highway, and which the parish was bound to keep in repair, there was a hole in a part of the footpath, which had been caused by a flow of water from the adjoining hills, and in consequence of unusually heavy rains just before the accident, the hole had become much enlarged. Notice to the defts. of the existence of the hole, some time before the accident happened, was proved. The plt., while walking along the footpath, fell into the hole and broke his leg. The jury found a verdict for the plt., with 150*l.* damages, leave being reserved to the defts. to move to set aside the verdict if the court should be of opinion that the action would not lie against the defts.

In the following Michaelmas Term a rule nisi was obtained calling on the plt. to show cause why the verdict should not be set aside and a verdict or a nonsuit entered for the defts., or why judgment should not be arrested for the insufficiency of the declaration, upon the ground that no action could be maintained against surveyors of highways for omitting to repair a highway, whereby the plt. had been injured. It was afterwards argued, and the Court of Ex. held, that a surveyor of highways appointed under the 5 & 6 Will. 4, c. 50, was not liable to an action for damages resulting from an accident caused by the non-repair of the highway, as was substantially decided in *M'Kinson v. Penson*, 3 Ex. 319, and in error, 9 Ex. 609.

This was an appeal by the plt. from that decision.

*Dowdeswell (Bowen with him)* for the plt.—The first question is, are the defts. liable, as surveyors of the highway, for an omission of the duty imposed upon them by the Act of Parliament? The plt. contends they are, and that this action is maintainable. Many of the sections of the Act are mandatory. Sect. 6 enacts that the surveyor "shall repair, and keep in repair," &c.; sect. 7 gives the qualification; sect. 8 imposes a penalty on surveyors for not acting when chosen; by sect. 9 surveyors may be appointed with a salary. [COCKBURN, C. J.—Not sufficient to cover damages, &c., in an action for personal injury like this. How can you distinguish this case from *M'Kinson v. Penson*?] It is distinguishable, as, under the Act in that case, no penalties were imposed. Wherever a statute imposes duties, as this Act does, the person on whom such duties are cast is liable in a civil action for damages for the neglect of those duties, notwithstanding penalties are given for neglect of duty: (*Couch v. Steel*, 3 E. & B. 402.) [BYLES, J.—Has the surveyor any funds? It is not so alleged in the declaration, nor was it shown by the evidence produced at the trial.] Sect. 27 gives them full power to make rates whereby they could obtain funds; and sect. 90 enacts that the quarter sessions may award costs in certain cases there mentioned. Proceeding by presentment is now taken away by sect. 99. [COCKBURN, C. J.—Where a duty is imposed by Act of Parliament the party neglecting it may be indicted, may he not? Surveyors have no means in that capacity of paying damages. No action lies against the inhabitants of a parish. Surveyors are the servants of the parish, and although the inhabitants are not liable, yet you must contend their servants are; they are bound under penalties by sect. 8 to accept the office, and you say they are to be made liable for damages when they who appoint them are not liable.] Surveyors are not merely the servants of a parish; when appointed, the surveyors become superior and independent of the parish—they have a control over the rates: (sect. 27, &c.) An action lies for private injury resulting from their negligence. Com. Dig. "Action on Case for

Negligence," A 1, A 2: "Whenever a duty is imposed by Act of Parliament an action lies for damages sustained by its omission; there is no distinction in law between commission and omission." [COCKBURN, C. J.—Where is a surveyor to get funds to defend these actions?] Sect. 27 provides for getting ample funds; but, if not, they should get them—where a sheriff of a county gets them—out of his own pocket. It is true the sheriff receives fees; but he gets them, not by the common law, but by statutes. [CROMPTON, J.—According to your argument, the parish and the surveyors are liable. You must show that it clearly exists.]

*Keightley's case*, 10 Co. 139 b;

*Henley v. Mayor of Lyme Regis*, 3 B. & Ad. 77, 92;

*Sutton v. Johnstone*, 1 T. R. 493;

*Lacon v. Hooper*, 6 T. R. 224;

*Schinotti v. Bumpsted*, 6 T. R. 648;

*Ashby v. White*, 1 Sm. Lead. Cas. 185;

*Barry v. Arnaud*, 10 A. & E. 646.

[WILLES, J.—Is there any case against trustees of a turnpike-road for non-repair?] No; because their duties are specially pointed out by the Act of Parliament, and are upon a different principle. *The Lancaster Canal Company v. Pharnaby*, 11 A. & E. 230, is very like this case in principle, and *Mersey Dock v. Pehallons*, 7 H. & N. 329, still more so.

*Gibbe v. The Liverpool Dock*, 6 Ex. 164;

*Ruck v. Williams*, 3 H. & N. 308;

*Whitehouse v. Fellows*, 10 C. B., N. S., 765;

*Caswell v. Worth*, 5 E. & B. 885;

*Nicholl v. Allen*, 1 Best & Sm. 929,

are authorities in favour of the plt. An omission to obey a duty imposed by statute is as actionable for a private injury as an act of commission. Secondly, the rule should not have been made absolute in the count below to enter a nonsuit, but at most only to arrest the judgment, as even supposing the declaration to have been held bad in law if it had been demurred to, yet the allegations in it were clearly proved at the trial, and the learned judge was correct in leaving it to the jury. [WILLES, J.—Probably as to that the defts. would consent to a *stet processus* being entered, if the court should be of opinion upon the first point, that the defts. are entitled to judgment.]

This was assented to by the plt. and the defts.

*Mellish, Q.C. (Pigott, Serjt. with him)*, for defts., was not called upon.

WILLES, J.—We are clearly of opinion, and it is the opinion of the Lord Chief Justice and my brother Crompton—who are not at this moment in court—that the judgment of the court below was correct, and ought to be affirmed. It was admitted, on the part of the plt., that before the passing of the 5 & 6 Will. c. 50, there was no legal remedy for a personal injury occasioned by the non-repair of a highway. Mr. Dowdeswell has to establish his proposition, that the concluding words of sect. 6 of that Act create a liability in the surveyor to such an action; but I do not think, after looking at its whole provisions, that it is the proper construction of the statute. The 6th, or any other section, should not be read alone. It is not the proper mode of construing a statute to take one section, or part of it, in order to ascertain the real meaning, but the general scope and object should be looked at, and the words of the 6th section should be read by the light of the whole Act. It was not the object of the Act to create a new liability on an individual and to remove it from the parish, but to provide, by the appointment of a surveyor, the machinery by which the obligations of the parish should be discharged. It is the duty of the surveyor to fulfil the enactments of the statute, and the Legislature has provided certain penalties for omission and neglect by him. There is nothing in the Act to show that such an officer is to

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to be made liable for the duty of his masters, particularly where no such liability exists upon the masters themselves. We are of opinion that the decision of the Court of Ex. upon this point was a sound and reasonable one, and the judgment of that court ought to be affirmed.

*Judgment affirmed.*

Attorneys for the plt., Messrs. Parker, Rooke and Parkers, 17, Bedford-row, London.

Attorney for the defts., J. L. Wright, 7, South-square, Gray's-inn.

### HOUSE OF LORDS.

Reported by JAMES PATTERSON, Esq., of the Middle Temple, Barrister-at-Law.

Friday, July 10, 1863.

SHAW'S WATER COMPANY v. GREENOCK POLICE TRUSTEES.

*Local Improvement Act—Police rate—Rateable value—Waterworks—Milling power.*

*The S. Waterworks Company were empowered to make reservoirs and to let sites for mills on the banks of the waterfalls at rents, which water rents were payable to the company by the millowners in respect of the water power of which they had the use. In rating the company as occupiers, these water rents were included as part of the annual rateable value of their waterworks; but the company contended that the millowners alone ought to be rated as the occupiers:*

*Held, that the rate was right, for these water rents were part of the yearly value of the waterworks occupied by the company.*

This was an appeal from a judgment of the Court of Session as to the rateability of certain waterworks under a local improvement Act.

In 1825 the Shaws Water Company was incorporated by statute 6 Geo. 4, c. 120, in order to supply water to the town and harbour of Greenock. The statute empowered the company to construct waterworks and reservoirs, and on the sloping ground between the reservoirs and the town to sell pieces of land to millowners, that mills might be erected which might use the water power of the waterfalls. These pieces of land were granted by fen contracts or conveyances, which conveyed in consideration of a rent the ground, together with the privilege of the waterfall, and the use and benefit of the water adjoining, to be held for ever of the Shaws Water Company.

The Greenock Police Act, 3 Vict. c. 27, empowered certain trustees to assess all tenants and occupiers of dwelling-houses, mills, &c., at a sum not exceeding 2s. in the pound of the yearly rent towards the purposes of that Act. Waterworks were included in the definition of the word "lands." Under this statute the Shaws Water Company were rated in respect of the annual sums paid by way of rent by the millowners for the use of the water power, being part of the rent of the waterworks. The company then commenced the present proceeding, the object of which was to obtain a declaration of the court that such water rents ought not to be included in the rate upon the company, but were properly included in the rate upon the millowners. The Court of Session held, that the water rents were no part of the rateable value of the waterworks, whereupon the company brought the present appeal.

*Held, Q.C. and Anderson, Q.C. for the apps.*

The Solicitor-General (Palmer), Mure and J. Brown for the resps. *Cur. adv. vult.*

The LORD CHANCELLOR.—My Lords, the resps. are a company incorporated for the purpose of supplying water to the town of Greenock. Under the powers granted by their Acts of Parliament they have constructed large works, including reservoirs and aqueducts

or watercourses within the burgh of Greenock, by means of which they collect and conduct the water for the use of the town and the ships in the harbour. As the reservoirs are at a considerable elevation above the level of the town, the fall in the stream of water as it flows down the aqueduct or watercourse is considerable, affording a constant supply of water power. And accordingly the company is empowered to let sites for mills upon the line of their watercourse, and also to contract to supply water power to the mills at such annual rate as might be agreed on. Accordingly, under fen contracts entered into by the company, mills have been erected along the line of and adjoining their watercourse, and the company has engaged to supply water for the purpose of driving the machinery in those mills at various annual sums, which are reserved and made payable by the fen contracts. In these contracts provision is made to the end that the water supplied as a driving power may not be diminished or deteriorated in its passage through the mill, but may be returned again to the watercourses so that it may flow on to the town of Greenock. The sums thus paid to the company for water power constitute a considerable portion of its revenue, and in respect of their annual income derived from this source the company are assessed by the apps., who are trustees under a local Act, the 3 Vict. c. 27, at the annual sum of 976l. By the 51st section of that local Act, it is provided that the assessment to be levied under the Act upon any mills erected or hereafter to be erected upon any of the falls or mill sites of the Shaws Water Joint Stock Company shall not exceed the rate of 4s. for each and every horse power of such falls or mill sites respectively, such horse power to be reckoned and computed according to the regulations of the said Shaws Water Joint Stock Company, with further provisions which it is not necessary to state at length. It is this section which has given rise to the present controversy. It is contended by the resps. that the mills are rated in respect of the water power supplied to them, and that to rate the resps. in respect of the water so supplied would be to rate the same property a second time. But in my opinion this is erroneous. The mill is rated in respect of its own independent value, which is no doubt increased by water power, and the resps. are properly rated in respect of the waterworks, of which they are the possessors and occupiers, and by means of which they receive and enjoy, as part of their revenue, the income which has been assessed at the sum of 976l. per annum. This sum is not income arising from anything which is in the exclusive occupation of the millers, but is income derived and enjoyed from and in respect of the works within the borough of Greenock, which are in the occupation of the company. The water-way will give an additional value to two properties which were the subject of distinct occupation. The water in passing through the mill augments the value of the mill, and the money received for the service done by the water is incident to the possession of the waterworks from which the water is supplied. The provisions with respect to the water in the fen contracts show that the stream of water in its transit through the mill is still the property of the company, and that it is not in the possession of the miller, who has only a qualified use of it. Upon the general question, therefore, I am of opinion that the view taken by the Lord Ordinary is correct, and that the judgment appealed from is erroneous and ought to be reversed. There is a minor ground on which it is clear that the judgment of the Court of Session is wrong. Under the Scotch Valuation Act the resps. have had the entirety of their works valued by the Government assessor, who has fixed the sum of 976l. (at which the resps. are rated by the apps.) as the annual value of such part of the resps.' works as are situate within the burgh of Greenock,

being the premises to which this appeal relates. And by the 33rd section of the same Act it is in effect enacted that the valuation appearing on the valuation roll shall be always deemed and taken to be the just amount of real rent for the purposes of every county, municipal, parochial, or other public assessment, rate, or tax, under any Act of Parliament; and that the same shall be assessed and levied according to the same yearly rent or value accordingly. Therefore it is plain that, so long as the valuation remains, the apps. are not only justified, but bound to assess the resps. at this sum of 976*l.*, being the annual value fixed by the assessor on their property in the burgh of Greenock. As this valuation still continues, the judgment of the Court of Session is plainly wrong, being at variance with the Act of Parliament. It is said that this valuation may be corrected in the future year, which is true, if it be wrong; but, for the reasons already given, I am of opinion, and submit to your Lordships, that the assessment is correct, and that the judgment of the Inner House ought to be reversed, and that of the Lord Ordinary restored and affirmed, and the prayer of the reclaiming note refused with expenses.

LORD CRANWORTH.—My Lords, concurring as I do entirely with my noble and learned friend on the woolsack, perhaps I should be adequately discharging my duty by merely expressing that assent; but inasmuch as I differ from the judgment of the learned judges below, I will briefly state the mode in which the case has struck me. The whole case turns upon the question as to the rating of the mills. I will not again refer to the 51st section of the Act, which has been read by my noble and learned friend. I merely remark that, pursuant to the provisions of that clause, the mills have been regularly assessed according to the amount of horse power which they respectively enjoy; and it was argued, that to make the resps. pay any rate for the water which they supply to the mills would be to make a second assessment on property already rated. But this is not so. If the owner of a house in a town rated at 50*l.* a-year were to discover a spring of water in his house by means of pipes connected with which he should be able to supply pure water to ten adjoining houses at a rate of 5*l.* per house, his house would properly be rated thenceforth at 100*l.* instead of 50*l.*, and every one of the ten houses would also be properly rated the additional value which was conferred on them by a stream of pure water. The rateable value of the house supplying, as well as of all the houses supplied, would be increased in value, and so become liable to an increased assessment. But it was further argued that the resps. could not be rated as being in the occupation of the water supplied to the mills. The mill sites, it was truly said, have been feued out to the millers, and therefore no longer occupied by the water company, and these sites, in most if not in all cases, comprise the *solum* of the aqueduct over which the water passes, and so are in the occupation, not of the company, but of the millers. Some question was raised as to how far the feu contracts with the millers did pass the *solum* of what was feued, so as to carry with it a right to the water; but I do not think it necessary to go into this inquiry. By the 48th section of the Water Companies Act, they are authorized to feu out mill sites, and by the next section, to contract for the supply of water to the feuars of such mill sites. The Legislature plainly considered them as continuing in the enjoyment of the running water, however they might have dealt with the soil over which it passed; indeed, on no other hypothesis could they continue to carry into effect the purposes of the Act, which was to secure a constant supply of water to the town and harbour of Greenock. What is rated, and properly rated, is the entire waterworks. Of those works, treated as a whole, the resps. are in possession; they derive their revenue from the works as one entire un-

divided property, extending through several parishes; and the only difficulty in such cases is to say how much beneficial occupation there is in each parish through which the entire property extends. But here the Legislature has interfered. By the Scotch Valuation Act of 1854 (17 & 18 Vict. c. 91), the commissioners of supply in every county, and the magistrates of every burgh, are authorised and required to make, annually, a valuation of all land and heritages in every parish in the county, and in every burgh respectively; and the Legislature seeing that, in the case of railways, canals, waterworks, and other like undertakings traversing many parishes, there might often be great difficulty in fixing fairly the value of such undertaking, and the part fairly attributable to each parish, has provided that, in such cases the Treasury shall appoint a special assessor; and directions are given by the Act as to the mode in which the assessment shall be made and apportioned among the several parishes in which the works of the railway, canal, or other company are situate. The valuation so made is liable to be questioned in the mode pointed out by the Act; but unless so questioned it is to be final for the year for which it is made. With respect to the railway and canal companies, no option, as I understand the Act, is given; they are obliged to have the valuation of their undertakings made by the Government assessor. But with respect to the waterworks companies the case is different. They are at liberty to insist on having their works valued by the Government assessor as one entire heritage, and the value apportioned among the several parishes in which they are situate; or they may leave every parish in which any part of their works is situate to value that part singly according to its value. The resps. have since the passing of the Act of 1854 had their entire works valued by the Government assessor, probably because they thought that the most beneficial course to be pursued by them; and it is by that officer's decision that the sum of 976*l.* has been fixed as the value of so much of the works as is situate in the town of Greenock. By sect. 33 of that Act it is enacted, "that where in any county, burgh, or town, any county, municipal, parochial, or other public assessment, or any assessment, rate, or tax, under any Act of Parliament, is authorised to be imposed and made upon or according to the real rent of the lands and heritages, the yearly rent or value of such lands and heritages, as appearing from the valuation roll in force for the time under this Act in such county, burgh, or town, shall, from and after the establishment of such valuation therein, be always deemed and taken to be the just amount of real rent for the purposes of such county, municipal, parochial, or other assessment, rate, or tax, and the same shall be assessed and levied according to such yearly rent or value accordingly, any law or usage to the contrary notwithstanding." It is clear, therefore, that under the express provisions of that Act, the apps. were bound to assess the resps. at the sum found by the assessor to be the value of their works properly assessable on the burgh of Greenock, and even if in the ascertaining that value the assessor had made any mistake, it could not now be corrected. I have, however, stated that in my opinion there was no mistake; and therefore I think that the Lord Ordinary was right in dismissing the case, and in finding the resps. liable to expenses; so that the judgment complained of ought to be reversed.

LORD CUNLIFFORD.—My Lords, the question to be determined in this case is, whether the defts., as trustees acting under the said statute, are entitled to impose on or levy from the p<sup>ts</sup>. assessments in respect of any annual duties payable to the p<sup>ts</sup>. under feu contracts with the proprietors of any mills or other buildings erected upon any of the falls or mill sites held of the p<sup>ts</sup>. upon or along the Shaw's Water aqueduct. Both the Lord Ordinary and the judges of the first division

seem to have considered that the validity of the assessment depended upon whether the *solum* of the aqueduct, by means of which the water for which the annual duties were paid passed to the mills, was in the millowners or in the water company. It may perhaps be difficult to collect from the feu contracts whether the soil of the aqueduct is granted to the millowners; but it seems to me that the apps. may afford to concede this point, and yet successfully contend for the propriety of the assessment upon the company. The counsel for the resps. stated the question to be, whether the millowners or the company were to be rated in respect of the annual duties payable under the feu contracts. If this really were the question, the decision would not be difficult. It certainly would be extraordinary to lay a rate upon the millowners in respect of an annual payment which is not a benefit to them, but a burden upon their lands. The millowners are not assessable in respect of the water supply, though a quantity of the supply of water may at their option be taken as the means of ascertaining the assessable value of their occupation. But they are at liberty to have the valuation made according to the yearly rent or value. In neither mode of rating could the annual duties which they pay to the water company come within the reach of the rate. The water company are clearly liable to assessment by the Greenock trustees; and the assessable subject upon which the rate is to be laid is their waterworks generally according to the yearly rent and value under the Valuation Act. In ascertaining the yearly rent or value, are the annual duties paid by the millers to enter into and form part of the valuation, or to be altogether excluded? In other words, are the company overrated to the extent of these annual duties? This question might, and probably ought, to have been decided in another form. If the water company considered that they had been improperly assessed, they ought to have appealed to the trustees, and from them to the sheriff or his substitute, whose judgment or decision would have been final and conclusive. But passing by the subject of the jurisdiction altogether, the question seems to be reduced to the simplest point. The water company are assessable in respect of their waterworks as a whole. The aqueduct, whether the *solum* of it is in the company or in the millowners, is at all events a part of the waterworks. It is clear that the waterworks generally must be assessed upon the yearly value of the entire subject. The annual duties paid by the millers for the water supply are part of the yearly rent or value. No person is rated separately in respect of them, and no reason exists for separating the aqueduct from the rest of the works as a distinct subject of assessment altogether. It could not, for the reasons given, be laid upon the millowners, and, if it were not imposed upon the company, they would not be assessed according to the entire value of their waterworks. It was asserted in argument that if the company were rated for the increased value of their property arising from these feu duties, the same subject matter would be twice rated. But this is not the case. If the millers are rated according to the amount of horse power, it has been shown that the water duties would not be reached by such an assessment; and even if they were to elect to have their mills rated in the same manner as other property, although the rate upon them might be higher in consequence of the increased value of their mills occasioned by the water supply, the duties which they are liable to pay would not be any part of the subject of this assessment, but would rather be a reduction to be made before the rateable value could be ascertained. Upon these short grounds I agree that the judgment appealed from ought to be reversed.

*Judgment reversed.*

## COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK, Esq., Barrister-at-Law.

June 30, July 1, and Aug. 1, 1863.

(Before the LORDS JUSTICES.)

THE ATTORNEY-GENERAL v. THE PORTREEVE, ALDERMEN AND BURGESSES OF AVON (otherwise ABERAVON) AND OTHERS.

*Municipal Corporations Act, 5 & 6 Will. 4, c. 76—Charter—Corporate property and rights—Practice—Amendment—Supplemental bill—Trusts—Adverse claimants—Parties.*

*Where there was no title to sue at the time of the filing of an original bill or information, a decree cannot be founded upon a right of suit subsequently acquired and brought forward by supplemental bill; for although the Chancery Amendment Act enables matters which have occurred subsequently to the filing of an original bill to be introduced by way of amendment, it does not alter the law or practice of the court so as to enable a plt. in that manner to seek relief to which, at the time when his original bill was filed, he had no title whatever. There must be a right of suit when the suit is commenced, and a supplemental bill is merely the continuance of a suit already instituted, and not the commencement of a new one.*

*The defts., the portreeve, &c., of Aberavon, were a corporation from time immemorial, and that town was exempted from the provisions of the Municipal Corporations Act. By the Aberavon Market Act, 1848, the portreeve, &c., were empowered to construct a market, market-place, &c., and to levy and receive rents and tolls, which were to be applied, first, in defraying the costs of obtaining the Act; secondly, in making and maintaining the buildings and in paying off borrowed moneys; and thirdly, to such objects as the portreeve, &c., should think fit. In 1860, pending an application by the inhabitants for a charter of incorporation, the portreeve, &c., sold all their property except the town-hall and the market, &c., constructed under the above-mentioned Act, and early in 1861, after an intimation that the Lord President would recommend the Queen to grant the charter, they sold the town-hall, and agreed to let the rents and tolls to J. J. for fifty years, at an annual rent of 5l., in consideration of a fine of 600l.*

*On the 15th March 1861, the original information was filed, praying a declaration that the portreeve, &c., were not authorised so to demise or lease the rents and tolls, and that any such demise or lease would be a breach of trust, and praying an injunction accordingly.*

*On the 2nd July 1861 the new charter was granted, which enabled the new corporation to hold lands over and above any real estate to which the corporation might then be entitled, and on the 6th Feb. 1862 the information was amended by making the mayor, aldermen and burgesses under the new charter defts., and praying a declaration that the markets, market-place, &c., and the lands belonging thereto, and all rights to levy rents and tolls, and all other the property and rights of the portreeve, &c., had become vested in the mayor, &c., under the Municipal Corporation, Act, &c.; that the portreeve, &c., might be decreed to deliver up possession thereof, and that inquiries and accounts might be directed to ascertain what property belonged to the portreeve, &c., at the date of the new charter.*

*The portreeve, &c., insisted that there was no trust for the benefit of the inhabitants, and their Lordships having come to the conclusion that this was so*

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except as to the property under the Aberavon Market Act 1848; it was held, that a decree of the M. R., in conformity with the prayer of the amended information must be discharged, and that a decree should be made affecting only the market, market-house, rent and tolls, inasmuch as with respect to them the Aberavon Market Act 1848 had created a public trust which the Attorney-General had a right to enforce.

*Persons claiming a title purely adverse to a trust cannot be made parties to a suit for the execution of the trust.*

*It is not the province of a court of equity to declare the effect of an Act of Parliament.*

This was an appeal by the defts. the portreeve, aldermen, and burgesses of Avon (otherwise Aberavon), in the county of Glamorgan, against a decree of the M. R., the hearing before whom is reported at 8 L. T. Rep. N. S. 594. The circumstances under which the appa. became entitled to the property in dispute will be found fully stated in *Evan v. The Portreeve, &c. of Avon (otherwise Aberavon)*, 3 L. T. Rep. N. S. 347, and from that report, together with the report of the hearing of the present information at the Rolls, and the judgment of Turner, L. J. on this appeal, the facts will so fully appear that it is unnecessary now to state them.

The M. R. having made a decree in conformity with the prayer of the information as amended, the defts. the portreeve, aldermen and burgesses now appealed against it. Its material effect is stated by Turner, L.J. below.

*Baggallay*, Q. C. and *William Pearson* supported the decree on behalf of the informant, the appeal being from the whole decree. They contended that the portreeve, &c., constituted a public corporation, having certain property and rights solely for the benefit of the inhabitants, and that by the charter of incorporation granted under the Municipal Corporations Act in July 1861, all its property, rights and privileges had become vested in the mayor, aldermen and burgesses. The granting of that charter, though subsequent to the original information, was properly introduced by amendment; but, at all events, as to the market and the rents and tolls under the Aberavon Market Act 1848, there was created by that Act an express trust before the institution of the suit. They referred to

15 & 16 Vict. c. 86, sect. 53;

The Municipal Corporations Act, 5 & 6 Will. 4, c. 76, ss. 1, 6, 71, 92, &c.;

The Municipal Corporations Amendment Act, 7 Will. 4 & 1 Vict. c. 78, sect. 49;

*The Attorney-General v. The Corporation of Leicester*, 9 Beav. 546; and

*The Attorney-General v. Wilson*, 9 Sim. 30; on appeal Cr. & Ph. 1.

*Selwyn*, Q.C., *Speed* and *Everitt*, for the appa., argued that there was no trust affecting the property of the portreeve, &c. If the charter of July 1861 created a trust at all, that trust was not in existence in March 1861, when the original information was filed, and the charter creating it could not be introduced, either by amendment or supplemental bill. The Attorney-General must stand upon such rights as he had when the suit was commenced. Upon this question they referred to

*Tonkin v. Lethbridge*, Coop. 43;

*Pilkington v. Wignall*, 2 Madd. 240;

*Pritchard v. Draper*, 1 Russ. & Myl. 191.

The Aberavon Market Act 1848 did not create any trust, for the surplus rents and tolls were to be applied at the sole discretion of the appa. This court would not determine the effect of the statutes, nor of the charter granted under them, and if the informant

desired to have that effect declared, his proper course was to go to a court of law.

*The Corporation of Arundel v. Holmes*, 4 Beav. 325.

*Baggallay*, Q.C. having been heard in reply, judgment was reserved until the 1st Aug., when

Lord Justice TURNER said:—This is an appeal by the defts. the portreeve, aldermen and burgesses of Avon (otherwise Aberavon), and by the defts. Griffith Williams, their common attorney, from a decree of the M. R. made on the hearing of the cause, by which his Honour declared “that all and singular the estates, money, property and effects of or belonging to the portreeve, aldermen and burgesses of Avon (otherwise Aberavon), in their corporate capacity, at the time of the granting of the charter of incorporation in the information mentioned, including the market, market-place, place for holding fairs, slaughterhouses, and the lands, buildings, premises and appurtenances belonging thereto in the information mentioned, and the right to levy and receive the stallages, rents and tolls leviable and recoverable under the Aberavon Market Act, have become and are now vested in the defts. the mayor, aldermen and burgesses of the borough of Aberavon, for the purpose and subject to the provisions of the Municipal Corporations Act, and the several Acts for amending the same; but subject nevertheless to any mortgages, charges, or incumbrances, or any debts or obligations of the said portreeve, aldermen and burgesses lawfully affecting the said premises, or any of them, at the time when the said premises became vested in the said mayor, aldermen and burgesses. And it is ordered that the following inquiries be made, that is to say: 1. An inquiry what the estates, moneys, property and effects of the said portreeve, aldermen and burgesses consisted of at the time of the granting of the said charter of incorporation, and what mortgages, charges, or incumbrances, debts, or liabilities then affected the same, and whether any and what proceedings are proper to be taken with a view to the recovery of the same, and the informant Edward Jones is to be at liberty to serve any person or persons now in possession of any of such estates, moneys, properties and effects, with a copy of this decree, who are to be at liberty to come in under the decree. 2. An inquiry whether any, and what estate, moneys, property, or effects of or belonging to the said portreeve, aldermen and burgesses on the 16th Jan. 1861 were sold or otherwise disposed of between that date and the date of the charter, and under what circumstances respectively.” And then directions are given as to the costs. The borough of Avon (otherwise Aberavon) is an ancient borough, and the defts., the portreeve, aldermen and burgesses of the borough, were at the time of the passing of the Municipal Reform Act, 5 & 6 Will. 4, c. 76, a corporate body which had existed from time immemorial. It was one of the many like corporations scattered through the country which was not made subject to the provisions of the above-mentioned Act. By an Act of Parliament made and passed in the 11th & 12th of the Queen (the Aberavon Market Act 1848), after reciting that there was no established market-place or place for holding fairs for the sale of horses or cattle or other live stock, provisions, or agricultural produce in or for the town and borough, but that the sale was carried on in the streets and other inconvenient places, and that the Earl of Jersey had agreed to convey to the portreeve, aldermen and burgesses of the town and borough, by way of free gift, certain hereditaments therein described, the site whereof was convenient for the erection of a market-place and place for holding fairs for the town and borough, and that it would be highly advantageous to the inhabitants and the neighbourhood if the portreeve, aldermen and burgesses were empowered to erect a market-place and place for holding fairs on the

site, subject to certain regulations, powers were given to the portreeve, aldermen and burgesses to construct upon the lands therein described a market-place and place for a fair, with all necessary buildings and works for the sale of the commodities as therein mentioned, and also a market-place for the sale of cattle, and might enter upon, take and use such of the lands as should be necessary for that purpose. And after various provisions authorising the taking of stallages, rents and tolls, it was enacted, by the 21st section of the Act, that all "the moneys arising from the said stallages, rents and tolls, should be applied, firstly, in paying the expenses of obtaining that Act and incident thereto; secondly, in making and maintaining the market or fair, and works connected therewith, and the slaughterhouses to be established or constructed as aforesaid, and in payment of the interest and repayment of the principal of all moneys borrowed on the security of the said works, stallages, rents and tolls, and that the residue of such moneys (if any) should be retained by the said portreeve, aldermen and burgesses, and be applied by them as they should think fit." After the passing of this last-mentioned Act, and in the year 1853, application was made to Her Majesty in council, by some of the inhabitants of the borough, for the grant of a charter of incorporation for the borough under the Municipal Reform Act, in pursuance of the powers given to Her Majesty by the statute of the 7 Will. 4 & 1 Vict. c. 78, s. 49; but this application was opposed by the defts., the portreeve, aldermen and burgesses, and was not successful. Subsequently, and in the year 1859, a further application was made on the part of some of the inhabitants to Her Majesty in council for a grant of a charter of incorporation. This application was again opposed by the defts., the portreeve, aldermen and burgesses. Pending this application, and in the year 1860, those defts. sold and disposed and conveyed away all their estates and property except the town-hall of the borough and the market-place and slaughterhouses constructed under the Aberavon Market Act 1848. On the 16th Jan. 1861 a communication was made from the Privy Council that the Lord President had decided on recommending Her Majesty to grant the charter of incorporation for the borough. After this communication, and in the month of Feb. 1861, the defts., the portreeve, aldermen and burgesses, sold and conveyed away the town-hall of the borough, and they also came to an agreement with John Jones, another of the defts. to this information, to grant him a lease of the stallages, rents and tolls, to be levied or taken under the Aberavon Market Act 1848, for the term of fifty years at a rent of 5*l.* per annum, in consideration of a sum of 600*l.* to be paid by him to them. It was under these circumstances the original information in this cause was filed on the 15th March 1861, stating to the above effect, and that the above-mentioned sales and the agreement to grant the lease to the deft. J. Jones had been made by the portreeve, aldermen and burgesses under the apprehension that estates vested in them would by the charter to be granted be taken out of their control, and be transferred to the corporation to be created under the charter, and in effect for the purpose of defeating such transfer, and further stating that "from time immemorial until the sales hereinafter mentioned the said corporation were seised in fee of a town-hall and appurtenances within the said town and borough, and of large freehold estates situated in the parish of Avon (otherwise Aberavon), and in the parish of Michaelstone-super-Avon, and elsewhere in the county of Glamorgan. All the said estates were held upon certain trusts for the benefit of the said town and borough and the burgesses and inhabitants thereof." Then it states that a draft of the charter had been prepared, but had not been yet engrossed. And then it is submitted that the proposed lease or demise to John Jones was not

authorised by the Aberavon Market Act, or the statutes incorporated therewith, or otherwise, and by such a lease and demise the stallages, rents and tolls leviable and receivable under the Act will be altogether misapplied and misappropriated and diverted from the purpose to which by the Act of Parliament they were expressly made applicable, and that no funds existed for maintaining the market and fair and the works connected therewith for the said slaughterhouses and inhabitants of the said town and borough, and that the persons using the market and slaughterhouses would be greatly prejudiced and injured. Therefore the information prayed that it might be declared that the defts. the portreeve, aldermen and burgesses of Avon (otherwise Aberavon) are not authorised by the said Aberavon Market Act 1848, or the Acts incorporated therewith, or otherwise, to demise or lease the stallages, rents and tolls leviable and receivable under the said Acts, or any of them, to the deft. John Jones or any other person or persons for the term of years upon the terms hereinbefore mentioned, or upon any other similar terms or conditions, and that any such demise or lease would be a breach of the trust upon which the said market and slaughterhouses and the right to the stallages, rents and tolls leviable in respect thereof, are now respectively vested in the said portreeve, aldermen and burgesses; and therefore praying an injunction to restrain the defts., the portreeve, aldermen and burgesses of Avon (otherwise Aberavon) "from making, executing, or granting to the deft. John Jones, or any other person or persons, any demise or lease of the stallages, rents and tolls, or any of them, leviable or receivable in respect of the said market or slaughterhouses under the provisions of the Aberavon Market Act 1848, for the term of years and upon the terms and conditions hereinbefore mentioned, or upon any similar terms or conditions, and from applying or appropriating, or causing or sanctioning or permitting the application or appropriation of, the said stallages, rents and tolls, or any of them, to any other use or purposes than the purposes in the said Aberavon Market Act 1848 in that behalf mentioned." Immediately after the filing of this information, and on the 16th March 1861, an *ex parte* injunction was granted in the terms of the prayer. The deft. John Jones, it appears, then refused to accept the lease, and in consequence of his refusal the lease was, notwithstanding the injunction, granted to the deft. Griffith Williams, the common attorney of the portreeve, aldermen and burgesses. No payment, however, was made by him in respect of the lease, and the lease granted to him was shortly after cancelled. In April 1861 a motion was made on the part of the defts. to dissolve the injunction. This motion was supported by affidavits denying that the estates of the defts. the portreeve, aldermen and burgesses were ever held upon trust for the benefit of the town and the burgesses and inhabitants, as alleged by the information, and asserting that on the contrary they were the absolute property of that corporation, and further stating that the corporation was largely indebted on mortgage and otherwise, and that the sales had been made for the payment of the debts, and the proceeds applied for that purpose, and that the 600*l.* proposed to be raised by the lease was required for the same purpose. It further appeared from these affidavits that the lease proposed to be granted contained covenants on the part of the lessee for keeping the demised premises in repair. This motion was met by counter affidavits asserting acts of ownership on the part of the inhabitants over the estates of the corporation. Ultimately the motion was ordered to stand over until the hearing of the cause. The defts. then on the 23rd May 1861 put in their answer to the information, which was to the same effect as the affidavits filed on their part in support of the

motion to dissolve the injunction. At this point of the case, and on the 2nd July 1861, the new charter was granted by which Her Majesty, as well by virtue of the powers and authorities vested in her by virtue of her Royal prerogative, as by virtue of the powers and authorities given to her by the Act of the 7 Will. 4 & 1 Vict. c. 78, incorporated the inhabitants of the borough within certain limits mentioned in the charter by the title of the Mayor, Aldermen and Burgesses of the borough of Aberavon, with all the powers, authorities, immunities and privileges of the boroughs named in the schedules to the Municipal Reform Act, as if the said borough of Aberavon had been one of the boroughs included in the second section of schedule B. to the said Act annexed, and extended to the said inhabitants of the said borough all the powers and provisions of the said Act, and amongst other things granted and declared that the said mayor, aldermen and burgesses should be capable to take, purchase and acquire lands, tenements and hereditaments, and other provisions, to the value of 1000*l.* a-year within the said borough over and above any real estate which the corporation might be entitled to. The information was then, on the 6th Feb. 1862, amended by naming as defts. the mayor, aldermen and burgesses in their corporate character under the new charter, and stating amongst other things that: "The said portreeve, aldermen and burgesses still remain and are in the possession of the said market, market-place, place for holding fairs, and slaughterhouses, and the buildings and premises belonging thereto, and in the receipt of the said stallages, rents and tolls, and they claim and insist that they are now entitled to the same, notwithstanding the granting of the said charter of incorporation and the creation of the said new corporation. The defts., the portreeve, aldermen and burgesses of Avon, have, or ought to have, in their hands large sums of money and property derived by them from the sales of the said estates as aforesaid, and from mortgages created by them thereon, and from the rents and profits of the said estates, and the said stallages, rents, or tolls, and it would so appear if accounts were taken of all such moneys and the application thereof;" and by making the following addition to the prayer: "That it may be declared that, under and by virtue of the said Municipal Corporations Act, and the several Acts for amending the same, and by the granting of the said charter of incorporation and the creation of the said new corporation under the same, or otherwise by operation of law, all and singular the said market, market-place for holding fairs, slaughterhouses, and the lands, buildings, premises and appurtenances belonging thereto, or connected therewith, and the right to levy and receive all and singular the stallages, rents and tolls leviable and receivable under or by virtue of the said Aberavon Market Act, and all and singular other the estates, moneys, property and effects of or belonging to the said portreeve, aldermen and burgesses of Avon (otherwise Aberavon) in their corporate capacity at the time of the granting of the said charter of incorporation, have become and are now vested in the defts. the mayor, aldermen and burgesses of the borough of Aberavon, for the purpose and subject to the provisions of the said Municipal Corporations Act, and the several Acts for amending the same, but subject, nevertheless, to any mortgages, charges, or incumbrances, or any debts or obligations of the said portreeve, aldermen and burgesses, lawfully affecting the said premises or any part thereof, at the time when the said premises vested in the said mayor, aldermen and burgesses, and that the defts., the said portreeve, aldermen and burgesses of Avon (otherwise Aberavon) may be decreed to deliver possession and pay over to the defts. the mayor, aldermen and burgesses of the borough of Aberavon, all such

premises as aforesaid. That all such inquiries may be made and accounts taken as shall be necessary for ascertaining what moneys, property and effects were in the hands of or belonging to the said portreeve, aldermen and burgesses at the time of the granting of the said charter of incorporation, and what mortgages, charges, or incumbrances, debts or liabilities then affecting the same." The defts. the portreeve, aldermen and burgesses, and the deft. Griffith Williams, put in their answer to the amended information, by which they stated, amongst other things, that their debts and liabilities still amounted to 11,000*l.* and upwards, and they insisted as follows: "We are advised and humbly submit and insist, that the charter in letters patent of the 2nd July 1861, in the said amended information mentioned, are invalid and void, and that there is not and never was any such corporation as the mayor, aldermen and burgesses of the borough of Aberavon. And we further submit and insist, that if any such corporation as the mayor, aldermen and burgesses of the borough of Aberavon does exist, they have no estate, right, title, or interest whatsoever in the estates and hereditaments of these defts. the portreeve, aldermen and burgesses of Avon (otherwise Aberavon) or any of them, and that if they had or claim to have any such estate, right, title, or interest as aforesaid enforceable in equity, they ought to have been parties complainants to this suit instead of being defts. thereto; and we humbly submit and insist, that this suit is improperly constituted as to parties and otherwise, and that the informant is not entitled to the relief prayed by the said amended information, or to any relief in equity, as against us or either of us, and that the said amended information ought to be dismissed with costs." Further affidavits were afterwards made both on the part of the informant and of the defts. It is not, I think, necessary to go into the details of these affidavits. The conclusions, to be drawn from them and from the documents in proof in the cause seem to me to be these: that the new charter was accepted by the inhabitants, and that the sales made by the defts. as above mentioned were made with a view to prevent the property falling into the hands of the corporation created by the new charter, but that on the other hand there is no foundation for the allegation in the information of the property having been originally subject to any trust for the benefit of the inhabitants. This latter point seems to me to be all-important in the case, for, assuming that there was originally no trust, I cannot (speaking with all deference to the *M. R.*) at all see my way to the declaration contained in this decree, and the inquiry founded upon it. Assuming that there was originally no trust, there was not, so far as I can see, at the time of the filing of the original information, any right or title in the Attorney-General to institute a suit in respect of any property of the defts. except the market-place and slaughterhouses. The right to introduce into the second, by way of amendment, matters which had accrued subsequently to the filing of the original, bill or information, is, as I apprehend, a right which is given merely for the purpose of saving the expense of proceeding by supplemental bill. It was not, as I conceive, intended to alter, nor, as I think, does it alter, the law and practice of the court in any other respect. Now, I take it to be a well-settled rule of the court, that where there has been no title to sue at the time of the filing of an original bill or information, a decree cannot be founded upon a right of suit subsequently acquired and brought forward by supplemental bill. The substratum falling the superstructure falls also; and I think this rule must apply not only in cases where the title to sue in respect of the whole matter of the suit is acquired subsequently to the filing of the original bill, but also in cases where the title to sue in respect

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of any part of the matter of the suit is so acquired; for the principle would seem to be this, that there must be a right of suit when the suit is commenced, and a supplemental bill is not the commencement but the continuance of the suit. If, therefore, the case rested upon this ground alone, I should think that the declaration contained in this decree, and the inquiry founded upon it, could not be maintained; but, supposing this difficulty could be got over, there is still this further difficulty in the case. The right of the Attorney-General in this court can go no further than to have the trust executed, if there be a trust; but the claim of the apprs. is adverse to the trust, and I do not think that persons claiming a title purely adverse to a trust can be made parties to a suit for the execution of a trust. The case of *Talbot v. Lord Radnor*, 3 M. & K. 252, is the only case of which I am aware at all bearing upon this point; and that case has been constantly disapproved and never followed. This is not, it is to be observed, the case of following trust property, but it is an attempt to fix upon property a trust to which it has never been subject. There is besides a further objection to the declaration contained in this decree, that the case made by the information rests upon the operation of the Act of Will. 4 and the Act of 1 Vict. c. 78. Either that Act gives the corporation created by the new charter a title to the property, or it does not. If it does not, there is no foundation for the information; if it does, no declaration of this court is needed to give effect to it. It is not, as I conceive, the province of a court of equity to declare the effect of an Act of Parliament. For these reasons my opinion is that this decree cannot be maintained; but I do not think that the case made by the information wholly fails. The case made by the information as to the market-place, market and slaughterhouses, is, I think, well founded. The Market Act seems to me to create a public trust, which the Attorney-General had and has a right to enforce. Whether the defts. were entitled to grant any lease of this property it is not necessary for us to decide, but assuming that they were so entitled, they were not, I think, entitled to demise the property at diminished rents upon payment of fines, the rents being devoted to the maintenance of the property. In the result, therefore, my opinion is that this decree should be reversed and a decree made restraining the defts. from granting any leases of this property upon payment of fines, and to dismiss the rest of the information without prejudice to any other proceedings, and without costs; and of course there will be no costs of the appeal.

Lord Justice KNIGHT BRUCE.—Had my learned brother been disposed to dismiss the whole of the information without costs and without prejudice to another suit, I believe that I should have concurred. He has taken a view to a certain extent different to mine, but I do not think it is incumbent upon me to dissent from that view; therefore I agree to the decree which he proposes.

Solicitors for the informants, *Loftus and Young*, agents for *Cuthbertson*, of Neath, Glamorganshire.

Solicitors for the defts., *Rowland and Bacon*.

## ARCHES COURT OF CANTERBURY.

Reported by Dr. SWABBY, of Doctors'-commons.

July 1, 2 and 24, 1863.

(Before the Right Hon. STEPHEN LUSHINGTON, Dean.)

The Office of the Judge pronounced by BURDER v. O'NEILL.

*Criminal proceedings—Admissibility of evidence—Number of witnesses—Costs.*

*The deft., in criminal proceedings in an ecclesiastical*

*court, is not an admissible witness, even with consent of all parties. In a proceeding under the Church Discipline Act, the Ecclesiastical Court will act on the rules of evidence which obtain at common law. The conduct of the deft., after the charge against him is made known to him, may be such as to oblige a bishop to carry the suit through. In such a case, if there is no evidence on which the court can convict, it may dismiss the deft., but without condemning the promoter in costs.*

In this case the office of the judge was promoted, under letters of request from the Bishop of Ely, by John Burder, against the Rev. J. O'Neill, clerk, vicar of Luton, in the county of Bedford, diocese of Ely and province of Canterbury, more especially for having committed the crime of fornication, lewdness, or incontinence, contrary to the statutes, the constitutions and laws ecclesiastical of the realm.

The 6th article charged "that the Rev. J. O'Neill, on the 19th Aug. 1861, being at the time a curate of Blandford Forum, Dorsetshire, directed Margaret Ellen Strickland, a girl aged sixteen, and a pupil teacher at the national school of Blandford Forum, whom he met going thereto, to call at his house at Blandford Forum at about seven o'clock the same evening, in order to obtain some needlework, which he stated he wished her to do for him; that Margaret Ellen Strickland, at the hour mentioned by the Rev. J. O'Neill, went to the said house, and, at his request, proceeded up stairs; that, in a certain closet or landing on the top of the stairs, the Rev. J. O'Neill did then and there conduct and demean himself in an indecent manner to Margaret Ellen Strickland, by putting his arm round her waist and kissing her, and that he afterwards forced or threw her down on the floor, exposed his person, and with force did have, or attempted to have, a carnal knowledge of, and criminal connection with, the said Margaret Ellen Strickland; that she became insensible, and for many days suffered great pain; that before leaving the house the said Rev. J. O'Neill enjoined her to be sure not to tell any one of his conduct towards her."

The *Queen's Advocate* (Sir R. J. Phillimore), Dr. Middleton and Field for the promoter.

Collier, Q.C., Dr. Deane, Q.C. and Prichard for the deft.

This case is reported chiefly for three points noticed in the judgment: first, the inadmissibility of the evidence of the deft., even with consent of all parties, in a criminal proceeding in the Ecclesiastical Court; secondly, that in proceedings under the Church Discipline Act, the Ecclesiastical Court will follow the rules of evidence which obtain at common law; thirdly, that though there may be no evidence before the court on which it can convict, the conduct of the deft., subsequent to his knowledge of the charge made against him, may be such as to oblige a bishop to carry the suit through; and in the present case the court dismissed the deft., but made no order as to costs.

July 24.—Dr. LUSHINGTON.—Before I enter on the facts of this case, I wish to state briefly why I refused to allow Mr. O'Neill to be examined as a witness. Before the passing of the 14 & 15 Vict. c. 99, it was agreed on all sides that in a prosecution of this description the deft. could not be examined, and such was the invariable practice of the Ecclesiastical Courts; the question therefore depends on the construction to be given to the statute which I have mentioned. The 2nd section is in these words: "On the trial of any issue joined or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties authority to hear, receive and examine evidence, the parties thereto and the persons on whose behalf any such suit, action, or other proceeding may be brought or defended shall, except as



hereinafter excepted, be competent and compellable to give evidence either *virâvices* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding." Assuming, for the moment only, that the general terms used in the 2nd section would apply to the present case, and operate to make the evidence of Mr. O'Neill admissible, what is the effect of the 3rd section? "But nothing herein contained shall render any person, who in any criminal proceeding is charged with the commission of any indictable offence or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband." Looking at the pleadings and evidence, I incline to the opinion that the offence is indictable and punishable on summary conviction. If I am right in the opinion, then it would follow that I also did right in rejecting the application to examine Mr. O'Neill; for, according to the words of the 3rd section, he would not be a competent witness, and if not competent, no consent, no waiver of objection, could make him so. But supposing I am in error in taking this view of the section containing the exception, I fall back on the words of the 2nd section itself, and on the construction of that section I come to the conclusion that it does not operate to render Mr. O'Neill or any other person in his position a competent witness, and I adhere to this construction on the principle and authority of the case of *Hawkins v. Gathercole*, 24 L. J. 333, Ch. Now let me for a moment consider the consequences of holding Mr. O'Neill to be a competent witness. By the section referred to, if a competent witness, he would also be compellable to give evidence, the effect of which would be, that in a case resembling the present, where character and pecuniary prospects are at stake, where practically the issue is whether the accused should be disgraced and ruined, the accused might be compulsorily put upon his oath and might be compelled to take his choice between perjury or ruin. I cannot conceive that any proceeding could take place more utterly repugnant to the principles and practice of British law. But this is not all; the effect of holding Mr. O'Neill to be a competent witness, and consequently compellable to give evidence, would be to repeal the statute 13 Car. 2, c. 12, the 4th section of which enacts, "that it shall not be lawful for any archbishop, bishop, vicar-general, chancellor, commissary, &c., to tender or administer to any person whatsoever the oath usually called the oath *ex officio*, or any other oath whereby such person to whom the same is tendered or administered may be charged, or compelled to confess, or accuse, or to purge him or herself of any criminal matter or thing whereby he, or she may be liable to any censure or punishment." I do not think that this statute is repealed. One more consideration: look at the exception in the 3rd section, and see the utter discrepancy which would arise in principle if such evidence could be given. A man is protected from giving evidence against himself in all petty offences cognisable by a magistrate, however small the penalty or slight the punishment on conviction; but, if I am mistaken, a clergyman of the Church of England would not be exempted where the penalty might be disgrace and the loss of valuable preferment. It is true that such an anomaly might exist; but I am sure that, if legal principles would permit, it is such an anomaly as every court would be most anxious to avoid. I am of opinion, that even if the words of the 2nd section could be so construed as to render

such evidence admissible, still the expressions are general, and not specific; therefore I again say, upon the principles laid down with admirable clearness in *Hawkins v. Gathercole*, and for the other reasons stated, I adhere to my original ruling against the reception of such evidence. (a) It is important to state clearly another principle as to rules of evidence which will govern my judgment in deciding the case. It is a proceeding in an ecclesiastical court under the Church Discipline Act, 3 & 4 Vict. c. 86. In former times the Ecclesiastical Court required, under some modification, the evidence of two witnesses in order to prove any alleged fact or offence, and to this rule Sir Herbert Jenner adhered to the last. In *Evans v. Evans*, 1 Rob. 165, he refused to pronounce that adultery had been proved by one witness, though the husband had recovered damages to the amount of 500*l.* As judge of the Consistory Court of London, it was my duty to follow that decision of the Archbishops Court, and I did so, though most reluctantly. But I am of opinion that the rule requiring the evidence of two witnesses, modified by what was very obscurely called corroborating evidence, is not applicable to proceedings under the Clergy Discipline Act; and I think so for divers reasons: first, because evidence is now taken orally, under 17 & 18 Vict. c. 47, and, according to the rules of common law; and, secondly, because I think that rules of evidence are subject to modification by courts of law. Lord Ellenborough, on a former occasion, and somewhat contemporaneously, refused to consider cases reported in *Siderfin & Keble*, and said: "We do not sit here to take our rules of evidence from those ancient authorities. My intention is, to the best of my ability, to abide by the rules and practice of the courts of common law, in the consideration of the evidence given in this case." I have now to consider what is the charge preferred against Mr. O'Neill in these articles. That charge is pleaded in the 6th article, that Mr. O'Neill by force had, or attempted to have, sexual intercourse with the girl Margaret Strickland. So far as this article charges a rape, (b) I am in doubt whether I can proceed upon such a charge till a conviction at common law has been obtained. This objection has not been taken, but I cannot altogether pass it over in silence, though to discuss it at length would require the expenditure of much time. I have very great difficulty in trying the case at all, except upon the presumption that Margaret Strickland was a consenting party, and therefore that she must be considered an accomplice. A single witness she certainly is as to the principal fact, and the rules of evidence as to such a state of things must be borne in mind; it is not denied that there must be corroborative evidence. What is corroborative evidence I fully discussed in the case of *Simmons v. Simmons*, 5 N. C. 342, and to the principles I then adopted I adhere. [The learned Judge then discussed the evidence of Margaret Strickland and the other witnesses, and then continued:] I now come to the last, and perhaps the most important head for the determination of the court, I mean the conduct of Mr. O'Neill himself when he was made cognisant of the charge preferred against him. Now this inquiry opens up a question of some difficulty. What, in legal acceptance of the term, is evidence corroboratory of the testimony of Margaret Strickland? There can be no doubt that a confession of the party accused is evidence against him, and also the conduct of a party accused is a material incident in the investigation of his guilt or innocence. Let me consider what has been done by Mr. O'Neill on this occasion. There were acts done by him, and there is

(a) See *Moss v. C.*, 6 L. T. Rep. N. S. 302.

(b) See *Burpyne v. Free*, 3 Hag. 466; *Burder v.*, 3 Curt. 827; *Dean of Jersey v.*, 3 Moo. P. C. 229; and *Rogers's Eccl. Law*, 3rd edit. 786 (note).

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COYNE v. BRADY.

[IRELAND.]

his correspondence. The first act is his visit to Mr. Strickland's at twelve o'clock at night. Now, divested of the evidence of Strickland, the father, which the court has discarded, this act, however imprudent—and it was most improper—is not corroborative evidence, either of the charge preferred, nor is it an admission of guilt. The next act is of still more importance in the case. It appears that an action was brought against Mr. O'Neill either for seduction or some other offence of that kind, founded upon the transaction disclosed in the present case, and that when the case came on for trial at the last assizes held for the county of Dorset, Mr. O'Neill consented to a compromise on the following terms: That he should pay 100*l.* for the benefit of the girl and 60*l.* for costs, and this payment was made by Mr. O'Neill under protestation of innocence of any charge against him (a). The suggestion for this compromise came from the solicitor of Margaret Strickland. Now, the question is, whether such a transaction is consistent with innocence. Certainly, such a compromise *prima facie* raises a very strong suspicion against the innocence of a man in Mr. O'Neill's position; the very fact of such a compromise must necessarily be injurious to his character as a clergyman, for of course all would contend that no man would submit to a pecuniary sacrifice, to a certain extent necessarily based on an assumption of guilt, unless guilt really existed. I am very sensible of the strength of this argument, but still the matter may be looked at in another point of view. It may be considered as a total want of judgment in Mr. O'Neill, but still he might have been induced to adopt that course by motives perfectly consistent with innocence. It might well be that, considering, whatever might be the result of the trial, that, to a clergyman whose character was hitherto unassailed, the public exposure would be infinitely painful to himself and distressing to his family and all his friends—it might be that, to avoid such consequences, he submitted to the compromise and the pecuniary loss; even if that be so, there was a great want of moral courage, there was a great error of judgment. We know from experience that there have been many who, from the want of that inestimable quality of mind, have yielded to the imputation of acts when there was not the slightest ground for the accusation. Such instances are not of very rare occurrence, and certainly a want of moral courage, if such were the case, conveys no imputation of guilt. Having carefully reflected upon this transaction, and considered to the best of my ability the deduction that ought to be drawn from it, I have come to this conclusion, that I cannot deem it to be, however suspicious, either an admission of the charge preferred, or a confession of guilt. I abstain from commenting upon the letters. I fully admit that these letters show that Mr. O'Neill has not met the charges preferred against him in the manner and with the feeling that a clergyman of the Church of England ought to have met them. I am very free to own that he has raised suspicions against himself by all that he has done and written since he was apprised of the accusation made against him by Margaret Strickland; but I cannot find, in any part of this correspondence, any admission of guilt, or any confession that the charge preferred was founded in truth. I am of opinion that

(a) Note.—The memorandum of agreement was as follows: “*Strickland v. O'Neill*. Record withdrawn. No further proceedings of any kind to be taken by or on behalf of the plt., or any guardian or next friend of plt.; Mr. Johns having power to undertake for such guardian or next friend. Debt to pay 100*l.* Lord S. G. O. and Mr. Johns for plt.; 60*l.* for costs to Mr. Johns, it being expressly understood that debt makes the payment, protecting his innocence of the charge made against him, solely to avoid pain and annoyance to himself and scandal to the Church which might result from the trial of such an action.”

the evidence of Margaret Strickland is insufficient to prove the facts to which she has deposed, and that there is no adequate confirmation of her testimony, either by the mouth of witnesses or from the letters of Mr. O'Neill: there is no proof of the *corpus delicti*. I must pronounce that the promoter has failed in proof of the articles, and in all ordinary cases I should feel it my duty to accompany such a decree with condemnation in costs; but I am of opinion that the conduct of Mr. O'Neill himself requires me to make an exception to this rule. I refer more especially to the letters, and to that letter he addressed to the bishop, and I think it was under the circumstances the bounden duty of the bishop to proceed. I dismiss Mr. O'Neill, but I do not give costs.

*Shepherd and Skipwith*, proctors for promoter.  
*Pritchard and Sons*, for debt.

### Ireland. (a)

#### COURT OF COMMON BENCH.

Reported by J. FIELD JOHNSTON, Esq., Barrister-at-Law.

Saturday, Jan. 17, 1863.

COYNE v. BRADY.

*Cruelty to animals—Construction of the 12 & 13 Vict. c. 92—Judicial respect for English decisions. The penalties imposed by the 3rd section of the 12 & 13 Vict. c. 92, on persons assisting at a cockfight, are restricted to combats of that character conducted in a place particularly kept for this purpose.*

This was a case stated by the justices of the peace for the county of Dublin, assembled at Tallaght, for the opinion of the court, pursuant to 20 & 21 Vict. c. 43, s. 2. A summons in writing having been preferred by Thomas F. Brady, secretary to the Society for the Prevention of Cruelty to Animals, and John Harvey, a head constable, under sects. 2 and 3 of 12 & 13 Vict. c. 92, John Coyne was on the 3rd June 1861 convicted by the said justices assembled at Tallaght, of having been unlawfully engaged in cockfighting on the morning of the 15th May 1861, upon the lands of Glassamucky and Kiltipper, contrary to the provisions of the 12 & 13 Vict. c. 92. The fact of the cockfight was proved to the satisfaction of the magistrates, and it was further proved that John Coyne was seen to win and lose money in betting, but there was no evidence of his having handled the birds. Within three days John Coyne applied in writing under 20 & 21 Vict. c. 43, s. 2, requiring the justices to state a case for the opinion of the Superior Court.

*J. A. Curran*, jun. for the app.—This conviction is bad. There are two several grounds on which it will be sought to sustain it, and I shall deal with them in order. To encourage, aid, or assist at the fighting of cocks is not an offence within the intent or meaning of the 12 & 13 Vict. c. 92, s. 3. There must be more than this. It must be done in a place so kept or used for the purpose of fighting cocks as to subject the keeper of it to the penalty imposed in the foregoing clause of the same section. That section enacts, “That every person who shall keep, or use, or act in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature, or shall permit or suffer any place to be so used, shall be liable to a penalty not exceeding 5*l.* for every day he shall so keep, or use, or act in the management of any such place, or permit or suffer any place to be used as aforesaid; provided always, that every person who shall receive money for the admission of any other person to any place kept or used for any of the purposes aforesaid, shall be deemed

(a) From the *Irish Jurist*, by permission.

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to be the keeper thereof; and every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid, shall forfeit and pay a penalty not exceeding 5*l.* for every such offence." The words "as aforesaid" mean in the way or manner aforesaid, i. e. in a place kept for fighting or baiting animals. This construction will make the section intelligible. It will be unintelligible otherwise. We cannot suppose the Legislature to have intended that the principals should be exempted from the penalty they were imposing on those who should encourage, aid, or assist. It is accessories they mean—accessories to the offence specified in the previous part of the same section. But the magistrates conceived that a fresh offence was created in this latter clause, and they convicted the app, who was only proved to have won and lost money by betting. This view of the meaning of the section will be confirmed by referring to the 5 & 6 Will. 4, c. 59, s. 3, for which the present enactment was substituted. The latter statute clearly affected those only who frequented such places as I have mentioned. Indeed, there is an express decision on the point. In *Clarke v. Hague*, 2 L. T. Rep. N. S. 85; 8 Cox Crim. Cas. 324, the full Court of Q. B. in England held that, to constitute an offence within the meaning of the 12 & 13 Vict. c. 92, s. 3, the assisting at the fighting or baiting must occur at a place kept for the purposes of fighting or baiting; and Blackburn, J., in giving the judgment of the court, reasons upon the statute as I have done. But, secondly, supposing this point decided in the app.'s favour, the magistrates will seek to shelter themselves under the more comprehensive verbiage of the 2nd section. In their case they rely on this section, and profess to have convicted Coyne under and by virtue of it. It will be argued for them, that this appeal differs from *Clarke v. Hague*, because express notice was taken of the 2nd section, and the magistrates availed themselves of it. That section enacts, "That if any person shall, from and after the passing of this Act, cruelly beat, ill-treat, over-drive, abuse, or torture, or cause, or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal, every such offender shall for every such offence forfeit and pay a penalty not exceeding 5*l.*" I submit that it is impossible for them thus to unite the two sections in order to support their own Act. But that section meant no such thing as to include a case of this kind; it applies only to cruelties caused by the immediate act of man, it does not contemplate cases where the animals themselves are the agents. If the fighting of cocks was meant to have been included in the 2nd section, then the concluding clause of the 3rd section becomes utterly useless; and this, whether it bear my construction or the construction which will be contended for upon the other side. Read the words "as aforesaid" to mean, "whether of domestic or wild nature," and they will only have repeated an offence previously created; or read them to mean in the precise manner in this section specified, and the Legislature will be punishing in a particular instance that to which, under the more general words of the 2nd section, they had already attached a penalty, and that penalty the same penalty.

Barry, Q.C. (with him *Perce*) for the respa.—The words "as aforesaid" mean animals "whether of domestic or wild nature," &c. The distinction taken by the English Court of Q. B., in *Clark v. Hague*, between principals and accessories is fanciful. If this distinction be insisted on, then the cock is the principal in a cockfight, and all the people present, whether they handle the birds or encourage them by shouting, or bet upon them, are accessories. [MONAHAN, C. J.—Did you ever hear of a cock being indicted?] I insist upon

it that there is no difference between a man handling the birds, and a man encouraging them to fight, such as that which exists between principals and accessories; the latter is no more an accessory than the former. If the app.'s construction of this section be supported, it follows that I may carry a bear with me about the country for the purposes of baiting or fighting with impunity, provided I keep him moving from spot to spot, and never repeat the offence in the same place. In *Clarke v. Hague* the resps. were unrepresented: the app. argued the case, and there was no appearance on the other side. But further, supposing this section be construed in the app.'s favour, the 2nd section will sustain this conviction. [Reads 2nd section.] *Clarke v. Hague* is also reported in 29 L. J., N. S., 105, and there the following observations with which Blackburn, J. closed his judgment, are given: "We do not wish to be understood as confirming the opinion that no penalty can be incurred unless the animals are baited in a place (to use the phrase in the case) regularly kept for that purpose; on this we pronounce no decision, as the justices have not found the fact to raise this point, nor asked us any questions upon it, the only question submitted to us being whether it is an offence to assist at cockfighting elsewhere than in such place; we think it is not, and therefore our judgment must be for the app."

MONAHAN, C. J.—The public are little able to appreciate the grounds of doubt in the breasts of different judges; and it naturally tends to bring the administration of the law into contempt, when they see before them conflicting interpretations of the same statute. This is a thing to be avoided where it can be. Every opinion of every judge is fallible; and this is a principle to be recognised in the expression of a decision. Did this 3rd section of the 12 & 13 Vict. c. 92, come before us for the first time, we must have taken a different view of it; we must have acquiesced in the resp.'s reading and supported this conviction. But it has not so come; and this express decision of an English court we do not feel ourselves at liberty to overrule. Accordingly, this conviction must be quashed, but without costs. *Conviction quashed.*

Wednesday, May 6, 1863.

BATES v. M'CORMICK AND ANOTHER.

*Cruelty to animals—Construction of 12 & 13 Vict. c. 92, s. 2.*

*To cause one cock to fight another is an offence punishable under the 2nd section of the 12 & 13 Vict. c. 92.*

*A cock is an "animal" within the meaning of the 2nd section.*

*Coyne v. Brady, 7 Ir. Jur. N. S. 66, distinguished.*

*The 2nd section of 12 & 13 Vict. c. 92, deals with offenders who, if the offence were a felony, would be principals in the first degree; the 3rd with those who would be accessories before the fact or principals in the second degree: (per Christian, J.)*

This was a case stated by the justices of the peace for the county of Longford, assembled at Longford, for the opinion of the Court of C. P., pursuant to 20 & 21 Vict. c. 43, s. 2. The case stated that, at a petty sessions holden on the 13th April 1863, the defts. were charged, by a certain summons, for that they, on the 17th March last, at Longford, were guilty of cruelty to animals in having encouraged, aided, or assisted in fighting cocks, contrary to the 2nd section of the 12 & 13 Vict. c. 92; that at the hearing of the said complaint it was proved, on the part of the complainant, Constable Henry Bates, of Longford, that the defts. cruelly treated, abused and tortured certain cocks by fighting same on the 17th March last; that it was

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contended, on the part of the defts., that cock-fighting did not come within the meaning of the 2nd section of the Act; that the justices being of opinion that the offence so committed rendered the defts. legally liable under the statute, gave judgment against them, and adjudged that each of the said defts. should pay respectively the sum of 1*l.* as a fine, and 1*s.* costs.

*Waters* (with him *Sullivan*, Serjt.) claimed to be heard first in support of the conviction, and cited

*Bridge v. Parsons*, 32 L. J., N. S., 95, Mag. Cas. J. A. Curran, jun. (with him *W. Irvine*) contended that the appa.' counsel had a right to be heard first, and cited

*W. and L. Railway Company v. Kearney*, 12 Ir. C. L. Rep. 224;

*Fosberry v. W. and L. Railway Company*, 8 Ir. Jur. N. S. 64;

*Coyne v. Brady*, 7 Ir. Jur. N. S. 66.

[CHRISTIAN, J.—It is a mistake to call the parties appa. and respa. at all: it is a matter between the justices and the court.] It was suggested by the court that the counsel in support of the conviction should not press the point until the members of the court had communicated with the other judges.

J. A. Curran, jun. cited

*Clarke v. Hague*, 8 Cox's Crim. Cas. 324;

*Coyne v. Brady*, 7 Ir. Jur. N. S. 66;

*Morley v. Greenhalgh*, 32 L. J., N. S., 93, Mag. Cas.

These were all decided on the 3rd section (a), the concluding part of which would be perfectly useless if, under the more general words of the 2nd section, cock-fighting could be put down in any place [MONAHAN, C. J.—The 3rd section applies to any one who aids, encourages, or assists; but the charge against your clients is, that they fought the cocks themselves.] In *Bridge v. Parsons*, 32 L. J., N. S., 95, Mag. Cas., which will be relied on on the other side, one cock had its leg broken, and therefore was tortured; but though two cocks were fought, they were not both tortured. [MONAHAN, C. J.—Was it put upon the defenceless condition of the cock?] Yes.

*Sullivan*, Serjt. and *Waters* contra.—As a matter of fact it is found in this case that the defts. tortured the cocks by fighting, and the quantum of torture has nothing to do with the question. There are two points of law to be considered: whether fighting is torturing within the 2nd section, and whether a cock is an animal within the 2nd section. *Bridge v. Parsons* is conclusive. The point of that decision did not lie in the fact that one cock was disabled, as has been stated. Upon the argument that there had been cruelty, Wightman, J. says: "You may assume that that was so; but the more difficult question is, whether the cock is an animal within the meaning of the statute." It was held that he was; and Wightman, J., in giving judgment, says: "The Legislature,

therefore, may have intended to exclude from sect. 2 animals of a wild nature, such as foxes, for instance, so that no one should be liable for practising the ordinary sports of the field; and therefore they have limited the operation of sect. 2 to animals of a domestic nature. I think, therefore, that this case falls within the 2nd and 29th sections; and I am well disposed to put such a construction upon the words of the Act if that construction may have the effect of preventing such cruelty as we find described in this case." Fighting is torturing; and the cock is an animal. As to *Coyne v. Brady*, this court decided that case upon the 3rd section; but it never expressed, and never meant to express, any opinion on the 2nd. It is as great cruelty to set cocks fighting in a private yard as in a place kept for the purpose.

*W. Irvine* in reply.—If the argument on the other side were to hold good, there would be no use in the 3rd section being added to the 2nd. It is assumed that fighting cocks and torturing them are the same thing, but the true assumption is the reverse. The justices have stated in the case that the defts. have tortured the cocks by fighting; but the English courts have decided that that can only take place in a place kept for the purpose. The justices do not aid themselves by jumbling together the 2nd and 3rd sections. Unless *Coyne v. Brady* is overruled this conviction must be quashed. *Bridge v. Parsons* was decided on its own merits. A great deal of weight was attached to the fact that the cock was maimed and disabled. *Ipsa facto* that cock was tortured. In the present case there is not even mention made of spurs being used. To allow the cock to follow its own wicked nature is not torturing it.

MONAHAN, C. J.—We do not entertain any doubt but that this case comes within the 2nd section of the 12 & 13 Vict. c. 92. *Coyne v. Brady* was decided in reluctant obedience to a case in England, in which it was held that the latter part of the 3rd section referred to publicly fighting cocks in a place kept for the purpose. It is not necessary to consider that now, for the present case is stated under the 2nd section [his Lordship read the section]. In *Bridge v. Parsons* it was decided that a cock is an animal within this section, and we think that was rightly decided. The next question is, whether the causing one cock to fight another is causing or procuring the animal to be tortured. We do not doubt but that doing so in the manner described in this case is an offence within the 2nd section.

CHRISTIAN, J.—The 2nd and 3rd sections deal with distinct classes of offenders. The 2nd deals with those who, if the offence were a felony, would be principals in the first degree. The 3rd deals with those who would be accessories before the fact or principals in the second degree. I fasten on the words "cruelly abuse." Unless fighting cocks be not cruelly abusing them, this conviction must be affirmed.

*Conviction affirmed.*

This being the first case, and the Crown being the prosecutor, no costs were given.

## COURT OF EXCHEQUER.

Reported by OLIVER J. BURKE, Esq., Barrister-at-Law.

M'CULLAGH v. M'GARRY.

*Case stated by the justices*—*Wights and Measures Act*, 25 & 26 Vict. c. 76—*Practice*—*Right to begin*—*Order of counsel's address*.

*W. M. purchased a given weight of flax from M. C. for 14*l.* 17*s.* 6*d.*, and only paid therefor a sum of 14*l.* 14*s.* 6*d.*, being three shillings less than he ought to have paid for same, and having declined to pay the said sum of 14*l.* 17*s.* 6*d.*, he was summoned to appear before the justices of the peace*

(a) 12 & 13 Vict. c. 92, s. 2. And be it enacted that, if any person shall, from and after the passing of this Act, cruelly beat, ill-treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal, every such offender shall, for every such offence, forfeit and pay a penalty not exceeding 5*l.*

Sect. 3. And be it enacted, that every person who shall keep, or use, or act in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature, or shall permit or suffer any place to be so used, shall be liable to a penalty not exceeding 5*l.* for every day he shall so keep, or use, or act in the management of any such place, or permit or suffer any place to be used as aforesaid. Provided always, that every person who shall receive money for the admission of any other person to any place kept or used for any of the purposes aforesaid, shall be deemed to be the keeper thereof. And every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid, shall forfeit and pay a penalty not exceeding 5*l.* for every such offence.

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of the B. Petty Sessions District, under the 25 & 26 Vict. c. 75 (*Weights and Measures Amendment Act*). The justices of said district, having heard the complaint, fined said W. M. ten shillings and costs 1l., to be paid within one fortnight. From this sentence an appeal in the shape of a case stated was brought:

*Held*, that the conviction of justices was wrong, inasmuch as the Act was conversant with weights and measures alone, and not with the prices of the articles purchased:

*Held*, also, that in the arguments of cases stated for the opinion of the court by the justices, the junior counsel for the app. opens the argument.

Case for the opinion of the court from the justices of the Ballybay petty sessions district, co. Monaghan, stated, "that at a petty session held in and for the petty session district for Ballybay, in the county of Monaghan, on Monday the 16th Feb. 1863, before the undersigned justices of the peace acting in and for the said county of Monaghan, one William Magarry, the deft., was summoned before us, charged in and by a certain complaint, namely, that the said deft., having contracted with complainant for the purchase of a quantity of flax by weight, and the true weight of said flax having been ascertained pursuant to the *Weights and Measures (Ireland) Amendment Act 1862*, and said quantity so ascertained having been delivered by the complainant to the deft. as such purchaser, he, the said deft., under a certain pretext, claimed and made a deduction or allowance from said weight, same not being for the weight of any sack, bag, cask, firkin, or other covering of said flax, and deft. paid said complainant, James M'Cullagh, short, whereby the said deft. has incurred a penalty of 5l., on the 17th day of Jan. 1863, at Ballybay, in said county of Monaghan, and the said parties respectively being then present with their respective attorneys, the said complaint was duly heard before us, and upon such hearing an order was made to the following effect, viz., deft. to pay a fine of 10s. and costs 1l., to be paid by deft. within one fortnight. It appeared in evidence that William Magarry had purchased a quantity of flax at 8s. 6d. per stone from M'Cullagh, the complainant; that Magarry, when paying for the flax, paid 14l. 14s. 6d. instead of 14l. 17s. 6d., being a sum less than the sum he ought to have paid by three shillings, and that the deft. declined to pay the full sum on the ground that same was due for what was called storage, which was an old custom in that part of the country, though in point of fact there was no storage at all to claim allowance for."

Fraser was proceeding to open the argument for the app., when

Dowse, Q.C. interposed, and claimed the right to begin on behalf of the resp., insisting that such was the practice in the Q. B. and Ex. in England, although it is different in the C. P. in that country.

Fraser cited *Rez v. Brophy*, 9 I. C. L., App. xi., in which the rule is laid down by the Q. B. in Ireland, "that in the argument of cases stated for the opinion of the court by justices of the peace under the 20 & 21 Vict. c. 43, s. 2, counsel address the court in the same order as in law arguments. There the junior counsel for the app. opens the argument; then the junior on the other side opens the resp.'s case, and is followed by his senior. The senior counsel for the app. replies upon the whole case." [PIGOT, C. B. said that the court would follow the rule laid down by the Q. B. in Ireland.]

Fraser for the app.—The conviction by the magistrates was bad, inasmuch as the offence charged by the summons was that of making a deduction from the weight of the article sold; whilst the evidence set out in the case showed that the deduction was not from the weight, but from the price agreed to be paid for

the article sold, and that such deduction from the price did not come within the provisions of the 13th section of the *Weights and Measures Act*; 25 & 26 Vict. c. 76, whereby it is enacted that every article sold by weight shall, if weighed, be weighed in full net standing beam; and for the purposes of every contract, bargain, sale, or dealing, the weight so ascertained shall be deemed the true weight of the article, and no deduction or allowance for tret or beamage, or any other account, or under any other name whatsoever, the weight of any sack, bag, cask, firkin, or other covering, in which such article may be alone excepted, shall be claimed or made by any purchaser on any pretext whatever, under a penalty of not exceeding 5l.; and the preamble to part second of the statute recites that it is expedient to abolish all local denomination of weights, and so prohibit improper deductions in weighing, and otherwise to regulate the mode of weighing articles sold: be it therefore enacted, &c. No provision is made by this statute as to the paying or deduction of payments, but is merely conversant with vendors selling by false weights, while the justices deal with the vendee paying from and deducting from such payment. This is a penal statute, and must be construed liberally.

*MacMahon* (with whom was *Dowse*, Q.C.).—This case, if it be not within the letter, is within the spirit of the statute, and every statute ought to be expounded according to the intent of its makers: (4 Inst. 330; *Plowden*, 497 a.) The mischief to be corrected by the statute must be considered: (*Co. Lit.* 246.) The *Weights and Measures Act* was passed for the purpose of protecting both buyers and sellers. In the construction of statutes the ends contemplated are to be considered: (*Comyn's Dig.*, tit. "Parliament," 319.) And in *Vere v. Sampson*, *Hardres*, 208, 13 Car. 2, it is said that what is within the intention of an Act, though not comprehended within the express words of it, is equivalent to what is within the express words, and as strong; and as to penal statutes, equity makes no difference between a penal statute and all others: (*Heydin's case*, 3 Rep. 3; *Hardres* 206-8.) In the case of *Bywater v. Brandling*, 7 B. & C. 660, Lord Tenterden says, in construing Acts of Parliament we are to look not alone at the preambles, or at any particular clause, but, if we find any particular expression not so large and extensive in its import as those used in other parts of the Act, and if upon a view of the whole we can collect from the more large and extensive expressions used in other parts the real intention of the Legislature, it is our duty to give effect to the larger expression, notwithstanding the phrase of less extensive import in the preamble, or any particular clause.

PIGOT, C. B. (reads the preamble of the statute 25 & 26 Vict. c. 76, part 2nd, and also the 15th section of said 2nd part).—It is perfectly plain that the whole scope and tenor of the Act are conversant with the proper ascertainment of the weight of the article sold, and with nothing else. The Act contains ample provision for protecting the buyer from any deduction in weighing the article sold by the seller as to weights and measures, and deals with the manner that weight is to be accurately ascertained; but it leaves both buyer and seller perfectly free to contract, or to make any deduction whatever that might suit them in the price of the article sold; the conviction, therefore, of the magistrates cannot be sustained.

*Conviction of the magistrates quashed accordingly.*

Q. B.]

RUTTINGER v. TEMPLE—REG. v. HODGSON.

[Q. B.]

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,  
Barristers-at-Law.

Tuesday, Nov. 3, 1863.

RUTTINGER v. TEMPLE (Administratrix, &amp;c.)

*Illegitimate child—Maintenance after mother's death.*

*There is no legal obligation on the part of the personal representative of the deceased mother of a bastard child under sixteen, to pay out of the assets for the expenses of its maintenance incurred after the mother's death.*

This was an action to recover 36*l.* 12*s.* 1*d.* for the funeral expenses of the deft.'s deceased daughter, and the cost of the maintenance, &c., of an illegitimate child, of which the daughter was the mother.

The declaration contained two special counts, on an alleged agreement, by which the plt. undertook to bring up the child after the mother's death, and the deft. undertook to take out administration in respect of some property belonging to the deceased, and to pay over the money and interest she might receive to the plt.'s agents. The plt., however, failed to prove the same upon these counts, and the only question raised at the trial was upon the common counts.

The deft. paid 12*l.* into court, which was admitted to be for the funeral expenses only. The verdict was found for the plt. for 24*l.*, with leave reserved to move to enter the verdict for the deft.

The facts were, that the deceased had cohabited with the plt. up to about March 1862, when there was a separation. The deceased some time subsequently (May 1862) was delivered of a male child in Queen Charlotte's Lying-in Hospital. At the time of her death (15th May 1862) she was entitled to some property, and an arrangement was come to between the plt. and all the members of deceased's family, with the exception of her two brothers, that the plt. should bring up the child, and the deft. take out administration, and pay over the proceeds of the deceased's property to certain persons for the plt. This arrangement not having been performed on the part of the deft. this action was brought.

In Hilary Term a rule *nisi* was obtained to enter the verdict for deft.

Perry, Serjt. now showed cause.—The sole question is, whether the administrator of the mother of a bastard child under the age of sixteen is liable for the maintenance of a child after the mother's death. By the 4 & 5 Will. 4, c. 76, s. 71, the mother of a bastard child is bound to maintain it until the age of sixteen, so long as she shall be unmarried or a widow; but if she marry, the obligation to maintain the child is cast on the husband: (sect. 57.) [BLACKBURN, J.—How does that enactment compel the administrator of the mother to maintain the child after the mother's death?] The mother would be indictable for not supplying necessaries to the child. [BLACKBURN, J.—No doubt, when she has the custody of the child; but here the expenses sued for were incurred after the mother's death.]

1 Black. Com. 448, was then cited.

The *Solicitor-General* (Woollett with him).—The deft., as administrator, was not liable. Her duties were to collect the deceased's estate, pay her debts and distribute the residue according to the Statute of Distributions. Here there was no debt or obligation incurred in the mother's lifetime, which the administrator was liable to satisfy, and no provision is made by the Statute of Distributions for the maintenance of an illegitimate child.

*Mortimore v. Wright*, 6 M. & W. 482, was cited.

Cockburn, C. J.—The rule must be made absolute. The 4 & 5 Will. 4, c. 76, s. 71, imposes on the

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mother of an illegitimate child the liability to maintain the child, but that liability is a personal one. It is much to be regretted that no provision is made in the case where the mother of an illegitimate child dies leaving means sufficient to provide for the child, that the estate left, or some part of it, should be applied to its maintenance. In the absence of such statutory obligation, I do not gather from the authorities that any liability exists at common law whereby the administrator of the mother is liable to provide for or to pay for the expense of the maintenance of the child out of the assets. This was merely a personal obligation, but it might have been a different question if the payment had been made by the plt. in the mother's lifetime. Here the assets come to the administratrix, who is bound to distribute them according to the Statute of Distributions, which makes no provision for the maintenance of an illegitimate child. The administratrix in this case, therefore, cannot be held liable, and the rule must be made absolute.

WIGHTMAN, BLACKBURN and MELLOR, JJ. delivered similar judgments. *Rule absolute.*

REG. v. HODGSON.

*Certiorari—Practice—Time for obtaining.*

*The preliminary step for applying for a certiorari at chambers to quash a conviction was taken on the 22nd Aug., the six months from the date of the conviction not expiring until the following day. Subsequently the learned judge at chambers dismissed the summons, indorsing it, "no order—without prejudice to any application to the court:"*

*Held, that an application to the court within the first four days of the following term was too late.*

H. Matthews moved for a *certiorari* to bring up a conviction of the deft. Hodgson, dated 23rd Feb. 1863, under the Salmon Fisheries Act (24 & 25 Vict. c. 109), s. 20, with a view to the same being quashed on the ground that the justices before whom the case was determined were interested parties.

It is unnecessary to enter into the main facts, as the contest before the court resolved itself into the question whether this application was in time.

The 13 Geo. 2, c. 18, s. 5, enacts that no writ of *certiorari* shall be granted, &c. to remove any conviction, &c., had, or made by or before any justice or justices of the peace, unless such *certiorari* be moved or applied for within six calendar months next after such conviction, &c., and unless six days' notice thereof be given in writing to the justices, that they may show cause (if they shall think fit), against the issuing or granting of such *certiorari*.

On the 15th Aug. six days' notice was served, in pursuance of the above enactment, on the convicting justices; and on the 22nd the parties attended at the judge's chambers to apply for a *certiorari*, and the affidavits to be used were left with the judge's clerk, as the judge was not in attendance on that day, it being vacation time, during which period attendance was given on Tuesdays and Fridays only. On the 25th the learned judge, on the application being made, refused to grant a *certiorari*, indorsing the summons, "no order—without prejudice to any application to the court."

It was now contended that the leaving of the affidavits with the judge's clerk at chambers on the 22nd was a making of the application on that day, and if so, that it was made within the six months, which did not expire until the 23rd Aug., and that by the indorsement on the summons "without prejudice to any application to the court," the present motion was, as it were, an adjournment of that application as chambers on the 22nd Aug. [WIGHTMAN, J.—Not so: the indorsement "without prejudice to any application to the court" is a very common one, and does

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not mean that. When a judge at chambers refers an application to the court he indorses the summons "I refer this to the court." Here, on the contrary, the judge indorses "no order."]

By the COURT.—This is an independent application to this court, and it is too late. It is clearly made after the six months. The deft. is now in the same situation as if he had made no application at chambers, for the judge made no order, and dismissed the summons.

*Rule refused.*

Thursday, Nov. 5, 1863.

REG. v. STAPLETON.

*Poor-rate—Endowed school—School-house, &c., and master's residence—Rateability.*

*Premises were held in trust to permit the master, wardens, &c., of B. to hold and enjoy the house for a residence of 100 poor boys, a schoolmaster and necessary servants for a school. The boys were boarded, &c. and put out as apprentices. The establishment was purely an endowed one:*

*Held, that the schoolmaster was rateable for the house, &c. occupied by him, and the master, wardens, &c. for the portion appropriated for the boys, servants, school-house and playground.*

Special case stated on appeals against a rate or assessment to the relief of the poor of the parish of Stapleton, Gloucestershire. The Quarter Sessions ordered the names of the apps. to be struck out of the rates.

By indentures of lease and release, dated respectively the 24th and 25th Nov. 1708, Edward Colston, of London, merchant, conveyed to certain persons (hereinafter designated the feoffees), and to their heirs and assigns for ever, certain manors, lands and hereditaments, therein particularly described, and also a capital messuage then since known as the Great House, in the parish of St. Augustine, in the city of Bristol, upon the trusts only and to the only intents and purposes following; that is to say, upon trust to permit the masters, wardens, assistants and commonalty of Merchants Adventurers within the said city of Bristol and their successors for ever (hereinafter designated the trustees), to hold and enjoy the said capital messuage, manors, lands and hereditaments upon the trusts, confidences, &c., for the only ends, intents and purposes following, that is to say, that the said Great House should for ever thereafter be used, enjoyed and employed for a house, habitation and abiding-place for fifty poor boys (by a subsequent endowment in the same deed increased to 100 poor boys), and one or more schoolmaster or masters, and for necessary servants to inhabit in and for a school to teach the said boys, and to find and provide for such boys meat, drink, washing and lodging, and clothing of all sorts of cloth, linen and woollen, and to place such boys apprentices from time to time when and as they should become capable, and to pay 10*l.* to a master with each boy, when he should be so placed apprentice, and a convenient allowance for such schoolmaster, at the discretion of the trustees, who might, from time to time, displace such schoolmaster and schoolmasters if they should think fit, and also from time to time to repair the said Great House, and to pay and discharge all the before-mentioned liabilities out of the rents, issues and profits of the said manors, lands and hereditaments thereby conveyed. By the said indenture it was provided that any vacancies amongst the boys should be filled up by the said E. Colston as their founder and visitor during his life, and that from and after his decease one-half of the said number of boys were to be chosen by the trustees and their successors from time to time, and the other half of the said number of boys, after the decease of the executors of the said E. Colston, by Francis Colston and eleven others

therein named (and therein and hereinafter designated the nominees) and their successors from time to time. And the said indenture further provided that all the said boys should be ordered, governed, placed, and upon just cause displaced by the trustees, and that no poor boys should be thereafter elected or admitted in the said house but what were or should be the sons of freemen of the said city of Bristol, or born within the city, save twenty of the boys appointed by the nominees, which twenty boys might be of any other place, with a provision in favour of boys of kin to or of the name of the said E. Colston.

On the 1st Aug. 1842 the M. R., on an information filed by the Attorney-General, made a decree declaring that the lands, tenements, hereditaments and premises comprised in the indenture of settlement of 1708 are held on the charitable purposes therein expressed, and that the trustees are not entitled to appropriate the rents or profits thereof to their own use, and ordering a scheme for the management of the charity and the application of the rents and profits thereof.

On the 2nd May 1859 the M. R., on the application of the trustees, declared that it was fit and proper and for the benefit of the charity that it should be removed from the said Great House in St. Augustine's-back, in the city of Bristol, to the premises comprised in the assessment, and that the conditional contract for the purchase thereof entered into by the trustees should be completed and carried into effect, and it was ordered that the scheme hereafter mentioned should be the scheme for the future regulation of the charity, and that the removal of the school should be completed and the necessary alterations in the premises effected by the trustees, with the sanction and direction of the court.

The scheme above referred to provided, *inter alia*—  
1. That the charity and the lands and property thereof should continue under the management and control of the society of Merchant Venturers, herein designated the trustees.

2. That the trustees should, with the sanction and direction of the court, complete on behalf of the charity, the said purchase of the house and premises at Stapleton, and that the said messuage and premises should thenceforth, from the date of such completion, be called Colston's Hospital.

3. That the trustees might borrow money upon mortgage and sell the said Great House and premises.

5. That the trustees should, with the sanction of the Court of Ch., make such alterations in the said messuage and premises and land at Stapleton as should be necessary for the adoption thereof to the purpose of the said hospital or free school.

11. That the proportion of eighty town and twenty country boys, as constituted by the said E. Colston, should not be interfered with, but that the existing limitation of eligibility by birth of town boys should be extended to the limits of the present borough.

12. That the surplus of the charity income which should remain undisposed of after making the payments and investments thereinbefore directed to be made should be applied in adding to the number of boys in the existing school such a number as the surplus income of the charity should from time to time be sufficient to support.

The said conditional contract for purchase was completed on the 14th July 1859, when the premises were conveyed to the present feoffees of the estates comprised in the settlement of 1708, upon the trusts thereof, and subject to the said order and scheme, the alterations and additions which have been made to the school premises received the sanction and approval of the Court of Ch.

The trustees and nominees hold monthly and other visitations of the school for the purposes thereof, but the trustees conduct all business in reference to the

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school and trust estates, which it is not requisite to connect in the school premises, in their common hall in the city of Bristol.

Boys have been, and may continue to be, admitted to the hospital from the resp. parish.

The said message and premises and land are situate in the said parish of Stapleton, and up to the time of the removal of the said school to the said premises, were always rated for the support of the poor of the said parish, and in consequence of their value materially contributed to such support.

The rate is dated 24th Oct. 1861, and the assessment on Mr. Rowlatt comprises his apartments as well as the premises used for school purposes. Out of the acres 22 perches which were purchased 2 acres 9 perches are let off to a tenant who is separately assessed.

The residue of the land, in respect of which the rates were assessed, consists only of the house and offices, roads, playgrounds, shrubberies, a sitting place, about a quarter of an acre of pleasure ground, or garden, in front of the master's rooms, of which he has the exclusive enjoyment, the boys being sent out from it, and about a quarter of an acre of arden ground, cultivated by the boys themselves for their amusement. No profit is made by the sale of vegetables or fruit; but the whole produce of the arden, which is very trivial, is consumed by the boys themselves on the establishment.

The boys are ordinarily excluded from the ground in front of the master's rooms, to which he has a separate entrance. The master's apartments consist of three sitting-rooms on the ground floor, with three bed-rooms above. The lower rooms open into a passage which communicates with the general dining-hall, and a passage on the upper floor communicates with the staircases through doorways, which are closed or opened at the discretion of the head master. The masters and nominees have access to all parts of the establishment, including the master's rooms.

The establishment consists of 120 boys, 5 under-masters and 7 servants. The head master is appointed with the pleasure of the trustees, and receives a salary of 200 guineas per annum, and has meals for himself and family from the school-house kitchen, of which any extras are provided by himself. He receives no perquisites from the pupils, nor any profit from the lands. Although the master's wife resides with him, holds no appointment in the employ of the trustees, she, in fact, discharges all the duties in the household which, if the master were a married man, would devolve upon a matron to discharge.

Since the death of his two children, Mr. Rowlatt has had two nieces as frequent visitors residing with him in his apartments, and, on some occasions, his mother-in-law.

The parish officers of Stapleton rated Richard Rowlatt, the head master, as occupier of the said house, garden and premises used for the purposes of the said hospital or free school, and the trustees for so much of the said house and premises as is not appropriated to the use of the schoolmaster, against which rates appeal were entered.

Upon the hearing of the said appeals, the court, after hearing counsel on both sides, amended the rate by striking out the names of the said R. Rowlatt and the trustees on the ground of their having no beneficial interest in the premises, subject, however, to the opinion of the Court of Q.B. as to whether, on the foregoing statement of facts, the said R. Rowlatt and the trustees were liable to be so rated to the relief of the poor of the parish of Stapleton, or not.

June 26.—W. H. Cooke argued for the resps., and Gray (Gilmore Evans with him) for the apps.

*Cur. adv. vult.*

Nov. 6.—BLACKBURN, J.—The question in these cases is, whether the rate in respect of the house and premises occupied as Colston School is good? It appears, from the statement in the case, that the premises in question were, under the sanction of the Court of Ch. in 1859, conveyed to feeoffees on trusts of a settlement made by Edward Colston, and subject to a scheme and order of the Court of Ch. for carrying out those trusts. The effect of the settlement and scheme is, that the feeoffees hold the premises in trust to permit the master, wardens, assistants and commonalty of the Merchant Venturers of Bristol (called in the case the trustees) to hold and enjoy the house for a residence for 100 poor boys, a schoolmaster and necessary servants to inhabit in it for a school to teach boys. The trustees are to find and provide for them board and lodging there, and ultimately to put them out as apprentices. Of these boys eighty are to be sons of freemen of Bristol or born in the city, twenty may be born in any other place, but a preference is to be given to those who are of kin to the founder; all must be poor, and all of the Church of England. The premises are used for this purpose. The present schoolmaster, Mr. Rowlatt, has been rated to the relief of the poor of the parish as occupier of the portion of the premises used as his residence, and the trustees have been rated as occupiers of the portion appropriated for the boys, servants, school-house and playground. It does not appear on the case that the portion occupied by the schoolmaster is in excess of what would be reasonably appropriated to the accommodation of such a functionary. No question is raised as to whether the nature of the schoolmaster's enjoyment is sufficiently exclusive to make him the occupier, or whether it is merely an enjoyment as a lodger or inmate may be under the trustees. The present question raised is, whether the fact that the premises are held for the purposes of Colston school prevents the occupation from being beneficial so as to be rateable. We think the rates are good. It is now settled that where lands are occupied for public purposes, as for instance the court-houses, prisons and the like, so that (to adopt the language of the Court in *Reg. v. Wallingford Union*, 10 A. & E. 264) the public is the occupier, "whilst those who would otherwise have been the occupiers are in the situation of public servants, receivers and managers for the public benefit, without any interest of their own," there can be no rate imposed, for the rate must be on the occupier, and the occupier, in such cases the public, cannot be rated. But in the present case it cannot be said that the purpose for which these premises are occupied is public in any sense of the word; they are occupied for the purposes of a highly laudable charity, but of a strictly private nature. The recipients of the charity would themselves be rateable if they had an exclusive occupation. In *Reg. v. Cree*, 10 B. & C. 203, and in *Re v. St. Luke's Hospital*, 2 Bur. 1053, which were especially relied on, the decisions went on the ground that no person was shown to be occupier of the premises in question. In the present case there is no such difficulty, as by the express terms of the settlement, as well as from the nature of the thing, the trustees are to be in the occupation of the premises for the purposes of carrying out the charity. It is true that Lord Mansfield, in the case referred to, uses language which has been understood to lay down the proposition that where the occupiers of land are bound to apply it for the benefit of a charity they are not rateable. But this doctrine has not recently been adhered to. In the last case upon the subject, *Reg. v. Licensed Victuallers' Society*, 1 Best & Smith, 71, Hill, J. says: "I do not agree that there is no distinction between buildings used for charitable and buildings used for public purposes. In the former case there is an actual occupier, in the latter there is not." Then my brother Crompton referred to



several recent cases in which the distinction has been pointed out. The Court in that case acted upon the distinction, and we think we ought to follow the decision. The consequence is, in each case the order of sessions must be quashed and the name of the appellant restored.

*Order of sessions quashed.*

Wednesday, Nov. 11, 1863.

THE LONDON AND NORTH-WESTERN RAILWAY COMPANY (apps.) v. THE CHURCHWARDENS OF CANNOCK (resps.)

*Poor-rate—Railway—Branch line—Profit derived by main line from traffic coming from the branch.*

*The rateable value of land in a parish may be increased by its producing a return to the occupiers out of the parish, as where a branch railway occupied by a company owning a main line into which it runs, produces a profit by virtue of the traffic which it causes over such main line.*

*The branch line of A. ran into the main line of B., and was leased to the latter at a fixed rent. The traffic on the branch yielded no profit whatever with reference to the branch itself, but such traffic passed over the main line, and contributed considerably to the traffic and profit of such main line:*

*Held, that B., as the occupiers of land in the parishes through which the branch line ran, were liable to be rated not merely with respect to the earnings of such branch lines in such parishes, but in respect of the value to them as bringing a profit to their main line.*

This was a special case stated for the opinion of the court in pursuance of an order of Crompton, J., made under the 12 & 13 Vict. c. 45, in an appeal by the London and North-Western Railway Company to the Quarter Sessions of Staffordshire against a rate for the relief of the poor of the parish of Cannock in the said county.

The case was as follows:—

The apps., the London and North-Western Railway Company, are an incorporated company acting under the provisions of an Act passed in the session of Parliament held in the 9th & 10th years of her present Majesty Queen Victoria, and intitled, "An Act to consolidate the London and Birmingham Grand Junction and Manchester and Birmingham Railway Company." The Cannock Mineral Railway Company were incorporated under that title, by the Cannock Mineral Railway Act 1845, and were thereby authorised to make a railway from Cannock Mill, in the resps.' parish, to the North Staffordshire Railway (Potteries line), forming a junction with the Trent Valley line of the apps.' railway at or near the Rugeley station of the said railway, in the county of Stafford. The same statute enacted, that it should be lawful for the Cannock Mineral Railway Company to demise or lease their undertaking for such consideration or annual rent, and upon such terms and considerations as they should think proper, to the London and North-Western Railway Company, for any term which had been or should have been agreed upon. In the exercise of this power, and before the completion of the line, a lease was agreed to be granted by the Cannock Mineral Railway Company to the apps., of their line and station, and of the goodwill of the trade of carriers thereon, at a yearly rental of 5500*l.* in perpetuity, and the apps. had entered into possession and enjoyment of the said premises and goodwill so agreed to be leased at the time of making the poor-rate hereinafter mentioned. For the purposes of this special case, it is said to be taken, that at the time of the making of the said rate, a lease had been granted in the terms of the said agreement. The apps. are bound by the agreement to keep the line in repair. Copies of the Acts of Parliament herein referred to accompany this case, and are

to be deemed part thereof. The Cannock Mineral Railway was opened the 7th Nov. 1859, and is worked by the apps. They carry on exclusively upon it a business of carriers of passengers and goods. The length of the Cannock Mineral Railway is 7½ miles, and it passes for a length of 2½ miles through the resps.' parish. The actual number of acres of land occupied by the 2½ miles of railway in the resps.' parish is 35 acres, and the rateable value of such land as arable or pasture land may be taken at 40*s.* per acre.

By a rate or assessment for the relief of the poor of Cannock and for other purposes chargeable thereon according to law, made on the 26th Nov. 1860, after the rate of 10*d.* in the pound, the London and North-Western Railway Company were assessed as occupiers of the said two miles and a half of the said Cannock Mineral Railway in the resps.' parish (and of the goodwill of the apps.' trade of carriers thereon) at a gross rental of 325*l.* 12*s.*, and a net rateable value of the same sum of 325*l.* 12*s.*, and the rate demanded of the London and North-Western Railway Company on that assessment amounts to 13*l.* 11*s.* 4*d.* The London and North-Western Railway Company duly appealed against the said rate, and gave due notice of such appeal, and such appeal was duly respited at the quarter sessions held in the first week next after the 28th June 1861, and again at the quarter sessions held in the first week next after the 11th Oct. 1861. The causes and grounds of such appeal, and the apps.' objections to the said rate, are to the effect that the apps. are in and by the said rate or assessment over-rated in respect of the yearly value of the rateable property occupied by them in the said parish, but it is admitted that the apps. are to have the full benefit of such grounds should the effect of them be here insufficiently stated. The said order of Crompton, J. was made on the 11th May 1863, whereby it was amongst other things ordered that the parties should be at liberty to state the facts of the case in the form of a special case for the opinion of the Court of Q. B., they agreeing that a judgment in conformity with the decision of the said court, and for such costs as the court shall adjudge, may be entered on motion by either party at the court of sessions of the peace to be held in and for the county of Stafford next or next but one after the decision of the Court of Q. B. shall have been given. The gross receipts of the apps. in the year for which the rate was made amounted in the parish of Cannock to 143*l.* 6*s.* 9*d.* per mile, making 338*l.* 6*s.* 10*d.* for the two miles and a half of railway in the resps.' parish. The total expense of working the Cannock Mineral Railway in the resps.' parish in the year for which the rate was made, independently of the rent of stations, renewal of road, interest on tenants' capital and tenants' profits, amounted to the sum of 322*l.* 18*s.* 4*d.* per mile, making 807*l.* 5*s.* 10*d.* for the two miles and a half of railway in the resps.' parish. The expenses of working the railway in the resps.' parish therefore exceeded the gross receipts there, and so far as relates to the earnings or profits there, the apps. do not make any net earnings or profits in respect of the land occupied by them in the said parish. The Cannock Mineral Railway forms a link in the apps.' system of railways, and at the time when the said agreement for a lease was made, the apps. considered the possession of this railway desirable, both with a view to secure traffic for their main lines and to prevent other railway companies from gaining access to the district. These considerations induced the apps. to enter into the agreement for a lease of the Cannock Mineral Railway at the rent before mentioned; but so far as regards the exclusion of the said other companies from the district, such considerations, from a change of circumstances, did not exist at the time of the making of the rate in question.

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The Cannock Mineral Railway unites at one end, as before stated, with the Trent Valley Railway of the apps., and at the other forms a junction with the Cannock branch of the South Staffordshire Railway, of which last-mentioned railway and branch the apps. are also lessees. Passengers, minerals and goods are conveyed over the Cannock Mineral Railway and over the main and other lines belonging to or leased by the apps., at through rates and fares, and nearly the whole of the traffic on the Cannock Mineral Railway passes over some part of the apps.' other lines. By this means the Cannock Mineral Railway contributes considerable additional traffic to the main lines of the apps.' railways, but the apps. are rated in respect of such additional traffic, together with all other traffic passing along their lines in the different parishes where the profit upon it arises. In the above-mentioned statement of gross receipts the profits accruing to the apps. from the traffic so carried over their other lines from and to the Cannock Mineral Railway is not included. The traffic of the Cannock Mineral Railway is not yet fully developed; the line passes through a rich mineral district, and over land rapidly increasing in value. The apps. work the Cannock Mineral Railway in connection with and as part of their general system of lines, and in the manner which they considered most beneficial for such system, and not with any special reference to profits to be made upon the above railway alone, as distinct from the beneficial working of the whole system. It is admitted by the apps. for the purposes of this case that they are liable to be assessed at a net rateable value of 40s. per acre, being the value as arable or pasture land of the land occupied by them in the parish, making a sum of 70l. for the thirty-five acres of land, the total quantity of land the subject of this rate. The question for the opinion of the court is, upon what principle the apps. are liable to be rated for their occupation within the resps.' parish? If the court shall be of opinion that the apps. are not liable to be rated beyond the sum of 40s. per acre, then the rate is to be reduced accordingly to 70l.

If the court shall be of opinion that the apps. are liable to be rated beyond the said sum of 40s. per acre, then the rateable value upon the principle laid down by the court is to be ascertained by a reference and assessment to be made accordingly.

*Mellish, Q. C. (Davis with him)* appeared in support of the rate, and contended that although the railway might not yield any profit to the apps. in the parish itself, yet that, taken in connection with the main line, over which such traffic would pass, it would yield a profit, and so the line in such parish would be of enhanced value; independently of which such line would be of value to the company in connection with their general system, and as giving them a monopoly in the district. He referred to *Reg. v. South-Eastern Railway Company*, 3 El. & B. 481, as establishing this principle.

*Bovill, Q. C. (Staveley Hill with him)*, for the apps., contended that, inasmuch as the working of the line yields no profit, the apps. are only liable to be rated for their occupation at the value of arable or pasture land. [*COCKBURN, C. J.*—We must look to its value to a tenant, namely, what it would let for to a company so situated as this company.] Here is a lease in perpetuity, and therefore we must look at the case as though the branch line were an integral portion of the entire line, and then it should be assessed upon the parochial principle:

*Reg. v. Fletton*, 30 L. J. 89, M. C.

[*COCKBURN, C. J.*—Rent is *prima facie* evidence of value. Suppose at this moment there were no lease, and the apps. wanted to take it, what is the rent they would give? They would arrive at that by this process. What is the traffic on the branch, what are

the expenses, what are the profits it would produce to the main line? with some other considerations. *BLACKBURN, J.*—What would be the elements of the rent? Why, amongst others, the capacity to add to the takings of the main line.] The true principle is stated by Lord Ellenborough in *Rez v. Bedworth*, 8 East, 387, which is that the property can only be rated whilst it is productive. The rate must be made upon the parochial principle:

*Reg. v. The Brighton Railway Company*, 15 Q. B. 213;

*Reg. v. The Great Western Railway Company*, 15 Q. B. 1085;

*The Newmarket Railway Company v. St. Andrew-the-Less*, 3 El. & B. 94.

[*WIGHTMAN, J.*—Is it found in the case that the London and North-Western Railway Company, if released from the lease, would give nothing as a rent for the line? ] It is not so found. [*BLACKBURN, J.*—Why, if there are no profits, do they keep the line open? ]

By the COURT.—The case must go back as provided for, to have it ascertained what, taking all its advantages into consideration, is the rateable value of the branch line in the resps.' parish to the apps.

*Judgment accordingly.*

Attorney for the resps., *John Collis*, Penkridge.

Attorney for apps., *James Blenkinsop*, Euston Station.

PAPPIN (app.) v. MAYNARD (resp.)

*Highway—A game upon—5 & 6 Will. 4, c. 50, s. 72—Conviction.*

*Where a number of persons assembled together in a public highway to enjoy a diversion called "a stag hunt," which consisted in one of the number representing a stag, and the others chasing him, whereby an obstruction was caused:*

*Held, that this was "a game" within the meaning of sect. 72 of the 5 & 6 Will. 4, c. 50.*

This was a case stated under the 20 & 21 Vict. c. 43, upon a refusal of justices to convict of an offence under sect. 72 of the 5 & 6 Will. 4, c. 50 (the Highway Act), which imposes a penalty upon any person who "shall play at football, or any other game, on any part of the said highway, to the annoyance of any passenger or passengers."

It appeared that many of the inhabitants of Stratton, Cornwall, were in the habit of amusing themselves, on certain evenings, by a representation of a stag-hunt in the public streets, which consisted in one of their number being dressed so as to represent a stag, and many others following him, as in the chase. On the 1st May last such a game was indulged in, and caused an obstruction, and upon an information laid under the foregoing section, the justices dismissed it, holding that this was not a game within the meaning of the Act.

*Welsby* now appeared in support of the information.

[*COCKBURN, C. J.*—What do you say to Guy Faux, or to sweeps upon a May-day? ] Those would be games within the Act if they were an obstruction. These facts show that the parties were engaged in a game, and they obstructed the highway. [*COCKBURN, C. J.*—It might be said to be analogous to the game played by schoolboys of "hare and hounds." ] Just so; and as it was an obstruction, it is clearly a game within the meaning of the section.

No one appeared on the other side.

*COCKBURN, C. J.*—Assuming that they were pretending to hunt the stag, it certainly appears to be a game such as might be the subject of a conviction under the statute. The case, therefore, must go down again to the justices, with our opinion upon it.

*Case remitted to the sessions, with the opinion of the court.*

HOPTON (app.) v. THIRWALL (resp.)

*The Salmon Fishery Act*—Having in possession the young of salmon—Ignorance of fish being the young of salmon.

Under the *Salmon Fishery Act* 1861, sect. 15, a penalty is imposed upon any person who shall "have in his possession the young of salmon." A., with a rod and line, caught a number of samlets (the young of salmon) whilst he was fishing for trout, not knowing the difference, and having no intention of taking or having in his possession samlets or the young of salmon, or the young of the salmon species:

*Held*, that he had committed no offence under the statute.

This was a case stated under the 20 & 21 Vict. c. 43, upon a refusal of justices to convict upon an information under the 24 & 25 Vict. c. 109, s. 15 ("An Act to amend the laws relating to fisheries of salmon in England.")

By the above section it is enacted (*inter alia*) that no person shall do the following things or any of them: "wilfully take or destroy the young of salmon, or have in his possession the young of salmon;" and by sect. 4 it is enacted (*inter alia*) that "young salmon shall include all young of the salmon species, whether known by the names of fry, samlet," &c.

It appeared that the deft. was found fishing in the river Ithon, Radnorshire, with a rod and line; that he had trout and samlet in his basket, eight or ten samlets being recently killed; that the deft. admitted taking them, but stated that he had taken them while fishing for trout, not knowing at that time the difference between trout and samlet, and having no intention of taking or having in his possession samlets or the young of salmon, or the young of the salmon species. The justices, upon the hearing, found that the deft. had taken and had in his possession certain fishes found in the river Ithon called samlets, but that he had not done so wilfully, and that he was at the time ignorant of the fact of the said fishes being samlets, or the young of salmon, or young of the salmon species, and they were of opinion that they ought not to convict the deft. of the offence, and they therefore dismissed the information.

Davis now appeared for the app., and contended that the justices were wrong, for that as in fact the samlets were in his possession, it was immaterial whether or not he knew they were samlets. [COCKBURN, C.J.—Ignorance of the law is no excuse, but it is otherwise with ignorance of the fact. Suppose he had thought they were trout. He must intend to act unlawfully.] The Legislature has made it an offence "to have samlets in his possession." [COCKBURN, C.J.—*Prima facie* he must be taken to know what it is he has in his possession; but here the justices have specifically found the other way.] That might be a ground for mitigating the penalty, but the Legislature has made it an offence merely to have them in possession.

By the COURT.—For the reasons which the justices have given they came to a right decision.

*Judgment for the resp.*

### COURT OF COMMON BENCH.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

Wednesday, Nov. 11, 1863.

FELKIN (app.) v. BERRIDGE AND ANOTHER  
(resps.)

*Laying out of new street*—Public Health Act 1848—  
Local Government Act 1858—Bye-law of local  
board of health.

The *Public Health Act* 1848 required certain notices to be given to the local board of health by persons laying out new streets in their district. The *Local Government Act* 1858 gave power to the local board to make bye-laws regulating amongst other things the laying out of new streets; but it contained a saving clause with respect to all "proceedings, matters, or things" begun under the previous Act. The defts. some time before the coming into operation of the *Local Government Act*, proposing to lay out a new street, gave the necessary notices required by the *Public Health Act*, to the local board, but did not proceed to lay the street out till the month of May 1862. In the meantime, in pursuance of the powers given by the *Local Government Act*, the local board had made a bye-law requiring notices to be given of a more detailed character than had been required by the *Public Health Act*, and they contended that the street had not been begun within the meaning of the *Public Health Act*, and that therefore the defts. ought to have given fresh notices so as to satisfy the new bye-law, and that they were liable to a penalty for proceeding to lay out the street without having done so. The local board thereupon summoned the defts. before justices, who dismissed the complaint:

*Held*, on appeal, that the decision of the justices was not wrong.

Case stated for the opinion of the Court of C. P. under 20 & 21 Vict. c. 43, s. 2.

At a petty sessions held at Sittingbourne, on the 2nd June 1862, before justices of the peace for the district of Sheerness, in the county of Kent, the resps., Richard Berridge and Henry Bateman Jenkins, appeared to answer a complaint laid by app. Edward Felkin, the clerk to and on behalf of the Sheerness local board of health, that the resps., being the owners of certain land within that district, lying between Berridge-road or Green-street, Marina-town, and Marine-terrace, Ward's-town, near Sheerness, did, on the 12th March 1862, offend against a certain bye-law, No. 28, duly made in that behalf by the local board of health, pursuant to sect. 34 of the *Local Government Act* 1858, confirmed, printed, and hung up as required by that Act, and then and still in force (that is to say): For that the said resps. did lay out a new street within the said district, to wit, from and out of a certain road leading from Banks-town to Cheyney-rock to a certain chapel, of and belonging to a society called the Bible Christians Association, at Marina-town, in the said district, and did not, nor did either of them, give one month's notice to the local board of such intention by writing, delivered to the local surveyor, or left at his office as required by the said bye-law, in contravention thereof; and that the said resps. did not, nor did either of them, leave, or cause to be left at the office of the said surveyor a plan or section of such intended new street as required by the bye-law in contravention thereof.

By sect. 72 of 11 & 12 Vict. c. 63 (the *Public Health Act* 1848), it is enacted, "That one month at the least before any street, &c. is newly laid out as aforesaid, written notice shall be given to the local board of health, showing the intended level and width thereof, and the level and width of every such street shall be fixed by the said local board, and it shall not be lawful to lay out, make, or build upon any such street otherwise than in accordance with the level and width so fixed, unless, upon disapproval by the said local board of the level or width specified in such notice, the General Board of Health shall otherwise direct; and whosoever shall lay out, make, or build upon any such street otherwise than in accordance with the level and width fixed by the said local board, or approved by the said general board, shall be liable

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for every such offence to a penalty not exceeding 20*l.* for every day during which he shall permit or suffer such street to continue to be so improperly laid out, made, or built upon, and the said local board may, if they shall think fit, cause any such street laid out or made at a level or width otherwise than in accordance with the level and width so fixed or approved as aforesaid, or any building built in any such street otherwise than in accordance with such level and width, to be altered in such manner as the case may require, and the expenses incurred by them in so doing shall be repaid to them by the offender, and be recoverable from him in a summary manner: provided always, that if no such level or width be fixed, and no approval or disapproval of the level or width proposed be signified by the said local board within one month from the last-mentioned notice, the intended street may be laid out and made upon the level and of the width specified in such notice if the same be otherwise in accordance with the other provisions of this Act."

The Local Government Act 1858 (21 & 22 Vict. c. 98), took effect in the district of the Sheerness local board of health from the 1st Sept. 1858. By sect. 34 of that Act it is enacted, "That every local board may make bye-laws with respect to the following matters, that is to say:

"1. With respect to the level, width and construction of new streets, and the provisions for the sewerage thereof.

"2. With respect to the structure of walls of new buildings, for securing stability, and the prevention of fires.

"3. With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings.

"4. With respect to the drainage of buildings, to water-closets, privies, ash-pits and cesspools in connection with buildings, and to the closing of buildings, or parts of buildings, unfit for human habitation, and to prohibition of their use for such habitation.

"And they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws. Provided always, that no such bye-law shall affect any building erected before the date of the constitution of the district; but for the purposes of this Act, the re-erecting of any building pulled down to or below the ground-floor, or of any frame building, of which only the framework shall be left down to the ground-floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation, or the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only, shall be considered the erection of a new building."

Bye-laws were made by the Sheerness local board of health on the 25th day of Oct. 1860, in pursuance of this section:—

Bye-law No. 28 was as follows:

"Every person who shall intend to make or lay out any new street, whether the same shall be intended to be used as a public way or not, shall give one month's notice to the local board of such intention by writing, delivered to the local surveyor or left at his office, and shall, at the same time, leave, or cause to be left, at the said office, a plan and section of such intended new street, drawn to a scale of not less than 1 inch to every 44 feet, and every such plan shall show thereon the names of the owners of the land through or over which such street shall be intended to pass; the level, width, direction, the proposed mode of

construction, the proposed name of such intended new street, and its position relatively to the street nearest thereto; the size and number of the intended building lots, and the proposed sites, height, class and nature of the buildings to be erected therein, and the proposed height of the division and fence walls thereon, and shall contain the name and address of the person intending to lay out such new street, and be signed by him or his duly authorised agent. Every such section shall show thereon the level of the present surface of the ground above some known fixed datum, the level and rate or rates of inclination of the streets with which it will be connected, and the level of the lowest floors of the intended new buildings."

Sect. 9 of the Local Government Act 1858 enacts that "all proceedings, contracts, matters and things respectively begun or made under any section of the Public Health Act 1848, repealed by this Act, may respectively be proceeded with and enforced, as if no such repeal had taken place, and all powers exercised or bye-laws made under any section, shall continue in force until the new powers and bye-laws authorised by this Act are brought into operation, and no such repeal shall affect any decree or order of the High Court of Chancery, or of any other court of justice that has been obtained previously to the passing of this Act."

It was admitted by the app. that the resps. had given notices to the local board and had deposited plans of a new street intended to be laid out by them pursuant to sect. 72 of the Public Health Act 1848, some time before the Local Government Act 1858 came into operation.

The resps.' attorney objected that the complaint laid by the app. alleged no offence, inasmuch as the fact of notices and plans having been given, deposited and accepted in compliance with sect. 72 of the Public Health Act 1848, was not negatived. He contended that the notices given by the resps. to and accepted by the local board prior to the Local Government Act 1858 was "a proceeding, matter and thing begun or made," within the meaning of sect. 9 of the Local Government Act 1858, and might still be carried into execution.

The justices, considering that the admission by the app. that notices had been given and plans deposited and accepted by the local board previous to the operation of the Local Government Act 1858, was in fact an answer to the case, held the objection to be good, and dismissed the complaint.

The question for the opinion of the court was, whether the decision of the justices in dismissing the complaint on the ground aforesaid was or was not right in point of law.

It was said by the counsel for the app., but not stated in the case, that the notices had been given and plans deposited by the defts. as long as seven years ago, and that the street in question was one of a large number of streets projected by the defts., only a small portion of which had been subsequently laid out.

*Archibald (Lush, Q. C. with him) for the app.*—The facts are not satisfactorily stated in the case, for it is merely stated generally that the notices were given some time before the coming into operation of the Local Government Act. The words of the saving clause do not apply where a party has lain by for many years. There have been no "proceedings begun" within the meaning of the Act.

*E. C. Willoughby for the resps.*

*ERLE, C. J.*—In an appeal from the decision of magistrates, the apps. are bound to show that the decision of the magistrates is wrong. Upon the statement of the facts here it is not shown that the magistrates were wrong in their decision. I am anxious to limit our judgment by expressing it in this guarded way, so that in case the parties choose to raise the question

again when subsequent dealings take place with the property, if they can change the facts at all, they may not be prevented from doing so.

WILLIAMS, BYLES and KEATING, JJ. concurred.

*Judgment for the resp.*

Nov. 11 and 12, 1863.

SAVAGE v. SAVAGE.

*Markets—Local Board of Health—Penalty under bye-laws.*

*By sect. 64 of 3 Geo. 4, c. xxv., it was enacted that no person should be subject to any penalty by virtue of this Act for placing or setting any stalls or standings, or exposing to sale any provisions, goods, wares, merchandise, or other articles or things whatsoever, in such parts of the several streets, lanes, passages, and public places within the town of Barnsley as should have been theretofore used for that purpose at the times of the usual fairs and markets within the said town, due care being taken to impede as little as possible the public passage along the same :*

*Held, that a Local Board of Health constituted since the passing of the above Act had power to direct by their bye-laws where certain goods should be exposed for sale in the town on a market day, and also to impose a penalty upon any person selling goods on ground not appropriated by the Board for that purpose; and that a person so violating their bye-law would not be exempted by the above statute from the penalty, notwithstanding he had exposed his goods for sale for many years on the same spot previously to the formation of the Board.*

An information was laid before the justices sitting at petty sessions at Barnsley, by the app. (inspector of markets and fairs in the township of Barnsley) against the resp. (a butcher), for placing and exposing for sale some butcher's meat on May-day-green, in Barnsley, that not being the place appropriated for the sale of butcher's meat, contrary to the directions of the inspector of markets, and contrary to the statute and the bye-laws of the local board. The justices dismissed the information, and the app. being dissatisfied with their decision, the following case was stated for the opinion of this court :—

#### CASE.

A local Act, 3 Geo. 4, c. xxv., entitled, "An Act for lighting, paving, cleansing, watching and improving the town of Barnsley, in the West Riding of the county of York," was passed in 1822. By the 62nd section a variety of annoyances and nuisances in the streets, lanes, roads, highways, passages, or other public places in the said town, were prohibited. The same section provided that "if any person or persons shall in any of the present or future streets, lanes, roads, highways, passages, or other public places in the said town, expose for sale or sell any horse, ass, pig, sheep, bull, cow, or other beast or cattle (except in any public market or fair), or hang up, place, or expose to sale the carcass of any calf, sheep, swine, cattle, or beast, or any part or parts thereof, or any goods, wares, or merchandise whatsoever, or any fruit, vegetables, or garden stuff, or other matter or thing in or upon, or so as to project over or upon any footway or carriage way, or beyond the line of or on the outside of the window or windows of the house or shop at which the same shall be so hung up or placed or exposed to sale, or so as to obstruct or incommode the passage of any person or carriage;" any person so offending was rendered subject to a penalty of a sum not exceeding 5l.

Sect. 63 of the same Act, which is not repealed, is as follows :—"Provided always, and be it further

enacted, that no person shall be subject to any penalty by virtue of this Act for placing or setting any stalls or standings, or any waggons, carts, or other carriages in which any provisions, goods, wares, merchandises, articles, or things shall have been brought and be offered for sale, or exposing to sale any such provisions, articles, or things, so as that such waggons, carts, or other carriages, stalls or standings, articles or things, be placed in such part of the said streets, lanes, roads, passages, or public places as shall be appointed for that purpose by the said commissioners, with the consent of the owner or owners of the fairs and markets held at, within, or for the said town of Barnsley for the time being, or his or their authorised agent, in writing, due care being taken in all the aforesaid cases to impede or obstruct as little as possible the public streets, lanes, roads, highways, passages and places within the said town."

And sect. 64, which is also unrepealed, is as follows :—"Provided also, and be it further enacted, that no person shall be subject to any penalty by virtue of this Act, for placing or setting any stalls or standings, or exposing to sale any provisions, goods, wares, merchandises, or other articles or things whatsoever, in such parts of the several streets, lanes, passages, and public places within the said town as shall have been heretofore used for that purpose at the times of the usual fairs and markets within the said town, due care being taken to impede as little as possible the public passage along the same."

The Duke of Leeds was at the time of the passing of this Act the lord of the manor of Barnsley, and the owner of the markets and fairs in the town of Barnsley, which had been customarily held in parts within that town, with the pickages, stallages, market rents and tolls thereof, and of three pieces of land, one called the Church-field or Michaelmas Fair-field, in which the Barnsley October fair had usually been held, the Market-hill and the May-day-green, where fairs had always been held in February and May.

By an ancient charter, dated 1249, the right to hold a market in the town of Barnsley every week on Wednesday was granted to the priors and convent of Pontefract, and a market for the sale of butcher's meat and other marketable commodities has been always held on the Market-hill during the day time on Wednesday, and a like market was also holden there on Saturday evenings until the butchers commenced to sell their meat on Saturday upon the May-day-green. They so commenced more than thirty years before the commencement of these proceedings, and since then without interruption the sale of butchers' meat and several other marketable commodities upon stalls or standings has taken place on Saturdays upon the May-day-green; and on Wednesday also the market generally has been held, not only on the May-day-green but also on the Market-hill.

The butchers placed stalls on the May-day-green for the purposes aforesaid, and pipes were laid for supplying gas, and the same was supplied to and paid for by the stall owners.

Some of the butchers have paid during the past thirty years, although irregularly, to lessees and others, stallage rent for standing upon the May-day-green, but the right to collect this stallage has always been disputed.

The commissioners appointed under the said Act 3 Geo. 4, c. xxv., did not purchase the rights of the lord, but purchased the piece of land called the Market-hill, and in other respects continued to exercise their powers under the Act, until the year 1853, when the General Board of Health made a provisional order, which was confirmed by the statute 16 & 17 Vict. c. 24 (called "The Public Health Supplemental Act 1853, No. 1"), so far as the same was authorised by the Public Health Act. By this order and statute

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a local board of health was constituted in the town of Barnsley, and it was thereby provided, amongst other things, that the powers, properties and estates of the commissioners should be transferred to the local board of health, and also that the provisions (with certain exceptions) of the said Public Health Act should, whenever practicable, be applied to anything which should arise under the unrepealed parts of the said local Act, and such unrepealed parts should be incorporated with the said Public Health Act, and should extend to the whole of the said township.

The local board was duly elected and has since exercised the functions conferred upon them by the Public Health and Local Government Acts, and the property belonging to the commissioners became vested in them: among other property was the piece of land containing about 999 yards above referred to, and termed the Market-hill.

In the month of July 1860 a resolution was passed at a meeting of the owners and ratepayers of the district of the township of Barnsley (being the district of the said local board) that the local board should have power to do the following things, or any of them, within their district:—

"To provide a market-place and construct a market-house and other conveniences for the purpose of holding markets in the said district," &c.

This resolution was carried upon a poll.

The local board thereupon completed an arrangement which they had been negotiating for the purchase of the rights to the markets and fairs belonging to the Duke of Leeds, and by a conveyance dated the 12th June 1861, between the trustees of the will of the late Duke of Leeds and the Local Board of Health of Barnsley, which was executed with the sanction of the Court of Ch., the said trustees, in consideration of the sum of 2700*l.* paid to them by the said local board, "Thirdly, all that waste or uninclosed land or ground situate in the township of Barnsley aforesaid, called or known by the name of May-day-green, together with all and all manner of lawful profits, commodities, privileges, and advantages whatsoever, coming, arising, renewing, increasing, or payable for or in respect of all and every the said fairs and markets and every of them hereafter to be holden and kept under or by virtue of these presents for the said town of Barnsley within the bounds, limits and precincts of the same."

As soon as the conveyance was executed and the local board obtained permission, they proceeded to frame bye-laws, and to settle tables of tolls for the markets and fairs. The bye-laws purported to be made and ordained by the Local Board of Health for the district of the township of Barnsley in the county of York, for the better regulation of the markets and fairs and market-places for the sale of cattle, animals and provisions and all other marketable commodities within the said district, pursuant to the powers and provisions contained in the Public Health Act 1848, the Public Health Supplemental Act 1853 (No. 1), and the Local Government Act 1858.

The notices required by the Public Health Act were duly given, and the bye-laws were submitted to and approved by the Secretary of State.

The certificate of two justices required by the 10 & 11 Vict. c. 34, s. 32 (the Markets and Fairs Clauses Act 1847) was also obtained, certifying that the Corn Exchange or market-house, Market-hill, May-day-green, Church-field, and other places to be used for fairs within the said district, were properly completed and fit for public use.

The 3rd and 4th bye-laws were as follows:—

*"Appropriation of the Open Market, Market-hill.*

"3. The open market, situate on Market-hill, in Barnsley aforesaid, shall be appropriated as a market

for the sale therein on Wednesdays of butcher's meat, bacon, pork, cheese, eggs and butter in the firkin or 'laid down,' flower roots, plants, trees, shrubs, calicoes, cloth, linen, mercery, articles of dress, provisions, coopers' ware, pastry, spices, confectionery, books, nuts, brooms, besoms, and hardware; and on Saturdays the same shall be exclusively appropriated for the sale therein of butcher's meat, bacon, pork, cheese, eggs and butter in the firkin or 'laid down.'

*"Appropriation of the Open Market, May-day-green.*

"4. The open market situate on May-day-green, in Barnsley aforesaid, shall be appropriated for a market for the sale therein of horses, cattle of all kinds, calves, sheep, pigs, geese, fruit, vegetables of all sorts, fish, earthenware, potters' ware, glassware, hay, straw, grass and vetches, medical wares, old metal, images, pictures, cutlery, hardware and small ware, clothing, boots and shoes: provided, however, that these several appropriations shall be open to alterations and additions at any time hereafter as the said local board of health shall find requisite or convenient."

The 6th bye-law was as follows:—

*"As to articles offered for sale.*

"No article shall be offered for sale or sold in any market, or kept, or brought into the same for sale other than such for which the said market, or part of any such market, shall have been appropriated as hereinbefore set forth. Every person offending against this bye-law shall forfeit and pay for the first offence the sum of 5*s.*, for a second offence the sum of 10*s.*, and for every offence subsequent to a second offence the sum of 20*s.*"

The 12th and 13th bye-laws are as follows:—

*"Stalls to be placed on the parts appropriated.*

"12. No stall, bench, cart, hand-cart, wheelbarrow, hamper, basket, box, or tub, or other article, shall be placed otherwise than as and where the inspector of the market shall direct, and the several articles brought into the markets shall be sold and placed, and exposed for sale only at or in such parts of the market as shall be appropriated by the regulations hereinbefore specified for such articles respectively. Every person offending against this bye-law shall forfeit and pay for the first offence the sum of 2*s.* 6*d.*, for a second offence the sum of 5*s.*, and for any offence subsequent to a second offence the sum of 10*s.*

"13. Provided that the bye-laws shall not extend, or be deemed or construed to extend, to prohibit any person from exposing or offering for sale any marketable commodities in any shop or warehouse not being in one of the said markets, or in his or her dwelling-house, or to subject such person to any penalty for so doing."

The markets having thus been opened, and the bye-laws duly made, allowed and published as above stated, a person named Francis Brook, of Wakefield, in the West Riding, butcher, on Saturday, 6th June last, after the market-place had been opened to public use, placed and exposed for sale certain butcher's meat on the May-day-green, not being the place appropriated for the sale of butcher's meat by the bye-laws above referred to, and continued to expose the same for sale, notwithstanding the said bye-laws, and contrary to the directions of the local board, through their officer, namely, the inspector of the markets. The local board of health thereupon caused this information to be laid by George Savage, the inspector of the markets, before us, justices of the peace for the West Riding of the county of York, for a penalty for a breach of the bye-laws above set forth, and on the hearing the deft. contended that the above bye-laws, especially the 4th and 6th, were invalid and inoperative against him on the following ground, namely, that the above cited 64th section of the Act, 3 Geo. 4, c. xxv., not having been repealed, no person was liable to a penalty for

exposing butcher's meat for sale in the public places in the town of Barnsley theretofore used for that purpose; that the bye-laws prohibiting the sale of butcher's meat on the May-day-green, and also the bye-law setting apart the Market-hill as the only place for the sale of butcher's meat, were not legal. For the informant it was contended that sect. 64 of the above-mentioned 3 Geo. 4, c. xxv., only referred to penalties under that Act, and had no operation in reference to the present penalty, which was incurred under the Public Health and Local Government Acts, for violating a bye-law made by the local board of health for the purpose of regulating the use of the markets vested in them by their purchase from the trustees of the Duke of Leeds, and by virtue of the powers contained in clause 9 of the provisional order hereinbefore mentioned, and in the Markets and Fairs Clauses Act 1847.

The justices were of opinion that the argument of the resp. was correct, and dismissed the information, subject to the decision of the Court of C. B. upon the following questions:—

First, whether, in consequence of the 64th section of the Act 3 Geo. 4, c. xxv., being unrepealed, the deft. was liable to a penalty for placing and exposing butcher's meat for sale on the May-day-green, under bye-law No. 12.

Secondly, whether the bye-law numbered 6, is a good and valid bye-law.

Thirdly, Whether the bye-laws numbered 3 and 4 are good and valid bye-laws.

And the judgment of the court is accordingly required upon these questions; it having been agreed that all the bye-laws made by the local board, and the whole of the statute 3 Geo. 4, c. xxv., and the conveyance from the trustees of the Duke of Leeds, with the map or plan thereupon indorsed not set out in the case, may be referred to if requisite, as if the same had been made part of this case for all the purposes of this case.

If the court should affirm the determination of the justices, the information shall stand dismissed; but if they should reverse it, a conviction for the penalty of 2s. 6d. shall be awarded against the deft., or such further order shall be made in the matter as to the Court of C. B. shall seem fit.

Dated this 21st day of Oct. 1863.

WALTER T. W. SPENCER STANHOPE.  
THOS. TAYLOR.

*Manisty*, Q.C., appeared for the app.

*Hayes*, Serjt. (*Beresford* with him) for the resp.

Nov. 12.—ERLE, C. J.—I am of opinion that the bye-law is good and that the conviction would have been proper. The application was made to the Board of Health, which derives its powers from the 16 & 17 Vict. c. 24, having an order containing many provisions and incorporating clauses from public and private Acts, and the order of the Board of Health being enacted to be valid, it takes the force of an Act of Parliament. One of the clauses incorporated is a clause from the Market and Fairs Act, 10 & 11 Vict. c. 14, s. 42, whereby it is enacted that the persons holding the market shall make such byelaws as they think fit, for, among other things, regulating the use of the market-place, of the building stalls and standings there, and preventing nuisances; and they are directed to regulate the use of the market-place. Then in the town of Barnsley, a market was granted some 800 years ago. It is a market granted to be held in the town of Barnsley, and according to that the whole of the town of Barnsley was liable to become a market-place, and the usage would show what part of the town would be the market-place which was so granted. It was granted to be holden on Wednesday, and the usage would also show that if by the course of prac-

tice it had been held on a Saturday, all that would have been presumed to be a lawful market held for the town of Barnsley, and the usage would show where it is to be so held. The town has greatly increased, and the number of persons resorting to the market, and the articles brought to the market, are likewise increased in number and value; and the Board of Health acting under the statute, as I have stated, have erected a building and made a regulation for persons resorting to the market to carry their wares there to the appointed places suitable for those wares. There is a covered market at the bottom for the sale of pork, fish, butter and eggs. The first floor has been dedicated to the sale of grain, seeds and the like of that; and then, with respect to the Market-hill, it is dedicated chiefly to what I may call the sale of provisions, confectionary, and the like of that; and May-day-green, which is the part now in question before us, under the regulation of the bye-law made by the Board of Health, is dedicated to the sale of live stock, horses, cattle, calves, sheep and pigs, and also to hay and straw, and brittle ware and hardware, and other articles of that description. It seems that the Board of Health have classified the different articles in an extremely useful manner, and by that classification they have enabled the persons resorting to the market with articles to sell to have convenient accommodation, and buyers to know the places where the articles they want are classified and arranged, so as to render the market suitable for the purpose for which it was made. Now, such being the town of Barnsley, and such being the right of the Board of Health, and such being the market held over the town, whether it is in the covered house, on the Market-hill, or on May-day-green, which are all the places used heretofore for selling, they each constitute one market; the bye-law I have stated, and the party against whom the application was made was a butcher, to whom a place was assigned on Market-hill for the sale of his goods, and he determined to resort, in violation of this regulation, to May-day-green, where the live stock was to be sold; and this application was for penalties for violating the bye-law. It seems to me, that the bye-law was a reasonable one; beyond all question he violated it, and if it was a reasonable one, he was liable to the penalty. So the matter would have stood if the case had been taken affirmatively, on the creation of the Board of Health with power to make bye-laws, and they had made this bye-law, and the party had infringed it and been convicted under it. But the difficulty that has been raised, on which the magistrates acted, and which they felt to be extremely grave, arises from 3 Geo. 4, s. 64, the first local Act giving power to a body in Barnsley, to see to the lighting, paving and cleansing of the streets of the town—an ordinary Act for managing the town, and it specified certain nuisances that parties might be guilty of in the town of Barnsley. Among the nuisances were, selling in the streets contrary to the regulations, so as to obstruct the highway; and that would be *prima facie* a nuisance under the sections creating and specifying them; and sect. 64 contains a proviso that any penalty by virtue of this Act for selling in such parts of the street within the town as shall have been heretofore used for that purpose to hold the market within the said town shall not be levied. The butcher says "I have been used before the Board of Health made the bye-law to sell on May-day-green, and in effect you are trying to make me liable for a penalty for that which was a place where I had been accustomed and used to sell before the bye-law was made." Therefore the 64th section of the statute should be examined. The 64th section is incorporated with the 16 & 17 Vict. creating this Board of Health, and is incorporated with the several sections I have adverted to, and it is to be taken as if it

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was enacted in the 16 & 17 Vict. for the first time, that "no person shall be liable to a penalty for selling in any part of the public streets heretofore used for that purpose" and to be read as if it was "used before the passing of the 16 & 17 Vict.," and not before the passing of the 3 Geo. 4. I assume, for the purpose of this judgment, the section to have been so worded, and so construed. It is material, because at the time of the 3 Geo. 4, May-day-green was not used as a market-place, and if the parties proceeded under that statute then no penalty would be payable; but if it is to be taken as incorporated with the 6 & 7 Vict., then we have to construe that statute and to see whether the bye-law is repugnant to that section of the statute; and it seems to me to contemplate this, that a party is guilty of a nuisance and liable to a penalty if he obstructs the use of a highway by selling. The provision in sect. 64 is, "You shall not enforce the penalty against parties selling in the highway on a market day, if those parts of the highway have been used by marketing people heretofore before the time of the body seeking to enforce penalties." It saves the use of a spot for marketing purposes; but, in my judgment, did not in the least degree intend to save to any one individual a right to resort to any particular spot in the town of Barnsley, and to say, "That is where I have been used to come, and if a regulation is made that a tradesman and the like of me must go to another part of the town, I have been used to come to that part, and there could not be any such regulation." I do not think that was the meaning of the statute. It presumed the overflow of marketing people and marketing goods beyond the ordinary bounds of the market-place, and that nobody should be liable to penalties for using the highways of the town that had been heretofore used for marketing purposes, as one object to which the regulations are to be applied. Now, if that is the meaning of the statute, the bye-law in question does not prevent people using any part of the town of Barnsley that had been used before the time of the 16 & 17 Vict. for marketing purposes; on the contrary, with respect to May-day-green, it is regulated by the bye-law and devoted to the marketing people dealing with a great number of articles, live stock, earthenware, brittle ware, hay, straw, glass, watches, boots and shoes, &c. It is a bye-law devoting May-day-green to marketing purposes; not a colourable bye-law, saying these articles only shall be sold there, but it takes the market-house, market-hill and May-day-green as places used for marketing purposes, and regulates them so far as it can go with sole attention to the convenience of the public and those going to the market, that they shall all have in the most ample manner that can be obtained by regulation the privilege of the market. Then the complainants say, "When you have got one place assigned to you on Market-hill you determined to come among the live horses, &c., on May-day-green, and you have violated the regulation of the market-house. You are violating a reasonable regulation and the bye-law, and as you have violated the bye-law you have violated the regulation of the market, and that is why you are proceeded against, and it has nothing to do with the penalty for obstructing the highway by a nuisance in respect of sect. 64 exempting marketing people from any liability in the case of the accustomed use of the market." That I think is the way in which these two sections are to be construed. It is clear to me that they were to regulate the hours of the market, as it is very convenient that they should be regulated. They might say, nobody shall come to the market before a certain hour. The parties might have chosen to say, "The only time I come to the market is seven in the morning; the market now is not to be opened till nine, and if I

come to May-day-green at seven in the morning as I have been accustomed to do, the 64th section saves me from any penalty for selling in any one of the places where it has been the custom to sell;" but there would be no doubt, if he came to the market-place but violated a reasonable bye-law in respect of time, he would be liable. He is thus made liable for selling at the place he was accustomed to sell in; but the time is regulated by a reasonable bye-law, and if reasonable he must conform to it, and is liable to a penalty which is totally distinct from the liability to a penalty for creating a nuisance in obstructing the highway, in respect of which he was exempted on marketing days, if he was a marketing person using a part of the highway for marketing purposes. I must say there is a difficulty in coming to a distinct opinion with a quantity of imperfectly recited Acts embodied and incorporated, and the power given under the Market and Fairs Act to make bye-laws, and of saying what is the exact limit of the rights. If they are apparently conflicting, I am obliged to reconcile them in the best way my powers will enable me to do: but if I see a public body, created for the convenience of the town, exercising powers entrusted to them for public purposes in the most reasonable and honest manner, I conceive they could exercise their powers in regulating the market. I should require a strong case to be made out influencing me to the conclusion that all that was to be set aside, and the persons resorting to Barnsley market were to be without any order or regulation. If a man says, "I have used this for twelve months or two months, or I have used it for one month," and every man who says, "I have used it for a month," is in defiance of all regulations to come and take his stand, and say, "I set at defiance what the Board of Health has done;" I do not think that would be a convenience for the town, or desirable in any way, nor within the intention of the Legislature. I am well aware this is a case not belonging to the town of Barnsley alone, who are exercising the right of all the rest of the Queen's subjects who may wish to resort to the town of Barnsley on market-days. My attention has been drawn to the fact that, if I decided in favour of the applicants, who come to May-day-green, I should put a power in the hands of anybody who chose to vex the Board of Health to set at defiance any regulation they may make, and it would leave the streets of Barnsley open to all manner of disorder on market-days, to the great inconvenience of those buying and selling and using the market, and therefore, after great consideration, I have come to the conclusion I have expressed.

WILLIAMS, J.—I am of the same opinion for the same reasons.

BYLES, J.—I agree with my Lord and my brother Williams.

KEATING, J.—I entirely concur.

*Judgment for the app.*

### COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

*Tuesday, Nov. 10, 1863.*

PEEK (app.) v. THE WATERLOO WITH SEAFORTH LOCAL BOARD OF HEALTH (resps.)

*The Public Health Act 1848 (11 & 12 Vict. c. 43)—The Local Government Act 1858 (21 & 22 Vict. c. 98, s. 62)—Meaning of "owner" therein—What a good service of notice on.*

*The Public Health 1848, s. 69, provides that in case any street (not being a highway) be not severed, levelled, &c., to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises front-*



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*ing or abutting on the same, require them to sewer, &c., and if not complied with, the board may execute such necessary works, and the expense incurred shall be paid by the owners in default, and may be recovered in a summary way.*

*By sect. 2 the word "owner" shall mean the person for the time being receiving the rack-rent, whether on his own account or as agent or trustee.*

*The Local Government Act 1858, by sect. 2, enacts that, where the local board have incurred expenses for the repayment whereof the owners of premises in respect of which the same are incurred is made liable, &c., the same may be recovered from the person who is "owner" of such premises when the works are completed for which such expenses have been incurred."*

*Certain premises requiring to be sewered, &c., the resps. inquired of the occupier who the landlord was, and who received the rent of the premises; the occupier said, as the fact was, that it was a Mr. R. Formby.*

*Due notice to Formby, on 15th May 1861, was accordingly given to sewer, &c.; he neglected to sewer, and the local board completed it on 13th March 1862. Formby received the rent up to the 2nd Feb. 1862. It afterwards appeared that the app. was the real owner on and subsequent to the 31st Oct. 1860, but had never really interfered with either Mr. Formby, the land rent, or occupier. The expenses of the resps. were 115l.*

*Held, that as Formby received, for the time being, the rack-rent of the premises, and was bonâ fide treated by the occupier as his landlord, the service of the notice to sewer, &c., by the resps. on Formby was a sufficient service on the "owner" within the meaning of the above Acts, and that the app. was liable for the expenses incurred by the resps.*

*This was a case stated by magistrates under the 20 & 21 Vict. c. 43.*

A local board of health for the resps.' district had been duly constituted under the Public Health Act 1848 (11 & 12 Vict. c. 63). By sect. 2 it is enacted that the word "owner" shall mean the person for the time being receiving the rack-rent of the land or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such premises were let at rack-rent. Sect. 69 enacts, that in case any present or future street or any part thereof (not being a highway) be not sewered, levelled, paved, flagged and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, &c., require them to sewer, &c. the same within a time to be specified in such notice. And if such notice be not complied with, the said local board may, if they shall think fit, execute the works mentioned or referred to therein, and the expenses incurred by them in so doing shall be paid by the owners in default.

By the 21 & 22 Vict. c. 98, s. 62 (the Local Government Act 1858), it is enacted, "Where the local board have incurred expenses for the repayment whereof the owners of the premises for or in respect of which the same are incurred, is made liable either by application or agreement with the owner, or by the Public Health Act 1848, or any Act incorporated therewith, or this Act, the same may be recovered from the person who is owner of such premises when the works are completed for which such expenses have been incurred in the manner provided by the Public Health Act 1848, and such expenses shall be a charge

on the premises in respect of which they were incurred, with interest," &c.

The clerk to the resps. made, in Feb. 1863, an information, and preferred it to justices in the proper petty sessions, charging that one Richard Formby was, on the 15th May 1861, the owner of certain premises situate, &c., which road, on the day and year aforesaid, was not sewered, &c. to the satisfaction of the said local board of health, who had, by a certain writing dated 15th May 1861, sealed with the common seal, and signed by five of their members, given the said R. Formby notice, as owner of the said premises, they being premises fronting the said road, within the space of fourteen days from its date, to sewer, &c. so much of the said road as the said premises fronted; and that, in case the said R. Formby failed to comply with the notice within such time, the local board might execute the said sewerage, &c., and the expenses incurred must be paid by Formby, together with the costs in default, if any, as therein mentioned. Neither Formby or any other person did the requisite works within the time required, whereupon the local board executed the same, and they were completed on the 13th March 1862.

In the information it was alleged that Francis Peek, subsequently to the date and service of the notice dated 15th May 1861, became and was at the time of the completion of the said works the owner of the said premises; that the resps.' surveyor had apportioned the costs of executing such sewerage, &c., and he declared Peek's proportion to be 115l. 8s., which had been duly demanded of Peek, and which he refused to pay, and which the resps. had not declared to be private improvement expenses, contrary to the statute, &c. On the hearing the justices ordered the app. to pay the 115l. 8s., and 10s. costs, to be levied by distress, &c. or seven days' imprisonment.

Upon the hearing of the information the resps. proved that the road was not a highway repairable at the public expense at the date and service of the said notice; that Richard Formby did not reside in the resps.' district on the date or service of the said notice to sewer. The notice was served on Formby by being directed to him and transmitted through the post-office. It was proved that the land described was occupied by one John Caddick with other premises, and that Richard Formby received the rent of the whole at the date of the notice and up to 2nd Feb. 1862; that Richard Formby gave Caddick the tenant notice, dated 30th July 1861, to quit all the premises on 2nd Feb. then next, which Caddick did.

Formby received the rent of the whole up to Candlemas 1862, on the 15th April 1862, and the receipt for it was produced; it appeared as if he received such rent as absolute owner. On the hearing of the information it was admitted by the app. that the said notices had been served on R. Formby, the work properly done, and the apportionment correctly made, and it was proved also by the production of a conveyance dated 31st Oct. 1860 (admitted to be duly executed) that the app. became and was the owner thereunder of the said premises, having purchased the same from one James Formby, and that he never had any knowledge of the notice of the 15th May 1861 until the sewerage works had been executed. That he had by himself or servants driven cattle off the land which he had purchased as aforesaid after such purchase, believing that such cattle belonged to John Caddick, but he never told Caddick or resps. that he had purchased the land described in the notice to sewer. Such land consists of sand hills, on which star grass grows, but which is not of a pasturable nature for horned cattle, yet donkeys will graze there, and the app. turned his donkeys thereon, several of which he kept for domestic purposes, but which fact he did not communicate to Caddick. The said land has never been set apart or railed off by the app.

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The justices were of opinion that Richard Formby was in receipt of the rent of all the said premises on 15th May 1861, the date of the said notice to sewer the premises described. And the app. was the owner thereof at the time of the completion of the said sewerage works on the 13th March 1862, and that the app. was liable for the payment of the costs of such sewerage works, and convicted him accordingly.

The question was, whether the app. was bound by the notice served on Richard Formby on the 15th May 1861?

**Chas. Pollock**, for the app., argued that the notice before mentioned, requiring the work to be executed, ought not to have been served upon Richard Formby, but upon the app., as he was clearly proved to be the owner, his conveyance being dated 31st Oct. 1860, when he immediately took possession thereof by putting in his own donkeys and driving off others. He had never authorised Richard Formby, or any other person, to act for him as trustee or agent, nor had, in fact, Formby ever accounted to him for the rent. Formby was not the owner in fact, or within the meaning of the Acts of Parliament in question, when the notice was served on him. The service of it upon him, therefore, was in no way binding upon Peek, nor did it affect his right or interest.

**Leofric Temple** for resps.—The notice requiring the works to be executed served upon Formby was properly served so as to bind the owner at the completion of the works. He was in receipt of the rent at the time the notices were given, and up to Candlemas, the 2nd Feb. 1862. Caddick, the occupier, was applied to and asked who was the person who received his rent for this land in question, who was his landlord and the owner, and he said it was Mr. Richard Formby, and the notice was then served on him accordingly; therefore he was the owner within the meaning of the Acts of Parliament at the time of the service of such notice. If not the owner, then he was agent or trustee for the owner (being in receipt of the rent), and the actual owner might sue him as for money had and received to his use. [**PIGOTT, B.**—Why did you not serve the occupier, the party in possession?] The same difficulty would arise. He might have been occupying wrongfully for a very short time, whilst the real and proper occupier had been temporarily out of possession, although but for a day or even less.

**POLLOCK, C. B.**—I am of opinion that the resps. are entitled to our judgment. The person who receives the rent of the premises from time to time, not only when the notice was served, but both before and after it and during the performance of the work done, now sought to be paid for, must be considered as "owner" within the meaning of these Acts of Parliament. I think therefore this was, under the circumstances, a sufficient notice served as upon the "owner," and that the app. is liable for those expenses, of which he gets the benefit.

**BRAMWELL, B.**—I am of the same opinion. It is admitted that, although Peek was owner at the time the notice was given, yet Formby was permitted to take the rents and profits of the land, and to act altogether as Caddick's landlord, and the owner of the premises for which the expenses were incurred; but Mr. Pollock's argument was, that the notice should have been served, not upon the apparent, but upon the real, owner, the rightful receiver of the rent, or he who was rightfully entitled to it; but, why more to a rightful owner than a rightful occupier? How are the parties desirous of serving such notices to find out who should rightfully, or who does wrongfully, receive the rents, or remain in possession? I do not think such a burden is, or ever was, intended to be thrown upon officers of local boards of health, and the meaning of these Acts of Parliament is, that the notice may be served upon the person who is *de facto* the occupier,

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or if served on the "owner," then it may be served upon the person who *de facto* receives the rent of such occupier, and appears to the occupier and others interested as the owner of the premises. "Owner" is defined by the 2nd section of the first Act to mean the person for the time being receiving the rack-rent of the premises in connection with which the work is used, whether on his own account or as agent, or trustee for any other person. To my mind, this refers to a *de facto* receiver of the rent, whether rightfully or wrongfully so. The app. contended that he was the actual owner, yet had no notice or knowledge of these proceedings by the local board of health; then, if so, whose fault was it? Clearly it is the fault of the true owner that he does not receive his own rent, or permit his own agent to do it for him on his behalf. It appears to me the service of the notice was a good service, and the decision of the justices right.

**CHANNELL, B.**—I also think our judgment should be for the resps. It seems perfectly clear that Peek was the real owner at the time the works were executed by the resps., and that he would be liable if the notice served was a good notice properly served. It was served on a person who sufficiently answers the definition of "owner" in the Act of Parliament. It is treated as a rack-rent, and Formby acts throughout just as if he received it on his own account from the occupier, and so was the "owner." The notice appears to be a good notice to originate the proceedings. It may be a hardship upon the app. to have been served with the notice, as he was the actual owner, in fact, of the land; but I think the service made on Mr. Formby under the circumstances stated in the case was a sufficient compliance with the Acts of Parliament.

**PIGOTT, B.**—It was admitted that the notice had been served and the work properly done, and the only question in my mind was, whether it was not a condition precedent to the enforcing of these proceedings that Peek, as the actual owner, or the tenant or person *bonâ fide* in possession as occupier, should not have been served. I at first entertained some doubt about the matter, and it is not altogether removed now; but on the whole I incline to think service on the reputed owner, or person who receives the rent as owner, and is referred to and treated and considered by the occupier as the owner, is sufficient. If the actual owner suffers any detriment about this, he must consider it is entirely of his own making, and should blame himself only for not seeing to and looking after his own property.

*Judgment for resps. with costs.*

Attorneys for app., *Lawrence and Markby*, 6, Lincoln's-inn-fields.

Attorney for resps., *Josh. Mason*, Liverpool.

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqs., Barristers-at-Law.

Saturday, Nov. 7, 1863.

REG. v. THE BOARD OF WORKS FOR THE STRAND DISTRICT.

*Parochial boundary—Abutting upon a highway.*

*Where the boundary of property is described as abutting upon a highway, such boundary must be taken (in the absence of evidence the other way) to extend to the middle of such highway.*

*The northern boundary of the parish of St. Ann, Soho, extends to the middle of the road in Oxford-street.*

This was a special case stated upon an application for a rule for a new trial on an issue taken upon a return to a *mandamus*. The *mandamus* issued, on the prosecution of the vestry of the parish of St. Marylebone, to the board of Works for the Strand

district to pay certain sums of money required for the expenses of executing the Metropolis Local Management Act (18 & 19 Vict. c. 120) in the parish of St. Ann, Soho; and the question raised was whether the northern boundary of the said parish of St. Ann, Soho, ran along the middle of the road of Oxford-street, or included only the houses on the south side of that street; the parish of St. Marylebone contending for the former, and the parish of St. Ann, Soho, for the latter.

It appeared, from the facts stated upon the case that, by the statute of 30 Car. 2, the parish of St. Ann, Soho, was carved out of the parish of St. Martin-in-the-Fields, and it described the boundary of the former as all that precinct included within the bounds hereinafter expressed, viz., "all the houses, &c. beginning at the sign of 'The Crooked Billet,' near St. Giles's pound, &c., with all the houses and ground abutting on and upon the said road (Oxford-street) leading from the sign of 'The Red Cow' to 'The Crooked Billet.'" By the 2 Will. & M. c. 8, all streets were to be paved "at the cost of the householders, inhabitants in any such street, by each householder paving the street before his house unto the middle of such street." By the 10 Geo. 3, c. 23, s. 10, that part of Oxford-street was put under the control of commissioners with reference to paving, lighting and cleansing. From the year 1771 to the year 1855, rates were made by the parish of St. Marylebone, under the statutes, upon the occupiers of the houses on the south side of Oxford-street, towards the paving of the street. It appeared that, for the last thirty years, the parishioners of St. Marylebone had perambulated the boundaries of their parish to the middle of the road in Oxford-street, whilst, on the other hand, the parishioners of St. Ann, Soho, had perambulated the boundaries of their parish only to the pavement of the south side. An old map, dated 1771, in the possession of the parish of St. Marylebone, shows the line to be drawn along the centre of Oxford-street.

By sect. 140 of the 18 & 19 Vict. c. 120, powers are given to the board to put the exclusive management of a street which is in more than one parish under one vestry as regards paving, cleansing and lighting, and accordingly in 1857 the board placed the whole of this road under the control of the vestry of St. Marylebone. In the year 1858 the vestry of St. Marylebone made orders on the Strand district (which includes the parish of St. Ann, Soho), requiring such board to pay 436*l.* 10*s.* and 174*l.* 2*s.* required for defraying the expenses of executing the Metropolis Local Management Act. By each of such orders the said Strand district had been charged a sum bearing the same ratio to the whole sum expended in maintaining the southern half of Oxford-street that the length of the part between Crown-street and Wardour-street measured according to lineal frontage bears to the whole length of the said southern side of Oxford-street so measured.

Keane (*Petersdorff*, Serjt. with him) argued that the evidence and presumption of law went to show that the boundary line of the parish of St. Ann, Soho, was the middle of the road in Oxford-street.

*Batterby v. Gingell*, 1 Ex. 315;

*Berridge v. Ward*, 10 C. B., N.S., 400;

*St. Botolph v. Whitechapel*, 29 L. J. 228, M. C.;

18 & 19 Vict. c. 120, ss. 140, 160;

2 Will. & M. c. 8, s. 6;

8 & 9 Will. 3, c. 137;

10 Will. 3, c. 23, ss. 10, 66, 70, 71, 72;

35 Geo. 3.

Macnamara (*Bovill*, Q.C. with him) contended that the question must depend upon the language of the 30 Car. 2, which created the parish of St. Ann, Soho, and which clearly defined the northern boundary

as "the houses abutting on the said road," which therefore excluded the boundary of the middle of the road as contended for by the other side.

Keane in reply.

COCKBURN, C. J.—I am of opinion that the judgment of the court must be for the Crown. As to the first point, the *defa.* rely entirely upon the words of the statute of 30 Car. 2, which carved the parish of St. Ann, Soho, out of the parish of St. Martin-in-the-fields, and the question turns upon this, whether, by the statutory description of the boundary, as being the houses abutting on the street, we are to understand that the boundary was in reality the middle of the street or highway—the *medium filium*? Now, it is quite clear that, to put any other construction upon the statute would lead to the greatest inconvenience; for, according to the contention of the *defa.*, if the southern half of Oxford-street is not in St. Ann's parish, it must still be in the parish of St. Martin-in-the-fields, seeing that the boundary of the parish of St. Marylebone only includes the northern half of Oxford-street. In all acts and conveyances of land which abut on a river or a highway, it is never the practice to describe the boundary as being the middle line of the stream or highway, though in legal effect it always is so, unless the contrary is expressed. Therefore that is *prima facie* the right construction here also. So far as the evidence goes as to perambulations, St. Marylebone parish goes along the *medium filium* of the road, and therefore the legal presumption is very strong that St. Ann's parish includes the other half. Moreover, it has been the practice of the parish of St. Marylebone to repair the whole street, and call upon St. Ann's to contribute its proportion. Therefore, both upon principle and according to the practice which has prevailed, we must hold that the southern half of Oxford-street was part of the parish of St. Ann, Soho.

WIGHTMAN, BLACKBURN and MELLOR, JJ. gave similar judgments. *Judgment for the Crown.*

Saturday, Nov. 14, 1863.

REG. v. THE RECEIVER OF THE METROPOLITAN POLICE DISTRICT.

Metropolitan police—Superannuation allowance—2 & 3 Vict. c. 47, ss. 22, 23.

*The superannuation allowances to the metropolitan police constables, granted by the Secretary of State under the provisions of the 2 & 3 Vict. c. 47, s. 23, are revocable at his pleasure.*

On the 28th April 1862 a rule was granted calling on the Receiver for the Metropolitan Police District, to show cause why a *mandamus* should not issue directed to him commanding him to pay or issue a warrant or order for the payment to Colin Alexander Milne Grant of two several sums of 15*l.* 15*s.* and 15*l.* 15*s.*, being two quarterly instalments of a certain pension or superannuation allowance granted to him under and by virtue of the statute 2 & 3 Vict. c. 47; and upon the said rule coming on to be argued it was ordered by the court that the writ should issue, and that a special case should be stated for the opinion of the court, the only question therein to be whether the said grant to the said C. A. M. Grant of the said superannuation allowance is permanent or revocable.

The following is the case as stated:—

The said C. A. M. Grant was a constable, and served as such continuously and with diligence and fidelity in the Metropolitan Police Force for upwards of twenty years; that is to say, from the 9th March 1840 until he was in the year 1850 appointed to the rank of inspector in the said force, and from thence as such inspector up to and until the 1st Sept. 1860. He was admitted into the police force upon the conditions applicable to all members of the force, and

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made known to him at the time of his appointment, that the commissioners might, if they thought fit, dismiss him without assigning any reason. After the passing of the 2 & 3 Vict. c. 47, a fund called the "Police Superannuation Fund" was duly formed and invested in the name of the said receiver under and according to the provisions of the said statute, and during the whole of the said service of the said C. A. M. Grant there was, in pursuance of the said provisions, compulsorily deducted from his pay a sum at the rate of 2*l.* 10*s.* per cent. towards and for the purposes of the said fund. By the rules and practice on the said 1st Sept. and still in force with respect to the payment of pensions and superannuation allowances to constables of the said force and of the office of the said receiver, all pensions and superannuation allowances ordered by the Secretary of State to be paid out of the said fund in pursuance of the said statute were payable by the said receiver by quarterly instalments. For some years previous to the said 30th Aug. 1860 the said C. A. M. Grant had suffered severely from repeated attacks of bronchitis and rheumatism, and in consequence thereof had been frequently incapacitated from the performance of his duty and placed on the sick-list of the surgeon of the division of police to which he was then attached; and on the 16th Aug. 1860 he was examined by his then divisional surgeon, who then gave the said Commissioners of Police the following certificate:—

"Divisional Surgeon.

"The 16th day of Aug. 1860.

"I certify that police inspector Colin Alexander Milne Grant, No. —, of the C division, is incapable of the further discharge of the duties of his office from an infirmity of body arising from frequent attacks of bronchitis, with chronic rheumatism, affecting the large joints.

(Signed)

"F. D. TOTHILL, Surgeon.

"To the Commissioners of Police."

And on the 17th Aug. 1860 the said C. A. M. Grant was examined by the surgeon-in-chief of the said police force, Sir John William Fisher, who then told him that he would have to be re-examined at the end of twelve months, and gave to the said Commissioners of Police the following certificate:—

"Surgeon-in-Chief.

"The 17th day of Aug. 1860.

"I certify that inspector C. A. M. Grant, No. —, of the C division, is permanently incapable of the further discharge of the duties of his office, from an infirmity of body arising from chronic bronchitis and chronic rheumatism. To be re-examined at the expiration of twelve months.

(Signed)

"F. W. FISHER,  
Surgeon-in-Chief.

"To the Commissioners of Police."

And thereupon the then Commissioner of Police, D. Labalmondierre, Esq., sent to the then Secretary of State the medical certificates above set forth, together with a recommendation and certificate respecting the said C. A. M. Grant, which said recommendation and certificate are in the words and figures following:—

"Metropolitan Police-office, 4, Whitehall-place,  
Aug. 24, 1860.

"Sir,—I have the honour to state for the information of Secretary Sir George Lewis, that the police constables named in the annexed list have applied for leave to retire upon superannuation allowances under the provisions of 2 & 3 Vict. c. 47, s. 23, and the medical certificates of their unfitness for further service in the police are inclosed. The constables have served in the police for the period stated in the list in which their respective ages and yearly amount of pay are also specified. I beg leave to recommend that superannuation allowances may be granted to these

constables, who have performed their duty with diligence and fidelity, and whom I certify to be incapable from the causes stated in the respective medical certificates to discharge the duties of their office.—I have the honour to be, &c., &c.

"H. Waddington, Esq."

"D. LABALMONDIERRE.

Then followed a schedule of names, in which that or C. A. M. Grant appeared, with the date and length of his service, his age (forty-nine years), and his rank in the force, and the amount of his pay, with this note appended:—

"To be re-examined by the surgeon-in-chief at the expiration of twelve months."

And thereupon, on the said 30th Aug. 1860, the then Secretary of State wrote the following letter to the Receiver of Police:—

"Whitehall, 30th Aug. 1860.

"I am directed by Secretary Sir George Lewis to inform you, for your guidance, that upon the recommendation of the Commissioners of Police he has been pleased to grant allowances to the following officers, who are certified to be worn out and unfit for further duty, after a police service of above fifteen years:

"Superannuation Allowance.

"Inspector Colin Alexander Milne Grant, 63*l.*

"I am, &c.,

"The Receiver of Police." "H. WADDINGTON.

The pay of the said C. A. M. Grant, at the time of the making of the said order, amounted to 118*l.* 6*s.* per annum. Thereupon the said C. A. M. Grant received from the said Commissioners of Police a certificate, of which the following is a copy:—

"Metropolitan Police.

"This is to certify that C. A. M. Grant, C division, joined the Metropolitan Police, as constable, on the 9th March 1848, and resigned his appointment as inspector on the 1st Sept. 1860, having been allowed a pension of 63*l.* per annum. His conduct was very good.

"Given under our hands and seal of the Metropolitan Police,

"SOLOMON HANNANT,

"Superintendent.

"WM. C. HARRIS,

"Commissioner of Police of the Metropolis.

"Whitehall-place, 5th Sept. 1860."

The retirement of the said C. A. M. Grant was notified according to the usual practice in such cases in the general police orders signed by the chief of the said commissioners as follows:—

"Pensions: C. Inspector Grant. Worn out."

"Resignations: C. Inspector Grant. Certificate, No. 1."

In accordance with the custom of the said police force, upon the permanent retirement of an inspector, which custom is acquiesced in but not officially sanctioned by the said chief commissioner, a voluntary contribution was made by the greater part of the inspectors of the said force, amounting to the sum of 39*l.* 15*s.*, for the benefit of the said C. A. M. Grant. It is not the custom to make such contributions in cases of mere temporary retirement. The said superannuation allowance was duly paid by the said receiver to the said C. A. M. Grant up to the end of the year 1861, by quarterly instalments. After the expiration of a year from the granting of the said allowance, viz., on the 24th Oct. 1861, the said C. A. M. Grant was again examined by the said Sir J. W. Foster, who was of opinion, and reported to the Commissioner of Police, that the said C. A. M. Grant was able to resume his duty, and the said C. A. M. Grant was then required to resume duty, but refused to do so, and therefore the said commissioner reported to the then Secretary of State that the said C. A. M. Grant had been re-examined by the chief surgeon of the said force, and had been reported by him to be fit to resume his duty in the said force, but

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refused to do so. And the then Secretary of State then authorised the said receiver to discontinue the payment of the said superannuation allowance. Subject to the effect (if any) of such authority of the said Secretary of State as before mentioned two sums of 15*l.* 15*s.* and 15*l.* 15*s.*, being two further quarterly instalments of the said allowance, became payable respectively on the 1st Jan. 1862 and the 1st April 1862, and the payment of the same was afterwards duly demanded of the said receiver by the said C. A. M. Grant. It is admitted for the purposes of this case, although not as a fact for any other purpose, that at the times when the said sums so became due, and at the time of such demand of payment, the said receiver had in his hands funds properly and in pursuance of the statutes in that behalf applicable to the payment of all such superannuation allowances sufficient for the payment of the said allowance of the said two sums above mentioned, but the said receiver, when payment was so demanded absolutely refused, and still refuses, to pay the same respectively, on the ground of the said authority from the said Secretary of State to discontinue the said allowance.

The question for the court is, whether the grant of the superannuation allowance was permanent?

By the 2 & 3 Vict. c. 47 (An Act for further improving the police in and near the Metropolis), it is enacted by sect. 22 that a superannuation fund shall be provided by a deduction from the pay of each constable not exceeding 2*l.* 10*s.* in the 100*l.*, &c., which fund is to be invested in Government stock by and in the name of the receiver, which fund is to be applied from time to time for payment of such superannuation or retiring allowances or gratuities as may be ordered by the Secretary of State at any time, to any of the said constables as hereinafter provided.

Sect. 23 enacts, "That it shall be lawful for the Secretary of State to order that any of the said constables may be superannuated and receive thereupon out of the police superannuation fund a yearly allowance subject to the following conditions, and not exceeding the following proportions; that is to say, if he shall have served with diligence and fidelity for fifteen years and less than twenty years, an annual sum not more than half his pay; if for twenty years or upwards an annual sum not more than two-thirds of his pay; provided that if he shall be under sixty years of age it shall not be lawful to grant any such allowance unless upon the certificate of the said commissioners of police that he is incapable from infirmity of mind or body to discharge the duties of his office; provided also, that if any constable shall be disabled by any wound or injury received in the actual execution of the duty of his office it shall be lawful to grant to him any allowance not more than the whole of his pay; but nothing herein contained shall be construed to entitle any constable absolutely to any superannuation allowance or to prevent him from being dismissed without superannuation allowances."

*Hawkins*, Q.C. and *Holl* appeared for the prosecutor, C. A. M. Grant, and argued that the superannuation allowance being once granted it could not be revoked, for although it may be discretionary in the Secretary of State to grant the allowance, yet the statute clearly contemplates that such grant is to be permanent. That having ceased to be a constable he could not be required to resume his duties, and that the Commissioners of Police had no longer any jurisdiction over him. [*BLACKBURN*, J.—The question is whether the order of the Secretary of State is revocable. In ordinary cases it may well be imagined that the pension once granted will not be withdrawn, but there may be exceptional cases, and it is said this is such a one.] The prosecutor's resignation was actually received, and he no longer belonged to the force. It is

hard upon him that having for more than twenty years contributed to the fund from his pay, he should now be deprived of his allowance.

*Field*, contra, contended that the superannuation allowance was revocable, and only payable at pleasure; that it being admitted that the constable may be discharged at pleasure there is no greater hardship than though he had been discharged without an allowance.

*Rez v. The Lords Commissioners of the Treasury, re Hand*, 4 A. & E. 984;

10 Geo. 4, c. 44, ss. 5, 12; 20 & 21 Vict. c. 64, s. 15.

The fact that he was to be re-examined at the end of twelve months shows that there was a reservation. There are good reasons why the allowance should be revocable; he might commit a crime, or come into a large fortune, or obtain another lucrative office.

*Hodgson v. The Mayor of Hull*, 4 Ell. & Bl. 986.

*Hawkins*, Q.C. in reply.

*BLACKBURN*, J. (a)—I think, in this case, looking at the section of the Act of Parliament, we are bound to give our decision for the deft., on the ground that there is no legal right in the constable to insist on the payment of this annuity. The question very much turns upon the 12th section of the 10 Geo. 4, c. 44, by which the Secretary of State was first authorised to grant an allowance to such constables as should be disabled by bodily injury received, or should be worn out by length of service; and under that statute it is clear that such allowances were paid, not as a matter of right, but upon orders which, in legal effect, would be precarious. Then comes the 2 & 3 Vict. c. 47, and the 22nd section constitutes a superannuation fund, which is derived from deductions from the pay of the constables and some other sources; and the next section gives the Secretary of State a power to order superannuation allowances in certain cases. Then we must see if the Secretary of State has given an allowance in this case which is irrevocable. Now, the police constable holds his office not as of right or to be continued, but it is an office from which he may retire upon giving a month's notice, and also he may be dismissed without any grounds being assigned. It is therefore fair to assume that the allowance is only a gratuity. The deduction from the pay of the constable would certainly lead to the belief that he has a right to the allowance. It is, however, answered that all the constables have to contribute to this deduction, and yet they may be dismissed without cause. In looking at the *Hull* case, there there was a superannuation fund, and the party was, by the words of the statute, entitled as of right; but here it is not so. The Legislature by sect. 23 says that "it shall be lawful for the Secretary of State," &c., which shows that the grant of an allowance is not imperative; and the section points out the proportions in which the allowance is to be made, with the condition, that if the constable is under sixty years of age he must appear to be incapable from infirmity of mind or body. It stands then, that the Secretary of State may order, but is not bound to order, a superannuation allowance. But we must look at the Act to see what are the express words and general meaning. Now there are no words certainly which say it shall be as of right, and at the close of the section it says, "but nothing herein contained shall be construed to entitle any constable absolutely to any superannuation allowance, or to prevent him from being dismissed without superannuation allowance." It seems, therefore, to me, that the Secretary of State has power to revoke the allowance, although we may feel assured that he never

(a) The Chief Justice was absent from indisposition, and Wightman, J. was sitting in the Court for Crown Cases Reserved.

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would revoke it without some good and sufficient reason. In this case there is a reason, for the Secretary of State seems to think that there having been a qualification that the constable should be again examined, and upon his examination he being certified to be fit to resume his duty and refusing to go back to his duty, he had a fair ground for revoking the allowance, which allowance being so revoked, the receiver was justified in not paying it. It seems to me that these superannuation allowances may be revoked, and that this court cannot review the decision of the Secretary of State upon the subject.

MELLOR, J. delivered a similar judgment.

*Judgment for the deft.*

Wednesday, Nov. 18, 1863.

HALL (app.) v. KNOX (resp.)

Poaching—Proceeding under 25 & 26 Vict. c. 114, s. 2—Search.

*To entitle a constable to summon a party under 25 & 26 Vict. c. 114, s. 2, whom he has reason to suspect of coming from land where he shall have been unlawfully in search or pursuit of game, it is not necessary to make an actual search of his person, if, after having heard reports of a gun, he sees him with a gun in the direction of the reports, and in the act of picking up game (though in a highway), and the offender then runs away.*

Case stated by justices of the peace in petty sessions at Alnwick, Northumberland, on the dismissal of an information preferred by William Hall against William Knox.

The information charged "that the said W. Knox on the 20th June last, at &c., having been found by the said W. Hall, a constable of the said county, in a certain public place, to wit, a footway leading from &c., who then and there had good cause to suspect the said W. K. of coming from land where he had been unlawfully in search or pursuit of game, and having in his possession a certain gun which had been used for unlawfully killing and taking game."

It appeared that the constable heard the report of a gun, and went along a public footpath in the direction of the report, when he heard a second report, and proceeding further he heard another report, saw the smoke, and immediately afterwards saw the resp. with a gun in his hand on a public footpath; he also saw a person inside the inclosed land adjoining, who threw a rabbit on to the footpath close to the resp., who then changed the gun from his right to left hand, and was in the act of picking up the rabbit, but before doing it he saw the constable and ran away. The constable seized the rabbit and followed the resp., but was not able to get hold of him.

On these facts it was contended that an actual search of the person of the resp. was not necessary to bring the case within the 25 & 26 Vict. c. 114, s. 2, and that if it was, a constable might search with his eyes as well as with his hands, and that the constable had seen all that was necessary to constitute the offence.

On the other hand it was contended that, to give jurisdiction to summon or hear and determine a case under this Act, an actual search was necessary, and then, if the constable finds game unlawfully taken or a gun unlawfully used, he may apply for a summons, and that if the constable cannot make the search by reason of the offender running off, he may proceed under the Game Act against him for poaching or trespass in pursuit of game.

The majority of the bench considering an actual search necessary, dismissed the information.

The 25 & 26 Vict. c. 114, s. 2, enacts, "That it shall be lawful for any constable or peace officer in any county, &c., in any highway, street, or public

place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person and having in his possession any game unlawfully obtained, or any gun, part of gun, or nets or engines used for the killing or taking game, and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game or such article or thing is being carried by any such person, and should there be found any game or any such article or thing as aforesaid, upon such person, cart, or other conveyance, to seize and detain such game, article, or thing; and such constable or peace officer shall in such case apply to some justice of the peace for a summons citing such person to appear before two justices in petty sessions as provided by 18 & 19 Vict. c. 126, and if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid for unlawfully killing or taking game, &c. (then follows a liability on conviction to a penalty not exceeding 5l. and forfeiture of the game, guns, nets and engines.)

*Kemplay for the app.*—The offence under sect. 2 is the unlawfully going on land in pursuit of game, and this clause was intended to give police officers the additional power of search, and not to alter the character of the offence. Searching is not a condition precedent to the laying of an information under the section under the 1 & 2 Will. 4, c. 32, ss. 30 to 36. Here the man is seen with the gun and in the act of picking up the game, and in such a case no search was necessary.

COCKBURN, C. J.—Suppose the constable had seen the man with rabbits hanging on his person before and behind him and carrying the gun over his shoulder, it could never have been intended that in that case the constable should go through the process of searching him. If the constable reasonably suspected the man then he might search. The search is merely a means of finding out, and the statute is satisfied if the game is seen and the gun found upon the man as in this case.

WIGHTMAN, J. concurred.

BLACKBURN, J.—The statute gives a right to search, that the constable might have the means of actually finding the game.

MELLOR, J.—The statute is abundantly satisfied by finding the game and things under the circumstances in this case.

*Appeal affirmed.*

DANT (app.) v. MOORE (resp.)

*Toll—Coprolites not stone or manure under a canal Act.*

*The Cam Navigation Act gave a toll of 1d. per ton on "stone, pebbles, sand, clay, manure, limestone," and of 3d. per ton on "other goods, wares and merchandise" not before mentioned:*

*Held, that coprolites, which are fossil substances generally supposed to be the dung of animals, and which produce when mixed with acid 60 per cent. of phosphate of lime and 40 per cent. of fusel, and are then used as manure, were not stone or manure within the above Act, but came within the class of "goods, wares and merchandise."*

Case stated by justices upon a conviction of David Dant for unlawfully resisting Samuel Moore, a toll-collector acting in the due execution of the River Cam Navigation Act 1851, 14 & 15 Vict. c. xcii.

On 1st Aug. 1863 Dant came down the Cam with 80 tons of coprolites in boats, for which Moore, the toll-collector, demanded toll at 3d. per ton. Dant offered 1d. per ton. This was refused, and the col-

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lector went to draw the chain against the boats and lock it. Dant obstructed him and prevented him from locking it.

It was contended before the magistrates that the proper toll for coprolites was 1d. per ton, and that they came within the clause in sect. 53 :

"For every ton of coals, culm, cooke, charcoal, or other fuel, road materials, stone, pebbles, sand, clay, manure, limestone..... 1d."

On the other hand it was contended for the complainant that they did not come within that clause, but were within this one :

"And for every ton weight of other goods, wares, or merchandise whatsoever not hereinbefore mentioned ..... 3d."

The coprolites were the fossil substances known by that name in science, and are generally supposed to be the dung of animals, and therefore organic, whilst stone, pebbles and limestone are not organic, and, as admitted before the justices, generally produced, when ground, 60 per cent. of phosphate of lime, which, when mixed with acid, is used as manure, and 40 per cent. of refuse which may be had for other purposes.

The justices determined that there was no evidence to satisfy them that coprolites were either stone, pebbles, manure, or limestone, or any other article for which a toll of 1d. per ton was payable, and that therefore they came under the general words of "other goods, wares, or merchandise whatsoever," for which a toll of 3d. per ton was payable.

The question asked of the Court was, whether the toll for coprolites was 1d. or 3d. per ton.

*W. G. Harrison* in support of the conviction.—It is a question of fact, what are coprolites? In commerce they are used in the manufacture of soap, and in glazing earthenware. In their simple state they are not used for manure. It lies on the other side to show that they fall within the word "stones" or "manure."

*D. D. Keane* for the app.—They are either "dung" or "stone," and if so, they are liable to the 1d. toll only. In *Pratt v. Brown*, 8 C. & P. 244, uncrushed bones carried through a turnpike to a farm, for the purpose of being crushed and part used as manure, were held to be exempt from toll under the word "manure," in 3 Geo. 4, c. 126, s. 32, and 5 & 6 Will. 4, c. 18, s. 1. So stone railway sleepers were held to come under the word "stone" in *Fisher v. Lee*, 12 A. & E. 622. Coprolites are stone, and before their value for the purpose of manure was discovered, were used for repairing roads : (5 E. & B. 944.)

*Cockburn, C. J.*—I think that the conviction in this case was right, and that the toll applicable to the conveyance of coprolites on this navigation was 3d. per ton and, not 1d. per ton. To come within the penny toll, coprolites must come under either the word "stone" or the word "manure" in the Act. It is not contended that any other of the things specified in the Act would comprehend it. I do not think that they can be considered within the meaning of the word "stone" in this Act, which words follows the words "road materials," and precedes "pebbles, sand, clay." It is true that coprolites are supposed to be organic matter petrified, but they are not in the category of the things specified "road materials, pebbles, sand," &c. I further think that they do not come under the word "manure," for they are not used for that purpose until they have undergone chemical decomposition by the introduction of sulphuric acid. Therefore, it seems to me that they come under the description of goods or merchandise not before mentioned.

*Wightman, J.* concurred.

*Blackburn, J.*—Coprolites are the raw material from which superphosphate of lime is to be manufactured, and do not come within the meaning of the words "stone" or "manure" in the Act.

*Mellor, J.* concurred.

*Conviction affirmed.*

HAYDON (app.) v. TAYLOR (resp.)

*Factory Acts—Winding cotton yarn—Duty to register premises so used.*

*Premises were used solely for the purpose of winding by machinery moved by steam power sewing thread from hanks sent to the premises on to large bobbins called cops, and from the cops on to other bobbins much smaller called spools :*

*Held, that these premises came within the Factory Acts, 3 & 4 Will. 4, c. 103, and 7 & 8 Vict. c. 15, and that the owner was bound to keep a register of young persons employed therein.*

Case stated by justices of Leicester on the dismissal of a summons taken out by the app., a sub-inspector of factories, against the resp., a manufacturer of cotton sewing thread, for neglecting to keep a register of young persons employed in his factory, contrary to the 7 & 8 Vict. c. 15, s. 27.

The resp. is a manufacturer of cotton sewing thread, and is owner of a factory at Mansfield, in the county of Nottingham, and of premises in Mansfield-street, Leicester.

At the factory at Mansfield, the resp. doubles cotton yarn, or the article which is purchased in Manchester market as twist, into sewing thread, which is sent out from thence to the premises at Leicester in hanks, which are packed in large parcels called bundles, and which are there, for the purpose of meeting the convenience of the retail traders and small consumers, wound by machinery moved by steam first through wire guides on to large bobbins called cops ; and, secondly, from the cops through other guides on to other bobbins of much smaller dimensions called spools.

The premises at Leicester, to which this case alone relates, are worked by steam power, and the only process carried on therein is that of winding the sewing thread so sent from Mansfield or other places from the hanks on to the cops, and from the cops on to the spools. The sewing thread when it leaves the factory at Mansfield in hanks is ready for the wholesale market, and is sold in the same state in which it is received at Leicester. The winding from larger into smaller quantities renders the article more saleable to the ordinary small consumers of sewing thread, and the thread exhibits a brighter appearance.

The resp. keeps at his factory at Mansfield a register of young persons employed therein according to the form prescribed in schedule B. annexed to the 7 & 8 Vict. c. 15, and in pursuance of the provisions contained in sect. 27 of the same Act, but he does not keep such a register at his premises at Leicester.

The statute 3 & 4 Will. 4, c. 103, enacts (*inter alia*), "that from and after the 1st Jan. 1834, no person under eighteen years of age shall be allowed to work in the night (that is to say) between the hours of half-past eight o'clock in the evening and half-past five o'clock in the morning, except as thereinafter provided, in or about any cotton, woollen, worsted, hemp, flax, tow, linen, or silk mill or factory wherein steam or water, or any other mechanical power is or shall be used to propel or work the machinery in such mill or factory, either in scutching, carding, roving, spinning, piecing, twisting, winding, throwing, doubling, netting, making thread, dressing or weaving of cotton, wool, worsted, hemp, flax, tow, or silk, either separately or mixed, in any such mill or factory, situate in any part of the United Kingdom of Great Britain and Ireland."

The 7 & 8 Vict. s. 73 (hereinafter called the Amending Act), enacts (*inter alia*) that the 3 & 4 Will. 4, c. 103 (the Factory Act), as amended by the Amending Act, and the Amending Act shall be construed together as one Act, and that so much of the Factory Act, and of any rule or regulation theretofore

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made by any inspector as is inconsistent with the Amending Act, shall be taken to be repealed.

The said Amending Act, sect. 73, further enacts (*inter alia*) that any person who shall work in any factory, whether for wages or not, or as a learner or otherwise, either in any manufacturing process, or in any labour incident to any manufacturing process, or in cleaning any part of the factory, or in cleaning or in oiling any part of the machinery, or in any other kind of work whatsoever, save in the cases thereafter excepted, shall be deemed, notwithstanding any other description, limitation, or exception of employment in the Factory Act, to be employed therein within the meaning of the Amending Act; that the word factory notwithstanding any provision or exemption in the Factory Act, shall be taken to be all buildings and premises situated within any part of the United Kingdom and Ireland wherein or within the close or curtilage of which steam, water, or any other mechanical power shall be used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incident to the manufacture of cotton, wool, hair, flax, silk, hemp, jute, or tow, either separately or mixed together, or mixed with any other material, or any fabric made thereof.

The said Amending Act also by sect. 27 enacts (*inter alia*) that registers shall be kept in the factory to which they relate by the occupier of every factory according to the forms and directions given in schedule B. to that Act annexed. And that the registers, certificates and other documents required by the said Amending Act to be received or kept shall be forthwith produced to the inspector or sub-inspector on his demanding to examine the same when the factory is at work.

On the 2nd Feb. 1863 the app. called at the premises of the resp., situate in Mansfield-street, in the borough of Leicester as aforesaid, whilst the machinery employed therein was at work, and required the said resp. to produce a register of young persons according to the form prescribed in schedule B., sect. 27 of the said Amending Act, and demanded to examine the same. The resp. failed to produce any such register, and admitted that he did not keep one.

Upon the state of facts set out above, it was argued by the app. before us that the resp.'s premises at Leicester were a cotton-mill or factory within the meaning of the Factory Act, 3 & 4 Will. 4, c. 103 s. 1, and that the word "winding" mentioned in that Act included the process carried on by the resp. of winding by machinery worked by steam power sewing cotton from barks on to cops, and from cops on to spools, and that inasmuch as the principles comprised in the Factory Act, 3 & 4 Will. 4, c. 103, were incorporated into 7 & 8 Vict. c. 15, and were explained by sect. 73, the resp. had rendered himself liable to a penalty for not keeping a register as required by sect. 27 of the said Amending Act.

On behalf of the resp. it was contended that the winding of sewing thread which was carried on by him at his premises at Leicester is not the winding referred to in the preamble of 3 & 4 Will. 4, c. 103; that being winding incidental to the manufacture of the sewing thread from the yarn or twist of which it is composed, and which is all done at the resp.'s factory at Mansfield, and that the premises of the resp. at Leicester were not a cotton mill or factory within the meaning of the 7 & 8 Vict. c. 15, as no steam, water, or any other mechanical power is used there for moving or working any machinery employed in the manufacturing or finishing, or in any process incident to the manufacture of cotton or of any of the other articles referred to in the said Act, and therefore resp. was not bound to keep the register therein according to the forms and directions given in schedule B to said Amending Act annexed.

The magistrates dismissed the summons, subject to the opinion of this Court; and if the court should be of

opinion that their decision was wrong, the resp. is to stand convicted in the penalty of 2*l.* and costs.

*Welby* for the app.

*Field* for the resp.

The arguments were the same as those set out in the case *supra*.

COCKBURN, C. J.—I think that the process of winding in this case is within the language of both statutes; it is within the word "winding" in 3 & 4 Will. 4, c. 103, s. 1, and within the words "manufacturing process" in the 7 & 8 Vict. c. 15, s. 73. The case is certainly within the mischief both Acts were intended to provide against.

The rest of the Court concurring,

*Appeal allowed.*

HILTON (app.) v. HILL (resp.)

*Benefit building society—Arbitration—Notice from arbitrators, how to be sent.*

*A rule of a benefit building society provided that all summonses, circulars and notices should be deemed duly served by putting the same into the post, addressed to the members according to the last entry on the register given by them for this purpose:*

*Held, that this rule only related to the ordinary business of the society, and did not apply to the case of notices of appointments by arbitrators for the purpose of proceeding with a reference.*

Case stated by the Stipendiary Magistrate of Manchester.

The app. was a shareholder in the Golden Eagle Third Equitable Benefit Building Society, and had had his shares advanced to him on mortgage security, and redeemed the same and had his deeds redelivered to him.

The society was not terminated at the anticipated period, and it was resolved that the members should be called upon to pay a sum of money each. The app. was called upon to pay 6*l.* on the ground that he had not paid the amount he ought to have done by that sum. This he did not admit. The trustees of the society referred this dispute to arbitration, but without the knowledge of the app. (as he alleged).

The arbitrators appointed under the rules of the society fixed a day for hearing the parties, and notice of this was sent to the app. by post, according to rule 21 of the society. The app. not appearing, the arbitrators proceeded *ex parte*, and awarded the app. to pay 8*l.* 10*s.* 6*d.* to the trustees, being the 6*l.* with interest from Dec. 1857 to April 1863, and the arbitrators' fees, 4*l.* 4*s.*

The app. not having complied with the award, the trustees took out a summons before the stipendiary magistrate of Manchester, under 10 Geo. 4, c. 56, s. 27, to enforce the award; and the magistrate having heard the parties, decided to enforce the award.

The case stated for the opinion of the court raised several important questions in relation to building societies, but as the case was decided on the point as to the sufficiency of the notice from the arbitrators to proceed *ex parte*, it is only necessary to set out the above facts.

The rule of the society respecting notices is the following:—

"Rule 21. The secretary shall issue all summonses, circulars and notices, which shall be deemed duly served by putting the same into the Manchester Post-office, addressed to the member for whom the same is intended, according to the last entry on the register, given by virtue of the rule for this purpose contained."

*Pepe* for the resp.—There is no provision in the Benefit Building Society Acts, nor in the rules of this society, entitling the arbitrators to proceed *ex parte* when one party refuses to proceed; but it is an implied condition in all arbitrations that the



arbitrator may proceed *ex parte* for good cause, and it is a good cause for so proceeding if a party has notice that the arbitrator will so proceed if he does not attend at the time appointed. Here the only question raised is, whether the notice of the appointment by the arbitrators was properly sent. The app. says he never received it, and the trustees cannot contradict him; but they contend that all the arbitrators were bound to do was to post the notice according to rule 21.

Holker, for the app., was not called upon to argue the points.

COCKBURN, C. J.—That rule does not apply to notices from the arbitrators, but only to notices from the society. It is, therefore, as if the arbitrators had not given notice, and they could not proceed *ex parte* against the app. without giving him notice.

WIGHTMAN, J.—In point of fact, this notice was posted by the secretary and sent to an address which the app. had given to the society five years before.

MELLOR, J.—Rule 21 is for summonses, circulars and notices incidental to the ordinary meetings and business of the society, and not for notices from the arbitrators.

*Appeal allowed.*

#### OVERSEERS OF NEITHROP v. WHIDCOAT.

*Justices' clerk's fees—Vagrant cases—Order for payment on overseers.*

An order under the 5 & 6 Vict. c. 109, s. 17, and 12 & 13 Vict. c. 20, s. 2 on overseers, requiring them to pay a sum of money to W., the superintendent of police, "for fees due to him," is not supported by evidence that the fees were those really due to the clerk of the justices in vagrant cases, and had been paid in the first instance to him (a) by the superintendent, who sought the order in question as a means of reimbursing himself, and therefore justices are not authorised to enforce such an order.

On the 13th Feb. 1862, two justices of the Banbury and Bloxham Petty Sessional Division (Oxford) made an order under 5 & 6 Vict. c. 109, and 12 & 13 Vict. c. 20, s. 2, upon the overseers of the poor of the township Neithrop, in the said division, in these words:—

"County of Oxford, } To the overseers of the poor of  
to wit, } the township of Neithrop, in  
the said county.

"In pursuance of the Act of Parliament, made and passed for the appointment and payment of parish constables, we, the undersigned, two of Her Majesty's justices of the peace in and for the said county, do hereby order and require you forthwith to pay to Mr. William Whidcoat, superintendent of police, the sum of 4*l.* 5*s.* for fees now due to him, and that you do pay the same out of the moneys in your hands collected for the relief of the poor. Given under our hands, &c.,

"H. NORRIS,  
"C. T. WYATT."

The above sum of 4*l.* 5*s.* consisted of magistrates' clerk's fees in cases of the apprehension of vagrants, duly comprised in the annexed table now in force for the county, which fees were properly incurred by the superintendent of police of the division in prosecuting vagrants and drunkards for offences committed within the township of Neithrop.

In these prosecutions the prisoners were either committed to goal without a fine, or they had no means whereby to pay the expenses incurred.

The justices before signing the order were satisfied that the fees had been properly incurred, and they had the items comprised in the amount before them, which

(a) The case was argued on the assumption that the magistrates' clerk had received these fees from the superintendent; but, from the statements and counter statements of counsel in court, this was not at all clear.

they examined and allowed, and then signed the order for the total sum of 4*l.* 5*s.*

The overseers did not have notice to attend when the order was made, and when the money was afterwards demanded of them the particulars of the amount mentioned in the order were not furnished to them. The overseers refused to obey the order, and were duly summoned to a subsequent meeting of the said justices to show cause why they should not pay.

The overseers appeared both personally and by their attorney, and it was argued on their behalf that the overseers should have been summoned to attend, when the order was proposed to be made, so that they might have been present to examine the account, and if they thought proper object to the making of the order, and that the different items or particulars of the amount mentioned in the order should have been annexed to it when presented for payment, and it was also contended for the overseers, that the superintendent of police should have kept an account, and produced it in vestry, according to the old statute 18 Geo. 3, c. 19, and that such account must have been allowed and passed in vestry before the magistrates could legally make the order.

The justices considered that these objections were invalid, inasmuch as the statutes above mentioned (5 & 6 Vict. c. 109, s. 17, and 12 & 13 Vict. c. 20, s. 2) enact that when the duties have been performed the expenses shall be paid by the overseers of the parish out of the poor-rate upon the order of justices in petty sessions assembled; and the 11 & 12 Vict. c. 91, s. 6, further enacts that any money paid by an overseer to a constable in obedience to an order purporting to be made as this one was made shall not be disallowed by any auditor or other authority competent to examine overseers' accounts on any ground whatever. Under these statutes the justices considered that, having satisfied themselves that the fees had been actually and properly incurred by the constable, all that was required of the justices was to embody the sum in one order, and then direct the overseers to pay it as above set out. The justices informed the overseers that this was their view of the case, and expressed their determination to enforce the payment by the overseers of the said sum mentioned in the said order, *e. g.* so much for warrant, so much for examination, so much for order of discharge, &c.

The overseers thereupon expressed their dissatisfaction at this determination as being erroneous in point of law, and applied to the justices to state a case for the opinion of this court, which the justices consented to grant. The opinion of the court is requested whether the justices were right or wrong in their determination to enforce the payment by the overseers.

Tozer, Serjt. for the resp.—The objection before the magistrate was that the superintendent ought to have proceeded under the 18 Geo. 3, c. 19, as stated in the case. The fees in question were authorised by the scale of fees settled by the justices under 5 & 6 Vict. [109, s. 17; see also 13 & 14 Vict. c. 20, s. 2.]

WIGHTMAN, J.—The order of the justices calls upon the overseers to pay 4*l.* 5*s.* for fees due to the superintendent. Now these particular fees are not due to him, but to the clerk to the justices. The language of the order cannot be supported; but this is not the objection made before the magistrates.

Huddleston (Sawyer with him) intimated that they would rely on that objection now.

COCKBURN, C. J.—Suppose the magistrates' clerk gave credit for those fees instead of getting them paid at the time, is there any power by which the justices can make the overseers pay those fees. And, assuming such fees to have been paid by the constable, what authority had the constable to pay money on behalf of the overseers? The order is manifestly wrong, for the fees are in fact due

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to the clerk to the justices. The question asked the court is, whether the justices ought to enforce the order, and we say no. The 18 Geo. 3, c. 19, is still alive as regards constables' "expenses," and by the subsequent statutes the justices have authority to make orders on the overseers for the payment of constables and magistrates' clerks' fees.

The rest of the Court concurring,

*Appeal allowed.*

Saturday, Nov. 21, 1863.

REG. v. HOW.

*Highway district—Excluded parish—25 & 26 Vict. c. 61, s. 7—Highway board under 5 & 6 Will. 4, c. 50, s. 18—Appointment—Vestry meeting.*

*A parish claimed to be exempted from being included in a highway district under 25 & 26 Vict. c. 61, s. 5, by reason of its highways being under the superintendence of a board established under 5 & 6 Will. 4, c. 50, s. 18. The 25 & 26 Vict. c. 61, passed in July 1862, and the highway board under 5 & 6 Will. 4, c. 50, s. 18, was alleged to have been constituted at a vestry meeting in Nov. 1862 by a majority of two-thirds of the vestrymen present, the chairman having refused to grant a poll which was demanded at the meeting:*

*Held, that a poll ought to have been granted, and that therefore the highway board under sect. 18 of 5 & 6 Will. 4, c. 50, was not properly created, and so the parish was not exempted from being included in the highway district under 25 & 26 Vict. c. 61, s. 5.*

This was a rule to quash an order of quarter sessions of the county of Kent, annexing the parish of Bromley to the Bromley highway district under the provisions of the 25 & 26 Vict. c. 61 (the New Highway Act), on the ground that the sessions had no jurisdiction to deal with such parish under the Act, inasmuch as it was under the management of a board constituted under sect. 18 of the 5 & 6 Will. 4, c. 50, and by sect. 7 of the former Act was exempt from being so annexed.

By sect. 5 of the 25 & 26 Vict. c. 61 (An Act for the better Management of Highways in England), powers are conferred upon the quarter sessions to form highway districts; but by sect. 7 certain restrictions are imposed upon such powers, and it is enacted, "Firstly, there shall not be included in any highway district formed in pursuance of this Act, any of the following places: that is to say (*inter alia*), any parish or place, the highways of which are at the time of the passing of this Act, or may be within six months afterwards, under the superintendence of a board established in pursuance of sect. 18 of the principal Act, unless with the consent of such board."

By sect. 18 of such principal Act, the 5 & 6 Will. 4, c. 50 (the General Highway Act), it is enacted, "That in any parish where the population by the then last census taken from the returns made to Parliament exceeds the number of 5000, if it shall be determined by a majority of two-thirds of the votes of the vestrymen present at such meeting as aforesaid to form a board for the superintendence of the highways of the said parish, and for the purpose of carrying the provisions of this Act into effect, it shall be lawful for the said vestry to nominate and elect any number of persons not exceeding twenty, nor less than five, being respectively householders, and residing in and assessed to the rate for the relief of the poor of the said parish . . . to serve the office of surveyors of highways for the year ensuing; and such persons so to be nominated and elected as such surveyors, or any three of them shall, and are hereby authorised to act as a board, and to be called 'The Board for Repair of the Highways in the Parish of —,' &c."

It appeared from the minute-book of the proceedings that in Nov. 1862 a vestry meeting was held in the parish of Bromley, with the view of forming a highway board under sect. 18 of the 5 & 6 Will. 4, c. 50, so as to avoid being included in a district under the 25 & 26 Vict. c. 61; at that meeting there were eighteen vestrymen, two-thirds of whom would have been twelve. Upon the resolution being put for the formation of a highway board eleven voted for it and four against it, three having declined to vote. Upon this a poll was demanded and refused, the chairman holding that the resolution had been carried by a majority of two-thirds of the votes of the vestrymen present as provided by the statute. A board was accordingly formed.

Nov. 11.—*Manisty*, Q.C. and *Poland* now showed cause, and contended that the board formed under sect. 18 of the 5 & 6 Will. 4, c. 50, was not properly brought into existence, inasmuch as, first, the resolution was not carried by a majority of two-thirds of the votes of the vestrymen present at the meeting, as the three vestrymen who did not vote ought still to be reckoned; secondly, that the resolution was not legally adopted, inasmuch as the poll upon it was refused.

On the application of *Welsby*, who was in support of the rule, the case was adjourned for the production of affidavits as to the real number of voters at the vestry meeting.

Nov. 21.—To-day additional affidavits were produced on both sides, and *Welsby* proposed to show that the minutes were not correct, and that thirty persons were present at the meeting, of whom twenty-one voted in favour of the establishment of the highway board. *Manisty*, contra, objected that it ought not to be allowed to impugn the accuracy of the minute-book in that way, particularly when the rule *nisi* was obtained on affidavits relying on the entries in the minute-book.

Considerable discussion took place upon this point, but the case was ultimately decided on the refusal of a poll by the chairman, and it became unnecessary to decide whether the question of the establishment of the highway board was carried by a majority of two-thirds of the vestrymen present at the meeting.

*Manisty*.—The real question is whether the highway board was duly constituted under sect. 18 of 5 & 6 Will. 4, c. 50. It is submitted that it was not because the chairman of the meeting had no right to refuse a poll which was lawfully demanded. The Act regulating parish vestries is the 58 Geo. 3, c. 60, and there is nothing in the Act to exclude the common law right to demand a poll.

*Reg. v. St. Mary, Lambeth*, 8 A. & E. 356; and

*Reg. v. D'Oyley*, 12 A. & E. 139.

*Welsby* (*Waddy* with him), in support of the rule, contended that the object of sect. 18 of 5 & 6 Will. 4, c. 50, was, that the question of the formation of a highway board should be decided by a majority of two-thirds of the vestrymen present at the meeting, and that the chairman was not bound to grant a poll.

COCKBURN, C. J.—The vestry-rooms of populous parishes are not large enough to hold a hundredth part of the inhabitants, and it would be monstrous to conclude a whole parish by the votes of those only assembled in the room. In *Campbell v. Maudslayi*, 8 A. & E. 565, it was decided that the common law right to a poll could not be taken away except by express words. The case of *Reg. v. D'Oyley* is also singularly in point. A poll, therefore, having been demanded and refused, the highway board was not properly constituted, and this rule must be discharged.

The rest of the Court concurring,

*Rule discharged.*

Wednesday, Nov. 18, 1863.

ASHBY (app.) v. WOODTHORP (resp.)

*Metropolitan Building Act — Alterations in old buildings—Uniting buildings—Evidence—18 & 19 Vict. c. 122, ss. 9, 28.*

*Before the passing of the Metropolitan Building Act a communication had been made between two old houses, Nos. 66 and 67, in the same occupation, by openings in the party-wall. After the Act came into operation it was sought to make a communication between No. 66 and the house adjoining on the other side by openings in the wall separating the two. These two houses taken together contained less than 216,000 cubic feet, but if Nos. 66 and 67 were to be considered as one building within sect. 28, then such building and the third house taken together contained more than 216,000 cubic feet:*

*Held, that Nos. 66 and 67 were to be considered as one building for the purpose, and that the making the communication was an alteration of an old building within sect. 9:*

*Secondly, that evidence was admissible to show whether the wall separating No. 66 and the house with which the communication was to be made was a party-wall or a cross-wall:*

*Thirdly, that in making such communication the rules in sect. 28 were obligatory.*

Case stated by Alderman Sidney, one of the justices for the city of London, on the conviction of the apps. under the Metropolitan Building Act 1855.

The apps. are builders and the resp. is the district surveyor of the northern division of the City of London. The apps. were employed by Messrs. Baggallay to make two openings in the wall dividing the premises No. 66, Aldermanbury and No. 6, Love-lane, No. 66, Aldermanbury being at the corner of Love-lane. The work was completed in Aug. 1862.

On the 17th Dec. 1862 notice was served by the resp. on the apps. that the work done was not conformable to the Building Act in certain particulars, and requiring them within forty-eight hours to render the same conformable thereto. The particulars of non-conformity stated were: by openings having been made in a party-wall dividing buildings which taken together exceed 216,000 feet in their entire contents, to wit, containing 320,000 cubic feet, without having the floor jambs and head formed of brick, stone, or iron, and the openings closed by two wrought-iron doors, each one-fourth of an inch thick in the panel, at a distance from each other of the full thickness of the wall fitted to rebated frames without woodwork of any kind as required by sect. 28, rule 3 of the said Act.

The notice not having been complied with, the apps. were summoned by the resp., and at the hearing it appeared that some years before the Building Act came into operation, a communication had been made between 66 and 67, Aldermanbury, by an opening on the first floors in the party-wall separating them, and the openings were closed when required by double iron doors; and Messrs. Baggallay came into the occupation thereof under those circumstances. In 1862 they became the occupiers of 6, Love-lane, and, for business purposes, made two openings on the first floor, in the wall separating 6, Love-lane, and 66, Aldermanbury.

No. 6, Love-lane, and 66, Aldermanbury, together contain less than 216,000 cubic feet.

It was urged that, as the buildings were not new buildings upon which the work was being done, the Building Act did not apply; that the opening between 6, Love-lane, and 66, Aldermanbury, was not an alteration within sect. 9; and that the wall between 6, Love-lane, and 66, Aldermanbury, was not a party-wall, but a cross-wall. The evidence of the district

surveyor was admitted, after objection thereto, to prove that in his opinion the wall was a party one. The justice found that the wall was a party-wall, and convicted the apps. and ordered them to comply with the requisitions in the said notice.

*Gray for the resp.*—First, evidence was admissible as to the nature of the wall between 66, Aldermanbury, and 6, Love-lane. Secondly, the premises, 66 and 67, Aldermanbury, formed one building within sect. 28 of 18 & 19 Vict. c. 122, which enacts (*inter alia*) that "no opening shall be made in any party-wall dividing buildings which if taken together would contain more than 216,000 cubic feet, except under the following conditions: such opening shall not exceed in width seven feet or in height eight feet. Such opening shall have the floor jambs and head formed of brick, stone, or iron, and be closed by two wrought-iron doors, each one-fourth of an inch thick in the panel, at a distance from each other of the full thickness of the wall, fitted to rebated frames without woodwork of any kind." No doubt, before the time the communication between 66 and 67 was made, they were two buildings, but the openings were made not for ventilation, but for doors for the purpose of using them as one building. Then the making the opening to 6, Love-lane, was an alteration within sect. 9, so as to subject the work to the regulations of the Act. If that be so, then taking 66 and 67 as one building, that, with No. 6, Love-lane, contained more than 216,000 feet, and the conviction of the app. was right, for not observing the rules in sect. 28.

*Raymond for the app.*—First, this is not an alteration within sect. 9. A mere opening like this in the wall cannot be said to have been contemplated by the Act, so as to require the interference of the district surveyor. Then this was a cross-wall within sect. 3, the interpretation clause, as the occupier was the same. Evidence was not admissible to show what a party-wall is within the meaning of the Act, as sect. 3 itself defines the meaning. [COCKBURN, C. J.—The wall was built to separate the two houses, and does not cease to be a party-wall because they have come into one occupation.] Lastly, the only two buildings it is proposed to unite are Nos. 66 and 6, Love-lane, and they together contain less than 216,000 cubic feet. It is not correct to treat 66 and 67 as one building. The communication between them was made years ago, and by a different person; and in considering whether the app. is liable to a penalty for what he has done, the court ought not to regard what was done at another time by other persons.

COCKBURN, C. J.—I entertain no doubt that the conviction was right. Looking at the premises, it is impossible to come to any other conclusion than that Nos. 66 and 67 had been united into one building for the purposes of sect. 28. That being so, the area of that building, taken together with No. 6, Love-lane, gives the requisite number of cubic feet within sect. 28, which subjects the uniting of the two buildings to the rules therein. The apps. not having united these two buildings in conformity with rule 3 of sect. 28, after the district surveyor gave them notice so to do, the conviction was right. With regard to the reception of the evidence as to the wall being a party-wall and not a cross-wall, the magistrate decided rightly.

The rest of the Court concurring,

Conviction affirmed.

Nov. 11 and 25, 1863.

REG. v. THE INHABITANTS OF ST. GILES, CRIPPLEGATE.

*Poor-law—Settlement by renting a tenement—General hiring—Tenancy for a year.*

*A renting of a tenement for an indefinite period, and an occupation for a year, constitute a tenancy for a year. A. B. occupied for upwards of a year a house under*

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a written agreement, whereby it was let to him from a certain day "at the monthly rental of 1*l.* 16*s.* 8*d.*," the said agreement containing this provision: "It is lastly agreed that one month's notice, to expire at either on the 25th day of March, the 25th day of June, the 25th day of September, or the 25th day of December, shall be a good and sufficient notice on either side for A. B. to quit and deliver up possession of the house:"

Held, that this was a hiring of a tenement indefinite as to duration, but terminable at a month's notice on either side on any of the specified quarter days; and the house having been actually occupied under that hiring for upwards of a year, it must be considered to have been an occupation under a hiring for a year.

This was a case stated upon an appeal to the City of London sessions by the parish officers of St. Olave, Silver-street, London, against an order of removal obtained by the parish officers of St. Giles, Cripple-gate, of Thomas Wilsheer, his wife and five children. The sessions quashed the order.

The only ground of removal alleging any settlement was the following:—"That in March 1858 the said Thomas Wilsheer hired for the term of one year a separate and distinct dwelling-house, situate No. 6, Windsor-court, Monkwell-street, in the sail parish of St. Olave, Silver-street, at a yearly rent of 22*l.*, and he immediately entered into the occupation thereof, and continued to rent and occupy the same therefrom and for one whole year and upwards, and he actually paid upwards of 10*l.* rent for the same in respect of one whole year; he was assessed and duly paid the poor rates in respect of the said dwelling-house for one whole year and upwards, and he resided and slept therein for forty nights and upwards after payment of the said poor rates." The question in dispute on the said appeal, and which was duly raised by the grounds of appeal, was whether the following agreement under which the pauper occupied the house in question constituted a yearly hiring or renting for the term of one whole year as required by the statute 6 Geo. 4, c. 57.

"Memorandum of agreement, entered into the 20th day of March, 1858, between Henry Piper, as agent for the trustees of Mrs. Henley, and Thomas Wilsheer of Dobie-court:—Henry Piper agrees to let, and Thomas Wilsheer agrees to take, the house No. 6, Windsor-court, from the 25th day of March 1858, at the monthly rent of 1*l.* 16*s.* 8*d.* Henry Piper agrees to pay all landlord's rates and taxes, and Thomas Wilsheer agrees to pay all tenant's rates and taxes, to keep the house in quiet and tenantable order, and to mend all squares of glass broken during his occupation. It is lastly agreed that one month's notice, to expire at either on the 25th day of March, the 25th day of June, the 25th day of Sept., or the 25th day of Dec., shall be a good and sufficient notice on either side for Thomas Wilsheer to quit and deliver up possession of the house to Henry Piper or other agent for the time being of Mrs. Henley's trustees.

"As witness our hands the day and year above written,

"HENRY PIPER,  
"THOMAS WILSHEER."

The said Thomas Wilsheer occupied the said dwelling-house under such written agreement up to Midsummer 1860, a period of two and a quarter years, and during the whole of such period was assessed to and paid the poor rates of the said parish of St. Olave, Silver-street, in respect of the said dwelling-house. The said Thomas Wilsheer paid the rent of the said dwelling-house monthly during the whole period, but it was conceded by the apps. that all other conditions of obtaining a settlement had been fulfilled by the said Thomas Wilsheer, and that he had gained a settlement in the said apps. parish if the said written agreement constituted a yearly hiring or renting for the term of

one whole year of the said dwelling-house, within the statute 6 Geo. 4, c. 57. The question for the opinion of the court is, whether such written agreement constituted such yearly hiring or renting for the term of one whole year of the said dwelling-house? If such question be answered in the affirmative, then the said order of sessions is to be quashed, and the said order of removal is to stand confirmed, otherwise the said order of sessions quashing the said order of removal is to stand confirmed, and the costs of the said appeal are to follow the decision of this court.

By the 6 Geo. 4, c. 57, s. 2, it is enacted, that "no person shall acquire a settlement . . . by or by reason of settling, upon renting or paying parochial rates for any tenement not being his or her own property, unless such tenement shall consist of a separate and distinct dwelling-house or building, or of land *bonâ fide* rented by such person in such parish or township, at and for the sum of 10*l.* a-year at the least, for the term of one whole year, nor unless such house, or building, or land shall be occupied under such yearly hiring, and the rent for the same, to the amount of 10*l.*, actually paid for the term of one whole year at the least," &c.

Giffard and Tayler appeared in support of the order of sessions, and contended that the agreement under which the pauper occupied the premises was not for a yearly renting as required by the 6 Geo. 4, c. 57, s. 1, but was a quarterly hiring at a monthly rent. [COCKBURN, C. J.—As the parties contemplated notices being given up to the end of the year, may it not be said that the hiring is for a year, unless they determine it before?] The payment of the monthly rent would tend to show that it is not a yearly hiring; and the provision for the month's notice to quit being to expire at the end of three months, does not alter it. It is a hiring for a month, with a condition as to its determination at certain days:

*Reg. v. Charlton*, 1 Q. B. 247;

*Puddington v. Willeaden*, 32 L. J. 109, Mag.;

*Reg. v. Herstmonceaux*, 7 B. & C. 551;

*Reg. v. Bathwick*, 4 Dow. & Ry. 335;

*Reg. v. Pontefract*, 2 Q. B. 548;

*Kemp v. Derrett*, 3 Camp. 510.

W. J. Payne, contra, contended that the hiring, as shown by the agreement, was a general one, and therefore in law was a year. It was a hiring for a year, determinable upon certain conditions, and that the cases decided upon the settlement of hiring and service are applicable.

*R. v. Byker*, 2 B. & C. 114;

*R. v. St. Andrew-in-Pershore*, 8 B. & C. 679;

*Wandsworth v. Putney*, 2 Bott. 188.

*Cwr. adv. vult.*

Nov. 25.—MELLOR, J.—This case was argued before the Lord Chief Justice, my brother Wightman, and myself. If we had been required for the first time to put a construction upon the 6 Geo. 4, c. 57, s. 2, and the previous statute of 59 Geo. 3, c. 50, we might have hesitated to decide that in the present case a settlement had been gained. In other words, we should have doubted whether the pauper had *bonâ fide* rented a tenement for one whole year or occupied under such yearly hiring. The case of *Rees v. Herstmonceaux*, 7 B. & C. 551, however, is a decisive authority that those statutes did not require any other hiring or renting than would in ordinary cases constitute a tenancy for a year. Now the rule of law is, that a renting of a tenement for an indefinite period and an occupation for a year constitutes a tenancy for a year. In the present case it was conceded that the tenancy could not be considered a monthly tenancy by reason of the restriction upon quitting or determining the tenancy. The monthly rent being excluded in determining the character of the tenancy, to what other conclusion can we come than that it was a hiring of the tenement,

indefinite as to duration, but terminable at a month's notice on either side on any of the specified quarterly days, and the house having been actually occupied under that hiring for upwards of two years it appears to us that it must be considered to have been an occupation under a hiring for a year. Many cases have been decided with reference to settlements by hiring and service, which established that a hiring at weekly wages, determinable on a month's notice, and service under such hiring for more than a year gives a settlement: (*Reg. v. Hampreston*, 5 T. R. 205; and *Reg. v. Great Yarmouth*, 5 M. & S. 114.) These cases are analogous to the present so soon as the effect of the statute Geo. 4, c. 57, s. 2, is determined. We are therefore of opinion that the rule for quashing the order of sessions must be absolute.

*Rule absolute.*

### COURT OF COMMON BENCH.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

#### REGISTRATION APPEALS.

Saturday, Nov. 21, 1863.

CAUNTER (app.) v. ADDAMS (resp.)

*Election law—Parliament—Borough vote—Assistant-overseer—59 Geo. 3, s. 12, c. 7.*

*The resp. claimed to be retained upon the list of voters for the borough of A., on the ground that he had duly served a claim to be rated on Y., the assistant-overseer, and had been rated accordingly. It was objected by the app. that the resp. was not duly qualified, on the ground that the claim made to Y. was of no effect, the appointment of Y. as assistant-overseer having been revoked. Y. had, in 1859, been duly elected and nominated by the inhabitants in vestry assembled to be assistant-overseer of the parish of A., which was co-extensive with the borough of A., at a certain fixed salary. He was subsequently duly appointed assistant-overseer by two justices pursuant to 59 Geo. 3, c. 12, s. 7. In March 1861 he gave notice of resignation to the board of guardians, but recalled his said notice prior to Lady-day 1861, on which day, by a resolution of the inhabitants in vestry assembled, his salary was increased by a fixed sum. The sanction of two justices to this increase was not obtained, and there was no re-appointment of Y. by justices. Y. continued to act as assistant-overseer. The app. contended that there had been a fresh election and nomination of Y. by the inhabitants in vestry on Lady-day 1861, and a fresh appointment by justices was required. The revising barrister overruled the objection and allowed the vote:*

*Held, upon appeal, that his decision was right.*

Appeal from the decision of the revising barrister for the borough of Ashburton, allowing the name of the resp. to be retained upon the list of persons entitled to vote in the election of a member of Parliament for that borough.

The case stated the following following facts:—

The borough of Ashburton is co-extensive with the parish. There are two churchwardens and four overseers. At a vestry meeting of the parish of Ashburton, held on the 21st April 1859 Stephen Yolland was nominated and elected to be an assistant-overseer of the said parish under the provisions of the 59 Geo. 3, c. 12, at a salary of 15*l.* per year, with a further salary of 3*l.* 5*s.* for the making and collecting of way rates.

On the 30th Aug. 1859 the election of Stephen Yolland was confirmed by a warrant of appointment by justices in petty sessions.

Subsequent to this election by the parish vestry and

before his appointment by the justices, the said Stephen Yolland gave the usual bond to the guardians of the Newton Abbott Union (of which union the parish of Ashburton forms part) for the due performance of his duties. Sometime before the 25th March 1861 Stephen Yolland gave notice to the board of guardians of the said union of his intention to resign the office, but he did not give notice to any one else. Prior, however, to Lady-day, he withdrew this notice by letter addressed to the board of guardians. Stephen Yolland's nomination and election was not by the board of guardians, but by the inhabitants in vestry. On the 25th March 1861 a vestry meeting was held at Ashburton pursuant to notice "to take into consideration the necessity of advancing the assistant-overseer's salary;" and at that meeting a resolution was passed that his salary should be increased from 15*l.* to 25*l.*, with 5*l.* for making and collecting way rates in lieu of 3*l.* 5*s.*

From that time to the present Mr. Yolland has continued to perform all the duties of assistant-overseer, and has received the increased salary of 25*l.* per annum, but has never applied for or received any fresh warrant of appointment by justices.

On the 15th Nov. 1862 the said Joseph Addams and others, the undermentioned voters, served a claim on Stephen Yolland to be put upon the then existing rate, which was the first rate for the electoral year, at which time all arrears of rates in respect of the property on which they claim to vote were paid to him as such assistant-overseer. They were not put upon that rate, but were put upon all subsequent rates, which rates, as well as the existing rate, were duly made and allowed by the justices, and also signed by Stephen Yolland as assistant-overseer.

Stephen Yolland made out, and in conjunction with the churchwardens and overseers signed, the list of voters for the borough of Ashburton for the present year.

At the revision of the said borough the name of the said Joseph Addams was objected to by the app. as not being qualified, upon the ground that he was not duly rated, and that the claim to Stephen Yolland was of no effect, inasmuch as his appointment was revoked by the vestry of 1861.

I held that the claim to be rated to Stephen Yolland was a valid claim, and overruled the objection, whereupon the said Joseph Addams duly proved his qualification, and I allowed the vote.

If the court shall be of opinion that the service of the claim on Stephen Yolland was not a due service of a claim to be rated within the 30th section of the Reform Act, the name of Joseph Addams is to be expunged from the register of voters of the borough of Ashburton.

*Karslake, Q.C.* for the app.—The case turns upon the construction of 59 Geo. 3, c. 12, s. 7. The short point is, whether or not a second appointment by justices was needed after the assistant-overseer's salary was increased. He had virtually resigned his office and been reappointed, but his second appointment had not been sanctioned by justices, as was necessary:

Burn's Justice, tit. "Poor," p. 1335;

*Bamford v. Hes*, 3 Ex. 380.

*Coleridge, Q.C.* (*Bullar* with him) for the resp., was not called on.

*ERLE, C. J.*—We think that the revising barrister was right. The question is, whether Yolland was assistant-overseer? He had a valid appointment as assistant-overseer, at 15*l.* per annum, and he gave notice of resignation, but before the time came for him to resign he withdrew that notice. That is a matter that anybody may cancel, and before the resignation had been accepted and the office vacated, he gave due notice in time, and continued in the office of overseer. A further ground of impeaching his title is, that the

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vestry raised his salary from 15*l.* to 25*l.* It is possible that he might not be able to recover that increased amount unless the justices had confirmed the increase, but the parish have paid it to him, and the absence of confirmation by justices does not invalidate his title or prevent his being assistant-overseer. Therefore, the notices given to him were valid notices, and the revising barrister was right in holding them to be valid.

WILLIAMS and KEATING, JJ. concurred.

*Judgment for the resp. with costs.*

#### HENRETTE (app.) v. BOOTH (resp.)

*Election law—Borough vote—Nature of occupation.*

*The app. occupied the upper floor of a house, communicating with the landing of the staircase by an outer door, over which he had complete control. The other floors were occupied by other tenants. At the bottom of the staircase, and in the common passage, was a door which separated the passage from the street. This door had no fastening, and ordinarily stood open night and day, though it fell to occasionally at night, and so remained closed by its own weight. The app. claimed to be retained upon the list of voters for the borough in which he resided, on the ground that he occupied a separate house within the meaning of the Reform Act, 2 Will. 4, c. 45, s. 27. The revising barrister disallowed the claim:*

*Held, on appeal, that the app. did occupy a separate house, and was entitled to vote in respect thereof.*

Appeal from the decision of the revising barrister for the city of London, disallowing the app.'s claim to vote. The barrister stated the following case:—

At a court of revision held before me A. H., barrister-at-law, duly appointed to revise the lists of voters for the city of London, Thomas Woodgate Booth, on the list of voters of the livery of the Company of Distillers, duly objected to the name of Peter Henrette being retained on the list of persons entitled to vote in the election of members for the city of London, in the parish of St. Giles without, Cripplegate, under the following circumstances:

It was conceded by the objector, and proved before me, that the qualification of Peter Henrette (who is hereinafter termed the app.) fulfilled all the conditions precedent to registration required by the Reform and Registration Acts, with the exceptions, if such the court shall adjudge them to be, hereunder detailed.

The app. occupied for the statutory period as tenant, the whole of the upper floor, consisting of two rooms, of a tenement in No. 4, Honeysuckle-square. He uses one room as a tailor's shop, and the other as a sitting and bed room. His only residence is in the premises, which, taken together, are of the requisite value to confer a qualification, but neither of the rooms taken singly is of the requisite value. They consist of an inner and outer room, opening the one into the other, and communicating with the landing on the staircase by one outer door, over which the tenant occupier has exclusive control. The floors below are occupied by other tenants, and all have access to their several holdings from the street through a doorway at the entrance of a passage leading to the common staircase of the building. At this entrance is a door open all day, but generally, although not invariably, allowed to swing to at night, and having no lock or fastening of any kind, nor any means of being so closed as to secure the premises from intrusion from the street.

It was under this state of circumstances contended before me for the app.: 1. That the subject of occupation was a "house." 2. That if not a house, it was a building within the meaning of the qualifying clauses of the Reform Act. 3. That if not a house or building, the use for commercial or business purposes as a workshop of one of

the two rooms not severed in any way from the rest of the premises, constituted the whole subject of occupation a "shop," within the meaning of the qualifying clauses of the Reform Act.

On the other hand it was contended by the objector: 1. That the facts did not show such a severance of the qualifying premises from the rest of the tenement of which they formed the upper floor as to constitute them a house. 2. That the one room used as a workshop was not of sufficient value to confer the franchise. 3. That the use of one of the rooms for the purposes of trade did not impart the character of a "shop" to the whole premises the subject of occupation. 4. That the nature of the occupation did not warrant their designation as a "building" within the meaning of the Reform Act. 5. That the use of one of the rooms for habitation rendered the whole premises a residence insufficient to confer a qualification because not a "house" within the meaning of the Reform Act.

I sustained the objection and expunged the name of the app. from the list of voters on the ground that the whole premises the subject of occupation did not constitute in law a house or building or a shop within the meaning of the Reform Act.

If the court shall be of opinion that this decision was erroneous, the name of the app. Peter Henrette is to be reinstated in the list of voters in the parish of St. Giles without, Cripplegate.

Kinglake, Serjt. (*Underdown* with him) for the app., cited

*Score v. Huggett*, 7 M. & G. 95;

*Cook v. Humber and Wilson v. Roberts*, 11 C. B., N. S., 30, 50; 5 L. T. Rep. N. S. 838;

*Toms v. Luckett*, 5 C. B. 23;

*Kearney's case*, Alcock's Registry Cases decided by the Twelve Judges for Ireland, 22;

*Downing v. Luckett*, 5 C. B. 40.

*Overend*, Q.C. (*Fawcett* with him) appeared for the resp.

ERLE, C. J.—I am of opinion that the revising barrister was wrong, and that the claimant obtained his franchise and was an occupier of "a house" within the meaning of the judgment in the case of *Cook v. Humber*. He occupied the whole of the upper floor which communicated with a landing on the staircase by an outer door, over which the claimant had exclusive control; and the case goes on to find that there were other floors occupied by other tenants, and that there was a common passage to which there was a door that was capable of falling to, but, in practice, was kept open night and day, and if it was closed at night it was closed only by the door falling to. In the case of *Cook v. Humber* the court felt very great difficulty in trying to come to some definite idea of what should constitute "a house" as contradistinguished from a "part of a house." But when it assumed that there might be several houses under one roof, the court was compelled to hold that the several houses under one roof might be divided either vertically by a party wall or horizontally by floors carried out with the intention of creating a separate tenement on each floor; and the court were further of opinion that a house being so constructed and each flat being a complete and separate house, yet that there might be, for the protection of all the houses, the additional defence of an outer door—a door to the passage, or a door to the bottom of the court in which the houses were, or some such contrivance, without its preventing each house from being a separate house. That having been laid down in the course of the judgment, and the case of flats having been considered, the court endeavoured to point out that the question, whether or not there was a separate house, did not depend upon the presence or absence of the

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landlord, or upon the handing over or keeping back of the key of the same outer door, but that it depended upon whether or not there was a severance of the part of the house occupied. A more definite description of what should constitute a separate house, where all is under one roof, I am unable to give. Upon the finding of the revising barrister here, the case is in complete analogy with that of chambers in the Temple, or the divisions of houses in Lincoln's-inn-fields, where there are separate rooms occupied by separate tenants and there is a common staircase and sometimes an additional outer door and sometimes none. This case falls, to my mind, precisely within those cases where the place is open to the street, and the claimant is the exclusive possessor of a floor and has an exclusive control over the outer door of that floor. In the case of *Roberts v. Wilson* the question turned upon what should be called the outer door. The claimant occupied the first floor of a London house; there was not the least distinction in the nature of his occupation from that of any other lodger in any other house let out in lodgings; the landlord had the ground-floor, and the first-floor was occupied by Roberts, and though he had a key to every door of every room in his lodgings, that did not, in the opinion of this court, create a separate house, there being an outer door and he living on the first floor. The doctrine we attempted to lay down in the case of *Cook v. Humber* appears to be sanctioned by the opinion of the twelve judges in *Kearney's* case in the court in Ireland, where the question arose in a different form. I am of opinion, upon the facts, that this appeal ought to be sustained.

WILLIAMS, J.—I am of the same opinion. I think that we are bound to abide by the doctrine that was laid down after great deliberation in the case of *Cook v. Humber*. That doctrine is found in the judgment there to the effect that a part of a house may give a franchise, provided it be occupied as an independent occupation and there be a complete severance between it and the remainder of the house. Having regard to the cases which have been decided upon this subject, it is not an easy thing to say what is a natural severance so as to come within the rule; but it is admitted on all hands that a flat occupied as chambers in an Inn of Court does come within the rule. It seems to me that the occupation would not be different because the occupiers of the different chambers might have agreed that they would have, at the bottom of the stairs, a gate, or an iron railing, or something that, if they should be so minded, might protect the common staircase from intruders. I do not see that this case differs in principle from the ordinary case of chambers occupied in an Inn of Court, and I think that there was an actual severance within the meaning of the Reform Act.

KEATING, J.—I am of the same opinion. The cases no doubt do, and necessarily must, run very close to one another and the distinction between them must necessarily be slight; but, taking, the facts as found by the revising barrister, I come to the conclusion that this is not part of a house, but a house in the sense in which the term is intended to be used in the Reform Act. The only outer door of which the barrister speaks, or which he specifies as an outer door, is the door over which the app. had exclusive control; that is, the outer door of his floor or set of rooms. Practically, there was no other outer door. The revising barrister does not call anything else the outer door. He does say that, at the end of the passage leading to the rooms, there was a door, but it was without any means of fastening and without any of the essentials requisite to an outer door. It could not be used, as the revising barrister says, to secure the premises from intrusion from the street. It is as though the door had been taken off the hinges

and left lying at the side of the door-post: then it would be no outer door. So, here, there is practically no outer door, and the revising barrister most correctly abated from calling it an outer door, but says that the door of the premises of the app. was the outer door. On these facts there was such a severance as this court thought existed in the case of *Cook v. Humber*, and therefore the voter occupied not part of a house, but a house within the meaning of the Reform Act.

*Judgment for the app.*

Tuesday, Nov. 17, 1863.

SMITH (app.) v. HALL (resp.)

*Election law—Borough vote—Charity—2 Will. 4, c. 45, s. 36.*

*The claimants were freemen of the borough of S., and "brothers" of the hospitals of St. B. and St. J., and as such brothers were entitled to houses to live in, and equal shares in the revenues of the hospitals, which are derived from landed estates. The hospitals are under the government of the Charity Trustees, and are reputed to be corporations by prescription. A person to be qualified to be elected a brother must be more than fifty years old, or a lame, blind, or impotent person unfit for husbandry. Each brother keeps his house in repair, and no brother when once elected was ever known to be turned out. It was objected that the claimants, though entitled to vote as freemen, were disqualified as the recipients of "parochial relief or other alms:"*

*Held, that these persons having a legal right to the revenues of the hospitals, and not being in a state of indigence and abject poverty, and having been qualified to vote at the time of the passing of the 2 Will. 4, c. 45, were not the recipients of "parochial relief or other alms" within the meaning of sect. 36 of that statute, and therefore were not disqualified from voting.*

This was a consolidated appeal from the court of the revising barrister for the borough of Sandwich. The following case was stated for the opinion of the court.

CASE.

Thos. Bowers, James Wyburn, Francis Crocier, James Dennis, Daniel Deverson, Henry Ewell, sen., Valentine Heill, sen., Edward Longley, John Gray Manning, Wm. Neale, John Spicer and John Valder, on the list of freemen entitled to vote for members of Parliament for the borough of Sandwich, were duly objected to by Charles Powell on the ground that all the several persons before named were disqualified from being registered by the 36th section of the 2 Will. 4, c. 45, which enacts, "that no person shall be entitled to be registered in any year as a voter in the election of a member or members to serve in any future Parliament for any city or borough, who shall within twelve calendar months next previous to the last day in July in such year have received parochial relief or other alms, which by the law of Parliament now disqualify from voting in the election of members to serve in Parliament." It was proved to me that all the before-named were brethren either of the Hospital of St. Bartholomew, or of the Hospital of St. John, in the town of Sandwich, and had been recipients of the gratuities and other benefits by law belonging to such brethren for more than twelve calendar months next previous to the last day of July 1863.

It was also proved that the said two hospitals of St. Bartholomew and St. John are identical in their constitution and management, and are both under the government of the Charity Trustees appointed by the Lord Chancellor.

It was further proved to me that each of the said

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hospitals is by repute a corporation by prescription, and that the property of the same consists in landed estates and houses, the income arising from the former being divisible annually among the brethren in equal proportions, and a house being assigned to each of the brethren wherein to live. These houses are an aggregation of separate buildings, and each is kept in repair by the brother who lives in it. The right of appointment of brethren to the said hospital is vested in the above-mentioned Charity Trustees.

No instance was cited to me of any brother once appointed having been turned out of either of the said hospitals.

There is no deed or document accurately defining the qualifications of the persons who are to be appointed brethren, but it was proved to me that in 1612 the mayor and jurats of Sandwich had the management of the hospitals, and that at that time an ordinance was made by them that "every person placed in the hospital should be of the age of forty years, or thereabouts, except always decayed jurats, or any lame, blind, or impotent person;" and by an inquisition of charitable uses taken Sept. 7 (6 Car. 1), it was found that the brethren ought to be above the age of fifty, except lame, blind, or impotent persons, and unfit for husbandry, and should be inhabitants of the said town, or a child of some then or late inhabitant, having no competent means to live.

It was proved to me that this latter regulation as to the qualifications for brethren is that which is now, and has been for some time past in force, and that in addition thereto, by a resolution of the Charity Trustees lately passed, no person is eligible to be a brother under the age of fifty-six years.

The brethren of the said hospitals have always heretofore voted for members of Parliament for the said borough without objection.

I directed that the before-mentioned persons were not disqualified from being registered by the said 36th section of the 2 Will. 4, c. 45, and I retained their names on the list of freemen entitled to vote. If the court shall be of a contrary opinion, their names ought to be expunged from the same list.

The said Charles Powell duly appealed from this decision.

(Signed) J. D. C.,

Revising Barrister.

*Hayes, Serjt. (Bourke with him) for the app.*—These voters are freemen of the borough, and set up an interest in the hospital, but the only question is, are they disqualified from voting by the receipt of alms? There has been no case on the disqualification clause since the Reform Act, 2 Will. 4, c. 45. *Faulkner v. Overseers of Upper Boddington*, 3 C. B., N. S., 412, was a case of certain persons called "beadsmen," and the court decided that as they had no duties to perform, except to receive their money, they had not an estate which came to them by promotion to an office, but were recipients of alms:

*Heath v. Hayes*, 3 C. B., N. S., 389;

*Heartley v. Banks*, 5 C. B., N. S., 40,

was the case of the poor knights of Windsor whose occupation was held to be a charity.

*Simpson v. Wilkinson*, 7 M. & G. 50;

*Freeman v. Gainsford*, 11 C. B., N. S., 68; 5 L. T. Rep. N. S. 611;

*Elliott on Qualifications and Registrations*, 2nd edit. p. 257, and the cases collected there.

These persons being recipients of alms, are not free agents. There are cases the other way which I may as well mention:

The *Bedford* case, 2 Doug. 114, 123; *Elliott*, 259;

*Taunton's* case, 1 Doug. 371.

The latter case is the case of the Chelsea pensioners; but that is not in the nature of a charity, though so called, but a reward for service.

*Welsby for the resp.*—It is conceded that these people are qualified to vote as freemen, and it is a question whether they are disqualified by the 36th section of the Reform Act (2 Will. 4, c. 45) as being the recipients of alms. The hospitals are reputed to be corporations by prescription, and the houses occupied by these persons are independent, and each kept in repair by the brother who occupies it, and there is no instance of any brother being turned out; besides which, they have always voted heretofore. [WILLIAMS, J.—In *Haywood on Elections*, there is the case of this very borough (*Haywood on Borough Elections*, p. 214), where the House of Commons decided by a majority of one, that a member who had been elected by these votes was rightly seated.] I do not see that they would be precluded from voting as freeholders if they were not a corporation. I think the cases decide that "other alms" refers only to such alms as are contributory to the poor-rate: (*Rogers on Elections and Registration*, 7 ed., p. 105, and the cases collected there.) In several of the cases cited there usage was taken into consideration. This is property vested in these people: they repair their houses and live in them for life. I don't dispute that it is charity, but I submit that it is not alms; there are charities which are not alms, and which at the passing of the Reform Act did not disqualify.

*Hayes, Serjt.*, in reply.—The recipients of the charity are to be people who have no competent means of living, and therefore must be supported by this charity or parish relief. The reason why a charity should not give a person a vote is also a reason why it should disqualify him as a freeman.

ERLE, C. J.—I am of opinion that the revising barrister was right, and that the votes in question are good. The claimants are freemen, and therefore have a right to vote unless they are disqualified by sect. 36, which disqualifies the recipients of parochial relief and other alms which by the law of Parliament disqualified at the time when the Reform Bill (2 Will. 4, c. 45) passed. The recipients of the proceeds of these lands were not disqualified at the time when the Reform Bill passed. In the case that has been referred to (*Haywood on Borough Elections*, 214) the committee seems to have held that these votes were good. Parliament seems to have doubted whether the committee was right; but ultimately decided that the member who came in with these votes was rightly seated. This leaves it doubtful; but we should incline in favour of the franchise against disqualification, unless the law compelled us to take the latter course. The meaning of the enactment is, that persons who are so situated as to be presumably subservient, without any independence of mind, should be disqualified, and I take it that these freemen, by reason of having a house and a share in the profits of the lands for life, would stand with a greater probability of independence, as far as their pecuniary interest was concerned, than would be the case of very many freemen and persons who have merely the proceeds of their own labour to rely on to support them. These men may be at that time of life when they may have many years of active labour before them, and yet may be qualified to have a house for life and a share in the profits of these hospitals, and I do not think that is a disqualification.

WILLIAMS, J.—I am entirely of the same opinion. I think that it is not made out that the circumstances under which the revenue of these hospitals was shared by the persons who were in the receipt of it showed a disqualification within the meaning of the statute. There certainly seem to be a great many conflicting decisions on the subject, as far as the committees of the House of Commons go; but I find the rule laid down in *Haywood on County Elections*, 2nd edit. p.



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278, a book of very high authority, that "a distinction may be made between charities which are of such a nature as to imply that the partaker of them is in a state of indigence and abject dependence, and those which afford no such inference, or from which a contrary one may be drawn." It seems to me that here it is out of the question that these recipients of alms are in that plight, and I think they are not disqualified.

BYLES, J.—I am of the same opinion. I collect from the statement of the case that both of these bodies are corporations by prescription, and the persons elected to receive alms are members of these corporations. Mr. Welsby has pointed out that all the proceeds of the charity are by law belonging to the brethren, and distributable in equal proportions amongst them. In the *Bedford* case, 2 Doug. 114, 123, and the case of the *Greenwich Pensioners*, 1 Doug. 371, the parties had a right to take their share, whatever it was; but in no case cited by my brother Hayes had the parties who were to receive alms a legal right to them. Under these circumstances, I cannot help thinking that these are not parochial alms within the meaning of the statute.

KEATING, J.—I am of the same opinion. The voters here *prima facie* are entitled to vote, but it is contended that they are disqualified by the receipt of alms. It is to be observed that there is nothing in the distribution of these alms, and the advantages which they possess under their distribution, which is interfered with by the parochial officers or any one else. And they have further the advantage of the houses which confer upon them the right to vote. Under these circumstances it appears to me that the objector was bound to show a disqualification, which he has not made out.

*Judgment for the resp.*

Attorney for app., *Henry Smith*.

Attorney for resps., *Dines and Harvey*.

### BAIL COURT.

Reported by A. GALLWEY and J. H. JAMES, Esqs.,  
Barristers-at-Law.

Monday, Nov. 24, 1863.

(Before BLACKBURN, J.)

REG. v. HAMMOND AND OTHERS.

*Interest—Disqualification of justices—Conviction. The defts., who are justices and shareholders in a railway company, convicted a man of travelling on that railway with an improper ticket:*

*Held, that the fact of their being shareholders, however slight their interest might have been, disqualified them from so acting.*

This was a rule calling on Hammond and others, justices of the county of Durham, to show cause why a *certiorari* should not issue to bring up the conviction of one Jabez Alexander, on the ground of interest in the justices. The prisoner was convicted on the 28th Sept. last, by these justices, of travelling on the North-Eastern Railway by a train other than that for which he had obtained a ticket, and some of these justices were shareholders in the railway.

*Mellish, Q. C. (Davidson with him) showed cause.*—There are two questions: first, is there any interest at all? The conviction is for travelling on the railway without a ticket, but the penalty does not go into the funds of the company, but to the county-rate—the alleged interest can be only as regards the costs. [BLACKBURN, J.—Suppose the conviction were for reappearing in pursuit of game, could it be said that the magistrate who convicted, and on whose land the offence was committed, had no interest?] The shareholders are a corporation, and have a personal interest. [BLACKBURN, J.—Surely the shareholders have an interest in preventing people travelling without tickets.

Suppose it was a charge of stealing, would the shareholders be incapable of adjudication?] The question of costs is incidental only to the main inquiry. [BLACKBURN, J.—The interest to each shareholder may be less than a farthing, but still it is an interest.] Secondly, has there not been a waiver of the objection? The prisoner appealed to the quarter sessions, and though he learnt the fact that some of the justices were shareholders after he gave notice of appeal, he went to the quarter sessions and took his chance of being acquitted on the merits. [BLACKBURN, J.—That was a waiver as to one of the justices, but he learnt that another was similarly interested, after the appeal was heard.] If he waived the objection against one, he waived it against the other.

*Macnamara contra.*—The conviction is bad, because the justices were interested. The court will not inquire into the amount of interest. The prisoner was convicted under the 8 Vict. c. 20, the 3rd section of which enacts that "justice" shall mean "a justice who shall not be interested in the matter:" (*Reg. v. Justices of Hertfordshire*, 6 Q. B. 753.) As to the second question, notice of appeal was given, and then it was learnt that one of the justices was interested. If the appeal had been abandoned, costs would have been incurred. But after the appeal was heard it became known that another of the justices were interested.

His LORDSHIP made the rule absolute.

*Rule absolute.*

Tuesday, Nov. 25, 1863.

(Before CROMPTON, J.)

REG. v. THE CORONER OF YORKSHIRE.

*Inquisition—Coroners' Act—Juror hearing part only of the *vide voce* evidence.*

*After a coroner's juror had viewed the body and heard part of the evidence, another person was sworn, viewed the body, and took part in the proceedings on hearing that portion of the evidence which had been previously taken read over to him: Held, that this was a sufficient ground for bringing up the inquisition.*

This was a rule calling upon the coroner of Yorkshire to show cause why a *certiorari* should not issue to bring up an inquisition taken before him. The application had been made on the part of a Mr. Ingham, on whose mill a boiler had burst, causing the death of one of his workpeople, and the jury found him guilty of manslaughter.

*Cleasby, Q. C.* now showed cause.—The first two grounds on which the rule was obtained were, that the cause of death, and the time of committing the offence, did not sufficiently appear on the face of the inquisition; the inquisition stating merely that the deft. "did feloniously kill and slay." This defect is cured by the 4th section of 14 & 15 Vict. c. 100, which enacts that, "in any indictment for murder or manslaughter it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused; but it shall be sufficient in every indictment for murder to charge that the deft. did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased, and it shall be sufficient in every indictment for manslaughter to charge that the deft. did feloniously kill and slay the deceased." By the interpretation clause, "the word 'indictment' shall be understood to include information, inquisition," &c. The 24th section provides that "no indictment for any offence shall be held insufficient for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence." The Coroners' Act (6 & 7 Vict. c. 83), by the 2nd section, enacts that inquisitions shall not be quashed on account of tech-

nical defects; one of which is enumerated as "the omission to state the time, when time is not of the essence of the offence." [CROMPTON, J.—What do the words "where time is not of the essence of the offence" mean?] They exclude cases of burglary, and offences against some of the game laws. [Temple, Q.C., who appeared in support of the rule, here stated that the court had granted the rule on these grounds, because, on referring to the 14 & 15 Vict. c. 100, it did not appear to apply to inquisitions. On this part of the case he should contend that the time must be stated, and where it must be stated, the manner and means of death must also be stated.] The court, however, has, if necessary, a power of amendment. The third ground was, that the jury did not view the body before the proceedings had commenced, nor at the proper time, nor in the proper manner. It appeared from the affidavits that fourteen or fifteen jurors assembled, and after they were sworn, went and viewed the body. Another person then came into the room where they were, and told the coroner that he also had viewed the body (wishing to form one of the jury). The coroner ordered him to be sworn, and taken back by a policeman to view the body again, which was accordingly done. Upon his return, that portion of the evidence which had been previously taken was read over to him. One objection was, that all the jurors did not view the body at the same time; but the 2nd section of the Coroners' Act cured this defect also: it provided that "no inquisition shall be quashed, &c. because the coroner and the jury did not all view the body at one and the same instant, provided they all viewed the body at the first sitting of the inquest." There had been no adjournment, and this was the first and only sitting; the mere fact of another juror coming in would not constitute a second sitting. [CROMPTON, J.—The next objection, I suppose, is, that the juror who came in last did not hear all the evidence?] Yes; that he did not hear it all given *visâ voce*. [CROMPTON, J.—It seems to me to be one of the strongest objections.] The impression of the court above was, that the inquisition should not be quashed by reason of a mere irregularity. There are no authorities on the subject, except as to cases of misconduct. [CROMPTON, J.—The objection that the jury did not view the body at the same time goes to the jurisdiction.] This is nothing more than an irregularity. An inquisition is traversable, and merely puts a man on his trial. [CROMPTON, J.—But here is a man put on his trial by a juror who has not had an opportunity of observing the demeanor of all the witnesses. This may be done by consent in civil, but not in criminal cases.] The jury might proceed without any evidence at all—upon their own knowledge. The irregularity cannot go to the root of the proceedings.

CROMPTON, J.—I have a strong opinion that the alleged defects on the face of the inquisition are cured by the acts which have been referred to; but I am against you upon the other point. I never allow a grand juror to be sworn after the charge is begun; much more ought every grand juror to be present when a bill is brought before them. I think this case should be put into the Crown paper; then fresh affidavits may be filed, if necessary, and the matter be more fully discussed.

*Rule absolute.*

## CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Nov. 22, 1862, and Nov. 24, 1863.

(Before POLLOCK, C. B., WIGHTMAN, WILLIAMS, JJ., CHANNELL, B. and MELLOR, J.)

REG. v. SAMUEL STANNARD.

*Brothel-keeping—Landlord—Weekly tenants.*

*The landlord was indicted for keeping and maintaining in the first count a common bawdy-house, and in the second a disorderly house. It was proved that the house was let out in apartments to young women by distinct takings as weekly tenants, but the landlord did not occupy any part, nor keep the key, or reserve to himself any right of entry. The tenants so occupied the house as to cause it to be a scandal to the neighbourhood. The only profit the landlord derived was the increased rent. Complaints were made to the landlord and he well knew the use to which the apartments were applied by his tenants, but he took no steps to remove the lodgers: Held, upon these facts, that the landlord did not keep or maintain a bawdy-house or a disorderly house.*

Case reserved by Cockburn, C. J. for the opinion of this Court:

Samuel Stannard was tried before me at the last Assizes for the county of Suffolk, upon the following indictments:—

Suffolk.—The jurors for our Lady the Queen, upon their oath present, that Samuel Stannard, on the 1st day of January, in the year of our Lord 1859, and on divers other days and times between that day and the day of taking this inquisition, at the parish of St. Mary Key, in the borough of Ipswich, in the county aforesaid, unlawfully did keep and maintain a certain common bawdy-house, and in the said house, for the lucre and gain of him the said Samuel Stannard, certain persons, as well men as women, of evil name and fame, then and there, and on the said other days and times, there unlawfully and wilfully did cause and procure to frequent and come together the said men and women and whores in the said house of the said Samuel Stannard, at unlawful times, as well in the night as in the day, then and there and on the said other days and times there to be and remain drinking, tippling, whoring and otherwise misbehaving themselves, unlawfully and wilfully did permit, and yet doth permit, to the great damage and common nuisance of all the liege subjects of our said Lady the Queen there inhabiting, being, residing and passing, to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her Crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Samuel Stannard, to wit, on the said 1st day of January, in the year aforesaid, and on the said other days and times aforesaid, at the said parish of St. Mary Key, in the borough aforesaid, in the county aforesaid, unlawfully did keep and maintain a certain common ill-governed and disorderly house, and in the said last-mentioned house, for the lucre and gain of him the said Samuel Stannard, certain persons, as well men and women, of evil name and fame, and of dishonest conversation, then and there and on the said other days and times, there unlawfully and wilfully did cause and procure to frequent and come together, and the said men and women, in the said house of him the said Samuel Stannard, at unlawful times, as well in the night as in the day, then and there and on the said other days and times, there to be and remain drinking, tippling, whoring and otherwise misbehaving themselves, unlawfully and wilfully did permit, to the great damage and common nuisance of all the liege subjects of our Lady the Queen there inhabiting, being, residing and passing, to the evil

example of all others in the like case offending, and against the peace of our said Lady the Queen, her Crown and dignity.

The facts proved were as follows:—

The house in question was inhabited entirely by women, who lived by prostitution openly carried on, and whose conduct was often riotous and grossly indecent, so as to be a scandal and offence to the neighbourhood.

The deft. was the owner of the house, but he occupied no part of it, neither did he keep the key or reserve to himself any right of entry. The apartments throughout the house were let to weekly tenants, who occupied separately under distinct takings, each lodger having her own room, her own key, and a door opening either into the street or into a passage communicating with the street.

The deft. had nothing whatever to do with the management of the house (if indeed a house thus divided into distinct and separate holdings could be said to be managed as a house) or of any part of it.

He received no share of the earnings of the women, nor did he derive any benefit therefrom, except so far as he may be said to have done so incidentally from their ability to pay their rent being thereby increased.

He had no control over the tenants, except such as might arise indirectly from his power as landlord to determine the tenancy from one week to another. He only went to the house to collect the weekly rent from the different lodgers, or when being pressed by the complaints of the neighbours he went (as sometimes happened) to endeavour to prevail on the inmates to be more orderly in their behaviour.

On the other hand, it was abundantly clear that he perfectly well knew the use to which the apartments were applied by the several lodgers, and that he let the apartments with a full knowledge that they would be applied to the purposes of prostitution and with a perfect assent on his part to their being so applied.

A question presented itself whether, under these circumstances, the deft. could be considered as having "kept" the house in the legal sense of that term.

Entertaining serious doubt how far the indictment could, on the state of facts I have stated, be supported, I thought it best, on the whole, to direct a verdict of guilty, reserving the case for the consideration of this Court.

COCKBURN.

No counsel appeared for the prisoner.

Nov. 22, 1862.—*Metcalf (Orridge with him)* for the prosecution.—It is submitted that the conviction was right. The 25 Geo. 3, c. 36, s. 8, defines who shall be deemed to be the keeper of a bawdy-house, "And whereas by reason of the many subtle and crafty contrivances of persons keeping bawdy-houses, gaming-houses, and other disorderly houses, it is difficult to prove who is the real owner or keeper thereof, by which means many notorious offenders have escaped punishment, be it enacted that any person who shall at any time hereafter appear, act, or behave him or herself as master or mistress, or as the person having the care, government, or management of any bawdy-house, gaming-house, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as such notwithstanding he or she shall not in fact be the real owner or keeper thereof." [POLLOCK, C. B.—What did the landlord do here as master or mistress?] He let it out to young women and so made himself responsible for the nuisance. The depositing of naphtha in large quantities in a warehouse has been held to be indictable as a nuisance: (*Reg. v. Lister*, 7 Cox C. C. 342; 1 Dea. & B. 209.) So in *Reg. v. Moore*, 3 B. & Ad. 184, the deft. was held indictable for keeping a pigeon shooting-ground, and thereby causing persons to come

upon the highway adjoining with guns to shoot the stray pigeons. So here the landlord may be said to bring these young women together, knowing their way of life and to what uses in all probability the apartments will be applied. [POLLOCK, C. B.—No doubt the lodgers were each liable for keeping a bawdy-house: *Pierson's* case, 2 Ld. Raym. 1197; but in what sense does the landlord keep the house so as to make him liable?] He knew the uses to which the house was to be applied, and so was an accessory before the fact; and under 24 & 25 Vict. c. 94, s. 8, was liable to be indicted as a principal offender. He had the power of determining the tenancies, and neglecting to do so was aiding and abetting the lodgers in so using the house. In *Reg. v. Fedley*, 1 A. & E. 822, it was held that the landlord of premises let out on short tenancies was liable for a nuisance arising during the tenancy, that being the consequence of the nature of the erection. So here the nuisance arises from letting the rooms to these young women with full knowledge of their way of life. In *Thompson v. Gibson*, 7 M. & W. 456, the defts. were held liable for continuing a nuisance from a building erected under their superintendence, although they had no right to enter upon the land to remove it. The cases of *Reg. v. Medley*, 6 C. & P. 292; and *Rich v. Basterfield*, 4 C. B. 783,

were also referred to. *Curr. adv. vult.*

Nov. 24, 1863.—POLLOCK, C. B.—In this case the facts were, that the prisoner being owner of a house, had let out the whole of it in different apartments to young women whose habits were not of the most moral kind. The prisoner retained no part of the house, and had no control over any part of it whatever. No doubt the persons to whom it was let, and who used it for immoral purposes, were themselves indictable. The prisoner, however, was indicted for keeping a disorderly house, and we are of opinion that, whatever other offence he may have been guilty of, he was not guilty of the crime of keeping a disorderly house. He did not keep the house, nor was any part of it kept by him. He had no right to let any one in or refuse admission to any one during the tenancy. We are therefore of opinion that the house was not kept by him, and that the conviction ought to be quashed.

Conviction quashed.

April 25 and Nov. 24, 1863.

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ., MARTIN, B., and KEATING, J.)

REG. v. F. BURRELL AND H. R. BURRELL.

Abduction—24 & 25 Vict. c. 100, s. 53 (a)—Taking

(a) The 24 & 25 Vict. c. 100, s. 53, enacts, "Where any woman of any age shall have any interest, whether legal or equitable, present, or future, absolute, conditional, or contingent, in any real or personal estate, or shall be a presumptive heiress, or co-heiress, or presumptive next of kin, or one of the presumptive next of kin, to any one having such interest whoever shall, from motives of lust, take away or detain such woman against her will with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person; and whosoever shall fraudulently allure, take away, or detain such woman, being under the age of twenty-one years, out of the possession, and against the will of her father or mother, or any other person, having the lawful care or charge of her, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years with or without hard labour, and whosoever shall be convicted of any offence against this section shall be incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she shall have any such interest, or which shall come to her as such heiress, co-heiress, or next of kin as aforesaid; and if any such marriage as aforesaid shall have taken place

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REG. V. F. BURRELL AND H. R. BURRELL.

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out of the possession of the father or mother—  
Stepfather.

Case reserved for the opinion of this Court by Williams, J.

This was an indictment under the statute 24 & 25 Viet. c. 100, s. 53, tried before me at the last Norfolk Assizes.

It charged that Frederick Burrell fraudulently allured, took away, and detained one Jane Burrell out of the possession of her mother, and one William S. Hyder, he then having the lawful care and charge of her, she being then under the age of twenty-one years, and having then a present legal interest in real estates, with intent to marry and carnally know her.

And Henry Richard Burrell was charged with feloniously aiding, &c. to commit the said felony.

The two defts. were the paternal uncles of Jane Burrell, who was sixteen years old in Feb. 1863, and was entitled by inheritance to real estates of the value of about 50*l.* a-year.

Her mother Mary Ann Hyder had married first James William Burrell, the father of Jane, and brother of the two defts. He died in 1846, and the mother afterwards, in the year 1848, married W. S. Hyder.

Her daughter Jane lived with her and her stepfather at Fakenham till she was sent to school by her mother, first to a school in Suffolk, in Jan. 1862, where she remained till Aug. 1862, when she came back to her mother's, and then in Oct. 1862, to a school in Norwich, where she remained till Dec. 20, when she came back to Fakenham for the Christmas holidays.

She arrived at her mother's house in the afternoon, and staid about half-an-hour, and then she left the house alone. About nine o'clock that evening she came back, and staid till ten, when she again left the house without her mother's knowledge or consent. She came back the next morning, and staid with her mother for about two hours, and then again went away without her mother knowing whither. In fact, she had gone to the house of her uncle, the deft. Henry Richard Burrell, who also lived in Fakenham, and she continued there until the 19th Jan. 1863, when she left Fakenham as hereafter mentioned.

She continued to pay visits to her mother for an hour or two nearly every day till the 19th Jan.

It further appeared that in the interval between her coming home from school in Suffolk and her going to that at Norwich, it had been arranged at her own desire, in consequence of her not living happily with her stepfather and mother, that she should live with her mother's mother and brother who dwelt together in Fakenham.

When she came back for the Christmas holidays she wished to remain with her mother; but the latter insisted on her daughter's abiding by her choice to go to her grandmother's for the holidays, and would not consent to her staying with her at her stepfather's house.

On this she went to the house of her uncle Henry Richard Burrell. Her mother, as soon as she discovered that her daughter was there, desired her to come to her house, and refused to let her have her clothes unless she did so.

On the 19th Jan. Frederick Burrell and the wife of Henry Richard Burrell left Fakenham together with Jane Burrell by the railway, and on the next day Frederick Burrell and Jane Burrell were married at the church of Plumstead near Woolwich.

These occurrences took place under such circumstances as fully warranted the jury in finding that Jane Burrell was allured and taken away by Frederick

such property shall upon such conviction be settled in such manner as the Court of Chancery in England or Ireland shall upon any information at the suit of the Attorney-General appoint."

Burrell with intent to marry her, and that Henry Richard Burrell aided, &c., in the committing of this act. And the jury accordingly convicted them.

But several points of law were raised by the counsel for the defts., which I reserved for the consideration of this court.

First, it was contended that there was no evidence that Henry Burrell had fraudulently allured and taken away the young woman within the meaning of the statute.

Secondly, that there was no evidence that she was taken out of the possession of her mother within the meaning of the statute.

Thirdly, that the indictment charged that she was taken out of the possession of her mother and of William S. Hyder, he having then the lawful care and charge of her, and that it was necessary to prove that she was in the possession of him, as thus alleged, as well as of her mother, when she was taken away.

But the only proof of that was, that the guardianship of her person and copyhold estate had been granted to him at a special court for the manor of Fakenham, when she was admitted as tenant of her copyhold estate in that manor. And it was contended on the parts of the defts. that this did not show that he had the lawful care and charge of her within the meaning of the statute.

On the part of the Crown it was argued that at all events there was evidence that she was taken out of the possession of her mother, and that this was sufficient to sustain the indictment.

EDWARD VAUGHAN WILLIAMS.

April 25.—*Draks* for the prisoner.—The conviction cannot be sustained. First, there was no evidence that the prisoner Frederick fraudulently allured, took away and detained Jane Burrell out of the possession of her mother. Some meaning must be given to the word "fraudulently" in this part of the section. If it be said that the motive was a pecuniary one, and that that would satisfy the word "fraudulently," the answer is, that the preceding part of the section provides for that case expressly. There was no evidence of any false pretences or mis-statements to satisfy the word "fraudulently" [MARTIN, B.—How can this court know that the prisoner fraudulently allured the young woman away except from the evidence? WILLIAMS, J.—All the evidence is set out in the case on the point. POLLOCK, C. B.—This may have been a very honest love match; but was it not a fraud against the child to pretend to marry her when he could not legally do so?] Secondly, there was no evidence that he took the girl out of the possession of her mother, within the meaning of the statute. This case differs from *Reg. v. Mantelou*, 6 Cox C. C. 143; *Dears*, C. C. 159, inasmuch as here the girl was in the possession of her mother at the time. [WIGHTMAN, J.—The mother would not let her stop with her.] It does not appear that either of the defts. knew that the mother had required her daughter to come back. [WIGHTMAN, J.—Sect. 55 would apply to the case of taking away a girl from school.] In *Hicks v. Gore*, 3 Mod. 84, where a mother had placed her daughter, an heiress, under the care of a lady, to prevent her being run away with, the lady collusively married the girl to her own son while she was under sixteen. The marriage being without enticement and openly, it was held that the case was not within the penalties of 4 & 5 P. & M. c. 8. Thirdly, the indictment avers that W. S. Hyder had the lawful care and charge of the girl. Hyder, the second husband of the girl's mother, had nothing to do with the care and charge of her: (*Ratcliffe's* case, 3 Co. R. 38.) Although he had been admitted as her guardian on the court-rolls of the manor, that does not constitute him guardian of her person. The prosecutrix was bound to prove that aver-

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ment in this indictment, and not having done so, it is submitted that the prosecution cannot be sustained.

*Bulwer* for the prosecution.—First, as to the word “fraudulently.” If any evidence of fraud is requisite, there was sufficient. The construction of the statute is obvious. Sect. 53 creates two classes of offences: the first is, “to take away or detain” any woman, &c. against her will, without reference to her age, contemplating the case of an heiress capable of giving consent to her marriage; but when the Legislature comes to deal with the case of an heiress under the age of twenty-one, and incapable of giving such consent, then the will to be violated is not the will of the woman, but of the person having the lawful care of her; and it is made an offence not only to “take away or detain” such woman out of the possession of such person, but also to “fraudulently allure” the woman out of the possession, &c. Where the offence is “taking away” or “detaining,” it is not necessary to allege or prove fraud; but where the offence is “alluring,” it must be alleged and proved to have been a fraudulent alluring, whatever that may mean. It is quite sufficient to support this prosecution, that here the uncle took away and married his niece, who was under age, without the knowledge of the person who had the lawful custody of her. The concealment of the fact from her lawful guardians is quite sufficient evidence of fraud. The fraud is against the persons having the lawful custody of the girl, and who by law have the power of giving her consent. [POLLOCK, C. B.—The consent is immaterial, as the marriage is wholly illegal. WIGHTMAN, J.—Do you contend for the conviction of both? WILLIAMS, J.—There was evidence of aiding and abetting which is not stated in the case.] The language of this part of the section is not, as in the first part, against the will of the woman, but against the will of her father or mother or other person having the lawful care of her. In *Ratcliffe's* case it was held, that the mother of a child who marries again is entitled to the legal charge and custody of her child. [WIGHTMAN, J.—The girl is not in the actual possession of her mother.] Assuming that the girl was living at her uncle's with the consent of her mother, why is she not then in her mother's custody and possession? The other side must contend, that if she was at her grandmother's, she was not in her mother's possession. The mother did not abandon her control. It was arranged that she should live with her mother's mother and brother. It is sufficient to sustain this prosecution that the mother had a right to the possession and charge of her daughter. In 1 East P. C. 457, it is said that *Hicks v. Gore* wants more consideration. In *Reg. v. Kipps*, 4 Cox C. C. 167, Maule, J. said: “The law throws a protection about young persons of the sex and within the age specified by the statute 9 Geo. 4, c. 31, s. 20. It has been determined by the Legislature that at that age young females are not able to protect themselves, or give any binding consent to a matter of this description. It is therefore quite immaterial whether the girl abducted consent or not; if her family, that is to say, those who under the statute may lawfully have the possession and control over her, do not consent to her departure, the offence is completed.” So again *Reg. v. Manktelow* supports this view of the case. As to the third objection, it is not necessary to prove the averment about the second husband having the lawful charge of the girl. That is surplusage, and may be struck out of the indictment.

*Metcalfe*, in reply, referred to

*Reg. v. Handley*, 1 Fes. & Fin. 648.

*Cur. adv. vult.*

Nov. 24.—POLLOCK, C. B.—The prisoner, Frederick Burrell, was indicted for fraudulently alluring, taking away and detaining a young female out of the possession of her mother and one W. S. Hyder, he

having the lawful care and charge of her, and the other prisoner was indicted for aiding and abetting him. The court is divided in opinion on the facts, not on any question of law. If there had been a difference in our opinion on the law, the case in the ordinary course would have been directed to be argued before all the judges. But as it is, we think the court may well act according to the opinion of the majority of the judges who heard the argument, and hold that the facts do not sustain the prosecution, and that in point of fact the crime was not proved. As I said before, there is no difference among the judges as to the law. *Conviction quashed.*

Saturday, Nov. 14, 1863.

(Before ERLE, C. J., WIGHTMAN and WILLIAMS, JJ., MARTIN and BRAMWELL, BB.)

REG. v. RINALDI.

*Forgery—Photographic impression on glass—Note of foreign country.*

*The making on a glass plate a positive impression of an undertaking of a foreign state for the payment of money by means of photography, without lawful authority or excuse, is a felony within the 24 & 25 Vict. c. 98, s. 19.*

Case stated by Keating, J. for the opinion of this Court.

Peter Rinaldi was tried before me at the last August Session of the Central Criminal Court, upon an indictment framed upon the statute 24 & 25 Vict. c. 98, s. 19, which charged that he did feloniously, &c., “make upon a certain plate, to wit, a plate of glass,” &c., an Austrian note for the payment of one gulden.

The indictment, which was to be considered a part of the case, contained fourteen counts.

The first was as follows:—

Central Criminal Court, to wit. The jurors for our Sovereign Lady the Queen upon their oath present that, in a certain foreign state, that is to say, the empire of Austria, for a long time previous to the commission of the felony and offence hereinafter charged, and at the time when the said felony and offence was committed, and since, hitherto and up to the present time, divers undertakings for the payment of money of the said foreign state, that is to say, the said empire of Austria, were made, issued, negotiated and circulated, and were lawfully current in the said foreign state, and that the said undertakings for the payment of money were, and each of them respectively was, during all the time aforesaid, made, issued, negotiated and circulated, and were current as aforesaid for payment of a certain amount of foreign money, that is to say, for payment of one piece of coin called a gulden, of the currency of the said foreign state, to wit, the empire of Austria, the said piece of coin being lawfully current in the said foreign state, and being, during all the time aforesaid, of great value, to wit, each gulden being of the value of two shillings in English money, and each of the said undertakings for the payment of money being for the payment of one gulden. And the jurors aforesaid, upon their oath aforesaid, do further present that Peter Rinaldi, late of the city of London, labourer, well knowing the premises, and whilst the said undertakings were so as aforesaid lawfully current in the said foreign state, to wit, the empire of Austria as aforesaid, to wit, on the 23rd day of June, A. D. 1863, in the city of London, and within the jurisdiction of the Central Criminal Court, wilfully and feloniously and without the authority of the said foreign state, and without lawful authority and without lawful excuse, did make upon a certain plate, to wit, a plate of glass, an undertaking for payment of money, to wit, for payment of one gulden, purporting to be one of the said undertakings

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for payment of money of the foreign state aforesaid, to wit, the said empire of Austria, so made, issued, negotiated and circulated, and lawfully current in the said foreign state as aforesaid, against the form of the statute in such case made and provided, and against the peace of our Sovereign Lady the Queen, her crown and dignity.

It was proved that the prisoner employed a photographer to counterfeit Austrian bank notes, his directions being to take the impression of the note on glass by means of the photographic process, and then get it engraved on metal or wood, so as afterwards to strike off the notes when the proper bank-note paper could be procured from the Continent. The photographer accordingly took off on a glass plate a "positive" impression of the note and showed it to the prisoner, who was apprehended whilst approving of the impression and giving further directions with respect to it. It appears that the process of photography consists in exposing to the light a plate of glass properly prepared with collodion, with the note opposite, by which means the shadow or impression of the note is produced upon the glass. This impression is called "a positive," and by converting it into a "negative," which is easily done, notes can either be printed by photography to any extent on properly prepared sensitive paper, or may be engraved from, as directed to be done by the prisoner; but the impression of the note could not be printed or engraved until the positive was converted into a negative. The impression was described by the witness as a mere shadow on the surface of the glass, and easily washed off until fixed, and it was found necessary to varnish the impression taken in order to fix it for production at the trial. The counsel for the prisoner objected that no offence was proved, that the statute did not contemplate the use of photography, but an "engraving or making," by cutting into the surface of some material for the purpose of taking impressions therefrom, that producing an evanescent shadow of the note upon glass, though intended to be subsequently used for the purpose of engraving, was not within the statute, and that the engraving of the note, which was ultimately contemplated and directed by the prisoner, never was made.

I thought the case within the statute, and so directed the jury, who found the prisoner guilty, and I respited the judgment for the opinion of the Court of Criminal Appeal.

H. S. KEATING.

*Metal* for the prisoner.—The procuring of the copy of the note to be photographed in the "positive," was not engraving, or making an undertaking for payment of money within the meaning of sect. 18 of 24 & 25 Vict. c. 93, which enacts that "whosoever, without lawful authority, or excuse (the proof whereof shall lie on the party accused), shall engrave, or in anywise make upon any plate whatsoever, or upon any wood, stone or other material, any bill of exchange, promissory note, undertaking, or order for payment of money, or any part of any bill of exchange, promissory note, undertaking, or order for payment of money, in whatsoever language the same may be expressed, and whether the same shall or shall not be, or be intended to be under the seal purporting to be the bill, note, undertaking or order, or part of the bill, note, undertaking or order of any foreign prince or state, or of any minister or officer in the service of any foreign prince or state, or of any body corporate, or body of the like nature constituted or recognised by any foreign prince or state, or of any person or company of persons resident in any country not under the dominion of Her Majesty, or shall use or knowingly have in his custody or possession any plate, stone, wood, or other material upon which any such foreign bill, note, undertaking or order, or any part thereof, shall be engraved or made, or shall knowingly offer, utter, dispose of or put off, or

have in his custody or possession, any paper upon which part of such foreign bill, note, undertaking or order shall be made or printed, shall be guilty of felony." This was a mere shadow on glass, which had to be varnished in order to preserve it for the sake of its being used as evidence in the case. It required another process to be gone through before it could be converted into an "engraving" or used for "making." No doubt what was done was an element in the process; but from a "positive" you could not engrave a copy of the undertaking. It might have been an overt act, showing that the prisoner intended to engrave, but it was not complete so as to come within this section. *Gambert v. Ball*, 32 L. J. 166, C.P., which decided that photographic copies of an engraving were piracies within the Copyright Act, has no application to this case.

*Poland*, for the prosecution, was not called upon.

ERLE, C. J.—I am of opinion that this conviction was right. [His Lordship then read the language of the section.] The prisoner clearly made on a plate of glass an undertaking for the payment of money. An undertaking for the payment of money lies in a certain form of words. The process adopted in taking off on a plate the positive impression of the note, is to put on the plate the exact words more perfectly than could have been done before the discovery of photography. The object of the statute upon which this indictment is founded is to prevent the counterfeiting of foreign securities. Leaving out of consideration the question of intent, this is a copying of an undertaking for the payment of money; and the prisoner does that without authority or excuse. And I am of opinion that the case is within the words, as it is clearly within the intention of the statute. It has been pressed upon the Court that this photographic impression was merely a preliminary process, and in an evanescent form. But the statute may apply to any stage of the process, and though this photographic copy was in the first stage only, and in the evanescent form, the prisoner was clearly guilty of the offence of forgery within the statute.

The rest of the Court concurring,

*Conviction affirmed.*

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*Nuisance—Exposure of person—Public place.*

*It is sufficient to support an indictment for indecent exposure of the person, if the act is done in a place where a great many people can see it, although that place is not a highway; as where the exposure took place on the roof at the back of a house where it could be seen from the back windows of many neighbouring houses, and was seen by several persons therefrom.*

Case reserved by the Deputy Assistant Judge at the Middlesex Sessions.

The prisoner was tried before me in the second court, at the Middlesex Sessions on the 25th August, on an indictment which charged that he in a certain open and public place, that is to say, on the roof of the dwelling-house of one G. H. Cook, situate in a certain open and public street called Albemarle-street, in the parish of St. George, Hanover-square, and near the dwelling-houses of divers of the liege subjects of the Queen situate in that parish, and also in and near the said open and public street and common highway called Albemarle-street, and within the sight and view of Elizabeth Aulsebrook and Mary Day and of many other of the liege subjects of the Queen there residing and dwelling, and along and through the open and public street and common highway there going, returning, passing and repassing, did unlawfully, wilfully, publicly and indecently expose his person and private parts naked, and did continue on the roof of the said dwelling-house, and near the

dwelling-houses aforesaid, &c., with his person exposed, &c., for the space of twenty minutes, to the great damage and common nuisance of the said E. A. and M. D., and of all other the liege subjects of the Queen, then and there being, and then and there residing and dwelling, and along and through the open and public street and common highway aforesaid going, returning, passing and repassing, against the peace, &c.

The prisoner lived as a servant at a house, No. 4 in Albemarle-street, Piccadilly, and on the 31st July, while several female servants belonging to a club-house were going to bed, about eleven at night, in a room at the back of the house, No. 11 in Stafford-street, the prisoner passed along the roofs of the houses and exposed himself on that of No. 6, Albemarle-street, which was exactly opposite the window of the room where the females were. He was almost entirely naked, and exposed his person.

They mentioned the circumstance to the other servants, but were scarcely credited.

On the following night the prisoner again appeared, and exposed himself in a most indecent manner, remaining on the roof for about ten minutes.

The head waiter of the club was sent for, and also a policeman, both of whom saw the exposure, making, with five females who were present, seven persons before whom, on this occasion, the exposure took place.

The house out of which the prisoner came, as well as that from which the witnesses saw him, were situate in public streets; but that part of the roofs of the different houses along which the prisoner walked did not face the public street, and his acts could not be seen by persons passing along those streets, but they could be seen from the back windows, not only of houses in Albemarle-street and Stafford-street, but also from those of several houses in Bond-street.

The prisoner's counsel submitted that the roofs of the houses did not constitute a public place, and that the exposure, in the presence of the different persons as described, did not amount to a public exposure so as to make the prisoner guilty of the common law misdemeanor.

The case was not argued before me; but it was suggested by the counsel on both sides that it should be reserved for the opinion of the Court of Criminal Appeal, and argued there. I consented to that course, being desirous that the point should be settled by competent authority, and I told the jury that, in my opinion, the place and the exposure were sufficiently public to bring the acts of the prisoner within the law, if they should be of opinion that he exposed himself in fact indecently, wilfully and intentionally.

The jury found him guilty, and the question for the determination of your Lordships is, whether I was right in so ruling. If I was, the verdict is to stand; otherwise not.

The prisoner not being able to find bail, is in prison awaiting the decision of your Lordships.

JOSEPH PAYNE,

Deputy Assistant Judge.

*Best (Besley with him) for the prisoner.*—It is submitted that the conviction ought to be quashed. The evidence did not support the averment in the indictment that the exposure occurred "in a certain open and public place." This is an indictment at common law, and the place where the exposure is made must be such as the public have access to. Here the place was not visible to any one passing along the streets. In *Sedley's case*, 1 Sid. 168, the exposure was in a balcony in Covent-garden, in sight and view of persons passing along the street. In *Reg. v. Webb*, 3 Cox C. C. 183, 1 Den. 338, an exposure to one person in a passage of a public-house leading to the public parlour was held insufficient. And so an urinal in a public market has

been held not to be a public place: (*Reg. v. Orchard*, 3 Cox C. C. 248.) The exposure must be a public nuisance to render it indictable.

ERLE, C. J.—We are all clearly of opinion that in order to be liable to an indictment for indecently exposing the person, it is not necessary that the man should stand and expose his person in a public highway. If it is in a place where a great number of the Queen's subjects can and do see the exposure, that is sufficient.

The rest of the Court concurring,

*Conviction affirmed.*

Saturday, Nov. 21, 1863.

REG. v. G. H. BREN.

*Embezzlement—Clerk or servant—Friendly society—Committeeman.*

*Two friendly societies appointed a committee, of which the deft. was a member, to conduct an excursion; the committee employed the deft. and several others to sell tickets. It was his duty to pay over the money so received, which was to belong to the two societies, to a person appointed by the committee, but he received no remuneration for his services: Held, that he was a joint owner of the money, and not a clerk or servant within the 24 & 25 Vict. c. 96, s. 68, liable to be indicted for embezzlement.*

Case reserved for the opinion of this court, by the Deputy-Recorder of Reading, at the borough sessions.

George Holgate Bren was charged that he, being employed as servant to D. L. (naming the other members of the committee), did whilst he was so employed receive and take into his possession 24s. for and in the name and on the account of the said D. L., &c., his masters, and the said money did fraudulently and feloniously embezzle.

The persons above named, with the said George Holgate Bren, were a committee formed from the members of two friendly societies, called the Excelsior and the Royal Berkshire Lodges, for the purpose of conducting an excursion by the South-Eastern Railway.

The said committee nominated certain persons to sell tickets, entitling the bearers to share in the excursion, and issued to them the tickets for sale. The tickets and the money produced by the sale of them belonged to the two friendly societies, each lodge being entitled in proportion to the numbers of its members. The duty of the persons appointed to sell tickets was to pay over the money received from the sale of them to a person appointed by the committee to receive it for the use of the societies. They received no remuneration for their services.

The said George Holgate Bren was a member of the Royal Berkshire Lodge, and one of the persons nominated by the committee to sell tickets. A certain number of tickets were issued to him for sale, which he sold, and instead of paying over the money to the persons appointed by the committee he fraudulently appropriated it.

The case was tried before me, acting as deputy to the Recorder for the borough of Reading, on Tuesday, the 27th Oct.

The jury found that the said George Holgate Bren was employed by the committee; that while so employed he received the money mentioned in the indictment in the name and on the account of the committee, and fraudulently converted it to his use.

Whereupon I directed a verdict of guilty, subject to the opinion of this court, whether he was employed "for the purpose, or in the capacity of a clerk or servant," within the meaning of the 68th section of 24 & 25 Vict. c. 96, and whether, being a member of the committee and of one of the societies, and thus a joint owner of the tickets, and the money produced by the sale of them, he could be lawfully convicted."

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Judgment has been postponed, and the prisoner discharged on recognisance of bail to appear and receive judgment.

T. BROS.

Reading, Oct. 29, 1863.

*Pater* for the deft.—The conviction cannot be sustained. The deft. was a mere trustee, and was not employed as a clerk, or in the capacity of a clerk. He received no remuneration, and was not under the control of any one. In *Reg. v. May*, 1 L. & C. 13; 8 Cox C. C. 421, a person who was to be allowed commission on all business that he did for the prosecutors, and who was to account to them for any money he might receive immediately on the receipt of it, was held not to be a clerk or servant within the 7 & 8 Geo. 4, c. 29, s. 47. In that case, Cockburn, C. J. said, that the relation of clerk or servant implied control. Here the deft. was subject to none. [MARTIN, B.—The prisoner was more like a managing partner than anything else.]

*Harington* for the prosecution.—Although the deft. was a member of the committee, and jointly interested in the fund, yet, according to *Reg. v. Proud*, 9 Cox C. C. 22, and *Reg. v. Burgess*, 9 Cox C. C. 302, he was liable to be convicted for the embezzlement. [MARTIN, B.—In *Proud's* case the prisoner was a paid secretary, and, as such, under a contract to receive and pay over the money, and until he had paid it over he held it on behalf of his employers.] In *Burgess's* case the prisoner was a member of the society, and was held liable to be convicted of larceny for taking money belonging to the society. [MARTIN, B.—A shareholder in a joint-stock bank has no interest in the money in the bank, only in the net profits.]

ERLE, C. J.—We are all of opinion that the conviction cannot be sustained. The deft. was a member of the committee, and so a joint owner of the money. And we think that he was not chargeable as a clerk or servant, and so not liable upon this indictment.

MARTIN, B.—I also think that the deft. was neither a clerk or servant, nor employed in the capacity of a clerk or servant.

The rest of the Court concurring;

Conviction quashed.

## REG. v. WILLIAM WHITE WATTS.

*Depositions—Mode of taking—Admissibility*—11 & 12 Vict. c. 42, s. 17.

*A deposition of a witness taken in the following manner upon the committal of a prisoner for trial, was held irregular and inadmissible in evidence at the trial.*

*A note of the evidence before the committing magistrate, consisting of the witnesses' names and the heads of what each could prove, was taken in the open court. Then the prisoner and the witnesses were taken into a room, and another clerk examined the witnesses from the note in the absence of the magistrate, and there wrote down the answers, and the witnesses then signed the paper, and the prisoner was not asked if he would then cross-examine the witnesses, but he did cross-examine them by his attorney in court. The prisoner and witnesses were then again taken into the court before the magistrate and the depositions read over to them; the magistrate then asked the prisoner in the usual way what he had to say, and signed the depositions.*

Case reserved for the opinion of this court at the Liverpool Borough Sessions:—

The prisoner was tried before me at a Court of Quarter Sessions of the peace holden in and for the borough of Liverpool on the 25th May 1863; he was indicted for larceny from his master.

It was proved that one of the witnesses examined

before the committing magistrate was unable to attend the trial as a witness by reason of illness.

It was then proposed on behalf of the prosecution to put in evidence his deposition taken before the committing magistrate, and for this purpose a witness was called who proved that the deposition was taken in accordance with the invariable and long-established practice of the magistrates' court; that when the prisoner was before the magistrate, he was defended by an attorney, who had a full opportunity of cross-examining and did cross-examine the witnesses; that a note of the evidence given before the committing magistrate, consisting of the names of the witnesses and the heads of what each could prove, was taken by a clerk to the magistrates; that afterwards the prisoner and the witnesses were taken into a room, and that there another clerk who had not been present at the examination before the magistrates, examined the witnesses from the aforesaid note in the absence of the magistrate, and there wrote down the answers, and that the witnesses then signed the paper so written by the said last-mentioned clerk; that the prisoner's attorney was not there, though he might have been if he had liked, and that the prisoner was not asked if he would then cross-examine the witnesses, and did not cross-examine them.

That afterwards the prisoner and the witnesses were again taken before the magistrate, and the evidence so taken and written down by the clerk in the room in the absence of the magistrate was read over to them; that the prisoner was not then asked if he would cross-examine the witnesses; that his attorney was not there, though he might have been if he had liked; that the magistrate then cautioned the prisoner, who then signed his own statement, and the magistrate then signed the papers so written as last aforesaid; that one of the depositions contained in the said last-mentioned paper was the deposition tendered in evidence before me.

It was objected on behalf of the prisoner that such deposition was not taken in accordance with 11 & 12 Vict. c. 42, s. 17, and therefore inadmissible; and the following authorities were cited:

*Reg. v. Arnold*, 8 C. & P. 622;

*Reg. v. Johnson*, 2 C. & K. 394;

*Reg. v. Christopher*, 1 Den. C. C. 536;

*Candle v. Seymour*, 1 Q. B. 889.

I admitted the deposition and the prisoner was convicted; but having doubts as to its admissibility, I granted this case for the opinion of your Lordships, whether the said deposition so taken was properly admitted.

I respited judgment and the prisoner was admitted to bail.

LEOFRIC TEMPLE,

Assistant barrister to the Recorder of Liverpool,

27th May 1863.

*Little* for the prisoner.—The depositions were inadmissible. They were not taken in accordance with 11 & 12 Vict. c. 42, s. 17. The legislation in respect of the depositions of witnesses is narrated in 2 Russ. on Crimes, 889. In 1 Taylor on Evidence, referring to *Reg. v. Potter*, 7 C. & P. 650; and *Reg. v. Thomas*, 1b. 817, it is stated that it was the intention of the Act that the justice should be present when the depositions of the witnesses are taken. [MARTIN, B.—The question is whether this deposition was taken in compliance with the Act.] It is not stated in the case, but it is the practice at Liverpool for several clerks to be employed at the same time in taking the depositions of witnesses in different cases when the magistrate is not present. The clerk may add or omit questions. Virtually he exercises the power intended to be exercised by the magistrate. [MARTIN, B.—My brother Willes mentioned to me that the same objection as that taken here was made before him at



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Liverpool, and that he understood that it was the universal practice. I have always been surprised at the great difference in the length of the cross-examination of witnesses when before justices and before judges, but I can now understand how it is that in the former case the cross-examination extends only to a line or two.] In the schedule to 11 & 12 Vict. c. 42, the depositions are stated to be "taken and sworn before me," i. e. before the magistrate. That evidence which was taken before the magistrate is not returned, and that which was not taken before him is returned. In *Christopher's* case a magistrates' clerk at his office drew up depositions from minutes taken before a magistrate and questions asked by him, and it was held that a witness in cross-examination might be asked what he had then said to the magistrates' clerk without putting in the depositions which had been afterwards read over in the presence of the prisoner and witnessed before the magistrate. The reasoning also in *Candle v. Seymour*, 1 Q. B. 889, applies.

*James, Q.C.*, for the prosecution, said that he appeared to hear the judgment of the court, and not to argue in support of the prevailing practice. The prosecutors were desirous that the court should lay down a rule for the guidance of the magistrates of Liverpool on future occasions. His own mind was opposed to the practice, and he would not argue in support of what he did not approve. If the court did not sanction the practice the corporation would put themselves in position to have further assistance for the discharge of the magisterial duties. The learned assistant-barrister was of opinion that the depositions were inadmissible, but reserved the case in order that the question might be raised and settled. No blame attached to the magistrates. [WIGHTMAN, J.—The officer of this court informs us that the practice in London and the metropolitan police-courts is to take the depositions in the presence of the magistrate. MARTIN, B.—I do not think it would be considered essential for the magistrate himself to write down the answers.]

ERLE, C.J.—I think that the depositions were inadmissible, not having been properly taken. The statute requires the depositions to be taken down in writing in presence of the magistrate and of the prisoner, and that the prisoner shall be at liberty to cross-examine the witnesses in the presence of the magistrates. In this case those requirements have not been complied with. It is not our province to lay down any regulations as to the particular way in which depositions should be taken, but to decide the question before us, and all that we now say is that these depositions were improperly taken. The conviction therefore will be quashed.

The rest of the Court concurring,

*Conviction quashed.*

### COURT OF PROBATE.

Reported by DR. SWABY, of Doctors'-common.

July 14, Nov. 3 and 10, 1863.

#### THE GUARDIANS OF THE POOR OF THE HAMLET OF MILE-END OLD TOWN AND OTHERS v. FINDLAY AND OTHERS.

In the Goods of JANE FINDLAY (Widow), deceased.

*Next of kin—Pauper lunatic—Administration under sect. 73 of Probate Act to guardians of the poor.*

*J. F. died intestate and a widow, leaving M. F. her daughter the only person entitled in distribution. M. F. had been for some years in the county lunatic asylum, maintained at the charge of the hamlet of Mile-end Old Town. No committee of person or estate had been appointed.*

*J. F. left a sum of money principally in the funds in the name of her late husband, under whose will she was entitled to it.*

*After the proper citations the court, under sect. 73 of the Probate Act, granted administration of the goods of J. F. to the clerk of the guardians of the poor for the use and benefit of the lunatic, limited till the period of her lunacy; the surties to justify.*

This was an application for a grant of administration to E. J. Southwell, clerk to the above-named guardians, and their nominee for the present purpose, of the personal estate of the above deceased.

Jane Findlay died on the 19th Aug. 1856, intestate, a widow, leaving Mary Findlay, spinster, her natural and lawful only child, and the only person entitled in distribution. The deceased left about 450*l.*, principally funded property, standing in the name of her late husband William Findlay, who died on the 3rd Aug. 1856, and under whose will she derived the money.

Mary Findlay, aged about forty-eight, had since the year 1852 been of unsound mind, and was still confined in Middlesex County Lunatic Asylum at Colney Hatch, where she had been maintained as a pauper lunatic at the charge of the hamlet of Mile-end Old Town.

No committee of the person and estate of Mary Findlay had been appointed. The above-named guardians had incurred charges in respect of the said Mary Findlay to the amount of 237*l.* 2*s.* 6*d.* up to the 6th Sept. 1861, the only security for which was an order of two justices of the peace for the county of Middlesex, under the 16 & 17 Vict. c. 97, s. 104, directing the said guardians, or Mr. E. J. Southwell, their clerk, or the relieving officers of the hamlet, to seize so much of any moneys, &c., of the said Mary Findlay, as may be necessary to pay the charges of the said guardians, and duly to account to the said justices for the same. Certain uncles and aunts were the only next of kin of the said Mary Findlay. They had been cited to take letters of administration of the personal estate of Jane Findlay for the use and benefit of the lunatic and during her lunacy, or show cause why the same should not be granted to E. J. Southwell, as clerk of the said guardians. None of the next of kin had appeared to this citation.

A citation had been served on Mary Findlay, the lunatic, in the presence of Mr. Marshall, surgeon of the Colney Hatch Lunatic Asylum, having charge of the said lunatic, and on Mr. W. Robinson, the only next of kin of the said lunatic residing in England. Inquiries had been made as to any creditors of William or Jane Findlay, but it did not appear that they left any debts owing at the time of their respective deaths.

*Dr. Deane, Q.C. (R. Pritchard with him)* moved the court accordingly, stating that he knew of no exact precedent.

*Sir C. CRESSWELL.*—If, as your statement is, Mary Findlay is a pauper lunatic, the parish is bound to maintain her. If the guardians apply as creditors, to whom do they stand in that position? I must take time to consider the application. *Cur. adv. vult.*

The motion was renewed before Sir Jas. P. Wilde, on the 3rd Nov.

*Sir J. P. WILDE.*—I think it is reasonable that the money which belongs to the pauper should be applied in payment of her subsistence; and if it can be done in no other than the mode now asked, I should wish, if I can with propriety, to grant this motion, but as no principle or conclusive authority has been cited, I must take time to consider. *Cur. adv. vult.*

Nov. 10.—*Sir J. P. WILDE.*—This is an application for letters of administration to be granted of the goods of Jane Findlay, who died a widow and intestate on the 19th Aug. 1856, to Mr. Southwell, as clerk to the guardians of the poor of the hamlet of Mile-end

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Old Town and others. It appears that Mary Findlay, spinster, was her only child, and the only person entitled to her personal estate. In 1852 Mary Findlay was admitted into the County Lunatic Asylum at Colney Hatch as a pauper, and from thence to the present time has been confined and maintained there at the expense of the before-mentioned hamlet. No committee of her person and estate has ever been appointed. The expenses incurred on her behalf by the hamlet amounted to 237l. 2s. 6d. On the 6th Sept. 1861 the guardians of the poor for the hamlet obtained an order from two magistrates to seize and sell so many of the goods of Mary Findlay as might be necessary to pay the above sum of 237l. 2s. 6d. The order recites that it has been proved on oath that the said Mary Findlay was entitled to a sum of money in the Bank of England, and another sum of money in the Poplar Savings Bank. It is also sworn on affidavit before the court that Jane Findlay, the mother, left personal estate of the value of 450l. It is also sworn by the nurse and the medical attendant at the asylum, that there is no hope of the recovery of Mary Findlay to soundness of mind. Search has been made for creditors of Jane Findlay, but none found. The next of kin of Mary Findlay have been cited, but have not appeared. It is under these very unusual circumstances that the court is asked for a very unusual grant. Those who apply for the grant are substantially creditors of the next of kin of the deceased. That character would not (so far as I have been able to discover) of itself entitle them, according to the practice of this court, to the grant they seek. There have no doubt been exceptional cases, though none that govern this; but the general rule would require something of a representative character in the person who seeks a grant on behalf of the next of kin. This character is here wanting, and if the court pronounces for this grant it must do so under the powers conferred by sect. 73 of the Probate Act. These powers are exercised with some reluctance; but the true function of the court is to facilitate the collection and distribution of the estates of deceased persons, and not by any technical rules to impede that distribution. If the administration now asked is refused, to whom can the estate be confided? The next of kin of the lunatic refuse to interfere, and there is no one who represents her. She is lunatic, and therefore cannot act herself; the grant must therefore go as prayed. It will be made under the powers conferred by sect. 73; it will be for the use and benefit of the lunatic, and limited to the period of her lunacy; furthermore, an inventory and justified security will be required.

Proctors, Fritchard and Son.

### COURT OF COMMON BENCH.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

Friday, Nov. 13, 1863.

RINGLAND v. LOWNDES.

Arbitration—Wainer of objection that award was not made in time.

*A cause having been referred, it appeared before the commencement of the arbitration that the time limited for the making of the award had expired, and had not been enlarged under sect. 124 of the Public Health Act 1848, and the deft., upon this ground, objected in writing, and verbally at the termination of the reference, to the arbitrator proceeding to hear the case. The deft., however, took part in the proceedings, cross-examined plt.'s witnesses, called his own witnesses, and addressed the arbitrator:*

*Held, in an action to enforce the award, which was in*  
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*favour of the plt., that the deft., by acting as he did, had precluded himself from saying that the arbitrator had no jurisdiction to proceed with the reference.*

This action was brought against the deft., who is the clerk of the Burslem Local Board of Health, to obtain the sum of 135l. 16s. as compensation for damages, and 154l. for costs under an award dated the 30th Dec. 1861, a copy of which is hereafter given, and also a writ of *mandamus*, commanding the Burslem Local Board of Health to levy a rate in pursuance of the Public Health Act 1848, for the payment to the plt. of the said sums of money.

The cause came on for trial before Byles, J., at the Stafford Midsummer Assizes 1862, when a verdict was taken by the plt. by consent for the sums named in the declaration, subject to a special case to be stated, and the following case was accordingly stated for the opinion of this court:—

#### CASE.

In the year 1850 the Public Health Act, 11 & 12 Vict. c. 63, was applied to the town of Burslem, in Staffordshire, and by virtue of the powers therein contained the local board of health for that town began to lay down a system of sewers within the precincts of the town for the drainage thereof.

Hans Ringland the younger, the plt. in this action, is the owner of four houses in Waterloo-road, Burslem, and the deft. is clerk to the Burslem Local Board of Health.

In the year 1856 the said houses of the plt. were alleged to have been materially damaged by the operations necessary to construct the said sewers, and in 1858 application was made by the plt.'s attorney to the local board of health for the town of Burslem, through their attorney, for compensation, and a request also made that they would appoint an arbitrator, under the 123rd section of the Public Health Act, to whom the matter in dispute might be referred.

A rule was subsequently obtained for a *mandamus*, commanding the board to make compensation, and this rule was made absolute, but eventually the plt., on the 17th Dec. 1860, appointed Henry Ward, of Hanley, in the county of Stafford, to act as arbitrator under the said statute on his behalf, and gave the said board notice of the appointment, and required them to appoint another arbitrator on their behalf within the time required by the said statute, otherwise the said Henry Ward would proceed *ex parte*; and thereupon, on the 2nd Jan. 1861, they appointed Richard Stone, of Derby, to act as arbitrator on their behalf.

The arbitrators having refused to appoint an umpire, an application was made by the plt., under the 125th section of the said Public Health Act, on the 11th April 1861, at the Easter sessions, to the Court of Quarter Sessions for the county of Stafford, to appoint an umpire under the said section of the said Act, which was resisted by the board on several grounds, and was refused upon the ground that the plt. had not complied with the rules of the Court of Quarter Sessions by giving seven days' notice to the said board of their intention, as required by the practice of that court.

The required notice having been subsequently given, a second application was made at the Midsummer sessions, on the 3rd July in the same year, to the said Court of Quarter Sessions, when the court decided that they would appoint an umpire, and a Mr. Johnson was accordingly appointed. Mr. Johnson was not present when the appointment was made, and neither side was instructed as to whether he would consent to act. It is the duty and practice of the clerk of the peace to make an entry of the acts and proceedings of the court, from which the orders of the court are subsequently formally drawn up, and there is no other entry made by the chairman or otherwise of motions or orders of the kind referred

to. No order would, in the course of practice, be formally drawn up unless the assent of the umpire to act had been previously obtained, but the representation of counsel at the sessions would be treated as sufficient for that purpose.

No assent had been given by Mr. Johnson or anyone on his behalf, and the clerk of the peace therefore abstained from making any entry of or relating to any nomination or any appointment of an umpire, but if the assent of Mr. Johnson had been obtained or signified before the end of the sessions, and there was time to communicate with him, the clerk of the peace would have then informed the court of that assent, and made the entry of the appointment, and the order would have been afterwards drawn up and an office copy sent to Mr. Johnson without the further intervention of the parties. No assent having however been obtained or signified, no minute or record whatever was made of any appointment or order, and none was drawn up. The clerk of the peace, on being subsequently applied to as to what had been done in the matter, stated that no order had been made, his view being that no order could be made, the consent of the umpire not having been obtained.

At the following quarter sessions, on the 14th Oct. 1861, an application was made to the same Court of Quarter Sessions for the appointment of an umpire. The application was resisted by the counsel on behalf of the board on the ground that a valid appointment of umpire was made at the Midsummer sessions, notwithstanding that no entry was made of it in the court, and that as the umpire had failed to make his award within the period of three months from the date of his appointment, the matter referred to him should be again referred to arbitration, as if no former order of reference had been made pursuant to the provisions of the said statute, and consequently that the proceedings should begin *de novo*, and new arbitrators be appointed who might agree upon an umpire, and that the court having once at the former sessions exercised its authority under the statute to appoint an umpire, it had no jurisdiction or authority to again appoint an umpire in the same matter at a subsequent sessions without the requirements of the statute having been duly complied with. Notwithstanding these objections the court, after hearing the counsel for the plt., who dissented from the view of the facts taken on the other side, appointed a Thomas Johnson to be umpire, whose assent had been then obtained, the chairman at the same time saying that the order was made out on the condition of the applicant, namely, the plt., taking on himself the responsibility of its validity. The appointment was entered, and formally made out by the clerk of the peace, and the first meeting was fixed for the 29th Nov. At that meeting the local board objected in writing to Mr. Johnson's acting as umpire on various grounds, the main one being that the time for making the award had not been enlarged, pursuant to the provisions of the 124th section of the Public Health Act 1848. The arbitration however proceeded, and the real question for the opinion of the court was, whether the attendance of the defts. at the reference examining their opponent's witnesses, addressing the arbitrator and calling witnesses in support of their case, waived a protest against the proceedings.

*Hayes*, Serjt. (*Beasley* with him), for the plt., cited *Bradshaw's* case, 12 Q. B. 562;  
*Tyerman v. Smith*, 6 E. & Bl. 719;  
*Palmer v. Metropolitan Railway Company*, 31 L. J. 289, Q. B.; 5 L. T. Rep. N. S. 542;  
*Holdsworth v. Wilson*, 39 L. J. 289, Q. B.; 8 L. T. Rep. N. S. 434;  
Public Health Act 1848, sects. 124, 125;  
*Lush*, Q. C. (*M'Mahon* with him), for the defts., cited

*Holt v. Meadowbank*, 4 M. & S. 468;  
*Lycett v. Tennant*, 4 Bing. N. C. 168;  
*Davis v. Price*, 6 L. T. Rep. N. S. 713;  
*Haigh v. Haigh*, 31 L. J. 420, Ch.; 5 L. T. Rep. N. S. 507;

*Burland v. The Local Board of Kingston-on-Hull*, 32 L. J. 17, Q. B.; 7 L. T. Rep. N. S. 316.

BYLES, J.—I am of opinion that in this case our judgment must be for the plt. The first objection to which our attention has been called, and which has been strongly urged by Mr. Lush, is, that there was an order made at the Midsummer sessions. Now, if the said "order" is to be understood in the sense of a formal order, or even of a written memorandum in the book of the clerk of the peace, there was no such thing. If it is to be understood in the sense of a substantial appointment, there was no such thing, because the party had not accepted the appointment down to the next sessions, to wit, the Michaelmas sessions, and supposing an order could have been drawn up, embodying the facts, what would it have stated? That A. B. was appointed subject to his acceptance of the appointment, and that he had not accepted, and that being so, it seems to me there was no appointment whatever at the Midsummer sessions. The Act of Parliament gives the power to either party complaining of delay to go to the sessions and apply for an umpire to be appointed, and it seems to me he is at liberty to go to any sessions within a reasonable time. Well, they go to the next sessions, and then the umpire is appointed and the umpire agrees to act. The hearing took place on the 29th Nov., which appears to be more than twenty-one days from the date of his appointment. I agree with my brother Hayes that the enlargement must be made within twenty-one days, and it is plain here that the enlargement was not made within the twenty-one days, and that being so, there was an objection to the jurisdiction of the umpire; but what sort of an objection? Not an objection that he was not the proper person to decide the question, if he had performed this formal act; not an objection that he had not jurisdiction over the subject-matter. The objection was, you have not gone through the form (not in writing, that is not necessary) of saying to yourself alone in your chamber, "I enlarge the time;" that is all he need do. Now, then, supposing that to be a fatal objection, what has he done, and what have the parties done? They go before him and ask if he has performed the ceremony, and he says he has not; and then they say to him in effect this: "Now then, we will appear before you; if your award is for us, we will avail ourselves of it; if it is against us, we will not be bound by it." They appear: they cross-examine the witnesses, they address the arbitrator and they call witnesses; and then they say, "The award is void, because, although we appeared, yet we appeared under protest." Now they have certainly cited several cases which show that where a tribunal has not jurisdiction, and a party appears under protest, that appearance is not to bind the party protesting. The leading case upon this subject, which has been cited ever since I can remember, is the case of *Holt v. Meadowbank*; but what was the objection there? That was a case where a proper special jury had been struck, and the words of the Act of Parliament are these: "A jury so struck shall be the jury to try the cause." The party there appeared, and said, "I am *coram non iudice*. The gentlemen have no more right to try my case than any twelve gentlemen in the street." But they said, "If you do not appear, the verdict shall be entered against you." There, Lord Ellenborough says, he was tied to the stake, and dragged on to trial. Then how did he appear? He appeared under protest, but the distinction between that case and the present is, that in that they were before the wrong tribunal, in this they were before the right tribunal; in that case

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there was a substantial objection, in this there was a shadowy one. In *Lycett v. Tennant* there was a variance between the writ of trial and the issue. The parties there had sent down the wrong issue to be tried. There the defect was not as to the jurisdiction of the judge to try the cause, but in the issue to be tried. That, again, was a fatal objection, and the party who appeared under protest was allowed to dispute the regularity of the proceedings. In the case of *Davies v. Price*, my brother Crompton does certainly say, "We are also disposed to think that, as the arbitrator persisted in going into the consideration of damages after objection taken by the defts., he did not waive his objection by attending subsequent meetings under protest, no case having been brought to our notice in which it has been held, that a substantial objection has been held to be waived by subsequent attendance before the arbitrator under protest." There, by a very learned judge, every word that falls from whom is worthy of respectful attention, it is said, "We are disposed to think;" but what was the objection there? That the arbitrator had taken into consideration the question of damages, and had assumed a power with reference to part of the case over which he had no jurisdiction; that again was a substantial objection. With respect to the case, *Re Haigh*, which was a decision of the L. JJ., the arbitrator had excluded from the room the son of one of the parties and the shorthand writer; the party had nevertheless proceeded with the reference, and, so far as I can collect, even without protest. But in that case the arbitrator had misconducted himself, and there is no reason to quarrel with that decision of the L. JJ. With these observations upon the cases cited I am of opinion, that an objection such as this which really comes to nothing more than the mere non-utterance of certain words to himself in his chamber, is waived by the conduct of the parties; and we should be going against the weight of authority and against common sense if we were to send the parties back on that ground for the sake of the defts., who in every possible manner have thrown a difficulty in the way of assessing the sum to be paid to the plt. That observation is not made with reference to any prejudice which ought not to, and shall not, affect our decision upon "any question of law; it is made with reference to the next matter which we have to consider, namely, the question as to a right to a *mandamus*. I say that the right to a *mandamus* is, to a certain extent, within our discretion. The difficulty that occurred to me was this, that the interval between 1856 and 1858 was not very satisfactorily accounted for. I think that the word "incurred" must be read with reference to the ultimate ascertainment of the amount, for it is impossible to make a rate which I presume would include the costs of the proceedings until you know what the decision is or is likely to be; therefore there is no objection so far as regards the time that has elapsed since the year 1858. But between 1856 and 1858 the time is not satisfactorily accounted for. Yet when we see what has been the conduct of the defts. as to that part of the case which we do understand, I cannot help thinking that, if there had been anything to be said which would have assisted them with respect to that interval, it would have been said; and as we decide for the plt. we are bound to do him full justice, and give him the only remedy he has in his right to a *mandamus*.

KEATING, J.—I am of the same opinion. The distinction which my brother Byles has taken with reference to all the cases cited seems to me to be a valid one upon the only question on which some doubt might have been entertained as put forward in the argument by Mr. Lush, namely, as to how far the attendance of the parties before the umpire did or did not waive the objection, which I also agree did exist at

that time, that the arbitrator had not enlarged the time within the twenty-one days. Now that distinction runs through all the cases, and will be found to reconcile all the cases where it has been held that such an attendance or appearance of the party did not waive the objection; the objection was one to the tribunal before which the party appeared, the objection being, "I am before the wrong tribunal," and that cannot be waived. None of the cases which were cited with reference to arbitrators struck me with much force, except the case of *Davies v. Price*; and there my brother Crompton says that he is disposed to think that the appearance of the party there did not waive the objection, the objection being that the arbitrator was assuming to himself jurisdiction over a subject-matter which the parties never agreed to invest him with; and he also says that no case had been cited in which the appearance of the party under protest had been held to waive a substantial objection, and he was disposed to think it had not been waived in that case. But the judgment of the court did not proceed even upon that, but upon this, viz., that the declaration was upon the express submission of the parties, and not upon an implied submission arising from the acts of either of the parties during the course of the reference. What was sought to be done there was in truth to alter the terms of the submission by the conduct of the parties during the reference, and that was what the court held could not in that case be done. But I must say that I should have been surprised if any case could have been adduced to sustain the defts. in this objection, because it appears to me to be a contradiction in terms to say that, having protested that there was no jurisdiction in the arbitrator, the party is not merely to attend to watch, but is to call witnesses, and to submit his case to the judgment of the party, and that then, if the award be against him, he may set it aside, but if in his favour, he shall be permitted to maintain it. Entirely agreeing with the views expressed by my brother Byles, I think the objection on the part of the defts. cannot be sustained, and that the plt. is entitled to our judgment. If he is entitled to our judgment, then the question comes, should the *mandamus* go? Now I think, notwithstanding the ingenious argument of Mr. Lush, that the board may be so well provided with funds that it does not necessarily follow that they are obliged to make a rate; that practically the only remedy this party has is to a *mandamus* to make a rate. If they pay him out of funds without making a rate, and we should ever hear of it again, in that event we probably should be disposed to endeavour to discover a possible construction in favour of that being a discharge in obedience to the *mandamus* on the part of the Board of Health. With reference to the operation of the 89th section of the Board of Health Act as a law, which was also referred to by Mr. Lush with regard to the question as to the six months' limit of time, it seems to me that the time we are to look to is the period which has elapsed between the six months, and therefore the objection founded on the terms of the 89th section must fail. For these reasons, and for those stated by my brother Byles, our judgment must be for the plt., both upon the questions referred and the *mandamus*.

## REGISTRATION APPEALS.

Tuesday, Nov. 17, 1863.

ROBINSON (app.) v. DUNKLEY AND ANOTHER, Overseers of the Parish of St. Sepulchre (resps.)

*Election law—County franchise—Member of building society.*

*The claimant, a member of a building society, purchased land of the annual value of 3l. and mortgaged it to the society for 73l., the amount of the purchase-*

money which they had advanced, and which he was to repay by monthly instalments, amounting to 4*l.* per annum. If these were not duly paid, the society had power to enter into possession. 7*l.* had been repaid to the society prior to the 31st Jan. preceding the time when the claim was made, and the remaining 2*l.* had been paid prior to the revision of the lists:

Held, that the claimant had a freehold interest in the land of the value of 40*s.* per annum, and was therefore entitled to vote.

The following case was stated for the opinion of the court by the revising barrister for South Northamptonshire:—

## CASE.

At the court held on the 28th Sept. 1863, at Northampton, for the revision of the list of voters for the parish of St. Sepulchre, Northampton, Francis Charles Robinson, the younger, duly objected to the name of Charles Derby being retained on the list of voters for the said parish of St. Sepulchre. The name of Charles Derby appeared upon the list of persons claiming to be entitled to vote thus, viz.:—

Christian name and surname of each voter at full length.	Place of abode.	Nature of qualification.	Street, lane, or other like place in this parish or township, and number of house (if any) where the property is situated, or name of the property, if known by any, or name of the occupying tenant; or, if the qualification consist of a reversion, then the names of the owners of the property out of which such rent is issuing, or some of them, and the situation of the property.
Derby, Charles.	34, Mayfair, Northampton.	Freehold building land.	Marriott-street, Kingthorpe-road, Northampton.

The facts of the case as proved were as follows:—Charles Derby is a member of a freehold land and building society in which he held one share.

The society advanced the purchase-money of the land, 73*l.*, some years since and the voter mortgaged the property to secure the monthly payments due upon his share, amounting annually to 4*l.*, and upon failure of the payment by the voter of his instalments for a certain limited period the society is entitled either to suspend enforcement of payment, or to enter upon possession, and the voter is entitled to redeem the premises by the payment of these monthly instalments alone without any other payment of principal. The funds of the society arise out of the monthly payments of the members, which are for the proportional benefit of the members. It was proved before me that the whole money paid up by the claimant was 73*l.*, and that the annual value of the property was 3*l.* for building purposes, and that during the past year ending in June last, he had paid instalments back to the society to the amount of 4*l.*, 2*l.* whereof had not been paid before the 1st of Jan. last.

It was contended, on the part of the objector to the vote, that, as the annual value as admitted by the claimant was less than the annual payment made by the claimant to the society, there was no freehold worth 40*s.* per annum. I was of opinion that upon these facts the claimant was progressing towards the acquisition of his freehold, which, when fully paid up, would have cost him 73*l.*, of which he had paid 71*l.* before Jan. 1863, and this having been completed by the payment of the remaining 2*l.* in July last, I found that he had a freehold prior to the 31st Jan. last of the value of 40*s.* per annum, and therefore I retained his vote.

If I was right in thus finding the value, according to the above facts, the claimant's name ought to be retained. If I was not right the claimant's name ought to be rejected. (Signed)

W. H. R., Revising Barrister.

Markham for the app.—The purchase-money of the estate was 73*l.*, and the annual value 3*l.*, but then there was a mortgage on it, and the annual payment was 4*l.* By 8 Hen. 6, c. 7, it is enacted that knights of the shire shall be chosen by people who “shall have free land or tenement to the value of 40*s.* by the year at the least above all charges.” Now, is this an estate of free land of the annual value of 40*s.*, free of all charges? The case finds that on the 31st Jan. he had paid 71*l.* of the purchase-money of the estate, but inasmuch as it was subject to an annual payment of 4*l.*, and only received 3*l.*, the annual value is nothing. [BYLES, J.—But he pays that on account of principal.] Principal and interest. The case finds that the annual payment was 4*l.*, and in considering whether this is a good vote, the only test is the annual value free of all charge. The revising barrister was of opinion that he was progressing towards the acquisition of the freehold; now, I contend that he is not entitled to a vote till he has got his land free of all charge; it will not do that he is progressing towards it. If a man takes a step here he may be said to be progressing towards Scotland, but he is not in Scotland. The only question here is, is this a charge? In *Copland v. Bartlett*, 18 L. J. 50, C. P. Wilde, C. J., speaking of “charges,” says that, “interest on a mortgage is a ‘charge’ upon the estate. . . . If the owner of an estate receives 20*s.* with one hand, and at the same time pays 30*s.* with the other, he has not left that quantum of interest in the estate which the law contemplated he should have as a qualification for a vote.”

*Lee v. Hutchinson*, 20 L. J., N. S., 4, C. P.;

*Beamish v. Overseers of Stoke*, 21 L. J., N. S., 9, C. P.

[ERLE, C. J.—The mortgagor has paid all principal and interest except 2*l.*; now, is there any case to show that he is incapacitated from voting because this 4*l.* remains due? BYLES, J.—The distinction between your case and *Copland v. Bartlett* is, that in that case the revising barrister did not find how much principal and interest still remained to be paid.] The society could enter and take possession if the interest was not regularly paid; how then could he be said to have the freehold? [BYLES, J.—They could only enter subject to the equity of redemption.]

No counsel appeared for the resp.

ERLE, C. J.—I am of opinion that the revising barrister was right. The difficulty that I have had in deciding the case has arisen from the decision in *Copland v. Bartlett*. In that case and in the present one the party taking land under a building society was bound to pay monthly instalments, which exceeded per annum the annual value of the property, and in each of them the mortgagor had not paid all the instalments. I think that with reference to the distinction between the two cases the proper course is to look at the substance of the transaction and the nature of the charge which the party has to pay. The claimant here was to pay 73*l.*, and when he has paid that he is owner of a freehold interest of the value of 3*l.* per annum. At the time the revising barrister had to ascertain his interest he had paid 71*l.*, he had never been in arrear, and according to the contract, the remaining 40*s.*, to make him the absolute freeholder would be due between the 31st Jan. and the time of the revising barrister's sitting. On the 31st Jan. he had paid 71*l.* of the 73*l.*, which was to give him a value of 3*l.* per annum, and the revising barrister says, “I find the value of that interest to be more than 40*s.* per annum.” I think he was right in that finding; the claimant here has 40*s.* to pay, and then he has 3*l.* per annum for him and his heirs for ever. That is the distinction between this case and *Copland v. Bartlett*. In that case the court asked the counsel arguing the case,

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what was the value of the mortgagor's interest at the time? how much had he paid? had he become entitled to an interest of the value of 40s. per annum? And Maule, J. says that, as the learned counsel declined to send the case down to be restated in order to ascertain the value of his interest, he must be presumed to have done so, for the best of reasons, because, if a return was made, it would show that it was not of the annual value of 40s. The court therefore came to the conclusion that if the revising barrister had found an interest that amounted to 40s. per annum, and so much money had been paid off as vested an interest in him to that extent, they would have held him qualified; because that was left in doubt he was disqualified beyond all question. Here the revising barrister finds that the mortgagor had an interest of the value of 40s. per annum, and he gives the facts which led him to that conclusion—facts which were left unfound in the former case, and which, if they had been found, would have led to a different result. I think, therefore, the decision should be affirmed.

WILLIAMS, J.—I am of the same opinion. I think the revising barrister was right, and I agree with the view he has taken of the point. But it has been said that we cannot come to this decision without differing from the decision in the case of *Copland v. Bartlett*. But, in my opinion, when that case comes to be narrowly examined it would seem that the point upon which this case turns was not raised in that case. The real contest in that case was this: It was contended on the part of the claimant that the statutes, by enacting that the mortgagor in possession was to vote, gave him a right to vote irrespective of what his interest was when the incumbrance was taken into consideration; and the court decided two points in the case: first of all, that by reason of the language of other statutes upon the question of the qualification of voters, the word "mortgage" was a charge within the meaning of the statute of Hen. 6, and that therefore the enactment that enabled the mortgagor in possession to vote must be considered to give him that right supposing he had 40s. a-year free from charges; and then the second point decided was, that the incumbrance which the member of this building society has is a mortgage within the meaning of that rule. Then in the course of the argument it was suggested that perhaps here the mortgagor had an interest of the value of more than 40s. a-year, deducting the amount of the incumbrance. But the facts in that case were imperfectly stated, and the court being apprised of that fact put it to the counsel arguing the case, "Will you venture to have the case amended?" He declined to advise the parties to have that inquired into, therefore it was clear the estate was not of the value of 40s. a-year when you deducted the incumbrance. Now, here it is clear, as found by the revising barrister, and, that being so, the claimant has a right to his vote.

BYLES, J.—I am of the same opinion, and were it not for the case of *Copland v. Bartlett* I should have entertained no doubt. As the facts are stated they amount to this: A man has an equitable interest and a beneficial interest in an estate of 73*l.* to the extent of 71*l.*, and that 71*l.* is worth more than 40s. a-year, exclusive of all charges; that gives him, as the mortgagor or party beneficially interested within the statutes of Will. 4 and Victoria, a vote. I certainly was embarrassed at first by the case of *Copland v. Bartlett*, but in that case the distinction already pointed out, upon a careful examination, seems to be perfectly well founded. In that case the value of the beneficial interest was not found, and therefore it did not appear that the allotment to him was of the value of 40s. a-year. I cannot help thinking that the counsel here ought to have pointed out the distinction between the payment of in-

terest in respect of principal and where a man pays off the principal, and when he has paid all claims gets the value in another shape in augmentation of the value of his beneficial interest. I therefore cannot help thinking the principle wrong which would reduce the value of a beneficial interest by sums paid from year to year in diminution of the principal: if it were acted on, it would come to this—that if a man mortgages an estate for 500*l.*, the value of which is 400*l.* a-year, and he has to pay 500*l.* in the course of the first year, he would have no beneficial interest at all during the course of the first year. So, if you were to look at the legal relations existing between the parties, there would be the same result. Upon these grounds I cannot help thinking the case of *Copland v. Bartlett* is distinguishable, and if you take the facts of this case, it seems to me free from all doubt.

KEATING, J.—I am of the same opinion. I think that the revising barrister was right. The position of the voter was that of a mortgagor in possession, with an incumbrance upon the land, not reducing his interest in the land below 40s. That is distinctly found by the revising barrister as a fact, that finding having been omitted in the case referred to of *Copland v. Bartlett*. Looking at the case of *Copland v. Bartlett*, I do not believe that the court intended to decide anything beyond that which was decided in the case of *Lee v. Hutchinson*. That was a case in which land, of the value of 5*l.* a-year, was mortgaged for 100*l.* It was held, that the mortgagor there had no vote, simply because he had not an interest in the land to the amount of 40s. a-year. In the present case I think the revising barrister was quite right. *Judgment for the resp.*

Attorney for app., *Henry Smith.*

Tuesday, Nov. 24, 1863.

CROWTHER (app.) v. BRADNEY (resp.)

*Election law—Notice of objection.*

*Where there is more than one list of voters for a parish or borough, a person objecting to the vote of another must, in his notice of objection, state in which list his (the objector's) name is to be found.*

This was a consolidated appeal from the court of the revising barrister for the borough of Kidderminster.

The following case was stated for the opinion of the court:—

At a court held before me for the revision of the lists of voters for the borough of Kidderminster, Geo. Bradney objected to the name of Alfred William Crowther being retained in the list of persons entitled to vote in the election of a member for the borough of Kidderminster. The notice both to the overseers and to the said A. W. Crowther was signed thus: "George Bradney, of Wharf-hill, on the list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of property occupied in the parish of Kidderminster."

The ancient parish of Kidderminster consists of the "Borough of Kidderminster," the Foreign of Kidderminster," and the "Hamlet of Lower Mitton," for each of which separate and distinct overseers, churchwardens, highway surveyors and other officers are appointed and separate and distinct rates are levied. The hamlet of Lower Mitton is within the parliamentary borough of Bewdley.

The said George Bradney in his notices of objection to the respective overseers of the said parishes or districts of "Kidderminster Borough," and "Kidderminster Foreign," addressed his notices respectively as follows:—"To the overseers of the parish of the Borough of Kidderminster," and "To the overseers of the Foreign of the parish of Kidderminster."

Two lists of persons entitled to vote for the parliamentary borough of Kidderminster were made out

C. B.]

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[Ex.]

and published in the present year, one headed "List of persons entitled to vote in the election of a member for the borough of Kidderminster, county of Worcester, in respect of property occupied within the Borough of Kidderminster," purporting to be signed by three persons describing themselves as "Overseers of the Borough of Kidderminster;" and the other headed "List of persons entitled to vote in the election of a member for the borough of Kidderminster in the county of Worcester, in respect of property occupied within the Foreign of the parish of Kidderminster," purporting to be signed by two persons describing themselves as "Overseers of the Foreign of Kidderminster." The name of George Bradney was on the first-mentioned list.

It was objected on behalf of the said A. W. Crowther, that the notices of objection (which were in all other respects good) were insufficient, inasmuch as the said George Bradney stated himself to be on the "list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of property occupied within the parish of Kidderminster." Whereas it should have stated on which of the said two lists of voters his name appeared.

I held, that the notice of objection was sufficient, and the said A. W. Crowther having failed to prove a qualification, I expunged his name from the list of voters.

Twelve other persons, whose names and qualifications are set out in a schedule hereunder written, were also objected to by the said George Bradney, and, failing to prove their respective qualifications, I expunged their names; but the like objection to the notice of objection in each of their cases existed and was taken before me, and I gave the same decision thereon. The parties objected to having given notice that they were desirous to appeal from my decision, I allowed their appeals, and declare that such appeals ought to be consolidated.

If the court shall be of opinion that such notices of objection were insufficient, then the name of the said A. W. Crowther, and also the names of the several other persons mentioned in the said schedule hereto, are to be restored to the respective lists of voters from which the same have been expunged, and the register of voters is to be altered accordingly. But if the court shall be of opinion that such notices of objection were sufficient, the register of voters is to remain unaltered.

(Signed) G. S., Revising Barrister.

Karslake, Q. C. (Bourke with him) for the app.—The notice of objection was objected to on the ground that there was more than one list of voters for the borough of Kidderminster, and the objector did not state on what list his name was to be found. He describes himself as "on the list of persons entitled to vote in the election of a member for the borough of Kidderminster in respect of property occupied in the parish of Kidderminster," and does not state in which parish within the borough he has property. Property in the parish of Kidderminster does not necessarily give a right to vote for a member for the borough, as some of the ancient parish is without the borough. There are two lists of voters, one for the parish of the borough, and the other for the parish of the foreign. [WILLIAMS, J. cited *Samuel v. Hitchmough*, 7 L. T. Rep. N. S. 360; 13 C. B., N. S., 1.] In that case the notice described the objector as a voter of the parish of St. Paul's, and there were two lists of voters for that parish, but they were made out by the same overseers, and were both placed on the same church door, and were in fact only two schedules of one list: (*Edisforth v. Farrar*, 4 C. B. 9.) He describes himself as on the list of persons entitled to vote for the borough when there is no such list, and then he goes on to say "in respect of property occupied in the parish of Kidder-

minster," and that may not be in the borough at all. It is not a question of whether he is entitled to vote, but whether he is on the list of persons entitled to vote:

*Tudball v. Town Clerk of Bristol*, 7 Scott N. R. 486; 5 M. & G. 5.

Welsby for the resp.—There is but one parish, which comprises three divisions, which I may call townships. [BYLES, J.—But they appoint their own overseers and churchwardens?] Yes; but it does not appear that there is more than one parish church. The case of *Samuel v. Hitchmough*, 13 C. B., N. S., 1; 7 L. T. Rep. N. S. 360, is directly in point. Everybody knows that there is but one parish church in Kidderminster, and my contention is, that the two lists, though prepared by different persons, would, when fixed on the same church door, become one list, as in the case of *Samuel v. Hitchmough*. [BYLES, J.—But by the statute (6 & 7 Vict. c. 18, s. 23) the lists are to be published on other places of worship which do not belong to the Established Church, and we must take judicial notice that the presumption is that, in such a place as Kidderminster, there is more than one place of worship.]

Karslake, Q. C. was not called on to reply.

ERLE, C. J.—I am of opinion that the objector must show which of the lists his name is on. This description is not sufficient.

The other learned Judges concurred.

*Judgment for the app.*

## COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Wednesday, Nov. 11, 1863.

BAKER v. THE GUARDIANS OF THE BILLERICAY UNION.

*Poor-law guardians—Action for debt against—Limitation to time for suing—Extension of time by Poor Law Board—22 § 23 Vict. c. 49, ss. 1 and 4.*

The 22 § 23 Vict. c. 49, s. 1, having enacted that "every debt due from the guardians of any union shall be paid within the half-year in which the same shall have been incurred or become due; or within three months after the expiration of such half-year but not afterwards; provided that the Poor Law Board, by their order, may, if they see fit, extend the time within which such payment shall be made for a period not exceeding twelve months after the date of such debt:"

Held, that an action commenced for the recovery of a debt after the expiration of the half-year, and the three months, in a case where the commissioners had not extended the time for payment, was not maintainable, and that a plea, setting up those facts as a defence, was a good answer, although at the date of the issuing of the writ the period to which the commissioners might have extended the time for payment, had they thought fit to do so, had not expired.

Seemingly, if the commissioners think fit afterwards to extend the time, a fresh action may be brought and judgment in the present action would not be a judgment in another and fresh action brought with the authority of such extension.

These were two actions consolidated by order, and by an order of Nisi Prius referred to a medical arbitrator, who stated a special case for the opinion of the court.

The plt. is a medical officer of the Billericay Union. The defts. are the board of guardians of the same union.

The claim is for medical fees beyond the salary to which the plt. is entitled as such officer.

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[Ex.]

The date of the writ in the first action was 9th June 1862.

For the purpose of the case, the pleadings are as follows:—

Declaration, *indebitatus* count.

Plea:—1. Except as to 35*l.* 10*s.*, never indebted. 2. As to the 35*l.* 10*s.* excepted, payment into court. 3. Except as to the 35*l.* 10*s.* excepted, that the matter herein pleaded to was a debt, claim, or demand, incurred by the defts., as the guardians of a union, after the passing of the Act, 23 Vict., intitled "An Act to provide for the payment of debts incurred by boards of guardians in unions and parishes and boards of management in school districts," and that the plt. did not commence any proceedings for the said debt within the half-year in which the same was incurred or became due, or within three months after the expiration of such half-year, nor has the Poor Law Board granted any extension of time for the payment of the said supposed debt or any part thereof, nor was this action commenced within the time limited by the statute in such case made.

The defts. affirm and the plt. denies that the third plea, assuming it to be good in law, is an answer to the plt.'s claim.

The plt. also affirms and the defts. deny that the third plea is bad in substance.

The question for the opinion of the court is, whether the third plea is not bad in substance, and the plt. entitled to have judgment arrested on it.

The 22 & 23 Vict. c. 49, s. 1, enacts that, "With respect to any debt, claim, or demand which may, after the passing of that Act be lawfully incurred or become due from the guardians of any union or parish, &c., such debt, &c., shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards; the commencement of such half-year to be reckoned from the time when the last half-year's account shall or ought to have been closed according to the order of the Poor Law Commissioners or Poor Law Board; provided that the Poor Law Board by their order may, if they see fit, extend the time within which such payment shall be made for a period not exceeding twelve months after the date of such debt, claim, or demand." And sect. 4 of the same Act enacts that "If any person claiming any debt or demand shall have commenced or shall hereafter commence proceedings in any court of law or equity, or before any justice or other competent authority within the time hereinbefore limited, or within the time to which the Poor Law Board may grant extension, and shall with due diligence prosecute such proceedings to judgment or other final settlement of the question, such judgment shall be satisfied by the guardians or managers against whom or against whose officer the same may be brought, notwithstanding that such judgment may be recovered, or such final settlement arrived at after the expiration of the period hereinbefore provided; and all proceedings taken by *mandamus* or otherwise for the enforcing of such judgment without delay, shall be deemed to be within the operation of this section."

At the date of the writ the commissioners might have extended the time if had they thought fit so to do.

D. D. Keane for plt.—The statute prohibits, not the bringing of an action, but merely payment, and is therefore no answer to the action, though possibly it may be to the execution. How this court might act to stay execution I do not know, but the authorities show that if the execution were wrong a court of equity would restrain it. The statute simply says it shall not be paid, but the same section says that it shall be paid within the prescribed time. The only limitation I can find is the one under the 4th section, and if so

it does not meet the case, for plt. had a right to bring his action under the 1st section. The 4th section does not alter the effect of the first, and the effect of the 1st section is only to prohibit payment after the time. [PIGOTT, B.—It prohibits payment of the debt by means of an action. CHANNELL, B. refers to the preamble, which his Lordship reads.] It was defts.' duty to pay within the time, and they now invoke the aid of the section, but do not show any reason for not paying. They are setting up their own wrong. He cited

*Attorney-General v. Wilkinson*, 28 L. J. 392, Ch.;

*Ince v. The Guardians of the City of London Union*, 24 J. P. 358, Q. B. (1860);

*Harrison v. Stickney*, 2 H. of L. Cas. 108.

C. E. Pollock, contra, for defts., was not called on. POLLOCK, C. B.—I am of opinion that the defts. are entitled to judgment. This was an action against poor-law guardians to recover a sum claimed to be due for medical fees, beyond the salary of plt. as the medical officer of the union. Now the Act says substantially that payment of any debt, claim, or demand shall not be made by the guardians unless within half-a-year of the time when it was incurred or became due, or within three months after the expiration of such half-year; but the Act also provides that the Poor Law Board may by their order, if they see fit, extend the time within which payment may be made for a period not exceeding twelve months after the date of such debt, claim, or demand. The present action was brought after the expiration of the two first-named periods of half-a-year and three months, and the question is, whether a plea setting up that fact as a defence is or is not a sufficient answer to the action, or whether, where the Legislature has said that the money shall not be paid, this court is to say that the Legislature, as my brother Bramwell observed, enacted a thing so absurd as that the action might be brought at law, but that the defts. should be at liberty to go to a court of equity, which would be bound to restrain the plt. from proceeding to issue execution? I am of opinion that when a statute forbids a thing to be done no action will lie to enforce the doing of it. There are a large class of cases illustrative of that proposition. For instance, a man promises to do something, the doing of which becomes subsequently unlawful before the time has arrived for the performance of his promise. In that case no action could be brought against him for not doing that which the altered state of the law has made unlawful. So here it is equally consonant with common sense as with law, that, if the money claimed is not to be paid, the creditor cannot maintain an action for it. The difficulty suggested as to the form of the plea may be answered thus: first, it is an answer to say that the time allowed by the Act of Parliament is wholly gone by now, and so judgment may be given for the defts.; or, secondly, if when the plea was pleaded the time was not wholly gone by, the answer is, that the Poor Law Commissioners had not extended the time. Here the action was brought after the two periods first named in the Act had passed, and no extension of time had been granted by the commissioners, and so this action cannot be maintained, none being maintainable until such extension be granted. The action would fail in the first instance for the want of an element in the claim on the part of the plt. which, in a second action, might be previously supplied. The defts. are entitled to our judgment in their favour.

BRAMWELL, B.—I am of the same opinion. Except for the proviso at the end of the 1st section, I should have no doubt at all upon the matter, for where a statute expressly says that a debt shall not be paid, the obvious and sensible meaning of that is, that it is a bar to any action in respect of such debt, and that a man



shall not sue, or if he does, that he shall sue in vain. The only difficulty or doubt which I have felt arose from this, that there is a power given to the commissioners to extend the time. Is, therefore, the statute a bar to the action until the period, within which the commissioners have power to extend the time, has gone by? The answer to that, I think, is probably this, that if the action is commenced after the two first periods limited by the section and before the extension of time by the commissioners, then the action is barred, though, if the board should think fit afterwards to extend the time, then another and fresh action may be brought. Against this view it may be said, that an action, if once barred, is barred for ever; but there are exceptions to that general rule. For example, the case of an attorney bringing an action on an unsigned bill. In one sense he has a cause of action, but it cannot be maintained. The statute runs against him and he is barred; but when he has delivered a signed bill under the Attorneys Act, he can recover. So here the plt. is barred of his action, but not of his claim. It may be that he may afterwards obtain an extension of the time. But in the present state of things our judgment will be for the defts.

CHANNELL, B.—I agree with the rest of the court in thinking that our judgment should be for the defts. The important question in this case is, what is the operation of the statute? I am of opinion that it is a bar to the plt.'s maintaining the present action. We have nothing to do with the consequences which will ensue. It has been held, over and over again, that the language of the enacting clauses of a statute cannot go beyond the preamble, and that is a safe mode of constraining an Act of Parliament. If we look at the preamble of this statute it will guide us to a proper construction of the statute itself. Now the preamble is as follows: [his Lordship reads it.] I think then the case stands clear on the 1st section. That section refers to three periods of time—two of them being definite periods—viz., first, the half-year within which the debt or claim shall have been incurred or become due; and secondly, the three months after the expiration of such half-year; the third period being an indefinite one, viz., the period, beyond such two definite periods, to which the commissioners have power, under the proviso at the end of sect. 1, of extending by their order, if they see fit to do so, the time within which such payment shall be made. Independently of the proviso, the statute means that payment shall only be made within the current half-year and three months beyond it. Then comes the proviso, which in case of any doubt about the limit of the half-year and three months affords a means of relief at the discretion of the commissioners. The plea here negatives that the action was brought within the two definite periods of the half-year and the three months; it negatives also that the board made any order extending the time; and, looking at the 1st section, I think the plea is an answer to the action. But then Mr. Keane has very ingeniously argued that, if we construe the 1st and 4th sections together, the plt. has a right to maintain his present action. I think the 4th section raises no difficulty. It provides that an action must be brought within either the two definite periods limited by the 1st section, or within the time to which the Poor Law Board may grant extension. And if that be done, and the proceedings be prosecuted with due diligence to judgment, such judgment may be satisfied even after the expiration of the period thereinbefore provided. It would have been monstrous had it been otherwise, for a man might then have brought his action, and it might have been resisted by proceedings causing delay and carrying it on over the time limited by the 1st section. I am clearly of opinion that the present action is barred, but I am also inclined to think that a new action may be brought if the plt. can clothe himself

with the requisite authority, the order of the Poor Law Board extending the time. The judgment in the present action will not be a judgment in another and fresh action brought with such authority.

PIGOTT, B.—I am of the same opinion. I have very little to add to what has already been said by the rest of the court. The clear object of this statute was to provide a remedy for the former administration of the poor-laws under which the overseers were in the constant habit of letting matters fall into arrear, and then rates were made retrospectively for the payment of the arrears, and the result was frequent disputes and constant litigation, the costs of which occasionally fell upon the overseers themselves in their individual capacity, so that they could hardly tell what was their duty or position. Then this Act was passed, of which it was the intention and effect both to protect the rate-payers and to define the duties of the guardians. Were we to give judgment for the plt. in the present case, we should entirely defeat the Act of Parliament. It seems to me that everything is made consistent by our holding that this statute is in fact and effect a statute of limitations; if not, we should repeal the statute and embarrass the guardians of the poor. It is impossible to see or to say how far it would go; judgment might be obtained, at the election of a plt., against any one of the guardians discharging a public duty, a proceeding which would be productive of frequent dissensions, and be attended possibly with ruinous consequences to individual guardians. If the plt. can get the time extended, he may bring another action. It is far better so to decide and to hold the plea good, than to take so artificial a view of the Act of Parliament as a contrary decision would involve.

*Judgment for defts.*

Plt.'s attorney, *Eaden*, 10, Gray's-inn-square.

Def't's attorney, *Lewis*.

## CONSISTORIAL COURT OF DERRY. (a)

Reported by W. R. MILLER, Esq., LL.D., Barrister-at-Law.

April, 1863.

(Before CHARLES H. TODD, Esq., LL.D., Vicar-General of the Diocese of Londonderry.)

*Re THE PEWS OF THE CATHEDRAL CHURCH OF ST COLUMB, LONDONDERRY.*

*Pews—Churchwardens—Parishioners.*

*The churchwardens alone have the regulation of the pews in a parish church, even if it also be a cathedral, subject to the control of the ordinary. Every parishioner has a right to be seated, but not to a pew. Persons not parishioners have no right to a pew or a sitting. Rights to pews annexed to messuages by prescription cannot be severed from the occupancy of the messuage. In a cathedral, not being a parish church, semble, there can be no allocation of seats unless by the bishop.*

This was a trial in the matter of the claims of parishioners of Londonderry to have seats in the cathedral of that city, which has been lately repaired and altered. The churchwardens had, with the consent of the dean and chapter allocated certain of the seats to parishioners, as also some to non-parishioners, but the allocation was objected to by other parishioners, and the present proceeding was for the purpose of setting aside the allocation.

Dr. *Battersby*, Q. C. and Dr. *Ball*, Q. C. opposed the allocation, and Dr. *Walsh*, Q. C. appeared to sustain it.

The facts are fully stated in the judgment.

(a) From the *Irish Jurist* by permission.

IRELAND.] *Re THE PEWS OF CATHEDRAL CHURCH OF ST. COLUMB, LONDONDERRY.* [IRKLAND.

Dr. TODD now delivered judgment. He said:—This case comes before me upon a petition presented by the Very Rev. the Dean of Derry. The cathedral church of St. Columb, in Derry, was recently, in the year 1862, renovated, and improvements made in it, to effect which the sittings or pews were altered. These alterations and improvements were effected under a faculty, therefore all the parishioners must have had notice of them, and, having acquiesced in them, they cannot now be heard complaining of the effect of them. An allocation of some of the pews was made by the churchwardens of the parish of Templemore, in which the cathedral is situated, and was confirmed by the dean and chapter. This allocation has given dissatisfaction to certain of the parishioners of Templemore, and some very unseemly proceedings took place in the church, and during Divine service, to terminate which, and to settle all disputes respecting the pews, the dean presented a petition praying that the allocation so made by the churchwardens might be confirmed by this court. Upon that petition being presented a citation issued, calling upon all persons who objected to the allocation to appear before me and state their objections; and accordingly an allegation has been filed on behalf of fourteen parishioners, only seven of whom, however, signed the proxy setting forth several objections. Some observations have been made reflecting on the persons who have thus come forward to object to this allocation, impugning their motives. With their motives, however, I consider I have nothing to do. My sole duty is to see whether their objections are valid in point of law and their grievances reasonable, and such as should be redressed. On the other side, most improper imputations have been cast upon the churchwardens, Messrs. Skipton and Lindsay. I say improper, because not a tittle of evidence has been adduced in support of them. They are said to have been influenced by the most unworthy motives in making this allocation. I must, however, say, in justice to these gentlemen, that they appear to me to have been uninfluenced by any motive but a desire to discharge a most unpleasant duty impartially and to the best of their judgment. Passing by the imputations on one side and on the other, I shall apply myself to the consideration of the objections which have been raised to the allocation, the first and most important of which is, that eight pews have been allocated to persons who are not parishioners of the parish of Templemore. It is contended that such allocation is contrary to law. Two of these pews have been allocated to persons who do not reside even in the diocese of Derry—viz., Sir Robert Bateson and Mr. McClinck. I apprehend, as to them, it is impossible to uphold their allocation; indeed I do not understand Dr. Walsh to contend that this could be maintained. The objection thus raised is a pure question of law, for the determination of which it will be necessary to inquire into the character of this church—that is to say, whether it be a cathedral or a parish church, or both. The Church of St. Columb, in Derry, was built by the London Society in the year 1633, and granted by them to the Bishop of Derry. The licence from King Charles I., to enable the society to make this grant, has been produced. It is dated the 7th Sept., 10 Car. I. By it licence is given to the society to grant the church, together with the chancel, library, vestry and tower thereof, and the ground and soil thereof, and also the churchyard, to the Bishop of Derry and his successors, with this intention, that they should be consecrated to the service of God; and, farther, licence is granted to the bishop to receive, enjoy, and retain the said church, or the fabric of the said church, and the ground and soil thereof, and all and singular the rest of the premises, with the appurtenances, to him and his successors for ever,

“to have and to hold to the said Bishop of Derry and his successors, in free and perpetual alms, the Statute of Mortmain, or any other statute, act, or ordinance to the contrary thereof in anywise notwithstanding.” A plain grant of the church and soil thereof to the bishop and his successors, making this church the bishop's church, and therefore a cathedral church; the bishop's church being so called because it has in it his throne or cathedra. The patent, however, proceeds: “And further, we will, and by these presents, for us, our heirs and successors, determine and ordain, that the said church, or the fabric of the said church, shall be consecrated and dedicated as well for a cathedral church of the Bishop of Derry and his successors, and the Dean and Chapter of the Cathedral Church of St. Columba of Derry, for the time being, as for a parish church, for the use of the inhabitants of the said city of Londonderry, and the parishioners of the parish of Derry, *alias* Templemore.” It is said that the whole city of Derry is within the parish of Templemore; I believe this is so, but it is immaterial for this inquiry. It seems then plain that this church is both a cathedral and a parish church, and was so constituted at its original consecration. It is not within either of the statutes referred to; it is not an ancient cathedral permitted to be used as a parish church, nor a parish church permitted to be used as a cathedral, in either of which cases the church retains its original character; but it is in its original consecration made at the same time cathedral and parochial. It must then have all the privileges, and be subject to the laws relating to both species of church, so far as these laws and privileges are consistent with each other. The bishop, the dean and chapter, and the parishioners of Templemore, have each their rights and privileges, conferred on them at the same time and by the same instrument. The parishioners of Templemore have a right to attend Divine service in it: they have a right to the pews in it, and they had the duty and the burden of keeping it in repair imposed upon them until the abolition of church-rates. Those rights of the parishioners in no way conflict with the rights of the bishop, or of the dean and chapter. Now the law as to pews in a parish church is very well defined and settled; in the present case it has not been questioned. It cannot be more clearly or accurately expressed than it has been by Sir John Nicholl, in *Fuller v. Lane*, 2 Add. 425. He says: “By the general law and of common right all the pews in a parish church are the common property of the parish; they are for the use in common of the parishioners, who are entitled to be seated orderly and conveniently, so as best to provide for the accommodation of all. The distribution of seats rests with the churchwardens, as the officers, and subject to the control of the ordinary. Neither the minister nor the vestry have any right whatever to interfere with the churchwardens in seating and arranging the parishioners, as is often erroneously supposed; at the same time the advice of the minister, and even sometimes the wishes of the vestry, may be fitly invoked by the churchwardens, and to a certain extent may be reasonably deferred to in this matter. The general duty of the churchwardens is to look to the general accommodation of the parish, consulting as far as may be that of all its inhabitants. The parishioners have a claim to be seated according to their rank and station, but the churchwardens are not, in providing for this, to overlook the claims of all the parishioners to be seated, if sittings can be afforded them. Accordingly they are bound in particular not to accommodate the higher classes beyond their real wants, to the exclusion of their poorer neighbours, who are equally entitled to equal accommodation, supposing the seats to be not all equally convenient.” And Lord Stowell, in *Blake v. Ussborne*, 3 Hag. 733, says: “By the general law the use of all pews

belongs to the parishioners; they are to be seated therein, in the first instance, by the churchwardens. The power, however, of the latter is subject to the control of the ordinary, who is to see that the churchwardens exercise their authority discreetly for the proper accommodation of the parishioners at large. This is the law, not merely as held in the ecclesiastical courts, not merely to be found in ecclesiastical authorities, but is the common law of the land, as laid down by the highest common law authorities." Now, it must be borne in mind that in these passages the learned judges I have referred to use the word "seat" in the sense of a sitting, and not of a pew. Every parishioner, rich or poor, has an equal right to be seated, that is, to a sitting for himself individually, not to a pew, which might accommodate several persons. In seating the congregation the convenience of all is to be consulted—all, rich and poor, without money and without price. Sir John Nicholl, in the case I have referred to, after adverting to the allocation of pews to individuals by means of faculties, says: "Some instances there are of faculties at large—that is, appropriating pews to persons and their families, without any condition annexed of residence in the parish; but such faculties are, so far at least, merely void, that no faculty is deemed, either here or at common law, good to the extent of entitling any person who is a non-parishioner to a seat even in the body of the church. As to an aisle or chancel, that, indeed, may belong to a non-parishioner; for the case of an aisle or chancel depends upon and is governed by other considerations. But whenever the occupant of a pew in the body of the church ceases to be a parishioner, his right to the pew, however founded, and how valid soever during his continuance in the parish, at once ceases and determines, though the contrary is very often supposed. So again of pews annexed by prescription to certain messuages; it is often erroneously conceived that the right of the pew may be severed from the occupancy of the messuage. It is no such thing. It cannot be severed, it passes with the messuage, the tenant of which, for the time being, has also *de jure* for the time being the prescriptive right to the pew." In *Walter v. Gunner*, 1 Hagg. Cons. 314, referred to by Dr. Battersby, which was a proceeding calling upon the churchwardens of Teddington to seat Mr. Walter, the churchwardens put in a return to the citation stating that the church was small, and amongst other things that there was a custom in the parish by which certain seats appurtenant to houses were let by the owners to non-parishioners. Lord Stowell held the return bad, since it pleaded a custom which is evidently illegal, and cannot be supported, viz., that pews are appurtenant to certain houses, and let by the owners to persons who are not inhabitants of the parish. "All private rights," he says, "in pews must be held under a faculty or by prescription, which presumes a faculty, and no faculty was ever granted to that effect, for the ordinary must have exercised his discretion to depopulate the church of its own proper inhabitants if he could have granted such a faculty." This is strong language, indicating that to allocate a pew in a parish church to a non-parishioner would be a most improper exercise of the discretion of the ordinary. *Byerley v. Windus*, 5 B & C. 1, referred to by Dr. Walsh, was a case of prohibition. Staple-inn, Holborn, claimed seven pews in the parish church of St. Andrew, Holborn. The libel in the Ecclesiastical Court stated that Staple-inn was extra-parochial, and surrounded on all sides by the parish of St. Andrew; that the inn had held these pews and repaired them from time immemorial. A prohibition was prayed, on the ground that the Ecclesiastical Court could not try a question of prescription. Judge Bayley, delivering judgment, said: "The claim in question is by non-parishioners in respect of messuages out of the parish.

These messuages are in no parish, but are extra-parochial, and surrounded on all sides by the parish of St. Andrew. But what right can the inhabitant of an extra-parochial place have in the body of a parish church, except by prescription? He contributes to none of the expenses of the church; they are borne exclusively by the parishioners. To whom does the use and enjoyment of the body of the church belong? To the parish and its inhabitants. The ordinary, indeed, has the right of disposing of seats; but can he dispose of them to a non-parishioner? I apprehend not. Is not his right confined solely to resident parishioners? I take it to be clear that it is. Why is a faculty to a man and his heirs bad? Because it proposes to give the right, whether the man and his heirs continue resident or not. Why cannot a seat be claimed, either by faculty or prescription, as appurtenant to land? Because it is in respect of inhabitancy that it is to be used. Why, if a man quits the parish, is his right to use a seat, whatever was the nature and origin of that right, at an end? Because he has ceased to be a parishioner. Why, if a seat is appurtenant to a house, cannot the owner of the fee restrain his tenant from the use of it? Because the seat is for the benefit of the house—for the inhabitant of the house; not for the benefit of the owner if he cease to inhabit it. Upon authority and principle," he says, "I am of opinion that extra-parochials cannot retain a pew in the body of a church otherwise than by prescription, if they could do so by prescription." In *Lousely v. Baywood*, 1 Y. & Jer. 583, a case which was decided about the same time as *Byerley v. Windus*, though it was not referred to either in the argument or in the judgment in that case, Chief Baron Macdonald held that a seat in the body of a church might be prescribed for by a non-parishioner, as appurtenant to a house not in the parish, on this ground—that the house might have been at one time in the parish, and therefore the prescription might have had a legal origin. This case seems to conflict with *Byerley v. Windus*; but they are capable of being reconciled. In *Byerley v. Windus* the pleading stated that Staple-inn had been always extra-parochial, not belonging to any parish, and therefore it showed on the face of it that the prescription could never have had a legal origin. However, I am far from acquiescing in the judgment of the Chief Baron. I do not think it is good law. I think, as regards a pew in the body of a parish church, the right thereto ceases, no matter how created, or how long it had existed, the moment the occupier ceases to be a parishioner, whether by leaving the parish or the parish leaving him. He ceases to be liable to the obligations and burdens of a parishioner. Why should he enjoy the rights of one? However this may be, it is plain that a non-parishioner cannot claim a pew by any means but by prescription, if he can by that. There is no case of prescription here. The church itself was built only in 1663. It is then clear, both by the ecclesiastical law and the common law, that a pew or sitting cannot be allocated to a person who is not a parishioner. So much is this the case that a faculty to a man and his heirs is bad, because they may become non-resident. If such a faculty is bad because, by possibility, he or his heirs may become non-parishioners, *à fortiori*, a faculty to a non-parishioner would be bad; and, if a faculty would be bad, it would be difficult to maintain that it would be either a legal or a prudent exercise of the discretion of the ordinary to allocate a pew to a non-parishioner by a less formal instrument. But it is said that some of these non-parishioners occupied seats in a gallery which had been removed during the alterations, and which gallery, it is said, had been erected by them, or those under whom they claim. It is not the case that any of these persons themselves

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erected the gallery, and it is not shown how they claim under those who did, or what right or power those persons had to give their pews to them. But even if they had erected the gallery, I do not think that circumstance, without a faculty, to which there is no pretension, would give a non-parishioner any right or claim to a seat. An aisle and a gallery rest on totally different grounds. A gallery is an erection in the body of a church, annexed to the church, and forming part of that which the parishioners are bound to repair; an aisle is an addition to the building. It is further argued, that this is a cathedral, that the cathedral is the parish church of the whole diocese, and that the bishop can, therefore, allocate a pew or seat in it to any person within the diocese, as all are parishioners of it. It is true, that the cathedral is the parish church of the whole diocese, because it is the church of the bishop, who has the cure of souls of the whole diocese; and, though all of the diocese may receive the sacrament there, or be married there, yet they are not bound to do so; nor were they liable to repair the cathedral, except in cases where all other funds failed. They have not, therefore, in a cathedral any parochial rights. As to seats in a cathedral, I can find nothing in the books of our law upon the subject. But Francis, in his work, "De Cathedralibus," c. 5, speaking of the nave of the cathedral, where alone the laity could properly go, says: "In which part of the church, if there should be forms or benches for the laity, and it be necessary to regulate them, the regulation of them belongs to the bishop; but seats ought not to be permitted." It would appear then, to be the law that seats in the nave of a cathedral ought not to be allocated at all, that the nave should be free for all persons of the diocese; at all events, the inhabitants of the parish in which the cathedral is placed have no rights in a cathedral; and if the bishop were to allocate a pew in a cathedral to any person in the diocese, it is probable that no one would have a right to question it. This possibly may be so in a church that is solely a cathedral; but in this church, which, in its original consecration, was made a parochial as well as a cathedral church, in which the parishioners of Templemore have rights, I am of opinion the distribution and allocation of pews must be governed by the law applicable to parish churches, and, consequently, that seats cannot be allocated in this church to persons who are not parishioners, and that this allocation must be amended in that respect. This will affect the allocation of three pews and four half pews. The pew allotted to Miss Dogherty is not affected by this ruling, and I shall not displace her. The other objections are all to the mode in which the churchwardens have exercised that discretion which the law gives them. I see no reason to believe that they have been guided or influenced by any improper or unworthy motive, or that they have not exercised a sound discretion. I shall not, therefore, interfere with this allocation, except where I think the churchwardens have erred in point of law. I cannot believe that they would allocate pews to parishioners who do not attend the church, or, if they did, that the dean and chapter would sanction such allocation. What, then, is to be done with these pews that have been improperly allocated? I have read carefully the allegation of the opposers. I cannot find it in any statement that any of them, except Mr. Hempton, were in the habit of attending the cathedral before the alterations; that they have been prevented, by this allocation of pews, attending the cathedral, or either of the other churches; that they reside nearer to the cathedral than the other churches, and that attendance on the other churches would be inconvenient to them or their families. It is evident the cathedral cannot accommodate all. I can find nothing, either in the allegation or in the memo-

rial sent to me, to enable me to make a selection from these persons, and allocate those pews to them; but I find it stated in the allegation that, by the alterations in the cathedral, the number of free seats have been greatly reduced. I regret this much. What I shall do is, I shall send this allocation back to the churchwardens, or rather, to the present churchwardens, directing them to allocate these pews among the existing occupiers of pews, in such a way as to increase the number of free sittings. There is but one observation further I desire to make, and it is addressed to those who shall be allotted pews. I wish them to understand that such allocation gives them no property in the pew. All the pews in this church are the property of the bishop. All a parishioner acquires by an allocation of a pew by the churchwardens is, a right to sit in it—a mere easement; he has no right to exclude others from it, if he and his family do not occupy the entire of it. The churchwardens have a right to fill the pews, even those allocated to parishioners. A man has no right to keep a pew unoccupied. I will give no costs.

## CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 14, 1863.

REG. v. THOMAS AND WILLETT.

*Treasure trove—Concealment from the Crown—  
Occultatio fraudulosa—Evidence.*

*In an indictment for concealing the finding of treasure trove from the Crown, it is not necessary to aver that the prisoner concealed it fraudulently. The words "unlawfully, wilfully and knowingly," are sufficient.*

*A., in ploughing, found large rings of old gold of considerable value and sold them for brass to B. for 5s. 6d., saying where he found it. B. afterwards found out that they were gold and offered them to a jeweller for sale as gold. Then B. said he had sold them to C. for brass. Then B. and C. were at a bank together, depositing part of the proceeds for which C. had sold the gold rings:*

*Held, that there was evidence to support a conviction of both B. and C. for knowingly concealing treasure trove from the Crown.*

Case reserved for the opinion of this court by Bramwell, B., at the Sussex Summer Assizes 1863.

(Copy Indictment.)

Sussex, to wit.—The jurors for our Lady the Queen upon their oath present that heretofore and before the committing of the offence hereafter mentioned, to wit, on the 12th day of Jan. A.D. 1863, one William Butchers, a labourer, in the employ of one Thomas Adams, farmer, of the parish of Mountfield, in the county of Sussex, while he, the said Wm. Butchers, was ploughing in a certain field in the occupation of the said Thomas Adams, at the parish aforesaid, in the county aforesaid, did find hidden in and under the ground and soil of the said field certain treasure of gold of the value of 500*l.* and upwards of lawful money of Great Britain, and which said treasure was of ancient time hidden as aforesaid, and the owner whereof at the time when the same was so hidden as aforesaid cannot now be found. And the jurors aforesaid upon their oath aforesaid, do further present that our Lady the Queen, in right of her Royal Crown, and by virtue of her Prerogative Royal, is, and at the time of the said finding was, entitled to the said treasure so found as aforesaid. And the jurors aforesaid upon their oath aforesaid, do further present that Silas Thomas, of the parish aforesaid, in the county aforesaid, labourer, and Stephen Willett, of the parish of Ore, in the county aforesaid, labourer, from the said 12th day of Jan. in the year aforesaid to the time of taking

this inquisition did unlawfully, wilfully and knowingly conceal the finding of the said treasure from the knowledge of our Lady the Queen, against the peace of our said Lady the Queen, her crown and dignity.

(Copy Inquisition.)

Rape of Hastings, Sussex, to wit.—An inquisition taken for our Sovereign Lady the Queen, at the dwelling-house of Richard Thompson, known by the name of the John's-cross Inn, in the parish of Mountfield, in the rape of Hastings, in the county of Sussex, on the 27th March 1863, before me, Nathaniel Polhill Kell, gentleman, coroner for the said rape, by virtue of my said office, and of the statute in that case made and provided, upon the oaths of Isaac Mannington, James Crouch, Thomas Buss, Robert Fuller, Daniel Olney, John Pinyon, Edward Muggeridge, Thomas Badcock, James Moon, Richard Jempson, George Hayward and Isaac Thompson, the several persons whose names are hereunder written and seals affixed, good and lawful men of the said rape duly chosen, and hereby assembled before me at the time and place aforesaid, and now here duly sworn and charged to inquire on the part of and for our Sovereign Lady the Queen, of and concerning certain treasure lately found in the earth and soil of and in a certain field situate and being in the said parish of Mountfield, and in the occupation of one Thomas Adams, of the said parish of Mountfield, farmer; and they, the said jurors, being duly sworn and charged, upon their oath aforesaid, to inquire on the part of our said Lady the Queen of and concerning the said treasure as aforesaid, and having heard evidence upon oath produced to them, do, on their oath aforesaid, say, that on the 12th Jan. 1863, William Butchers, of the said parish of Mountfield, labourer, being employed by the said Thos. Adams in ploughing in the said field, did then and there find deposited, hidden and concealed in and under the earth and soil of the said field, in the parish of Mountfield aforesaid, in the rape aforesaid, certain pieces of old gold of the weight of 11lbs., or thereabouts, and of the value of 530*l.* and upwards sterling of current moneys of this realm, and which said pieces of old gold were of ancient times deposited, hidden and concealed as aforesaid, and that the owner or owners whereof cannot now be known. And the jurors aforesaid, upon their oath aforesaid, do further say that the said several pieces of old gold so deposited, hidden, concealed, and found as aforesaid, before and at the time and so finding the same as aforesaid, were, and from thence hitherto have been, and still are, the gold, money and property of our said Lady the Queen; of the jurors aforesaid, upon their oath aforesaid, do further say that the said William Butchers and Silas Thomas, of the said parish of Mountfield, bricklayer, and Stephen Willett, of the town and port of Hastings, cab proprietor, from the time of the said finding, until and at the time of taking of this inquisition at the said parish of Mountfield, in the said rape of Hastings, in the said county of Sussex, concealed the said finding of the said several pieces of old gold from me the said coroner, and from our said Lady the Queen, and did not make known the said finding to any person or persons whomsoever lawfully authorised or empowered to receive the said old gold, or the information respecting the finding thereof, on behalf of our said Lady the Queen. And the said jurors do further say that the said William Butchers and Silas Thomas are now respectively in full life and living in the said parish of Mountfield, in the said rape of Hastings, and that the said Stephen Willett is also now in full life and living at the town and port of Hastings aforesaid. In witness, &c.

The prisoners' counsel having addressed the jury, a verdict of "Guilty" was returned.

The following questions were reserved for the opinion of the Court of Criminal Appeal:—

1. Whether the indictment and inquisition, or either, is sufficient in law?

2. Whether the evidence against both prisoners, or either, was sufficient to justify the verdict.

*Denman, Q.C. (Hance with him) for the Crown.*—It is submitted that the conviction was good. The points reserved were:—1. Whether the indictment is good? 2. Whether there is evidence to go to the jury? The indictment alleges that the prisoners "unlawfully, wilfully and knowingly" concealed the finding of the treasure from the Queen, and it was contended at the trial that it was bad for not averring that the prisoners concealed the treasure "fraudulently." The prisoner's counsel argued that the word "fraudulently" was necessary, on the authority of the following passage in Co. 3rd Inst. c. 58:—"Treasure trove is, when any gold or silver, in coin, plate, or bullion hath been of ancient time hidden, whosoever it be found, whereof no person can prove any property, it doth belong to the King, or to some lord or other by the King's grant or prescription. The reason wherefore it belongeth to the King is a rule of the common law, that such goods whereof no person can claim property belong to the King, as wrecks, strays, &c. . . . It appeareth by Bracton and Glanvil also, that *occultatio thesauri inventi fraudulosa* was such an offence as was punished by death." It will be found, however, if the authorities are carefully examined, that "fraudulosa" in this passage means nothing more than the wilfully and knowingly concealing the treasure trove. In Black. Com. 295, treating of the King's prerogative, "treasure trove" is stated to be "where any money or coin, gold, silver, plate, or bullion, is found hidden in the earth or other private place, the owner thereof being unknown, in which case the treasure belongeth to the King." In Glanv. lib. 1, c. 2, the words used are, "*occultatio inventi thesauri fraudulosa*;" and in lib. 14, c. 2, it is said, "A plea de *occultatione inventi thesauri fraudulosa* is usually managed in the manner above stated where a certain accuser appears." (Beame's translation, Lond. 1812, p. 352.) In Bracton, lib. 3, de Coronis, ff. 119, 120 (edit. 1569), the words are "*quasi crimen furti scilicet occultatio thesauri inventi fraudulosa* . . . est autem thesaurus quedam depositio pecunie vel alterius metalli, &c." In Britton (edit. 1640) De Coroners, c. 1, the word "maliciously" and not fraudulently is used, "*Et volens que come nule felonie ou mesaventure soit avouee ou que trezor soi trove desouthe terre manovegement musce*." The translation by Kelhan (edit. 1762), is "It is our pleasure, as soon as any felony or misadventure has happened, or treasure be found *designedly* concealed under ground," &c., that the coroner, as soon as he has notice, issue his precept. See also,

Fleta, p. 61;

The Mirror, c. 1, s. 13; c. 3, s. 18, pp. 43, 165; and

Stat. 4 Edw. 1, st. 2;

Staufordre pleas del Coron. (1583-90), c. 42, p. 39, tit. "Treasure trove;"

Chitty's Perog. (edit. 1820) p. 152;

Hawk P. C. C. 101, s. 57.

The result of the authorities is, that "fraudulosa" is not the essential word in the indictment, and need not be alleged. The offence is the knowingly concealing treasure trove without making it known to the coroner. The only precedent of an inquisition the Crown officers have discovered, is one drawn by Lord Abinger, when Attorney-General, of which the inquisition in this case is a copy. The indictment contains the additional words "unlawfully, wilfully and knowingly." Secondly, the offence was proved as against both prisoners. It is shown that treasure trove having been found, the prisoners knew it, and while it was in their possession concealed it from the Queen.

[MARTIN, B.—I do not see that the evidence is so clear that Thomas did know that what he was buying was gold.] There is evidence that he knew the circumstances under which the things were found; but not that at the moment of the purchase he knew that they were other than brass. [MARTIN, B.—The evidence is that Butcher found the metal which he believed to be brass, and that Thomas bought it of him under the same belief, but afterwards discovered that it was gold and neglected to give any information.] The policeman's evidence is important to show that both were knowingly concealing the finding of the treasure from the Crown.

*Ribton (amicus curiæ)* referred the court to *Reg. v. Fitzsimons*, 4 Cox. C. C. 246. In that case the Court of Criminal Appeal in Dublin held that it was necessary in an indictment on the 31 Geo. 3, c. 31, for driving away cattle under colour of a civil bill decree, to aver that the party did so fraudulently.

BALE, C. J.—I am of opinion that in this case the conviction was good. It appears to me, first of all, with respect to the form of the indictment, that there is no law which has said that it is essential to the validity of the indictment that the concealment should be charged to be a fraudulent concealment. The old authorities describe that the offence consists in the "*occultatio fraudulosa*," for two or three use the word *fraudulosa*, and two or three more show clearly what they mean by it, viz., that the party knew that he was concealing from the King treasure trove without any of the excuses which it is afterwards said the party may bring forward. He may say, "I hid it myself." He may say, "My friend hid it and I knew it at the time, and I always intended to find it." He may have other causes which will justify the concealment. We find that the meaning of the words "*occultatio fraudulosa*" in the earlier writers was an unlawful concealment, because the offence is, that if you know that it is treasure trove and do conceal it you are guilty of an unlawful act, "*occultatio fraudulosa*," unlawful concealment. The whole line of authorities, which we are very much obliged to Mr. Denman for going through, satisfies us that it is by no means the essence of the offence that it should be a fraudulent concealment. If a statute makes an offence and uses a word by which the debt is to be indicted under that statute, that word must be used. If a statute gives a short form of indictment and says that the description of the offence may be as follows, then using that short form of indictment, the leaving out of the essential description which is given in that short form loses the benefit of the statute which gives that form. Nothing of that sort applies to the present case. Then as to the offence itself, the law is perfectly clear. At one time this was a branch of the revenue to which importance was attached. Probably it may have been, after disturbed times, a source of considerable wealth. The Queen has a right to the treasure which is concealed, and the party who finds it is bound not wilfully to hinder the finding from coming to the knowledge of the Queen's officers. If he is guilty of a wilful act of concealment by which he has deprived the Queen of this treasure, that is the offence which all the law writers have laid down, and that is the offence charged in this indictment. The facts are, that a ploughman came upon a quantity of gold; that he was a perfectly innocent finder; that he believed it to be brass, because he sold it for brass. But the two persons here indicted, namely, Thomas and Willett, knew from the beginning that it was gold, and knew where it was found, from Butcher the finder; they got from him with a payment as for brass the gold which he had so found; they sold it for its value as gold; they continued to assert with falsehood that they had received only brass and sold it for brass. To my mind there is

very clear evidence that Thomas was informed by Butcher of the field where the treasure was found, and the nature of the article, and Thomas from the beginning said, "My brother-in-law will dispose of it." That brother-in-law being Willett, was applied to; he said, "I have been in California; I know what gold is;" and he is the person who takes this for brass; he joins in paying for it as brass; and is the man who sells it for gold, and has the benefit of the account which is opened out of the proceeds.

WIGHTMAN, J.—Agreeing, as I do, with the Lord Chief Justice in the nature of the offence which is charged, I should not have thought it necessary to say one word upon the matter, but that I am not satisfied that in this case there was not any sufficient evidence to show that Willett knew of the finding of the treasure. The offence is, the concealing the finding of the treasure, knowing that it had been found under such circumstances as would make it treasure trove and render it necessary to inform the Queen of it. But in this case I do not find any evidence to satisfy me that Willett knew that it was treasure trove, and that it had been found under such circumstances as would make it treasure trove. He seems to have given a very inadequate price for it, and if this had been an indictment for receiving stolen goods knowing them to have been stolen, there certainly might have been sufficient to warrant a conviction. But, as it is, I confess that I am not satisfied (I say no more than that) that there was sufficient evidence to warrant any verdict as against Willett. However, the rest of the court are of opinion that there was sufficient evidence, and therefore it is unnecessary for me to say more than that I do not feel satisfied that it was sufficient.

WILLIAMS, J.—I am of the same opinion as the Lord Chief Justice upon the law and upon the question whether there was sufficient evidence against Willett. I think that it was for the jury, and I would only say that I think that, in addition to the direct evidence in the case, there is a fact which must not be lost sight of, and which would probably be considered by the jury, namely, the extraordinary and significant nature and appearance of the articles.

MARTIN, B.—I am also of the same opinion. I take the offence to be that which is stated in the passage read from the Third Institute, that it is a fraudulent concealment of found treasure, that treasure being gold or silver. The first question is, is that alleged in the indictment? And it seems to me that, in the absence of any authority to the contrary, the allegation that the prisoners unlawfully, wilfully and knowingly concealed the finding amounts to that. If there had been any authority to the effect that the word "fraudulent" must of necessity be used in the indictment, I would have bowed to it, but the authority cited by Mr. Ribton by no means goes to that effect. I have looked into the precedents in Chitty on Pleading, and the text also, and I find no case which goes the length of saying that, when special demurrers existed in an action for false and fraudulent misrepresentation, the word "fraudulent" must of necessity be used, and that it would not be competent to use equivalent words. If that be so, it seems to me that the indictment is right. The next question is, is there evidence against these two prisoners? Now the doubt which I had originally, and the reason why I requested Mr. Denman to read the evidence was, that it struck me that the offence was committed upon the first concealment, namely, that the first person who arrived at the knowledge that this article had been found in the manner in which it was found, and who knew that it was gold, was the guilty party, and if there had been any guilty party anterior to the two prisoners, I should have required to have looked into the authorities upon accessories. But it seems to me clear that Butcher was an innocent agent in this matter, and was not guilty of any crime at all, and

that the first person who was criminally guilty was Thomas, he being aware of the fact that it was gold. And I own that it seems to me that the question is not whether, if I had been a jurymen, I should have convicted the prisoners, but whether there was evidence to go the jury, and whether my brother Bramwell was bound to let the case go to them; and without saying that if I had been upon the jury I should not have participated in the doubt of my brother Wightman and have acquitted the man Willett, it seems to me that the most probable state of things is that the first prisoner Thomas bought this article believing that he had made a good bargain of brass; that he then went to his brother-in-law, and that they made some further inquiry about it, and I should apprehend that the two together ascertained it to be gold by going to a goldsmith, and that being ascertained, Thomas sent Willett to London, and he got the money, and they divided it between them. It appears to me that such was the transaction, that there certainly was evidence to go to the jury, and that we must uphold the conviction.

BRAMWELL, B.—I cannot help saying with very great respect that it appears to me that there is evidence against Willett. He says, "I bought it for brass and sold it for brass. I gave 6d. a pound for it, and sold it for 6½d." That is utterly untrue. It shows that he knows something wrong has been done which must be concealed, and if it had been shown *alunde* that this gold had been stolen, this would prove guilty knowledge. But where you show *alunde* that another offence has been committed, why does not this show guilty knowledge? It seems to me almost a matter of demonstration that it does show it. Supposing that it had been a case of stealing, it shows guilty knowledge on the part of Willett, and I therefore think that there is evidence against him.

*Conviction affirmed.*

(Before ERLE, C.J., WIGHTMAN and WILLIAMS, JJ., MARTIN, B., and KEATING, J.)

REG. v. ISRAEL HILLMAN.

*Procuring poison or noxious thing—Intending to be used—Abortion—24 & 25 Vict. c. 100, s. 59.*

*A person supplying a noxious drug to a woman with the intent that the woman should use it for the purpose of producing a miscarriage, is guilty of a misdemeanor within the 24 & 25 Vict. c. 100, s. 59, although the woman herself did not intend to take it.*

Case reserved for the opinion of this court by the Chairman of the Wiltshire Quarter Sessions.

At the Midsummer Quarter Sessions for the county of Wilts, holden at Warminster, in the said county, on the 30th June 1863, Israel Hillman was charged in and by an indictment framed under sect. 59 of the 24 & 25 Vict. c. 100, with unlawfully applying and procuring a certain poison or noxious thing called savin, knowing that the same was intended to be unlawfully used or employed by one Sarah Carrier to procure the miscarriage of the said S. Carrier.

Upon the trial it was contended by the counsel for the deft. that there was no case against the deft. because amongst other objections it was necessary that the deft. should know that the poison or noxious thing is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whereas it was not so intended, except by the deft. himself, to be used at all.

I left the facts to the jury, and they being satisfied, as the evidence well warranted, that the case was in other respects proved, found in answer to the questions of the court, and in accordance with the evidence, that the prosecutrix did not intend to take the substance in

question, nor did any other person except only the deft. himself, intend that she should take it.

The jury then under my direction found a verdict of guilty, and the court admitted the deft. to bail to appear at a future sessions to receive sentence (if necessary), and I now pray the opinion of this honourable court as to whether or not the intention of any other person besides the deft. himself that the substance should be used to procure a miscarriage is necessary to constitute the offence with which the deft. was charged.

J. W. AUDRY,

Chairman of the Quarter Sessions.

T. W. SAUNDERS for the prisoner.—The 59th section enacts that whosoever shall procure any poison or noxious thing knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor. This section creates a new offence and contemplates a case only where the procurer and the recipient have the same intent. Here it is found that the woman did not intend to take the poison. The present case is not within the section, and it may be *casus omissus*.

ERLE, C.J.—The question is, whether or not the intention of any other person besides the deft. himself, that the poison or noxious thing should be used to procure a miscarriage, is necessary to constitute the offence charged under the 24 & 25 Vict. c. 100, s. 95. We are all of opinion that that question must be answered in the negative. The statute is directed against the procuring or supplying of poison or noxious things for the purpose of procuring abortion with the intention that they shall be so employed, and knowing that it is intended that they shall be so employed. The deft. knew what his own intention was, and that was, that the substance procured by him should be employed with intent to procure miscarriage. The case is therefore within the words of the Act. We confine our judgment to the question submitted to us. The conviction will therefore be affirmed.

The rest of the Court concurring,

*Conviction affirmed.*

## COURT OF COMMON BENCH.

Reported by W. MAYN and LUMLEY SMITH, Esqrs., Barristers-at-Law.

### REGISTRATION APPEALS.

Saturday, Nov. 21, 1863.

BENNETT (app.) v. BLAIN (resp.)

*Election law—County vote—Shares in joint-stock company provisionally registered—Provision in deed of settlement that shares should be personally—7 & 8 Vict. c. 110, s. 58.*

The app. claimed a right to vote for the county of L. in respect of one share in a freehold corn exchange from which he derived more than 40s. per annum. The corn exchange belonged to a company of shareholders, established in 1837, and registered under the 7 & 8 Vict. c. 110, s. 58. In accordance with the company's deed of settlement the freehold land upon which the exchange stood was vested in trustees. The affairs of the company were transacted by a committee of shareholders called the committee of management, and the profits derived from the corn exchange were divided by the committee among the shareholders. The shares in the exchange were declared by the deed of settlement to be the personal property of the shareholders, and to be transferable in the mode prescribed by the trustees:

*Held, that the app. had no freehold interest in land in respect of his share in the corn exchange entitling him to the franchise claimed.*

At a court held before one of the revising barristers

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BENNETT v. BLAIN.

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appointed to revise the lists of voters for the southern division of the county of Lancaster, at Manchester, on the 13th Oct. 1863, the name of James Bennett was objected to as not being entitled to be retained or inserted in the Manchester list of voters for the southern division of the county palatine of Lancaster. The revising barrister disallowed the claim and stated the following case:—

The said James Bennett is entitled to one share in the Manchester Corn Exchange, in Hanging-ditch, in Manchester aforesaid, from which he receives more than 40s. per annum.

The company of proprietors of the Manchester Corn Exchange was established by deed of settlement dated 20th Jan. 1837. (A printed copy of the deed accompanied the case.)

The land upon which the corn exchange is built is freehold, and was conveyed to and is now vested in trustees. The income is derived from letting the offices and cellars under the large room, from letting stands in the hall or large room for the use of subscribers on the day on which the corn-market is held, and the right of personal entrance to the building, and also from the money paid for the use of the large hall for public meetings, concerts, &c.

The company has only been registered under the 7 & 8 Vict. c. 110, s. 58, and the following is a copy of the certificate:—

"Certificate of formal registration of the Manchester Corn Exchange Company, pursuant to the Act 7 & 8 Vict. c. 110.

"I, Frederic Rogers, Esq., registrar of joint-stock companies, do hereby certify that the company of proprietors of the Manchester Corn Exchange Company is registered pursuant to the 58th section of the above-mentioned Act.

"Given under my hand and sealed with my seal of office, Jan. 8, 1845. "FREDERIC ROGERS,

"Registrar of Joint-Stock Companies."

It was objected—First, that the said company, being registered as above, became a corporation; and the case of *Bulmer v. Norris*, K. & G. 321; 3 L. T. Rep. N. S. 470, was cited on that point. Secondly, that the interests of the proprietors was merely personalty, and did not confer the right of voting. Upon each of these grounds the revising barrister disallowed the vote. The votes of thirty-eight claimants were also disallowed, who claimed under precisely similar facts, and the revising barrister granted appeals in each case, which were consolidated. The names of all the apps. as they appeared on the list of claimants to vote were appended to the case. The form used in each case was similar to the following:

Name.	Aboda.	Nature of Qualification.	Where situate.
Bennett James	Yew-tree-cottage, Crampsell.	Share in Freehold Corn Exchange.	Hanging-ditch

If this decision be wrong, the names of the apps. are to be restored to and inserted in the register.

*Hannen* for the app.—The company has never been completely registered, but only formally registered for the purpose of protecting the directors. By 7 & 8 Vict. c. 110, s. 59, a company is to be considered as incorporated on certificate of complete registration. In *Bulmer v. Norris* the company had been completely registered, which distinguishes that case from the present. As to the second point, it is true that the company's deed provides that the shares shall be considered as personalty, but the agreement of parties can have no effect to destroy the ordinary incidents attaching to the possession of realty. One of those inci-

dents is a right to vote in respect of a freehold producing 40s. per annum. [KEATING, J. referred to *Baxter v. Brown*, 7 M. & G. 198.] The case of a partnership was there expressly distinguished from that of a company incorporated by Act of Parliament. When the partners executed the partnership deed in that case, and declared that the estate and lands belonging to the partnership should be deemed personalty; they had no intention of depriving themselves of their right to vote in respect of their interest in the lands, and so when this corn exchange was projected there was no such intention on the part of the projectors.

*Welsby*, for the resp.—As to the second point, the interest of the app. in the corn exchange is personalty only. The rule is well expressed in *Rogers on Elections*, 7th edit. 132, where *Bligh v. Brent*, 2 Y. & C. 268, is cited. The property here is conveyed to trustees, whose duty it is to divide the profits between the shareholders. The shares are, according to the deed, to be transferable in any manner prescribed by the trustees, and the mode of transfer prescribed may be quite inapplicable to real property. If the app.'s contention is right it will be difficult to say who are the persons equitably seised. Would the executors of deceased shareholders be equitably seised? Would new shareholders be so? This case is distinguishable from *Baxter v. Brown*. [WILLIAMS, J.—That case is criticised by Lord St. Leonards in *Myers v. Perigal* (reported at law, 11 C. B. 90; in equity, 16 Sim. 533; and on appeal, 2 De G. M. & G. 599), which decided that shares in a joint-stock bank which possessed real estate were not within the Statute of Mortmain.] Shares in gas companies have been held not to come within the Statute of Mortmain, and the interest of a shareholder in a mine worked on the cost-book principle is personalty and not realty:

*Waller v. Richardson*, 2 M. & W. 882;  
*Thompson v. Thompson*, 1 Coll. Ch. Rep. 381;  
*Watson v. Spratley*, 10 Ex. 222;  
*Edwards v. Hall*, 19 Jur. 1189; 25 L. J. 82; Ch.

*Hannen* in reply.—When an Act of Parliament directs that shares in a company shall be considered to be personalty, no difficulty can arise; but from such cases no analogy can be derived which shall govern the present case. The committee here have the power of letting the rooms. The trustees are not consulted about the management or control of the business, which is entirely in the hands of the proprietors and their committee. The proprietors are in the position of *certainis que trust* left in possession by their trustees.

ERLE, C. J.—I am of opinion that the revising barrister in this case was right in holding that the franchise was not gained. He was right in respect of the one ground that he takes first, namely, that the shareholders in this company have not an interest in land. I think he was wrong in holding that the shareholders in this company were in the nature of a corporation, and were deprived of any of the interests which the individuals had held, because they had been parted with by reason of the rights vested in the corporation. The company was formed for the purpose of establishing a corn exchange in Manchester. The legal estate in the land is vested in trustees under a deed, and it is the duty of the committee of management to make profit of the land, and, after paying the expenses, to divide the profits among the shareholders. I am of opinion that the effect of the deed is to give each shareholder a right to call for his share of the profits, but that he has no right to a share of the land. The shareholders are, by the deed, declared to have only a personal interest, and the deed gives them modes of transferring the property which may not be consistent with the rules of law relating to the transfer



of real property, and the whole tenor of the deed appears to be to constitute an interest of a kind which has become perfectly well known, and has been the subject of consideration in the cases of many joint-stock companies. Now, is there any law prohibiting such an intention from being carried into execution? The legal estate in the land is in the trustees, who have undertaken to hold it under a committee invested with specific but very limited powers of letting stands in the market-place, and turning the corn exchange to profit in the manner specified in the deed. The very elaborate judgment in *Bulmer v. Norris* goes into all the cases upon this subject. That was the case of a joint-stock company incorporated, but it is clearly specified in the judgment that there may be many forms of companies contemplating that their lands should be vested in trustees, the shareholders having a right to a share in the profits, but not having any of the rights or liabilities that belong to the proprietors of land. So it is with respect to a company incorporated under the Joint-Stock Companies Acts. And such is the effect of the judgment in *Watson v. Spratley*, in which there is a most learned and elaborate judgment of Martin, B., as to a mine granted to a pursuer, where there is an arrangement that the mine should be worked by the pursuer, and the profits divided among the co-adventurers; and the question arose whether the co-adventurers had an interest in the land. Their interest was decided to be in the profits made by the pursuer, and not in the land. The judges in that case all concur in saying that parties may, if they choose, create such an interest as I have stated; land being vested in a pursuer in trust to work the mine, and the co-adventurers having a right to the profits. All that the judgment of Barons Alderson and Parke found in this case is, that upon the facts stated by Martin, B., who tried the cause, it was clear it was an interest the parties took in the mine upon the cost-book principle. Parke, Martin and Alderson, BB., said that they thought that the facts had not been sufficiently found by the jury, and that it was right that they should be investigated again by another jury, but all of the judges were of opinion that if the jury found that it was the intention of the parties to carry on the mine on the cost-book principle, the law would give effect to that intention, and that the property would be vested in the pursuer and the co-adventurers would have no interest in the land. The case of *Myers v. Perrigal*, holding that the shareholders in such a company as this are not within the Statute of Mortmain, and the elaborate judgment in *Bulmer v. Norris*, are to the same effect. Whether the former case be rightly decided or not, whether Lord St. Leonards' dissatisfaction with it be well founded or not, the tenour of the cases to which I have adverted affords, in my opinion, an ample foundation for the judgment to which the revising barrister has come in this case.

WILLIAMS, B.—I am of the same opinion. I think that this case must be governed by the principle which has been explained in the several cases to which we were referred in the course of the argument, and in particular in that of *Edwards v. Hall*, before Lord Cranworth, as to shares in joint-stock companies—canal, dock, railway, gaslight, water and banking companies. Now that principle has been solemnly decided to apply equally to a company which is not a corporation as to a company which is, and those cases were considered applicable and taken into consideration in the case of *Myers v. Perrigal*. It is that a shareholder in a company of this description, has no direct right to any portion of the tolls or rates, or other income enjoyed by the company, but only to a proportionate share of the profits. Now, applying that principle to the present case, it

seems to me that, according to the deed which governs the affairs of this company, the income of the real estate in respect of which the franchise is claimed is an income which is to be taken by the committee who are to conduct the affairs of the company and incur such expenses as are necessary for the conduct of the company, and pay the balance to the shareholders. I conceive that neither in law nor in equity is a shareholder entitled to any particular income arising from the land held in trust for the company. He is only entitled to a proportionate share of the profits. Therefore, according to the principle of those cases, which led the courts to say that a share, in such companies as came under consideration there, was not an interest in land, I apprehend that in the present case the shareholders have no interest at law or in equity in the land or in the income of that which is the subject of the trust, and therefore that they are not entitled to have the franchise in respect thereof.

KEATING, J.—I am of the same opinion. I think the app. has not an interest, legal or equitable, in the land, and that the deed under which he claims does not confer upon him any such interest. The deed creates a certain amount of capital to be divided into shares, and applied, amongst other purposes, to the acquisition of land and the building of a corn exchange, and the shares are made transferable in the way in which companies' shares are usually transferred, and provisions are made for dividends in the way usual with joint stock-companies. That being so, what are the rights of a shareholder? Could he go at any time and receive the moneys, or any particular portion of the moneys, in respect of the standings in the corn exchange? Certainly not; all that he could do would be to claim, in respect of his share, the dividend which would be appropriated to his share under the terms of the deed; that is, the dividend resulting from the profits of the company. I think, therefore, that unless Mr. Hannen's proposition can be maintained, that it is not competent for the parties by any arrangements to disqualify themselves, as it were, to vote for land which forms part of the property of this company, the app. cannot support his claim. But I think that Mr. Hannen's proposition cannot be maintained to that extent. The case of *Watson v. Spratley* seems to me to be in direct opposition to the proposition, and there is no authority whatever in its favour. In the case of *Baxter v. Brown*, 7 M. & G. though the land was held by the terms of a deed between the parties, it did not appear that the parties intended to divest themselves of the right to have votes incident to the ownership of the land; yet no such proposition was laid down in the case as that it was not competent to any parties by any words or deeds to disqualify themselves. Therefore the revising barrister was right, and the app. has no claim to vote.

Judgment for resp.

Tuesday, Nov. 24, 1863.

FORCE (app.) v. FLOOD (resp.)

Election law—Objection.

By 6 & 7 Vict. c. 18, s. 17, a notice of objection to the name of any person being inserted in the list of voters is to be given by the objector to the claimant, and is to be in the form given in schedule B, No. 11, which is in the following terms:—"To Mr. —. I hereby give you notice that I object to your name being retained, &c." The notice given in the present case was as follows:—"To Mr. Sidney Rice Force. I hereby give you notice that I object to the name of Force Sidney Rice being retained," &c.; this was objected to on the ground that it did not comply with the form given in the schedule, as the names were used instead of the person

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FORCE v. FLOUND.

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"your," and the Christian and surnames were transposed:

*Held, that the notice was essentially in the form required by the statute, and that if the transposition of the names was a misdescription, it was cured by sect. 101, which enacts that "no misnomer or inaccurate description" of a person shall vitiate the notice.*

This was a consolidated appeal from the court of the revising barrister for the city of Exeter, the following case being stated for the opinion of the court.

## CASE.

At the court held before me, H. T. E., barrister-at-law, duly appointed to revise the list of voters for the city of Exeter, Thomas Flound objected to the name of Sidney Rice Force being retained on the list of persons entitled to vote as occupiers in the election of members for the city of Exeter.

Sidney Rice Force stood on the occupiers' list of the parish of St. Sidwell, thus:—

Force, Sidney Rice	Dix's Field	House	Dix's Field, in succession from house, Sidwell-street.
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The notices of objection were duly served, and the only question raised is, as to the form of the notice of objection given to the party objected to, which was in the following form:—

"To Mr. Sidney Rice Force.

"I hereby give you notice that I object to the name of Force Sidney Rice being retained on the list of persons entitled to vote as occupiers in the election of members for the city of Exeter.

"Dated this 20th day of Aug. 1863.

(Signed) "THOMAS FLOUND,  
of Bedford-circus, in the precincts of Bedford, on the list of voters for said precincts of Bedford, in the said city of Exeter."

On the part of the appa. it was contended that this notice was bad, because it was not according to the form number 11, in the schedule B. of the statute 6 Vict. c. 18. It was argued that the notice ought to have run thus: "I object to your name being retained," &c. &c.; and great stress was laid on the circumstance that by the 17th section of the statute 6 Vict. c. 18, the notice to the party objected to is required to be "according to the form numbered 11, schedule B." omitting the words "or to the like effect," which occur in the 15th and 17th sections in speaking of other notices. It was also argued that the transposition of the Christian name and surname in the body of the notice was likely to mislead the party receiving the notice as to its meaning, and that there were no words to show that the person objected to was the same person as the party to whom the notice was addressed.

There was no other person of the same name on any list of voters for the city of Exeter.

I was of opinion that the notice was not bad merely because it departed from the very words of the form No. 11, schedule B., if it was so framed as to inform with sufficient clearness the person to whom it was addressed that the objection was directed against his name, and I was of opinion that the name of the person objected to was so denominated in the notice as to be commonly understood, and that it sufficiently appeared on the notice that the person whose vote was objected to was Sidney Rice Force, the person to whom the notice was addressed, and I was satisfied that the person to whom the notice was addressed, and on whom it was served, was not misled or in danger of being misled, by the form of the notice.

I therefore decided that the notice was good, and required Sidney Rice Force to prove his qualification,  
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which he failed to do, whereupon I expunged his name from the list.

At the same court Thomas Flound and Merlin Frier respectively objected to the names of the several other persons whose names and qualifications are set forth in the schedule hereto being retained on the several lists respectively mentioned in the said schedule of persons entitled to vote in the election of members for the city of Exeter. In all the cases the notice to the party objected to was precisely similar to the notice in the case of Force, except that the word "freemen," or "freeholders," as the case may be, was in the proper instances used for the word "occupiers." In all these cases the notices were duly served, and each notice was in the heading thereof duly addressed to the party objected to, the Christian name preceding the surname, and then in the body of the notice the names were transposed as in Force's case. In these cases there was not any instance where two persons of the same name stood on any list of voters for the city of Exeter. In all these cases I was of opinion that the name of the person objected to was so denominated as to be commonly understood, and that it sufficiently appeared on the notice that the person whose vote was objected to was the person to whom the notice was addressed, and I was satisfied in all these cases that the person to whom the notice was addressed, and on whom it was served, was not misled by the form of the notice.

The validity of these objections in all the cases hereinbefore mentioned depends upon the same point of law, and the appeals ought to be consolidated. If the Court of C. P. shall be of opinion that my decision was wrong, and that the notices of objection were invalid by reason of their form, then the names of the app. Sidney Rice Force and of the several other persons whose names and qualifications are set forth in the schedule, are to be restored to the respective lists from which they have been expunged.

I name the said Sidney Rice Force (who consents thereto) to be the app., and the said Thomas Flound (who consents thereto) to be the resp. in this consolidated appeal.

(Signed) H. T. E.,

Revising Barrister.

Karslake, Q. C. (Bourke with him) for the app.—The revising barrister decided that the notice of objection, which was not in the form given in the schedule to the Act (6 & 7 Vict. c. 18, sch. B., No. 11), was a good notice on the ground that it was sufficient to inform the party to whom it was addressed that he was the person objected to. The question here arises on the end of the 17th section of the 6 & 7 Vict. c. 18, which enacts that every person objecting shall give to the person objected to "a notice according to the form numbered 11 in the said schedule B. &c.;" that form was not followed in this case. [ERLE, C. J.—What is the departure?] Instead of saying, "I object to your name," it is "I object to the name of Force Sidney Rice;" and besides this, the name really was "Sidney Rice Force." [Mellish, Q. C.—But it was directed to Sidney Rice Force.] I know of no case in which there has been a departure from the form of the notice. *Wansey v. Parkins*, 7 M. & G. 137, has no bearing on the present case except as showing what was passing in their Lordships' minds as to the construction of the Act of Parliament. Cresswell, J. says (p. 142-3): "It may be laid down as a safe rule in the construction of Acts of Parliament that we are to look at the words of the Act and to render them strictly, unless manifest absurdity and injustice would result from such a construction." And Tindal, C. J., at p. 141: "The question in this case has not to be determined by any supposed hardships that may arise, but upon consideration whether or not the notice of objection is in compliance with the Act of Parliament." In *Eidsforth v. Farrar*, 4 C. B. 17, it is laid down that "where a

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man has a power conferred upon him by Act of Parliament of dealing with the rights of another, he must show distinctly that he falls within the description of persons to whom such power is given." Here then he must conform to the terms of the Act which gives him the power to object. The Legislature has given a certain form of objection. [BYLES, J.—You say that the word "your" ought to have been used instead of the word "your" stands for.] I say that the word "your" ought to be used and no other; that is my contention. If this is good, any form of notice might be used that the revising barrister thinks sufficient. Then there is another inaccuracy: the notice is directed to "Sidney Rice Force," and the name in the notice is "Force Sidney Rice." The 101st section (6 & 7 Vict. c. 18), does not apply to this case; all it provides for is that "any inaccurate description of any person, place, or thing," shall not vitiate the notice. The revising barrister had no power to allow a departure from the express words of the schedule, though he might have altered a mere misnomer, as "St. George" for "Saint George."

Mellish, Q. C., for the resp., was not called upon.

ERLE, C.J.—I am of opinion that the revising barrister was right. Whether the Legislature intended to make a difference between the two sections or not. I am of opinion that the objector has complied with all the essential requisites of the statute in respect of the notice that he has given. The form requires the notice to be directed to a person by name, and then are to come the words, "I object to your name." One objection of Mr. Karalake is, that he uses the actual name instead of the pronoun, "I object to the name of Mr. Force on this list," and that therefore the notice would be void because it must be in the form given in the schedule, or words to the like effect. I do not think the Legislature intended that there should be that species of absolute and literal accuracy as to a known matter of form, and for all useful purposes I should conceive, in such a case as I have put, you might use the name instead of the pronoun. Then the other objection is, that the surname appears first, and it is followed by the Christian names Sidney Rice, "Force, Sidney Rice," as though "Force" was the Christian name. It would be commonly understood that the surname was "Force" and "Sidney Rice," the Christian names. And the 101st section says, no inaccuracy in any description or misnomer shall vitiate the notice. It was perfectly understood by the parties interested, and I think was within the curative effect of the section. It seems to me, therefore, that the notice required in respect of objections under sect. 17 was essentially in the form required, and the revising barrister was right, and the decision must be affirmed.

WILLIAMS, J.—I am also of opinion that the revising barrister was right in holding the notice sufficient as a notice according to the form given in schedule B, as required by the 17th section of the 6 & 7 Vict. c. 18. It is evident it would be absurd to hold that the language of the notice must be servilely followed, and that any variance whatever would vitiate it, when, if there was a variance, it may be explained, and the information conveyed be exactly the same. Therefore, it comes to a question of degree, and it seems to be an inquiry merely, whether the notice is essentially according to the form. I think the notice in this case is essentially according to the form, and that it was sufficient.

BYLES, J.—I am of the same opinion. This notice is addressed to the party objected to by his two Christian names and a surname. Then, says the statute, you shall go on and say, "I object to your name being retained on the list of voters." The objection of Mr. Karalake is, that instead of saying "your name," he goes on and repeats the two

Christian names and the surname. and that is but another form of "your," or of the pronomen; instead of using the pronomen, he uses the nomina. I agree with my Lord and my brother Williams, that there is no necessity to have recourse to the healing efficacy of the last clause in the Act of Parliament. Then it is said the names are transposed. I doubt whether that be really so, because, for the purposes of this notice, the surname is more important than the two Christian names, because, on looking at the list, a party would find the surname before the two Christian names. But, at all events, when the statute uses the word "your," it does not say that that form shall be followed implicitly. I cannot see that there is any difficulty, and if there was, the healing section would come into operation.

KEATING, J.—I am quite of the same opinion. The only possible way in which it can be suggested that this notice would be bad was, that there might have been other persons of the same name. The revising barrister has found, as a fact, there was no other person of the same name. I think, if there be a misdescription, it was cured by the 101st section.

*Judgment for the resp.*

Monday, Nov. 16, 1863.

ROBBINS (Administratrix) v. JONES.

*Highway—Repairs—Dedication—Liability for death by reason of want of repair—5 & 6 Will. 4, c. 50—9 & 10 Vict. c. 93.*

*The plt. was the widow and administratrix of a person who met his death under the following circumstances. The roadway leading to a bridge over a river approached the bridge, which was necessarily at a higher level than the river banks, by means of a causeway springing at a considerable distance from the bridge. A row of houses stood upon the original level of the ground, and ran parallel to the causeway, leaving a gulf or space between the houses and the retaining wall of the causeway. This space belonged to the owners of the houses and was used for areas. The houses were divided, or capable of being divided, into two distinct dwellings, the lower part of each building having an outer door opening into a street on the lower level, and the upper part having an outer door opening upon the causeway leading to the bridge. The inhabitants of the upper part went in and out by that door, getting to and from the street by walking over a structure consisting of flags and gratings bridging over the gulf or space between the houses and the causeway. The gratings were not attached to the houses, but were fixed in the centre of the flagging, and served the double purpose of being walked upon and letting light through. The part of this structure lying between the doors and the roadway was flagging, so that it was not necessary to walk upon the grating in order to get to the houses. There was a flagged foot pavement between the edge of the flagging and grating and the carriage-way on the same level with the flagging and grating. Between it and the flagging and grating there was a narrow strip of gravel. The road on the causeway was a common highway to be repaired by the parish. Before the General Highway Act, the flagging and grating had been dedicated to the public and used as part of the highway, and continued so up to the time of the accident. The deft. was tenant of one of the houses under the owner of the fee-simple for a term of years assigned to him before and vested in him at the time of the accident. Whilst he was in possession, the flagging and grating became or were out of repair and insufficient, whether considered as a passage to the houses or as part of a public path, having regard to the tendency*

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of persons to collect in crowds in or near such ways upon extraordinary occasions. The deft. had notice of this from the parish before the accident, but did no repairs. He afterwards underlet one of the houses to a person, who again underlet the premises to another who let the rooms to lodgers. A crowd having collected upon one of the gratings, in consequence of the attempt of a bailiff to break into the house, and the deceased who had been beckoned by one of the lodgers being engaged in pushing his way through the crowd, the grating and a portion of the flagging gave way and the deceased and others fell down into the area and the deceased was killed. The fall of the grating and flagging was caused by its insufficiency and by the weight of the extraordinary crowd. The action was brought by the plt. under 9 & 10 Vict. c. 93, on behalf of herself and her child to recover damages for the loss of her husband:

*Held*, that if the passage over the area was to be considered as a private way to the house, the deft. was not liable, he not being the occupier; and that if it was to be considered as a public way the deft. was not liable, the gulf not being caused by excavations made by him; and that the deft. was not liable to repair on the ground that the structure which gave way was beneficial to him as proprietor of the houses; and generally that the action was not maintainable.

*Fisher v. Prowse approved.*

*Declaration.*—For that the deft. was owner and possessed of certain houses and premises and a certain area in front of and parcel of the same immediately adjoining and under a certain common and public footway. And the said area was covered and protected with and by an iron grating, and it was the duty of the deft. at all times to keep and maintain the said area and grating in good and sufficient repair so that persons passing over and along the said footway might not be in danger of falling into the said area. Yet the deft. wrongfully permitted the same to be and continue, and the same were and continued, in a dilapidated, decayed, dangerous and unsafe state and condition, to the danger of persons lawfully passing over and along the said common and public footway. And the deft., well knowing the premises, demised and let his said houses and buildings, and the said area and gratings, in the same state and condition, to certain other persons, to wit, S. A. Jeffs and A. Jeffs, and wrongfully suffered and permitted the said area and grating to be and continue, and kept and maintained, and continued, kept and maintained the same in the same state and condition until the happening of the grievance herein-after mentioned. And the said E. A. Robbins, deceased, afterwards, to wit on the 10th Feb. 1862, was lawfully passing over and along the said common and public footway, as he lawfully and properly might, and by reason of the said dilapidated, decayed, dangerous and unsafe state and condition of the said area and grating, the same fell in, and the said E. A. Robbins was thrown down into the said area, whereby he was severely hurt and injured. And by reason of the said injuries thereby occasioned to him as aforesaid, the said E. A. Robbins, afterwards and within twelve calendar months next before the bringing this suit, died. And the plt. sues as administratrix as aforesaid for the benefit of her the said widow, and Louisa Jane the child of the said E. A. Robbins, deceased, according to the form of the statute in that case made and provided.

*Plea:*—1. Not guilty. 2. That the said area was not immediately adjoining or under a common and public footway as alleged. 3. That the said E. A. Robbins was not lawfully passing over or along the said common and public footway as alleged. 4. That persons passing in and along the said footway were not, at the time the deft. was possessed of the said houses and

premises, and of the said area, in any danger of falling into the said area. 5. That the said area and grating was no part of the common and public footway, and that at the said time when, &c., the said E. A. Robbins unlawfully, and of his own wrong with others broke and entered the said grating, houses and premises, and he and others were unlawfully crowding thereon, and by reason thereof the said grating fell in, and the said E. A. Robbins was thrown down and injured as in the declaration mentioned. *Issue.*

At the trial before Willes, J., at the sittings in Middlesex after Michaelmas Term 1862, it was proved that the death of the deceased was caused by the giving way of a grating in the public way leading from the south end of Waterloo-bridge. The grating was in front of a house of which the deft. was lessee for a term of years, and which he had sublet to a person who again underlet it to a person who let the rooms out to lodgers. The facts connected with the history of the premises and with the occurrence of the accident, so far as they were considered by the court to be material to the decision of the case, are set out in the judgment of the court. There was a considerable conflict of evidence at the trial as to the state of repair of the grating and the cause of the accident, and ultimately Willes, J. left ten questions to the jury, which with the answers returned to them by the jury were as follows:—

1. Was there a nuisance causing danger to persons lawfully using the highway, even considered as bounded by the retaining wall? *Answer.*—Yes.

2. Was there a nuisance causing danger to persons lawfully passing from the highway to the houses. *Answer.*—Yes.

3. Was the flagging or grating in a reasonably fit state, having regard to the safety of persons using the highway? *Answer.*—No.

4. Was it in a reasonably fit state, having regard to the safety of persons going to and from the houses? *Answer.*—No.

5. Was it in a reasonably fit state for persons to stand or walk upon in any sense? *Answer.*—Not in the sense of a crowd always liable to be gathered together when it was used as a public highway.

6. Was the accident occasioned by an extraordinary crowd, or by the improper state of the flagging, or by both conjoined? *Answer.*—By both.

7. Was the deceased guilty of any negligence or misconduct contributing to the accident? *Answer.*—No.

8. Was he, when he fell, lawfully using the place to get from the road to the house? *Answer.*—Yes.

9. Was it a public highway? *Answer.*—Used as such by dedication.

10. Do you find your verdict for the plt. or the deft.? *Answer.*—For the plt., with 280*l.* damages, to be portioned into 200*l.* for the widow, and 80*l.* for the child.

A verdict having been entered for the plt., and a rule nisi having been obtained by the deft. to enter a nonsuit pursuant to leave reserved, or for a new trial on the ground that the verdict was against the weight of the evidence,

*Coleridge, Q.C. and J. Martin* showed cause.

*Lush, Q.C.* supported the rule.

In the course of the argument the following cases were cited:—

*Salmon v. Bensley*, Ry. & M. 189;

*Reg. v. Pedley*, 1 A. & E. 822;

*Rich v. Basterfield*, 4 C. B. 783;

*Todd v. Flight*, 30 L. J., C. P., 21; 3 L. T. Rep. N. S. 325;

*Bishop v. The Trustees of the Bedford Charity*, 29 L. J., 53, Q. B.; 1 L. T. Rep. N. S. 214;

*Fisher v. Prowse, and Cooper v. Walker*, 2 B. & S. 770; 31 L. J. 212, Q. B.; 6 L. T. Rep.

N. S. 711;

*Barnes v. Ward*, 9 C. B., 392;  
*Reg. v. Watts*, 1 Salk. 357;  
*Hounsell v. Smyth*, 7 C. B., N. S., 731; 1 L. T. Rep. N. S. 440;  
*Corby v. Hill*, 4 C. B., N. S., 556;  
*Bolch v. Smith*, 7 H. & N. 736; 6 L. T. Rep. N. S. 158;  
*Reg. v. St. Benedict*, 4 B. & A. 447;  
*Le Neve v. Vestry of Mile-end Old Town*, 8 E. & B. 1054;  
*Bayley v. Wolverhampton Waterworks Company*, 6 H. & N. 241;  
*Lade v. Shepherd*, 2 Stra. 1004;  
*Cornwell v. Commissioners of Sewers*, 10 Ex. 771;  
*Roberts v. Hunt*, 15 Q. B. 17;  
*Hardcastle v. South Yorkshire Railway Company*, 4 H. & N. 67; 28 L. J. 139, Ex.;  
*Brook v. Copeland*, 1 Esp. 203;  
*Coupland v. Hardingham*, 3 Camp. 398;  
*Baileman v. Bluck*, 21 L. J., 406, Q. B.

*Cur. adv. vult.*

Nov. 16.—WILLES, J., read the judgment of the court. This was an action brought by the administratrix of one Robbins to recover damages under Lord Campbell's Act, for the intestate's death. That death took place in consequence of the giving way of a portion of the east side of the public way leading to the south end of Waterloo-bridge. The part which gave way consisted of flagging and grating over the area of one of the houses at the side of the road by the default, as it is alleged, of the deft. The material facts are as follows: Waterloo-bridge was constructed under Acts of Parliament passed in the 53rd, 56th and 58th years of Geo. 3, and was finished in 1817. It was necessarily constructed so that the roadway should be at a level much higher than the river banks, and in order to give access to the roadway of the bridge so constructed, the road leading to the south end of the bridge approaches it upon a high causeway springing at a considerable distance. For some distance from the bridge persons passing along the causeway are protected against the danger of falling over the side by a parapet wall, or continuation upwards of the retaining wall of the causeway. This wall is continued up to a row of houses (of which the deft. is the lessee), and then ceases. This row of houses stands upon the original level of the ground and runs parallel to the causeway and road leading to the bridge, leaving a gulf or space of more than seven feet wide between the houses and retaining wall of the causeway. That space belongs to the owner of the houses, and the bottom of it is used for areas. The houses are divided, or capable of being divided, into two distinct dwellings, having separate outer doors. The outer door of the lower part of each building opens into a street or court upon the lower level. The outer door of the upper part of each house opens upon the level of the causeway towards the road leading to the bridge, and the inhabitants of the upper part of the house go in and out by that door, and get to and from the road by walking upon the structure, part of which gave way under the deceased. That structure consisted of flags resting at one end for about four inches in and upon the walls of the houses, and at the other end for about six inches upon the retaining wall of the causeway so as to bridge over the areas. At intervals there were gratings fixed by means of horns into the flags and forming with them one continuous roadway. The gratings were not attached to the houses, but were fixed in the centre of the flagging, and served the double purpose of being walked upon and of letting through light. The part of this structure lying straight between the doors and the roadway was flagging, so that it was not necessary to walk upon the

gratings in order to get to the houses. There was a flagged foot-pavement between the edge of the flagging and grating and the carriage-way on the same level with the flagging and grating. Between it and the flagging and grating there was a narrow strip of gravel. The end houses of the row had no flagging and grating, and the space over their areas was inclosed. The road on the causeway was a common highway to be repaired by the parish. In the course of time, before the General Highway Act of 5 & 6 Will. 4, c. 50, the flagging and grating had been dedicated to the public, and used by them as part of the highway for foot-passengers, and it so continued up to the time of the accident. The fee-simple of the houses was in the Lord Salisbury. The deft. was tenant under him for a term of years, created in 1830, and assigned to the deft. before and vested in him at the time of the accident. Whilst he was in possession, the flagging and grating either became, or at least were, out of repair and insufficient, whether considered as a passage to the houses, or as part of a public way having regard to the tendency of persons to collect in crowds in or near such ways upon the occasion of a fire or the like. It did not appear that any substructure was out of repair, but only that the flagging and gratings forming the surface were out of repair. It became necessary, in order to effectually sustain the flagging and grating as a way in the state to which time and wear and tear had reduced them, to make an entirely new work viz., to turn an arch under them, and so to make them safe. The deft. had notice of this from the parish in 1859, some time before the accident, whilst he was in possession, but no repairs were done between that time and the time of the accident. The deft. afterwards underlet to a person named Jeffs, who again underlet to a person who let the rooms out to lodgers. The rent fell into arrear, and a distress was put in upon the lodgers, who having paid their own rent barred out the bailiff. The bailiff retook possession by force, and a crowd collected and stood thick upon one of the gratings. The deceased was passing by at the time, and being beckoned to by one of the lodgers, he tried to get through the crowd to the door, and in doing so stepped on to the grating. Scarcely had he set foot upon it when the grating and the flagging resting upon the house wall, and a portion of that resting upon the retaining wall of the causeway, gave way, and the deceased fell, with about thirty others, down into the area and so met his death. The fall of the flagging and grating was caused by its insufficiency and by the extraordinary crowd pressing upon it at the time. The cause was tried at the sittings after last Michaelmas Term. There was conflicting evidence upon the question of repairs and sufficiency; but the above must be taken to be the result of the evidence as established by the verdict. Under the direction of the judge a verdict was found for the plt. for 280*l.* damages, subject to the opinion of the court as to the deft.'s liability. No question was raised upon the pleadings, nor could any usefully have been raised, as the court has power to amend, and the question has been treated as arising upon the general issue. Probably it arises also upon the record. A rule was obtained to enter the verdict for the deft. which was well argued in last Easter Term, before Erle, C. J., and Willes, Byles and Keating JJ., when we took time to consider of our judgment. It is for the plt. to make out that the deft. has been guilty of the breach of some duty which he owed to the deceased, and that thereby the accident was occasioned. Whether he has done so may be considered under the following heads. If the passage over the area be considered as a private way to the houses, then the reversioner is not liable, but the occupier. A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests

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for accidents happening during the term, for there is no law against letting a tumble-down house, and the tenant's remedy is upon his contract, if any. In this case there was none; not that that circumstance makes any difference in our opinion. If it be considered as a public way, then the deft. is not answerable for the area as for a hole made at the side of the highway, because there was no hole made by the deft. The gulf at the side of the causeway was the result of its being raised by the makers of it, not by the land at the side being excavated by the proprietors of it. The alleged hole was coeval with the highway, and a consequence of the making thereof. In *Barnes v. Ward* there was a hole made by the deft., and it was made after the dedication of the road. As for the suggested liability to repair, upon the ground that the construction was beneficial to the proprietor of the houses, that benefit was only retained by, not conferred upon, him. It is familiar law that a bridge made by a private individual for his own benefit at an ancient ford, if useful to the public, is to be repaired by them, and not by the builder. The liability to repair a highway has not been made to depend upon the quantum of benefit. If it were so, a man who drove a flourishing trade in the house ought to pay for the benefit of passers by, but not a musician or the inventor of the calculating machine. The flagging and grating were not, like a door, under the control of the occupier, but fixed. They were not worked, used, or worn out by the proprietor of the houses, otherwise than as one of the public uses a public highway on the side of which his house stands. The passage of light and air through the grating does not wear it out any more than the wind wears out the surface of the road. The more or less artificial character of the flagging and grating does not make it more or less a way to be repaired by the parish. Whether it be stone, iron, wood, or composition, as it is a public way, the public are to keep it in repair, and not the person who dedicated it. Hitherto the exceptions to the liability of the parish have been known. They are custom, prescription, tenure and inclosure whilst it lasts. Have we authority to add flagging and grating? The case is not the same as that of an open cellar flap, which may be considered as a trap in its nature and essence, unless it be kept shut. Besides that is worn out by use for the benefit of the occupier of the cellar to which it is the door. The present case is nearer to that of a mine propped up, and a way dedicated upon the surface. In such a case will any one venture to suggest that the owner of the mine and surface, or either of them, must renew the props when they rot and the road threatens to sink into the mine. This does not fall within the law as to keeping buildings adjoining a highway in such a state by repair or otherwise as not to endanger passers-by. What was insufficient here was part of the highway itself. Such law may apply to the arches of a cellar under a footway, though this we conceive to be worthy of argument and open to distinctions as to the state of things at the time of the dedication and other circumstances. It cannot apply to the footway itself. We may refer by way of illustration only to the case of one of the squares, where the footway at one side consists of arge flags reaching from the outer wall of the area to the outer wall of the cellar. There the upper part of the flags forms the way, and the lower part of the same flags forms, as we are told, the ceiling of the cellar. Who is to maintain and repair the flagged way? We apprehend the public who walk upon it and wear it out, without which it might last an indefinite time. It is to be observed, that in cases of liability under this head the building need not be repaired, but only prevented from causing injury by its fall, which implies that there is a power to remove, and such power does not exist in this case. It has been suggested, in addition to the grounds relied upon in argument, that the

fact of the flagging and grating concealing danger was a special cause of liability. To this we answer, first, that the flagging and grating did not prevent the existence of the deep area from being known to every body passing, and there was no fraud; secondly, that there would have been no danger if the parish had properly maintained and repaired the flagging and grating; thirdly, that the deft. did not erect and, as it was a highway, could not have removed, the structure. Moreover, concealment is relative, and every danger is more or less concealed. If a highway is dedicated with a dangerous obstruction on it, such as would have been a nuisance if placed upon an ancient way—for instance, a flight of step or a projecting flap—no action can be maintained for injury caused thereby, whether by day when it can be seen, or by night, when it is invisible. In such a case, it was held by the Court of Q. B. in *Fisher v. Prowse* 6 L. T. Rep. N. S. 711, that the public adopting a highway must take it *in statu quo*, and that no obligation is imposed upon the dedicator to remove projections or fill up holes which may be dangerous to passers by. In that leading case, which explained and overruled several out of the vague notions of liability that have sprung up, Blackburn, J., delivering the judgment of the court, expounded with clearness and force the law applicable to this supposed ground of liability as follows: "But the question still remains, whether an erection or excavation already existing, and not otherwise unlawful, becomes unlawful when the land on which it exists, or to which it is immediately contiguous, is dedicated to the public as a way, if the erection prevents the way from being so convenient and safe as it otherwise would be, or whether, on the contrary, the dedication must not be taken to be made to the public and accepted by them, subject to the inconveniences or risk arising from the existing state of things. We think that the latter is the correct view of the law. It is of course not obligatory on the owner of land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions, and subject to certain reservations, and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand, great injustice and hardship would often arise if, when a public right of way has been acquired under a given state of circumstances, the owner of the soil should be held bound to alter that state of circumstances to his own disadvantage and loss, and to make further concessions to the public altogether beyond the scope of his original intention. More especially would this be the case when public rights of way have been acquired by mere use. For instance, the owner of the bank of a canal or sewer may, without considering the effect of what he is doing, permit passengers to pass along until the public have acquired a right of way there. It is often hard upon him that the public right should have been thus acquired, it would be doubly so if the consequence was, that he was bound to fill up or fence off his canal." In this statement of the law we heartily concur. This is in accordance with the general law as to gifts, which, in the absence of fraud, must be taken as they are, without redress against the donor in respect of vice, apparent or secret, and all expenses in respect of which for repairs or otherwise are to be borne by the donee. This conclusion is also in accordance with the law as to grants of a right of way or other easement, whether for valuable consideration or not, to the effect that the grantee, and not the grantor, is to maintain and repair the subject of the easement, with a corresponding duty to do so, if by his neglect the grantor may suffer damage, and a

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corresponding right to enter upon the grantor's land, and to do all acts necessary for such maintenance and repair. The authorities to this effect in our own law, the civil law, and the code civil will be found in Gale on Easements, edition by Mr. Willea. It thus appears to us that to hold this action to be maintainable, whilst it would for the first time impose a heavy burden upon reversioners, would violate well established principles of law. The rule to enter a verdict for the defendant, therefore, be made absolute. *Rule absolute.*

## REGISTRATION APPEAL.

Tuesday, Nov. 24, 1863.

GARBUETT v. TREVOR.

*Election law—Customary tenure—Copyhold—2 Will. 4, c. 45, s. 19.*

*A tenant who holds his lands by customary tenure, although not strictly a copyhold, provided he has a permanent interest therein of the value of not less than 10*l.* per annum, free of all charges, &c., is entitled to be registered under sect. 29 of 2 Will. 4, c. 45.*

This was an appeal from the court of the revising barrister for Guisborough; the following case being stated for the opinion of the court:—

## CASE.

At a court held at Guisborough, on the 5th Oct. 1863, before me, the barrister appointed to revise the list of voters for the North Riding of Yorkshire, John Adamson was objected to. This name was thus entered in the list of voters for the township of Hinderwell. Adamson, John | Staithes | Copyhold house | Staithes.

The following facts were proved:—

1. The manor of Seaton, in the North Riding of Yorkshire, is co-extensive with the township of Hinderwell. The Marquis of Normanby is the lord of the manor. The township of Hinderwell contains the village of Hinderwell, the village of Staithes, and the village of Runswick; the inhabitants of all three villages are engaged in fishing or other maritime pursuits. In the village of Hinderwell are freeholders only of the said manor. In Staithes and Runswick all the houses and other tenements, hereinafter for brevity's sake called "houses," are held under a customary tenure hereinafter described, which has there obtained for a long period without alteration. No evidence was produced of any other tenure having at any time existed in Staithes or Runswick.

2. Between the said houses and in their immediate neighbourhood are pieces of ground, which are part of the waste of the lord of the manor of Seaton.

3. Every house in Staithes and Runswick is held by a tenant on the court-roll of the manor of Seaton, who pays a rent in respect of such house to the Marquis of Normanby.

4. The houses are generally of small value, but a few are of the value of 30*l.* per annum. The rent in each case is a very small or nominal sum, consisting of a few shillings annually, and is always much smaller than the annual letting value of the house. The rents of the various houses differ in amount, but the rent of each house has always continued the same in amount without alteration.

5. No notice is given as to when and where the rent is payable; but by custom the rent is payable twice a year to the land agent of the Marquis of Normanby, at the place where, and at the time when, rent is payable by all tenants of the Marquis of Normanby, in the manor of Seaton and elsewhere in the neighbourhood, namely, at a public-house in Staithes, called the White Horse, on the last Wednesday of May and the first Wednesday of December in each year.

6. To each tenant of a house in Staithes or Runswick so paying rent a quitance is given in the following form:—

"No.                      "Manor of Seaton.

"Received the 28th day of May 1863 of

X. Y., one shilling and sixpence for half a year's rent due to the Most Noble the Marquis of Normanby at Lady-day last, s. d. by me ..... 1 6

"Arrear £                      "JOHN KEER (agent)."

7. The rent is generally duly paid. One instance only is known of a notice to quit having been served on behalf of the Marquis of Normanby, on a tenant in Staithes or Runswick, and in that case the tenant did not quit. No action of ejectment has ever been brought against any of the said tenants.

8. All repairs to any of the said houses are done by the tenant of the same, and at his expense; and if any of the said houses have become ruinous, it is built up by the tenant at his expense.

9. Many of the said houses are let by the tenants from week to week, or from month to month.

10. Every tenant is rated to the poor, and assessed to the property-tax, as owner of the house which he holds.

11. Tenants of the said houses have occasionally been on the register of parliamentary voters for the North Riding of Yorkshire; their qualifications being therein described as copyhold houses in Staithes or Runswick.

12. The court of the manor of Seaton is held annually in October or November. Before holding the court the steward of the manor issues a precept to the bailiff of the manor, calling upon him to summon a jury to the court about to be holden. The names of the jurors are chosen by the said bailiff, and the land agent of the Marquis of Normanby, out of the freeholders of the manor within the village of Hinderwell, and the tenants of houses in Staithes and Runswick. The steward of the manor presides in the court, and the said land agent is always present. The list of suitors is called over, and the jury are sworn; after other matters are disposed of, applications from persons desiring to be admitted tenants of houses in Staithes or Runswick are heard.

13. The person A. B., desiring to be admitted tenant in the room of the outgoing tenant C. D., attends at the court, having been generally, but not in every case, summoned for this purpose by the bailiff of the manor. C. D., the outgoing tenant, frequently attends also. A. B. is then presented by the bailiff to the steward, who asks of him (but in no set form of words), "For what purpose do you come?" A. B. then replies (but without using any set form of words), "I seek to be admitted tenant of house No. 24, in room of C. D.," adding the circumstance, "I have purchased the house of C. D.," or "C. D. is deceased, and has left me the house by will;" or "C. D. has died intestate, leaving me his heir-at-law," or as the case may be.

Sometimes the bailiff states the circumstances of the case, sometimes one of the jurors, and sometimes the outgoing tenant.

The steward then always inquires of the land agent if there is any objection to the admission of A. B., to which the land agent replies, that there is no objection, or that there are arrears of rent due from the outgoing tenant, or as the case may be. The foreman of the jury is generally asked if he knows any objection to the admission of A. B. In most cases no objection is raised by any one, but occasionally arises in which all the circumstances of the case, as well moral as legal, are inquired into, as, for instance, on the application of the heir-at-law to be admitted tenant in the room of his father who has died intestate, the foreman or one of the jury may say that he, the said heir-at-law, has never done anything for his deceased father or his family, but that E. F., the daughter of the deceased, supported her father during his last illness, and that she is better entitled than A. B. to be admitted tenant.

The steward, after hearing the whole discussion, decides granting or refusing the application for.

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admission, according to his judgment, upon all the circumstances, as well moral as legal, of the case.

14. If A. B. is a purchaser his application to be admitted tenant is almost always granted; if so also he claims under the will of the deceased tenant; but in many instances, notwithstanding the devise of the property in question to the applicant has been admitted to have been in all points of form sufficient and without fraud, his application has been refused by the steward, and another person has been admitted by him as tenant.

15. If A. B.'s application is granted, the name of C. D., the outgoing tenant, is struck out of the court-roll by the pen of the steward, and the name of A. B. is inserted on the court-roll in its alphabetical place among the names of tenants in Staithes or Runswick, as the case may be: A. B. then takes the oath of fealty and pays to the steward a fee of 1s. 6d. No fine is paid to the lord of the manor.

16. A change of tenancy of houses in Staithes or Runswick often takes place between the holdings of the manor court. A. B., the person desiring to be admitted tenant, applies to the said land agent of the Marquis of Normanby, stating the circumstances of the case. The land agent usually requires a letter from the foreman of the jury of the manor court last held, to the effect that, in the judgment of him, the foreman of the jury, the said A. B. is best entitled to be admitted tenant of the house in question. The land agent, at discretion, gives or refuses to give to A. B. a letter to the steward of the manor, assenting to A. B.'s application. As a matter of fact the land agent usually gives such letter, but he has occasionally refused to give the same, on the ground that the outgoing tenant was in arrears of rent. Upon receipt of the letter expressing the assent of the land agent to the admission of A. B., but in no case without receipt of such letter, the steward of the manor indorses A. B.'s name upon the court-roll for the time being in the following form:—

"1862.

December 18.

Abraham Brown, settin tenant for house No. 24, in room of Charles Davis."

For every such admittance out of court the incoming tenant pays to the steward a fee of 5s., but no fine is paid to the lord of the manor. At the holding of the next manor court the name of such incoming tenant is entered in its proper alphabetical place in the court-roll among the tenants of Staithes or Runswick, as the case may be.

17. Every alteration or change of tenancy of any of the said houses in Staithes or Runswick, is completed by admission of a new tenant in substitution for or in addition to the former tenant in the court-roll of the manor of Seaton in the manner and on the conditions hereinbefore described.

18. Subject to these conditions, if a tenant disposes of his estate in one of the said houses by sale or by pledging, or if he disposes of the same by will and dies, or if he dies intestate, the vendee, pledgee, devisee, or heir-at-law, as the case may be, is admitted

tenant on the court-roll of the said manor, and enters upon the possession of the property.

19. In selling or pledging such estate no deeds or documents of any kind are used, nor is any copy of the court-roll furnished to the incoming tenant. If a tenant sells he usually does so by auction, and the auctioneer, as his agent, usually before selling asks of the land agent of the Marquis of Normanby permission to sell, and in some cases undertakes to pay over part of the purchase-money when received by him to the said land agent to meet arrears of rent due to him from the outgoing tenant. The handbills announcing the sale of a house are usually headed, "By permission of the Most Noble the Marquis of Normanby," and the house is therein described as "the property of" the outgoing tenant. After the sale and purchase the vendee is admitted tenant in room of the vendor, either by act in court or out of court as hereinbefore described.

If the tenant pledges his estate the person lending the money s, subject to similar conditions, admitted tenant in his room, or as co-tenant with him; when the money is repaid, the borrower is admitted sole tenant as before.

A tenant disposing of his estate by will describes it as "his interest in groundage property" in Staithes or Runswick, or his groundage property, or "his groundage," or "his frontage." On his death the person named in the will is, subject to the conditions hereinbefore described, admitted as tenant.

If a tenant being a *feme sole marries*, the husband is admitted co-tenant with her, or tenant in her room. No instance is known of a tenant becoming bankrupt or insolvent and his assignees being admitted tenant in his room.

In a very few cases one of the overseers of the poor of the township of Hinderwell has been admitted tenant on the court-roll in the room of a tenant who has become chargeable as a pauper to the said township, and on the pauper tenant dying intestate the overseer has continued on the court-roll, notwithstanding the application of the heir-at-law of the deceased to be admitted tenant.

20. Herein follows an extract from the court-roll of the manor of Seaton for the year 1862, which was proved to correspond in form with all the previous court-rolls of the said manor within memory.

"Manor of Seaton to wit.—The Court Leet, with View of Frankpledge and Court Baron of the Most Noble Constantine Henry, Marquis of Normanby, lord of the said manor, held at the house of Johnson Ridlers, situate at Staithes, within the said manor, on Thursday, the 4th day of Dec. 1862, before John Buchanan, gentleman, steward, and the suitors of the said court.

"The names of the jurors of the said court sworn to inquire and present as well for our Sovereign Lady the Queen as the lord of the said manor."

(Then follow the name of the foreman of the jury, the names of the twelve other jurors, and the name of the sworn Pinder.)

No.	Name.	Description of property.	No.	Name.	Description of property.	
	Freeholders, owners of lands and tenements within the said manor.		51	Beswick, Geo.	barkhouse	esa.
	Runswick Tenants and residents.		87	Brown, William	dwelling-house	
				Here follow other names, in alphabetical order, with description of property.		

Hinderwell.

Freeholders.

Adamson, Luke.

(Here follow other names, but without description of property.)

Staithes.

Tenants and residents.

46. Adamson, Elisha, dwelling-house—App.

88. Abram, Thomas and Francis, dwelling-house—App.

(Here follow names in alphabetical order, with description of property.)



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21. On behalf of the said John Adamson it was proved that the clear yearly value of the houses in respect of which he claimed to vote amounted to 10*l.*; that he had been admitted tenant of the said houses, and his name inscribed as such tenant in the court-roll, in the manor of Seaton, in the manner hereinbefore described; that he had thereupon entered into actual possession of the said houses, and has ever since continued in actual possession of the said houses, or in receipt of the rents and profits of the same, his name also being continued as such tenant as aforesaid on the said manor.

It was admitted that he had during his tenancy regularly paid to the land agent of the Marquis of Normanby a fixed rent in respect of the said houses, and had received receipts for the same as hereinbefore described.

22. A person claiming to vote for the riding in respect of copyhold houses in Staithes or Runswick would there be commonly understood as claiming to vote in respect of houses held in the manner hereinbefore described.

23. On behalf of the objector it was contended that the voter was a mere tenant at will of the lord of the manor, and that he was not seised at law or in equity of houses of copyhold or any other tenure whatever for his own life or for any larger estate.

24. I held that the said John Adamson was seised in law or equity of houses of copyhold or other tenure not freehold for his own life or for a larger estate, and I accordingly allowed his name to stand on the list of voters signed by me, subject to the opinion of the court.

25. The claims of seventeen other voters, whose names and qualifications are together with the name and qualification of the said John Adamson set out in the schedule annexed to this case, depended on the like facts and finding, and were decided by me in the same manner and on the same point of law as the case of John Adamson.

I accordingly allowed the said fifty-seven names to stand on the list, subject to the opinion of the court, and ordered the appeals to be consolidated, and duly named Thomas Garbutt, of Yarm, to be the app. in the consolidated appeal, and Thomas Tudor Trevor, of Guisborough, to be the resp.

If the court is of opinion that in the circumstances stated by me John Adamson was not seised at law or in equity of houses of copyhold or any other tenure whatever (except freehold) for his own life or for any larger estate, the eighteen names contained in the schedule annexed to this case are to be struck out of the list of voters for the township of Hinderwell; otherwise the said names are to be retained.

(Signed) V. L.,

Revising Barrister, Guisborough,

5th Oct. 1863.

*Thos. Chitty* for the app.—The 19th section of the Reform Act (2 Will. 4, c. 45), enacts that “every male person . . . who shall be seised at law or in equity of any lands or tenements of copyhold or any other tenure whatever, except freehold, for his own life, or for the life of another, or for any lives whatever, or for any larger estate, of the clear yearly value of not less than 10*l.* over and above all rents and charges payable out of or in respect of the same, shall be entitled to vote, &c.” The customs of this manor do not show that these are copyholders; there is no surrender and they do not hold by copy of the rolls. Lord Coke says there is only copyhold and freehold: (Coke’s Law Tracts, p. 12.) Then it will probably be contended that there is fealty in this case:

Co Litt. p. 58;

Vin. Abr. tit., “Copyhold,” “Grant;”

Cruise Digest, vol. 1, p. 266;

Kitchen on Courts, 168;

Starkie on Evidence, 1 edit. vol. 1, p. 38, citing B. N. P. 248.

What is there to show that these are tenants by copy? I am going to contend that the roll is merely a list of suitors of the court leet or barons: (Kitchen on Courts, pp. 6-12.) “App.” put opposite a name on the roll means that the person appears at; and “see,” that he is absent from the court. Would that be done in any titular roll? There is no livery of seisin, customary grant, or surrender. The person claiming to be admitted appears, and sometimes the outgoing tenant, but not always. There is nothing as to fines, relief, escheats, or rights of common. One of the customs is, that if a man is poor he is to be turned out. The only thing to show a title in these persons is, that they pay an annual rent, and their names are entered on the roll of tenants, but it is not stated of what lands they are tenants, but merely that they are tenants. [*Mellish*, Q. C.—The case sets out that they are admitted in a customary manner, and what the nature of the custom is.] It would be dangerous to open such a wide door to spurious votes. These can be only tenants at will, or at most tenants from year to year.

*Mellish*, Q. C. for the resp.—The court must presume that the parties have departed from the ancient customs. They must be either tenants for life or tenants at will, who may be ejected at any moment. It is quite unnecessary for me to make out that they are copyholds of inheritance; they may be copyholds for life, and it is quite clear that in copyholds for life there may be some limited right of nominating a successor: (1 Scriven on Copyholds, 22 and 43.) This is not strictly descendible, as the lord exercises a certain amount of discretion as to who shall succeed to the possession. The case finds that the rents are very small, and fixed in amount; is this consistent with a tenancy at will? You must presume that the lord has not power to raise the rents. The houses are repaired by the tenants, and no tenant has ever been turned out. [*Chitty*.—I contend that it is a tenancy from year to year, not at will.] Then these facts are quite inconsistent with a tenancy from year to year. They are summoned on the jury, and the arrears of rent are a charge upon the property itself. I admit that this cannot be copyhold of inheritance, as there is no surrender: (Scriven on Copyholds, 361.) He was stopped by the Court.

*Chitty* in reply.—If there is a customary tenure it is a freehold customary tenure, and they have no right to vote, the statute of Car. 2 (12 Car. 2, c. 24) having destroyed all tenures except freehold and copyhold.

ERLE, C. J.—I am of opinion that the revising barrister was right. I cannot say what the estate is, but it is a permanent interest in the land. If it is not a customary tenure for life, it would be held for some shorter period. There is no sign of its being a tenure at will, nor does it appear to be the case of mere squatters, as the learned counsel has suggested. I believe that, if history were looked into, copyholders were originally tenants at will, and their estate gradually grew up. Upon the whole of the facts stated by the revising barrister, I think that there is a permanent estate in the land; and the statute says, that any one having an estate of “copyhold or any other tenure whatever, except freehold for his own life or that of another, of the clear yearly value of not less than 10*l.* over and above all rents and charges, shall be entitled to vote.” I think, therefore, that the decision of the revising barrister must be confirmed.

WILLIAMS, J.—I am of the same opinion. There are many curious tenures, especially in the north, which are called “customary freeholds,” or “tenant’s rights,” and there has been a long controversy

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as to whether those estates are to be considered freehold estates, or in the nature of copyhold estates. In the present case it is quite immaterial whether the estates are freehold estates or copyhold estates, because, if they are not freehold, but of a copyhold tenure or tenure in the nature of copyhold, they being above the value of 10*l.*, are equally within the words of the Act of Parliament, which, by adding "other tenures" to the word copyhold, clearly pointed to estates of this description. The only question in this case is, whether the revising barrister was right in holding that they belonged to some tenure of this kind, be it freehold, as contradistinguished from estates held by copy of court-roll, or in the nature of a copyhold tenement. I think, that although it is true there are in the history of the enjoyment of these tenements circumstances which it may be difficult to reconcile with any tenure at all, and which would be perhaps more directly referred to such an enjoyment as is suggested by Mr. Chitty, or to encroachments on the waste, yet it must be borne in mind that here is the lord, represented by the steward of the manor and by the land agent, dealing with these people who are quite unable to resist them, and that state of things might lead to the commission of many lawless acts on the part of those who seek to secure the rent for the land, and who may impose on those in the enjoyment of the tenements, or representing them, certain restrictions and put upon them conditions which in point of fact the law did not authorise, but which they were too weak to resist. I think the revising barrister might well look at these anomalies as having come into existence in this way, and that notwithstanding there is here substantially a case of a tenancy of right, or a customary freehold, or some tenure of the kind, having nothing at all to do with the relation of landlord and tenant, but a tenure in the technical sense of the word, we cannot say that he had come to a wrong conclusion. I think we ought not to disturb that decision.

**BYLES, J.**—I am of the same opinion. If the revising barrister had found nothing, I should have thought that the legal freehold here is in the lord. But, on the other hand, the tenants are not mere tenants at will, with or without licence, nor are they tenants for years or tenants for lives; they have what are the various incidents to copyhold tenements. We cannot decide against the revising barrister, unless we can see clearly it is not, and cannot be, a copyhold tenement. Now there is nothing clear, as it seems to me, in this case, except that it is difficult to see what sort of an interest these persons had. It does not appear to have been found that they had a legal copyhold, for the finding is this, "I hold that John Adamson was seised in law or equity of houses of copyhold or other tenure, not freehold," and it may well be that the word copyhold may be consistent with a wider sense than that in which it has been usually employed. I therefore cannot say the revising barrister was wrong.

**KEATING, J.**—I am of the same opinion. No doubt the circumstances of this case may be of a very doubtful character. The revising barrister has found them to be such as come within the Act of Parliament. I cannot say he was wrong, because the suggestion of Mr. Chitty, as to the possible tenure of these parties, seems to me to be quite inconsistent with the facts as found by the revising barrister. Mr. Chitty seems to have given up the idea about a mere tenancy at will, because the case was too strong against him upon that point, but he seems to think that there was a tenancy from year to year. The facts are equally inconsistent with that supposition. Who ever heard of the oath of fealty being required of a tenant from year to year at the court? That seems to me to be wholly inconsistent with the other facts of the case. If the tenancy

is not from year to year, as suggested, then what is the tenure? It is not very easy to find what it is. I should say, if not strictly a copyhold, it is in the nature of copyhold, so as to bring it within the terms of the Act of Parliament, "copyhold or other tenure." I think the revising barrister was right.

*Judgment for the resp.*

### COURT OF EXCHEQUER.

Reported by F. BAILLY and H. LEIGH, Esqrs., Barristers-at-Law.

Nov. 11 and 12, 1863.

BUSH AND ANOTHER (Executors, &c.) v. MARTIN.

*Actions by clerk to commissioners under Local Act for salary and for law bill—Power to raise money to pay salaries—Retrospective rate—Statute of Limitations.*

*Pls., as executors of J. B., by their declaration, sought to recover from deft. as clerk to commissioners under a local Paving and Lighting Act, empowering them to appoint a clerk and to pay his salary out of the rates, &c., the amount of salary due under the Act to their testator, a deceased attorney, for work, &c., done by him for the commissioners as their clerk, duly appointed under the Act, and upon their retainer as such commissioners. Deft. pleaded in effect that the debt accrued due, part of it nine years, and the residue five years, before action; that the commissioners had not, at its accruing, or at any time since, funds in hand applicable to the claim; that they had collected all moneys and rates which the Act authorized them to collect, and applied all the funds in their hands in manner provided by the Act, except a small part retained by them to satisfy, as they were bound to do, certain just claims accrued due since, and other than the claim of pls., and that all moneys which the commissioners as such were empowered to collect in any one year had not been, at any one time, and would not be, more than sufficient to pay the aforesaid just claims and the necessary current expenses of the year:*

*Held, on demurrer, that the plea furnished no answer to the claim of the pls. A debt being shown to be due, the pls. were entitled to judgment, irrespectively of the question how they might be able to deal with it when seeking to realise its fruits: (Fallister v. Mayor, &c. of Gravesend, 9 C. B. 774; 19 L. J., N. S., 358, C. P.; Payne v. Mayor, &c. of Brecon, 3 H. & N. 572; 27 L. J. 495, Ex.)*

*Semble, the declaration was not bad for want of an allegation of funds in the hands of the commissioners, which, if it were a necessary allegation, was cured by the plea which admitted some money in hand.*

*To a declaration by the same pls. against the same deft., seeking to recover from the deft. as clerk, &c., the amount of a bill of costs for work, &c. done by the said testator, as an attorney, &c. for the said commissioners as such, upon their retainer and at their request as such commissioners, deft. pleaded a similar plea to the one above stated, except that it alleged in effect that the debt accrued due, part of it twenty-one years, and the residue twelve years, before action:*

*Held, on demurrer, that the plea did not amount to an informal plea of the Statute of Limitations, and pls. therefore were entitled to judgment in this action also.*

*Per Bramwell, B.—A debt may accrue for the purpose of the Statute of Limitations twice over, and therefore it is not enough for the plea to say the cause of action accrued more than six years ago, unless in effect it says that it did not accrue within six years in point of law.*

*Declaration by pls. as executor and executrix of the*

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will of John Bush deceased, in an action against left. as and being the clerk to the commissioners for putting into execution the provisions of an Act of Parliament (3 Vict.) for paving, lighting, &c. the town of Bradford, in the county of Wilts, for money payable by the said commissioners as such to the plts. as executor and executrix as aforesaid for the wages or salary of the said J. Bush, payable by the said commissioners as such to the said J. Bush in his lifetime, for work and services by him done and rendered in his lifetime as the clerk to the commissioners duly nominated and appointed under the provisions of the said Act in that behalf, and upon the retainer of the said commissioners as such and at their request, and for money in the lifetime of the said J. Bush found to be due from the said commissioners as such to the said J. Bush, on accounts in the lifetime of the said J. Bush stated between the said J. Bush and the said commissioners as such, of and concerning the matters aforesaid, and for money since the death of the said J. Bush found to be due from the said commissioners as such to plts. as executor and executrix as aforesaid on accounts since the death of the said J. Bush stated between plts. as executor and executrix as aforesaid, and the said commissioners as such, of and concerning the matters aforesaid.

Plea 3. That this action was commenced on 21st July 1862, and that the debts and moneys in the declaration mentioned accrued due many years before the commencement thereof; that is to say, to wit, 35*l.* accrued in and prior to the year 1854, and the residue thereof, to wit, 113*l.* 15*s.*, in and prior to the year 1857. And further, that the said commissioners had not, at the time of the accruing of the said debts and moneys, nor have they at any time since, had any funds or moneys in hand applicable to the claim of the plts.; that the said commissioners have duly collected as far as it was or is possible to collect the same, all moneys and rates which they were or are authorised to levy and collect; and that they have duly applied, disposed of and expended all funds and moneys, which have ever come to their hands as such commissioners as aforesaid, in and according to the manner provided by the said Act of Parliament, except a small part thereof; and that the said part of the said moneys and funds so remaining in their hands is required by, and has, in the *bona fide* exercise by the said commissioners of their discretion as such commissioners, been set apart for the purpose of satisfying, according to the said Act of Parliament, certain just claims upon the said commissioners which have arisen and accrued long since the accruing of the debts and moneys in the declaration mentioned, and are other and different claims than the said debts and moneys which the said commissioners are bound under the said Act to pay and satisfy out of such funds and moneys so far as the same will extend. And further, that the whole amount of any funds or moneys which could be raised and collected or received by the said commissioners as such by any rate heretofore made or to be made and levied, or in any other manner whatsoever, would be required by the said commissioners to meet the said just claims and the subsequent current costs, charges and expenses of the year in which the said rate was made and levied. And further, that the moneys which by the said Act the said commissioners as such are empowered to raise, collect, or receive in any one year, have not been at any one time, and will not be, more than sufficient to pay and satisfy the aforesaid just claims and interest, and necessary current costs, charges and expenses of the year, and that there never has yet been, and is not likely to be, any surplus in the hands of the said commissioners, or receivable by them as such, whereout the said commissioners as such could pay or satisfy the debts and moneys in the declaration mentioned.

Plea 4. That this action was commenced after the passing of the 7 Vict. c. 73 (the Attorneys and Solicitors Act) and is maintained for the recovery of fees, charges and disbursements for business done by the said J. Bush, deceased, as an attorney and solicitor for the said commissioners as such, and plts. did not, nor did the said J. Bush, one calendar month before the commencement of the action, deliver, &c. (Plea of no signed bill delivered as required by the said statute.)

Demurrer and joinder in demurrer to the third and fourth pleas.

A ground of demurrer to the said pleas marked in the margin was, that the fact that the commissioners had not nor were likely to have any moneys in their hands to pay the plts.' claim, affords no sufficient reason why plts. should not recover judgment for such claim.

A ground of demurrer to the fourth plea was, the plts.' claim sued for being on the face of the declaration for work and services done and rendered by J. Bush, deceased, as clerk to the said commissioners, the action could not have been for the recovery of fees, charges and disbursements for business done by the said J. Bush as an attorney and solicitor for the said commissioners, and the plea is no answer.

Plts.' points:—As to the demurrer to third plea: That the plea is in effect a statement by the commissioners that they have contracted a debt which they have not the money to pay, and affords no answer to an action of debt to recover that which is admitted to be a just claim on the part of the plts.

As to the demurrer to fourth plea:—1. That the claim in the declaration for the salary of plt., is not a claim in respect of fees, charges and disbursements for business done by plt. in his capacity of attorney and solicitor, but in his capacity of clerk to the commissioners, and is not, therefore, within the Attorney and Solicitors Act. 2. That the office of clerk to the commissioners might be held by any one who was not an attorney or solicitor. 3. That the fact of Mr. Bush being an attorney or solicitor does not render it necessary for him to send in a signed bill in accordance with the Attorneys and Solicitors Act, in respect of work done or salary earned by him, that any one not an attorney or solicitor might perform or earn.

Def't's points:—As to the demurrer to the third plea: 1. The plea sufficiently shows that the commissioners would have no other means of satisfying the claim of plts. than by levying a retrospective rate, which they have no power of imposing under their local Act. 2. The plea shows that part of the debt claimed was incurred more than nine years ago, and that no part of it is less than five years old, and the provisions of the local Act do not render the existing commissioners liable for debts which have been barred by the Statute of Limitations; or empower them to throw the burden of debts more than five years old on the existing ratepayers of the borough.

As to the demurrer to fourth plea.—The declaration admits that this action is brought for recovery of fees, &c., for business &c. done by testator as an attorney and solicitor for the commissioners, and consequently it was necessary that a bill of these fees should have been delivered, according to the provisions of the Attorneys and Solicitors Act (6 & 7 Vict. c. 73, s. 37), although the testator may, as the declaration alleges, have also been the clerk to the commissioners. 4. The decision of this court on the argument of the rule for reducing the damages in this case on 29th May 1863 does not affect the question raised by this demurrer, because the demurrer admits that all the services of testator as clerk to the commissioners were rendered as their attorney and solicitor also: (see *Bush and another v. Martin*, 8 L. T. Rep. N. S. 509.)

[Ex.]

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[Ex.]

The following sections of the local Act (2 & 3 Vict. c. 63) were referred to in the course of the argument:—

By sect. 12, annual accounts of the receipts and expenditure of all funds levied by virtue of the Act for every year are to be prepared by the commissioners.

By sect. 13, the commissioners may nominate and appoint a clerk, treasurer, collector of the rates, &c., and such other officers for the execution of the Act as they shall think proper; and the said commissioners may remove and displace any such clerk, &c., from time to time, whenever they shall think proper, and shall and may, out of the moneys that shall arise and be collected by virtue of this Act, allow and pay to such officers such salaries or allowances as the said commissioners shall think reasonable.

By sect. 16, the commissioners may sue and be sued in the name of their clerk.

By sect. 69, rates are to be made annually for the purposes of the Act. Sect. 80 empowers the commissioners to purchase lands and houses for the purposes of the Act; and sect. 94 directs that the rates, &c. to be levied under the Act shall be applied as therein mentioned for carrying the purposes of the Act into execution.

The facts of the case will be found in the report of the same case in another stage of the proceedings: (*vide Bush v. Martin*, 8 L. T. Rep. N. S. 509.)

*H. Lopes* (with him *Kinglake*, Serjt.) for plts. in support of the demurrer.—The 13th section of the local Act empowered the commissioners to pay their clerk's salary out of the rates, &c., raised under the Act, and therefore to say they had no money, and had properly expended what they had, was no answer to an action of debt. The question whether the commissioners had power to make a retrospective rate to pay the plts.' claim was premature and beside the point. But though that question could not be raised under the third plea, it was clear from *Harrison v. Stickney*, 3 H. of L. Cas. 108, that such a retrospective rate could be made. The plea was bad, and whether plts. could or not hereafter reap the fruits of their judgment, they were nevertheless entitled to judgment on this demurrer: (*Pallister v. Mayor, &c., of Gravesend*, 9 C. B. 774; 19 L. J. N. S., 358, C. P.) The plea here did not negative the fact of the commissioners having other property which might be taken, and was bad also on that ground:

*Payne v. Mayor, &c., of Brecon*, 3 H. & N. 572; 27 L. J. 495, Ex.; and

*Levis v. Mayor, &c., of Rochester*, 3 L. T. Rep. N. S. 300; 30 L. J. 169, C. P.,

were precisely in point, and in plts.' favour. A point raised by defts. appeared to be that the commissioners were not bound to pay a statute-barred debt, but if the commissioners had power and acted they were subject to the incidents necessarily attaching to their so acting. *Day v. Emery*, 1 C. M. & R. 245; 3 L. J. 308, Ex., was conclusive on the point which had also been already decided in plts.' favour:

*Bush v. Beavan*, 7 L. T. Rep. N. S. 106;

*Bush v. Martin*, 8 L. T. Rep. N. S. 509.

As to the fourth plea, it was not necessary that a clerk to commissioners at a fixed salary should deliver a signed bill as an attorney under sect. 37 of 6 & 7 Vict. c. 73: (*Bush v. Martin*, *ubi sup.*)

The *Solicitor-General* (with him *H. Bullar*) contra, for defts.—Plts. were suing the commissioners as such. The first point went to the goodness of the declaration. Without showing there were funds in hand applicable to the claim, plts. could not recover. That was a material allegation; wanting which the declaration was bad: (*Bogg v. Pearse*, 10 C. B. 534; 20 L. J., N. S., 99, C. P.) The

cases cited contra were corporation cases and had no bearing here. No bond was given here as in those cases, and defts. were not a corporation, but mere commissioners, the creatures of the Act, and without any property but that given by the Act, viz. the rates. They appointed a clerk to be paid out of moneys to be raised, which was an implied contract that there was to be no debt until moneys were levied, which was quite consistent with a corporation being liable on a bond or instrument under seal:

*Andrews v. Dally*, 4 Bing. 566;

*Tilson v. Warwick Gaslight Company*, 4 B. & C. 962.

If the commissioners improperly refused to collect moneys, the remedy was by action on the case, as in *Cane v. Chapman*, 5 A. & E. 647, or by *mandamus*. Defts. might be personally liable, but here their personal liability was not in question. The demand, too, was stale. The Act itself showed the clear intention, of which the clerk necessarily had notice, that the rates were to be levied annually, annual accounts to be prepared, and every year to close its own accounts; the commissioners were, as it were, "to live from hand to mouth:" (sects. 12, 13, and 69.) In *Woods v. Reed*, 2 M. & W. 777, Lord Abinger laid down the general rule, which clearly showed that there could be no retrospective rate charging the present ratepayers with the plts.' stale claim, nor had the clerk ever required the commissioners to make a rate. As to the fourth plea, the statement there put the plts. out of court. Being clerk was consistent with his acting as an attorney, and for the purpose of this argument it was admitted on the record that the work was done as an attorney, and therefore a signed bill should have been delivered. [CHANNELL, B. referred to and read a part of the judgment of the Court of Ex. in *Bush v. Beavan*, 7 L. T. Rep. N. S. 106.] (a)

*H. Lopes* in reply.

POLLOCK, C. B.—We are all of opinion that the plts. are entitled to judgment. The plts. say in their declaration, "You have had services for which you ought to pay." The defts. do not deny that by their plea, but merely say that they have no means of payment now. But why not? Have they not power to make a retrospective rate? It has been said by defts.' counsel that they have no such power; but I own I do not see why they have not, nor can I see on what ground they mean to say, by their plea, that they are not liable. In my judgment, the third plea forms no answer to the plts.' claim, and, as Mr. Lopes has said, I think the plts. are, at all events, entitled to judgment, whatever they may be able to do with it hereafter, which is entirely another question.

BRAMWELL, B.—I am of the same opinion; and, indeed, I am inclined to think that, if the plea stated what the defts. have contended, it would still be no answer to the claim of the plts. The defts. have put their case on two grounds. First, they say the declaration is bad, because the statute says the clerk is to be repaid out of the rates and there was no averment of funds in hand. Now, I do not think that the words of the 13th section of the local Act directing the mode of payment of the officers appointed by the commissioners under the Act make any difference. The clerk is to be paid; and the case of *Bogg v. Pearse*, cited by the *Solicitor-General*, was clearly distinguishable. Another ground relied on by the *Solicitor-General* was, that there could be no retrospective rate; but I think the two cases cited by Mr. Lopes, in his able argument, answer that objection, and show that it furnishes no answer as a plea in bar. The plea says, &c. [His Lordship read the plea]. Then the plts. say, "Well, you have funds in hand, why should not we have

(a) At the suggestion of the Court, plts. withdrew their demurrer to the fourth plea.

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[Ex.]

them?" To which the *defts.* by their plea go on to say, that "the moneys and funds so remaining in their hands are required by, and have, in the *bonâ fide* exercise by the commissioners of their discretion, been set apart for the purpose of satisfying, according to the Act of Parliament, certain just claims which have arisen and accrued long since the accruing of the debts and moneys in the declaration mentioned," &c. Then "why," say the *plts.* to that, "did you set aside funds for the payment of debts accrued since our debt was incurred and which you ought to have satisfied first?" In truth, the *defts.*' answer seems very like saying, "We do not owe you this money, because we have determined to pay somebody else with the money by-and-by." I cannot either make out that the plea establishes the second point made by the Solicitor-General, that the commissioners never had or can have funds wherewith to pay the *plts.* But it is very difficult to say what the plea really is. However, it is clear to my mind, on the authority of the cases of *Pollister v. The Mayor of Gravesend*, and *Payne v. Mayor, &c. of Brecon*, that a debt being shown to be due, the *plts.* must have judgment irrespectively of the question of how they will be able to deal with it. Their difficulties will begin when they come to realise the fruits of their judgment; but that is not in question now, but remains, perhaps, for future consideration. We do not decide that the *plts.* can effectually obtain payment of the money due to them, but only that they are entitled to judgment on the demurrer to the third plea, the demurrer to the fourth plea being withdrawn.

CHANNELL, B.—I also am of opinion that the *plts.* are entitled to judgment in their favour. A point was raised by the Solicitor-General, that the declaration was bad for want of an allegation that the commissioners had funds in hand applicable to the discharge of the *plts.*' claim. On the whole, however, I am of opinion that the declaration is good; and the question then is, whether it is answered by the plea, and I consider that it is not. The plea admits the possession of a small fund in hand, and for that and the other reasons mentioned by my brother Bramwell, it appears to me that the plea cannot be supported. I quite agree, too, in thinking that the question for our determination here is, whether the declaration is good, and if good, whether it is answered by the plea, and not whether, if the *plts.* get a judgment in their favour, they will be able to issue execution upon it. That is a question beside the present matter, and one which will have to be settled another day. The *plts.* having succeeded on a traverse of the fourth plea, are now willing, in compliance with a suggestion thrown out by brother Bramwell during the argument, to withdraw their demurrer to that plea, and our judgment will therefore be in accordance therewith.

PIGOTT, B.—I concur with my Lord and the rest of the court in the opinions which they have expressed. The declaration is good, and I cannot see what answer is furnished to it by the third plea. Everything that has been said here to-day might have been said year by year, and every year, in answer to a claim of the *plt.* for his salary. The mere fact that the claim accrued a long time ago is no answer to the claim, unless the plea had gone on to say that it was the intention of the Legislature that all accounts and claims under the Act should be made out, presented and settled yearly. I do not say it might not have been made a good plea by such an averment, but framed as it is, it is clearly no answer to the present case, and our judgment on the demurrer to the third plea must be for the *plts.*

*Judgment for plts. on the demurrer to the third plea; the plts. withdrawing their demurrer to the fourth plea on the usual terms.*

The *plts.* also brought another action (as executor, &c.), against *def.* as clerk, &c., to recover 191*l.* 13*s.* 2*d.* the amount of a bill of costs for work, &c., done by the deceased in his lifetime as attorney and solicitor for the said commissioners as such, upon their retainer and at their request as such commissioners, to which *def.* pleaded similar pleas to the third and fourth pleas in the previous case. The third plea in the present case alleging in effect that "the debts, &c., in the declaration mentioned accrued due many years before action, that is to say, part thereof twenty-one years and the residue twelve years before action."

Demurrer and joinder in demurrer to the plea.

The *plts.*' point for argument was the same as in the previous case.

*Defts.*' points:—1. The third plea is good in substance, because it shows that the commissioners under the Act have no other means of paying the *plts.*' claim than by a retrospective rate, which the Act does not empower them to impose upon the ratepayers. 2. The local Act does not authorise the present commissioners in paying debts incurred by their predecessors, part of which are (as the pleadings and demurrer admit) upwards of twenty years old, and all of which are upwards of twelve years old and barred by the Statute of Limitations. 3. The plea also affords an answer to the action under the Statute of Limitations, no part of the debt having accrued due within six years before commencement of action. 4. The declaration, so far as it relates to the claim of *plts.* for demands of the testator in his character of an attorney and solicitor, is bad in substance, on the ground that the local Act confers no power on the commissioners as such to employ an attorney and solicitor and to pay him out of the said rates.

H. Lopes (with whom was Kinglake, Serjt.) appeared for *plts.*

The Solicitor-General (with him H. Bullar) for the *defts.*

The case was not argued, the Solicitor-General admitting that it was similar in all respects to and was governed by the decision in the previous case between the same parties, unless the fact that, as appeared affirmatively on the pleadings, no part of the present claim was of less standing than twelve years before action brought constituted a material difference between the two cases, on which point,

*Curr. adv. vult.*

Nov. 12.—POLLOCK, C. B.—It was suggested yesterday that there was a difference between this and the case then decided between the same parties, because it might be said, that as to the Statute of Limitations there were two modes in which it might arise: either by the claim originally not having accrued within six years, or it might arise from a renewal of the promise by payment of money, or by a promise in writing which might be proved, as a continuing of the claim; and it might be pleaded not as being within the six years. Now, the plea was not in the ordinary way, but it might have been, at least, that the action did not accrue within six years, or it might be that the cause of action accrued more than six years ago. Now, to say that the cause of action accrued more than six years ago may be perfectly true, and yet the action may be maintainable; for though the cause of action originally accrued more than six years ago, yet a payment of money might be sufficient to take the case out of the statute, or there might have been an actual promise to pay, which would revive the liability. We think there is no substantial difference between the case decided yesterday and the present case, and therefore that Mr. Lopes' clients are entitled to the judgment of the court in this case also.

BRAMWELL, B.—The learned Solicitor-General admitted that the case argued and decided yesterday governed this case with one exception. There was

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this difference, that in this case it appeared affirmatively that no portion of the debt was less than twelve years old. Now that of itself, with reference to the question of retrospective rates, makes no difference. But it was suggested that this amounted to an informal plea of the Statute of Limitations. I am of opinion it does not, for this reason—although it says part of the debt accrued twelve years ago, it does not say the debt did not accrue within six years in point of law; as we all know a debt may accrue for the purpose of the Statute of Limitations twice over, that is to say, at the time of the original promise and the time of the renewal, though manifestly by the common answer to the Statute of Limitations, in taking issue on it that was supported in truth, and the plea was disproved by showing a subsequent promise. Therefore it is not enough for the plea to say the cause of action accrued more than six years ago, unless in effect it says that it did not accrue within six years. It seems that the difference between the two cases is not made out, and the plts. are entitled to our judgment.

CHANNELL, B.—In the case of *Bush v. Martin*, which was fully argued yesterday, the court gave judgment in favour of the plts. There followed another case in the paper between the same parties, very much the same sort of case; indeed the same, unless there was the distinction noticed by the Solicitor-General at the bar, and by my Lord Chief Baron and my brother Bramwell. I am of opinion that this plea does not amount to an informal plea of the Statute of Limitations, and therefore they are one and the same case, and judgment for the plts. is to be given in this case as in the case argued yesterday.

PIGOTT, B.—I am of the same opinion. I only wish to say that the plea does say the defts. never had any money in their hands applicable to the claim of the plts. I do not know the meaning of that at all. All I can say is, why have you not? The Act of Parliament has authorised you to appoint a clerk, and authorised you to pay him, and has pointed out the funds out of which to pay him. It is no answer to say, "We have appointed a clerk, we have had his services, and have no funds out of which to pay him." It seems that is only acknowledging a duty on the part of the defts., though they hint a laches on the part of the plts. The plea is not founded on the plts.' laches, if it had been I conceive that by possibility there might have been a defence made out under the statute.

*Judgment for plts. as in the previous case.*

Attorneys for plts. in both actions, *Kingsford and Dorman*, 23, Essex-street, Strand, agents for *Spackman*, Bradford, Wilts.

Attorneys for defts. in both actions, *Whittakers and Woolbert*, 12, Lincoln's-inn-fields, agents for *Slack and Simmons*, Bath.

## ARCHES COURT OF CANTERBURY.

Reported by DR. SWABET, of Doctors'-commons.

Nov. 5 and Dec. 18, 1863.

(Before the Right Hon. S. LUSHINGTON, D.C.L., Dean.)

GOUGH AND CARTWRIGHT V. JONES.

*Church-rate—Original and district parishes—Voluntary relinquishment of fees—8 & 9 Vict. c. 70, s. 10—Restoration of church—Alterations and additions—Principles applicable thereto when forming an item in a rate—Costs.*

*The consolidated chapelry of Holy Trinity, Leaton, was constituted by order in council, bearing date the 26th March 1860, of parts of the three parishes of St. Mary, Shrewsbury, Preston Gubbals and Fitz. From and after March 1860, an incumbent of Leaton took to his own use the whole of the fees*

*(usually called surplice fees) arising throughout the whole of the consolidated chapelry, without any claim thereto being made by or on behalf of the incumbents of the original parishes. The order in council made no mention of the fees; there was no evidence of any relinquishment of the fees recorded in writing, nor of any relinquishment (except by the incumbent of St. Mary's) by word of mouth; it did not appear that the incumbents of the other parishes knew of their rights in respect of such fees:*

*Held, that the court must presume such knowledge, and that the de facto acquiescence by the incumbents of the original parishes in the fees being taken by the incumbent of Leaton amounted to a voluntary relinquishment, so as to satisfy the terms of the 8 & 9 Vict. c. 70, s. 10.*

*Where a rate has been made to meet the expenses of the repair or alteration of a church, on objection being taken to such rate as excessive and illegal by reason of the nature of such repairs or alterations, the burden of proving the legal character of such repairs or alterations will lie on the churchwardens, unless a faculty has been granted.*

*There is a difference between the repairs which an ecclesiastical court would compel a parish to make and the repairs and alterations for which it would hold a rate sanctioned by a majority of the vestry to be valid.*

*By repairs, the court understands restoration of the fabric to its original state, and it is doubtful whether in any circumstances the court would refuse to uphold a rate made by a majority of the vestry for such repairs only.*

*The cost of alterations and additions may, in certain circumstances, be properly met by a rate made by a majority of the vestry; but, in considering whether such a rate were excessive, the court would be bound to take into consideration all the circumstances of the parish.*

*In the present case the Court held, on the evidence, that the work done was restoration only, pronounced for the rate, and condemned the deft. in costs, for though he had a right to try the validity of a rate of which his own share was 14s., and had raised a legal question of some nicety, and there was conflicting evidence as to restoration or alterations in the work done, the Court*

*Held, that there was no reason why the parish should be put to the cost of sustaining such a rate.*

This was a case of church-rate in the parish of St. Mary, Shrewsbury; the case was before the court on the admission of the libel: (7 L. T. Rep. N. S. 566.)

It now came before the court for final argument. The points raised were, first, whether part of the original parish of St. Mary, now forming part of the district of Leaton, was exempt, by reason of Leaton being a separate and distinct parish for ecclesiastical purposes under the Church Building Acts, from church-rate in St. Mary's, and therefore properly omitted in such rate; secondly, whether the work done to the church, towards the expense of which the rate was levied, was excessive and illegal alteration and addition so as to vitiate the rate.

The case was argued by Dr. Robertson and Dr. Tristram in support of the rate; by Dr. Deane, Q. C. and C. J. Foster in opposition thereto.

*Cur. adv. vult.*

Dec. 18.—The DEAN of the ARCHES delivered judgment as follows:—It appears that the Church of St. Mary, Shrewsbury, is a very ancient church. It matters not to inquire minutely into the age of the edifice, or how much is of greater antiquity than the rest. The present dispute arises from the work done to the four branch windows at the base of the spire. It appears from the evidence that they were repaired in

1811. Mr. Lloyd, the incumbent of the parish, who has paid great attention to the church, especially as connected with its architecture, deposes to those repairs having been done in the most inferior manner, and out of keeping with the architectural character of the church. In 1852 there was a storm which seriously damaged the tower and spire, and loosened the windows so much that they were supported by wooden props. For the repairs necessary to be done there was a public subscription, and also rates made. The broach windows were left undone; the other work was finished in 1856. At this period, the funds being exhausted, all further works were suspended, and the division of the parish into several districts appears to have been one cause. On the 24th May 1861, after the division had been completed, the rate now in dispute was made, and the item objected to is 100*l.* to complete the broach windows. It appears from Mr. Lloyd's evidence that this rate was made for the purpose of raising money towards the completion, and not for the whole work, which was subsequently contracted for for 250*l.*; consequently, the fair way of viewing this case is to consider whether the whole work was fit and proper to be done, this being only a component part. The rate is at 3*d.* in the pound. The question in this case is whether a church-rate for the parish of St. Mary Shrewsbury of 3*d.* in the pound made by a majority of vestry on the 24th May 1861 is a valid rate. It has been contended that the rate is invalid on two grounds: first, that a certain district called Leaton was liable to be assessed to the rate and has been omitted—if this objection be legally established, the rate is invalid, for a rate omitting to charge a considerable number of persons liable by law to be rated cannot be a fair and equal rate; secondly, that the object for which the rate was made was not sanctioned by law; that the expenses to be defrayed out of it were not legal expenses, not such repairs as the law allows, but extravagant and unnecessary alterations. Leaton was constituted a parish by taking parts from three other parishes, viz., from St. Mary Shrewsbury, Preston Gubbalds and Fitz. This was done in the year 1860. From that time the incumbent appointed to the new church of Leaton has received for himself all the surplice fees arising within the total limits of his new parish, which of course includes what were formerly portions of the parishes of St. Mary, Preston Gubbalds and Fitz. The incumbents of the old parishes were entitled to receive such portions of the fees during their respective incumbencies. It is alleged that they have relinquished them to the new incumbent. There is no trace of any formal instrument to that effect. Mr. Lloyd, the incumbent of St. Mary's, deposes that the fees were voluntarily relinquished by him, not by any instrument in writing, but, as he says, in answer to inquiries made by the patron; he was aware that he was entitled to the fees while he remained incumbent. The incumbents of Preston Gubbalds and Fitz do not appear to have any distinct notion of their rights; their impression appears to have been that when they consented to give up certain portions of their parishes the fees arising from such portions were also ceded as a sort of accessory. The most important fact, however, is that from the formation of the district the three incumbents have as a matter of fact not received these fees, but have quietly acquiesced in their being received by the incumbent of Leaton. In this most slovenly manner has this business been conducted. I certainly should have imagined that it was the duty of some official (I refer to no one in particular) to take care that the consent of the three incumbents was properly taken in writing and duly recorded in the Bishop's Registry or some other office. In this state of things, the first question is, have these incumbents legally relinquished the fees in such a

manner as to satisfy the statutory requisitions? The question is, how fees may be relinquished so that the incumbent may be barred from reasserting his right? It is important here, from one of its incidental consequences, if one of those consequences may be that Leaton remains liable to be assessed to the church-rate of St. Mary's. On what principle the relinquishment of fees should affect church-rates I do not discern, but for the purpose of this case I will assume the law to be, that there must have been a relinquishment of fees, a voluntary relinquishment, to use the words of the statute 8 & 9 Vict. c. 70, s. 10, and that this effect, namely, the alteration as to church-rate, is wrought by the 19 & 20 Vict. c. 104, s. 14. If then a voluntary relinquishment of fees is necessary for the constitution of a separate and distinct parish, and consequently to such separate and distinct parish raising church-rates for its own church and being exempt from church-rates for the parish to which it formerly belonged, what is it that constitutes a voluntary relinquishment of fees? Or perhaps the question would be better put in these words: What constitutes legal evidence of a voluntary relinquishment of fees? Must such consent be given in writing? No doubt all common prudence and care would require that such relinquishment should be expressed in writing. In all matters, save ecclesiastical, such common prudence and care would be expected. But there is no such consent in writing in this case, and I must of course presume that if such consent in writing had been so given, those who conduct the suit would have produced it, or have shown that diligent search had been made in the records of the Ecclesiastical Commissioners and otherwise, but in vain. I must conclude therefore that no such consent was given in writing. There is no intimation of such consent in writing to be found in the evidence. Then does the law imperatively require consent in writing? The statute does not do so in words, does it by implication? I cannot find any expression from which I can draw such a conclusion. I am not aware that it can be maintained as a legal proposition that all such consents should be in writing. There is a case in the C. P. somewhat analogous, and to which I will now refer: (*Roberts v. Watkins*, 14 Scott, 592.) I think the present case may fairly fall within the principle laid down in the case cited. But then the question remains behind, is there sufficient evidence of a relinquishment of the fees *de facto*? Except in the case of Mr. Lloyd there is no sufficient evidence of any specific act of relinquishment. Then the only evidence is that as a matter of fact the fees have been taken by the incumbent of Leaton, and no demand made on behalf of the incumbents of the three parishes out of which the chapelry has been formed. This absence of demand dates from March 1860. Is this *de facto* relinquishment sufficient to satisfy the law? A non-assertion of a lawful claim. I must admit that this is not very satisfactory evidence; but is it sufficient legal evidence? It must be assumed that the incumbents of the old parishes knew their legal rights; I think this a legal presumption, and if so, the non-exercise of their rights is, I conceive, evidence of relinquishment, such as may be contemplated by the statute; voluntary relinquishment, from which would flow the consequence that the chapelry became a distinct parish. On the whole, I have come to the conclusion that this objection to the rate cannot be sustained. I must now with respect to the second objection enter upon an important inquiry, though I do not think, for the purpose of this case, one of much difficulty. The inquiry is to what extent a majority of vestry can bind the minority by a compulsory rate as to repairs and alterations. This inquiry necessarily gives rise to another; namely, whether a faculty has been applied for and granted?

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GOUGH AND CARTWRIGHT v. JONES.

[ARCHES.]

In the present case I have no information as to this, as I think, very important matter. I say very important matter, because on the application for the grant of a faculty, the propriety of such grant, if opposed, may be fully discussed; then is the proper occasion for the ordinary to exercise his discretion whether the repairs were needed and proper; whether the alterations, if any, were required, and such as the law would sanction. If no opposition is made, the law would presume that the faculty was properly granted. I am not told whether on the present occasion a faculty was applied for, nor whether a faculty was granted. I cannot presume a faculty. I must, therefore, conclude there was none. A grievous act of imprudence in my opinion on the part of the churchwardens in a case of such extensive and expensive repairs, and more especially for this reason, that the neglect to obtain a faculty throws upon the churchwardens the whole burden of proof that the rate was required for legal purposes. I must, however, observe, on the other hand, that the absence of a faculty was not either pleaded or urged in argument. The result then is that the burden of proof is thrown on the churchwardens; they have no right to complain of this. It is their own laches, or that of their predecessors, for which they must be legally responsible. The churchwardens, therefore, must prove that the rate was made for purposes allowed by law. I will consider the facts of this case presently, but first address my attention to the law generally as it relates to repairs and alterations. There is in my opinion a difference between the repairs which the Ecclesiastical Court would, so far as its authority extends, compel to be done, and the repairs and alterations which, if sanctioned by a large majority of vestry, it would hold to be justly covered by a church-rate, and uphold the rate accordingly. I think that the Ecclesiastical Court has a wide discretion in these matters, of the same kind, though perhaps not to the same extent, as it exercises in the granting of a faculty, either before the work is done or a confirmatory faculty afterwards. The court ought to take a view of all the circumstances of the parish, for I think it quite evident that that which is fitting and right to be done in a large and wealthy town parish, would be quite out of place in a small country parish. The question naturally is divided into two heads: repairs and alterations, and additions. First as to repairs, the principle I take to be restoration to the original state; that is the general rule as laid down by Sir John Nicholl, as high an authority on these questions as could be cited. This is the general rule. I do not say there may not be exceptions which would induce the court to hesitate as to granting a faculty, such as decay of the parish and extreme poverty of the ratepayers; but if a rate to defray the expenses of restoration, and restoration only, was granted by a majority of the parishioners, I have very great doubt whether in any case the court ought to abstain from enforcing it. So much for restoration; now as to alteration. Here I think the court is invested with some discretionary power. With respect to alterations, much I think would depend on the description of the alteration. That a majority of vestry could make a valid rate to defray the expense of some alterations cannot, I think, be doubted; it is every day's practice. In some cases even restoration could not be conveniently effected without some alteration. Alterations, the substitution of new for old, and even in some cases additions may in my opinion be the subject of church-rates; as for instance, the erection of a gallery where it was clearly wanted. But all these matters are subject to limitations and to a consideration of the circumstances of the parish. Be it remembered, that I am speaking of a rate made by a majority of the parish; that my present observations do not extend to any case where a rate has not been so made.

They apply only to the case of a rate made. It is upon these principles I must try the validity of the rate with respect to the second question. It is true that the burden of proof lies upon the churchwardens, and from that principle I do not wish to depart; but the most convenient mode of considering the case with reference to these pleadings will be to advert, in the first instance, to the allegation given in on the part of the defendants. I will state, in as few words as I can, the essential parts of that allegation. The first article alleges that the church of St. Mary, Shrewsbury, is an ancient church having four broach windows at the base of the spire thereof; that the design in architecture was plain Gothic; that the four windows have been altered from the original design, and are now ornamental Gothic, with rich pinnacles; that the four windows, at the time of the making of the rate (in order to complete the same according to the previous design) might have been executed for 48*l.*; that the cost of two of the four windows has been 125*l.*, the greater part having been expended in new and elaborate pinnacles; and so on. The fourth article pleads that the present church-rate is excessive; that the moneys received on account of the rate are 203*l.* 7*s.*, the amount expended 143*l.* 2*s.* 10*d.* only. The substance of the allegation is, that there has been an extravagant expenditure with respect to these windows, and that, instead of being restored according to the original design, new and ornamental work has been grafted thereon; that such expenditure is extravagant and illegal. Now before inquiring whether if the allegations were proved the consequence of illegality and extravagance would follow, it is expedient to consider the fact, or in other words whether the allegation is substantiated by the evidence. We need not travel into the particulars of the responsive allegation; there are many details which need not detain the court; substantially the contents of that allegation are that the averments contained in the defendants' allegation are untrue, and that the work done and to be paid for out of the rate is restoration, and not the introduction of new and ornamental work. Such is the issue of fact which I have to try, the rate having been made as is proved by a large majority of the parish. I now proceed to an examination of the evidence, for it is by the evidence I must be governed, as of course I cannot undertake to form any opinion of my own as to the architectural questions raised in this disquisition. First, as to the evidence in support of the opposition to the rate: the evidence to show that the work done is not restoration according to the original design, and in keeping therewith; but the introduction of new ornaments, and, on that account, extravagant and excessive. Mr. Bidlake is the most important witness on that side; he is an architect of the age of thirty-three years, in practice on his own account for fourteen years, namely, from the age of nineteen. I mean no disrespect to this gentleman when I observe that his time of life is scarcely consistent with any extensive experience in many works of importance. The witness states that he has no sufficient recollection of the said lights (that is, the four broach windows) prior to the alterations which have lately been made. From actual comparison, therefore, he has no means of forming an opinion. His *media concludendi*, as I understand him, are these: he looks at the fabric as it is, and on architectural principles judges what the original design and work was, and then he says what has been done is not in accordance with the original design, but is extraneous ornament. It is to be recollected that the subject-matter of the present inquiry is confined to the four broach windows which are in the lower part of the spire of this ancient church. Mr. Bidlake deposes, in very strong terms, to his opinion that these windows are not repaired according to the ancient style, and he



censures them as extravagant and unnecessary. For confirmation of that opinion he refers to a sketch of the church annexed to these proceedings. The next witness is Mr. John Cross, who is a mason and builder. It seems that he was employed as such mason and builder in the years 1857-8, in the repairs of the chancel, the expense of which repairs were to be defrayed by the trustees of the grammar-school, and he states that he made a narrow examination of these branch windows, expecting that the work would be put up to tender; and he expresses his opinion that the work is most admirably executed as regards finish and detail—a great deal too much so for the position in which the work is placed; that it has nothing to do with restoration, and that it is an entirely new style; and he further states that he is quite satisfied that it is an entire deviation from the original design, and is altogether at variance with the original style of the architecture of the church and spire. Now, this is very strong language, and a very positive opinion—perhaps rather more strong and more positive than any experienced architect would venture to express upon a question not without difficulty—the conformity of the new with the ancient state of things—and I must declare my doubt whether the experience as a mason and builder would altogether warrant the delivery of so very strong and decided an opinion. I cannot but think that the knowledge of architecture, to be gained only by much study and practice, and so imperatively necessary in a case like this, cannot be predicated of this witness; and I think it right to observe that, for this and other reasons clearly appearing in the evidence of the case, there is not much reliance to be placed upon the evidence of this witness. Mr. Pountney Smith, the architect employed, has been examined: he has been intimately acquainted with the church at least from 1853, for in that year he deposes to having made a careful examination thereof for the purpose of estimating the necessary repairs—repairs, as he positively deposes, for the purpose of restoration to its ancient state—and he describes the materials he had for forming his judgment, partly from the remains of the ancient work, partly from reasoning from the general style of the building, the best materials which from the effect of time and weather could be obtained. His testimony, as respects the question before me, is very decided, that the work was restoration according to the original design. I cannot think it necessary to enter into a minute examination of the evidence of Mr. Lloyd, except to observe that he confirms Mr. Smith in every important particular. There is, however, one piece of evidence to which I must advert, that of Price, the vestry clerk; he deposes to the fact that a report was received from Mr. Gilbert Scott, adopted by the vestry, and a rate made for the repairs in conformity with the report of Mr. Gilbert Scott. I have not the report before me, therefore of its contents I can say nothing; but I have the facts that the repairs were done according to the plan and estimate of Mr. Smith, that Mr. Gilbert Scott did make a report which was adopted, and the work ordered accordingly. I apprehend the necessary deduction from these premises is, that Mr. Scott approved of what Mr. Smith recommended. It is also to be borne in mind that the plan underwent examination before the vestry, and was fully approved by them, approved by a large majority of those who are to bear the burden such as it is. Now, looking at all these facts and circumstances—that the church in question is an ancient church, a peculiar and admired fabric, that the parish of St. Mary is a part of the great and important town of Shrewsbury, where it cannot be supposed that the rate in question of 3d. in the pound could operate as a heavy burden—I say, under these circumstances, and admitting the evidence to be in some degree conflicting, still I think that the preponderance is greatly in favour of the proposition that

the work done is restoration, and not crude and unnecessary novelty. I think that, under these circumstances, the large majority of vestry testify the general feeling of the parishioners, and prove to me that the rate is neither excessive nor onerous. Upon all these grounds I pronounce for the validity of the rate. The question of costs is now to be disposed of. It has been contended on behalf of the debt, that a difficult question of law has been mooted in this case, and further that the question as to restoration or not was one deserving great consideration. The debt is called upon to pay the sum of about 14s.; no doubt he has a right to contest the validity of the rate, but if on that account he thinks fit to raise a question of law ultimately decided against him, I am at a loss to understand why such a circumstance should render it incumbent on me to depart from the general rule, I may almost say the universal rule, that in questions of church-rate costs should follow the result. I can see no sufficient reason why upon that account the parish should be put to the expense of defending this suit, and with regard to the second point, I think the evidence is clearly against the debt, so as to furnish no excuse whatever for the expensive litigation. I must condemn the debt in costs.

Nelson and Son proctors for plt.

Crosse for debts.

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.  
Barristers-at-Law.

Saturday, Jan. 16, 1864.

REG. v. HAGUE.

*Municipal corporation—Voicing for councillors—Inducing another to personate a voter—Conviction.*

*Under sect. 9 of the 22 Vict. c. 35 (an Act to amend the law relating to municipal elections), the offence of inducing another to personate a voter is committed, although the person induced, upon tendering the voting-paper and being asked if he is the person whose name is signed to the voting-paper, replies "No," and the vote is accordingly rejected. The formal conviction of such an offence need not set out the facts constituting the inducement.*

*At the election of town councillors for the borough of S., A. gave B. a voting-paper signed with the name of C., who was a burgess entitled to vote, with directions to go to the polling-place and give it in. B. went accordingly and tendered the voting-paper; but, upon being asked if he was C.? said he was not, and thereupon the voting-paper was rejected:*

*Held, upon a conviction of A. for inducing B. to personate C., that the conviction was good.*

This was a case stated by the Quarter Sessions of the West Riding of Yorkshire, upon an appeal, wherein a conviction of justices of one Thomas Hague, under sect. 9 of 22 Vict. c. 35, for inducing one James Fogle to personate a voter at an election of town councillors, was affirmed.

The case stated, that on the 5th Nov. 1862, Thomas Hague was summarily convicted, under 22 Vict. c. 35, s. 9, for unlawfully and knowingly inducing one James Fogle to personate one George Bamford, then being a burgess of the borough of Sheffield, then entitled to vote at the election of councillors for St. Philip's Ward, in the said borough, on the 1st Nov. 1862, as by the annexed conviction appears.

By the 9th section of the said Act it is enacted that if, pending any election of councillors, any person shall personate, or induce any other person to personate, any

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person entitled to vote at such election, or whose name is on a burgess-roll then in force, or falsely assume to act in the name or on behalf of any person so entitled to vote, &c., he shall be liable to be convicted and punished as therein mentioned.

On the 1st Nov. 1862, pending the annual election of councillors, the said Thomas Hague gave a nomination paper (a copy of which is annexed), signed by one George Bamford, to the said James Fogle, at a public-house in Sheffield, and asked him to take it to the schoolroom, Bowling-green-street, to vote. Fogle looked at the paper, and said it was not his name that was on it; that Hague told him to vote for Wood and Trickett, and said he was to take the paper and put it down before a gentleman he would see sitting, and that they would not say anything to him. Fogle asked Hague if he should get into any trouble; to which Hague said, "Oh no," there was one man voted eight times in an hour at the previous election." James Fogle after this took the said nomination-paper to the said schoolroom and put it into the hands of one John George Robson, the presiding officer there for the reception of votes for the said ward. The said John George Robson thereupon, being so required, asked the said James Fogle the following question: "Are you the person whose name is signed as George Bamford to the voting-paper now delivered in by you?" To this question the said James Fogle answered "No."

The name of George Bamford was at the time on the burgess-roll then in force. The voting-paper was not filed, nor was the vote of George Bamford recorded in the said election in consequence of the paper being so handed to the said John George Robson by the said James Fogle.

Against this summary conviction the said Thomas Hague appealed to the Court of Quarter Sessions holden for the West Riding of Yorkshire, at Sheffield, on the 9th Jan. 1863; and at the hearing of the said appeal contended that, on the above-stated facts, the offence within the meaning of the said statute whereof he had been convicted, had not been committed by him, inasmuch as Fogle did not actually vote, nor was the vote of George Bamford recorded at the said election, nor had Fogle represented himself to be the person whose name was on the voting-paper as entitled to vote, nor had the said offence been duly and sufficiently set forth, as no particular act of inducing had been specified in the conviction. The said Court of Quarter Sessions confirmed the conviction subject to a case for the decision of the Court of Q.B. whether the said Thomas Hague had, under the above facts, committed the alleged offence, within the meaning of the said statute, of inducing James Fogle to personate the said George Bamford pending the said election, and whether the offence of inducing was duly and sufficiently set forth in and by the said conviction.

If the Court of Q.B. are of opinion either that the said Thomas Hague did not commit the offence within the meaning of the said statute of which he is convicted, or that such offence is insufficiently set forth in the said conviction for the reason aforesaid, then the decision of the said Court of Quarter Sessions, confirming the said conviction, and the said conviction, are to be quashed; but if the Court of Q.B. are of opinion that the said Thomas Hague did commit the offence within the meaning of the said statute of which he was convicted, and that the said offence of inducing James Fogle to personate the said George Bamford is duly and sufficiently set forth in the said conviction, then the said decision of the Court of Quarter Sessions, and the said conviction, are to be confirmed."

The conviction was as follows:—

"Borough of Sheffield in the West Riding of Yorkshire, to wit.—Be it remembered that on the 5th day of Nov. 1862, at the parish of Sheffield in the borough of Sheffield, in the West Riding of the county of York,

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Thomas Hague, of the parish and borough aforesaid, in the said West Riding, labourer, is convicted before us the undersigned John Brown, Esq., mayor of the said borough, and Thomas Dunn, Esq., two of Her Majesty's justices of the peace in and for the said borough of Sheffield; for that he the said Thomas Hague within the space of six calendar months next before the laying of the information whereon this conviction is founded, to wit, on the 1st day of Nov. in the year aforesaid, in the West Riding aforesaid, pending a certain election of councillors for St. Philip's ward in the said borough, unlawfully and knowingly did induce one James Fogle to personate one George Bamford, then being a burgess of the said borough then entitled to vote at the said election, against the form of the statute in such case made and provided. And we adjudge the said Thomas Hague for his said offence to be imprisoned in the house of correction at Wakefield in the said West Riding for the space of two months. Given under our hands and seals the day and year first above mentioned, at the parish and borough aforesaid in the West Riding aforesaid. "JOHN BROWN (L.S.), Mayor.

"THOMAS DUNN, (L.S.)"

The conviction then set out the form of the voting-paper, purporting to be signed by George Bamford, of 97, Allen-street.

By sect. 9 of the 22 Vict. c. 35 (an Act to amend the laws relating to municipal elections) it is enacted that, "If pending or after any election of councillors, auditors, or assessors, any person shall personate or induce any other person to personate any person entitled to vote at such election, or whose name is on the burgess-roll then in force, or falsely assume to act in the name or on behalf of any person so entitled to vote, or wilfully make a false answer to any of the questions mentioned in sect. 18 of this Act, he shall for every such offence be liable on conviction before two justices in petty sessions to be imprisoned in the common gaol or house of correction for any period not exceeding three months, with or without hard labour.

Fowler appeared in support of the order of sessions and the conviction, but the Court called upon

Mauls for the app., who argued, first, that as Fogle did not vote, and upon the question being put to him declared at once that he was not George Bamford, he had committed no offence, and that Hague consequently could not be guilty of inciting him to commit it. [COCKBURN, C.J.—The question is, whether because a trick fails, it is less a personation.] The 5 & 6 Will. 4, c. 76, s. 32, describes the mode of voting, and by sect. 34 the questions can only be asked upon the requisition of two burgesses. [COCKBURN, C.J.—If these questions are not asked, the fact of personation is complete by handing in the voting-paper. BLACKBURN, J.—Surely, if by words or signs he represents himself to be the person, it is a personation.] The question is, did the inducer succeed in making Fogle pass off as another person? [COCKBURN, C.J.—Or rather, did he succeed in inducing him to go and endeavour to vote as another person? Is a man less guilty of uttering a forged note, because he is stopped before it actually changes hands?] There the offence is complete by tendering the note. [COCKBURN, C.J.—So is it here by his tendering himself as another person.] It is a distinct offence to make a false answer. Secondly, the conviction is bad for not setting out the facts constituting the inducement. In *R. v. Marsh*, 6 A. & E. 250, the indictment for a similar offence set out all the facts. [MELLOR, J.—There are certainly cases in which a general allegation is not sufficient, as where the act charged does not show what was really done; but here it is obvious.] The inducement certainly is set out, but not the means of inducement. The word "induce" may mean anything.

COCKBURN, C. J.—I am of opinion that the order of sessions should be confirmed. Whatever doubt may have existed as to whether or not the offence has been committed, if the charge had been upon the second branch of the section for making a false answer, yet there can be no doubt as to the first branch, which makes it an offence to personate, or to induce another to personate, a voter; and I cannot but think that if a man goes up to the voting-place and represents himself as another person, it is a false personation. The giving of a false answer to the questions would be of itself an offence, but that is an additional offence. I think it is not because his attempt was frustrated that he was not guilty of the offence. It was not because he would not give a false answer that he has not falsely personated another. His offence was equally grave whether he succeeded or not. As, therefore, Fogle actually falsely personated, the deft. was guilty of inducing him to personate.

CROMPTON, J.—I am of the same opinion. Mr. Maule argues that, to constitute the offence of inducing a person to personate, it is necessary that he should have successfully personated, and that as the personation was not successful, therefore he was not guilty. I am certainly inclined to think that if the party did not in fact personate another, the deft. cannot be guilty of inducing him to personate; but here there is an actual personation. I take it that the meaning of the section is—pretend to personate. Now here the party gives in a voting-paper, and so represents himself to be another person. I do not think that his refusal to tell a falsehood purges his offence. As regards the second objection, there is no authority for saying that you must set out the particular facts. In the old convictions it was certainly necessary to set out the evidence, that the court might see that the party has been convicted upon legal evidence, but this is not necessary at the present day.

BLACKBURN, J.—I am of the same opinion. I take it that, as soon as the man holds himself out to be the person entitled to vote, and does so in the name of another, he commits the offence; and that it is utterly immaterial that he is stopped before he succeeds in his object. Upon his tendering his voting-paper, he has done sufficient to warrant the conclusion that he personated.

MELLOR, J.—I think that when a man presents a voting-paper to the person whose duty it is to take the votes, the personation is complete, and it matters not that he afterwards withdraws from the act. I think also that the conviction sufficiently sets out the offence.

*Order of sessions and conviction affirmed.*

*Saturday, Nov. 14, 1863.*

HUDSON (app.) v. MACREA (resp.)

*Summary conviction—Bond fide claim of right—Claim without colour to support it—Jurisdiction.*

*To oust justices upon a summary conviction, of their jurisdiction by the assertion of a bond fide claim of right, such claim must have some colour to support it. Where, therefore, the claim set up is wholly without colour, the jurisdiction of the justices is not ousted, notwithstanding it is set up bond fide, and believed to be so set up by the justices.*

This was a case stated by justices under the 20 & 21 Vict. c. 43, upon a conviction of the app. for trespass in fishing, contrary to sect. 24 of the 24 & 25 Vict. c. 96.

The case stated that "Whereas on the 18th and 25th of July 1863, at Croydon, in the county of Surrey, there was brought on for hearing and determination before us Edward Richard Adams and Nathaniel Lawrence Austen, Esqrs., two of Her Majesty's justices of the peace for the said county, a

certain information of John Macrea, in the following form, that is to say, for that he the said Charles Hudson, at the parish of Carshalton, in the county of Surrey, on the 2nd July 1863, by angling at a certain hour, not between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, unlawfully and wilfully attempted to take fish in certain water, in which Samuel Gurney, Esq. then and there had a private right of fishing, contrary to the statute 24 & 25 Vict. c. 96, s. 24. And whereas the said Charles Hudson and John Macrea appeared by their respective attorneys before us upon the two hearings of the said information. And whereas having duly heard and considered the evidence produced, and the facts admitted by both parties, we did thereupon determine that the said complaint was proved, and ordered the app. to pay a fine of 1s. and 2d. 8s. 6d. costs, and in default to be imprisoned for twenty-four hours. And whereas the said app. being dissatisfied with our determination upon the said hearing as erroneous in point of law duly applied to us to state and sign a case setting forth the facts and grounds of such our determination as aforesaid for the opinion thereon of her Majesty's Court of Q. B. Now therefore we the said justices, in compliance with the said application and the provisions of the said statute, do state the following case:—

"All the facts and charges set forth in the information are admitted and are to be taken as proved, reserving only the question whether the act of the app. therein complained of was or was not illegal and contrary to the statute therein referred to.

"At that part of the river Wandle where it separates the parishes of Mitcham and Carshalton, in the county of Surrey, there is, on the Mitcham side of the stream, a dwelling-house and garden, which are occupied by one W. Macrea under a lease from Samuel Gurney, Esq., M.P. The land on the other side of the river is in the parish of Carshalton, and immediately adjoins the river, and running above its banks there is a public footpath. On the occasion in question the app. was fishing from this footpath. The Wandle is a non-navigable river. Many persons, some residing at Mitcham, some at Carshalton, and others at a distance from those places, have for many years—some for sixty years and upwards, and others for less periods—fished at their pleasure, and without interruption, in the said river, by angling from this footpath above mentioned; and it was stated in evidence that the public had fished there for sixty years and upwards. The defence of the app. was that, under the above circumstances, he had a right, as one of the public, to fish in that part of the river above described from the said footpath, and that by the making a claim *bond fide* to that right our jurisdiction was ousted. We were of opinion that the app. had acted and made his said claim under the *bond fide* but mistaken supposition that he had such a right. But we were of opinion that such a right could not, under the above circumstances, be acquired in a non-navigable river, and that it was not sufficient to oust our jurisdiction that the app. by mistake supposed that he possessed it and *bond fide* claimed it. The question of law arising on the above case for the opinion of Her Majesty's Court of Q. B. is, first, whether the claim by the app. as one of the public, and, under the above circumstances, to fish at the place in question was such an assertion of right as ousted our jurisdiction; secondly, and if not, whether our decision against the validity of the claim was right in law."

Mellish, Q. C. appeared for the resp., and argued that, to oust the jurisdiction of the justices, the claim of right must be supported by a colour of right, and that far from this being the case in the present instance, it was absurd to suppose that the public could have a right to fish in a non-navigable river; that

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*Jones fides* alone, without some colour of right, was insufficient to oust the jurisdiction of the justices:

*Scott v. Vins*, 30 L. J. 207, M. C.;

*Cornwall v. Saunders*, 32 L. J. 6, M. C.;

*Reg. v. Stimpson*, 32 L. J. 209, M. C.; 8 L. T. Rep. N. S. 536.

*Philbrick*, who appeared for the app., argued that the finding of the justices that the app. acted *bond fide* ousted them of their jurisdiction to convict:

*Taylor v. Newman*, 32 L. J. 166, M. C.; 8 L. T. Rep. N. S. 424.

BLACKBURN, J. (a)—I am of opinion that the conviction was quite right. This was undoubtedly a private fishery, and though the app. showed that he *bond fide* believed that he as one of the public had a right to fish there, the justices were right in holding that in point of law such a right could not exist in a non-navigable river. The rule has often been laid down in this court that the title set up by a deft. in order to oust the jurisdiction of the justices must be supported by some show of right, and here there was none whatever, for such a claim could not possibly exist. In *Reg. v. Stimpson* we held that the jurisdiction was ousted, for that was a navigable river, and the presumption was, that the public could fish there. As to the necessity of a *mens rea*, this was not a case in which the question of jurisdiction turned upon that ingredient. The only point was, whether there was reasonable evidence of a claim of right in the app.

MELLOR, J. concurred.

*Conviction affirmed.*

Tuesday, Jan. 19, 1864.

PENFOLD V. WEST AND OTHERS.

*Overseers—Action against—Debts of outgoing overseers—Plea—11 & 12 Vict. c. 91, s. 1.*

The pl. performed work and services for A. and B., as overseers of the parish of K., and upon their quitting office, he performed other work and services for C. and D., their successors, and afterwards brought an action against the latter for the amount due to him in respect of both sets of work and services. To this, C. and D. paid 60*l.* into court, which the pl. took out and entered a *nolle prosequi* to the remainder. Subsequently he brought an action against A. and B. for the amount incurred by them during their year of office, on the ground that in the former suit he had no right of action against C. and D. in respect of his claim against A. and B. and that he took the 60*l.* out of court only in discharge of his claim against C. and D. In this action A. and B. pleaded upon equitable grounds a plea setting out the proceedings in the former action, and alleging that the sum of 60*l.* was enough "to satisfy all the said claims made by the said pl. in his said action, including his claim in this action." Upon demurrer to this plea:

Held, that it was a good plea, and an answer to the action.

This was a demurrer to a plea.

The declaration was for money payable by the defts. to the pl. for work done and materials provided by the pl. for the defts. at their request and for money paid, and upon an account stated.

The 4th plea was as follows, "and for a fourth plea by way of defence, upon equitable grounds the defts. say that the said debts were contracted by the defts. by virtue of their office which they held of overseers of the poor of the parish of Kingston-upon-Thames, in the county of Surrey, and they lawfully contracted the same within three months prior to the termination of their year of office, which terminated before the commencement of this action, and the same not having been discharged by them before the termination of

their year of office, the same, according to the statute in that behalf became and were payable by and recoverable from the said Philip Jones, James Page, James Werman and James Coe White, who were the defts.' immediate successors in the said office of overseers of the poor of the said parish, and were chargeable upon the poor-rate of the said parish in like manner as it would have been by the defts., and the same being unpaid, the pl. brought an action against the said Philip Jones, James Page, James Werman and James Coe White, then being such overseers as aforesaid, in Her Majesty's Court of Q. B. for the recovery of the said debts, and other claims or debts made by the pl. against them as such overseers, and the pl., by a particulars of demand in the said action, and the declaration therein claimed and sought to recover from the said defts. in the action, the said debts in this declaration mentioned. And the said Philip Jones, James Page, James Werman, and James Coe White thereupon pleaded to the said declaration and the said claims against them, that as to 60*l.* parcel of the pl.'s claim therein, they brought into court the sum of 60*l.*, and that that was enough to satisfy the pl.'s claim as to that sum, and that as to the residue of the pl.'s claim, they never were indebted. And the pl. thereupon replied, taking the said sum of 60*l.* out of court in satisfaction of the said 60*l.* parcel, &c., and entered a *nolle prosequi* in the said action as to the residue of the pl.'s claim therein. And the defts. say, that the said 60*l.* so paid into court was enough to satisfy the said 60*l.* in respect to which it was paid, and to satisfy all the said claims made by the pl. in his said action, including his claim in this action. And the said Philip Jones, James Page, James Werman and James Coe White were never indebted to the pl., and no money became payable by them to him, nor had the pl. any claim whatever against them in respect of the residue of the pl.'s claims in this action, or otherwise."

To this plea there was a demurrer.

By sect. 1 of the 11 & 12 Vict. c. 91 (an Act to make provision for the payment of parish debts, the audit of parochial and union accounts, and the allowance of certain charges therein), it is enacted "that if the overseers of the poor of any parish shall lawfully by virtue of their office contract any debt on account of the parish within three months prior to the termination of their year of office, and the same shall not have been discharged by them before their year of office shall have determined, such debt shall be payable by and recoverable from their immediate successors in office, and chargeable upon the poor-rates of the said parish in like manner, as the same would have been payable and chargeable by such first-mentioned overseers during their year of office," &c.

Mellish, Q.C. (Keane with him) now appeared in support of the demurrer, and contended that the plea was no answer to the pl.'s claim, for that as in the former action the pl. could not recover against the then defts. the amount incurred during the year of office of their predecessors, the present defts., so, in taking as satisfaction in the action against them of the 60*l.* he only satisfied such claim, and did not thereby discharge his claim against the present defts. That the case of *Chambers v. Jones*, 5 Ex. 229; 19 L. J. 239, Ex., shows that under the 11 & 12 Vict. c. 91, the contract is not transferred to the succeeding overseers, and that if the pl. had gone on with the action against them in the former action for the amount due from their predecessors he must have failed, and that his acceptance of the 60*l.* was only in discharge of the claim he had against such succeeding overseers; that the pl. being advised that he could not recover against the subsequent overseers in respect of that part of the demand which arose against the former overseers, he took the 60*l.* in discharge only of his

(a) Cockburn, C.J. and Wightman, J. were not present at the argument.

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claim against the then debts. The entire claim of the plt. was 159*l*.

*M. Smith* (*B. C. Robinson* with him) appeared in support of the plea, and contended that it was an answer to the action, for that the 60*l* was paid into court not only to satisfy so much, but "to satisfy all the said claims made by the plt. in his said action, including his claim in this action." [BLACKBURN, J.—There are no words in the 1st section of the 11 & 12 Vict. c. 91, to say that the prior overseers shall be discharged.] That may be so; but if an action has been brought against the succeeding overseers for the whole, and they have paid into court a sum of money in respect of the whole, which is taken out in satisfaction of the demand in the action, that is an answer to a subsequent action, as in this case.

*Mellish*, Q.C. in reply.

COCKBURN, C. J.—As I understand the Act of Parliament, it is not to transfer the debt to the succeeding overseers, but to authorise them to pay it, and so it was payable by their successors in the sense that it was justifiable for them to pay it. Here is an action brought against the overseers, and a sum of money was paid by them sufficient, as they said, to include all the demand. That being so, this plea is good; at all events we cannot say that it is a bad plea. It was competent to the debts in the former action to pay that demand, and if paid it was a discharge. I understand the plea to be in effect a plea of payment, and in that sense I cannot say that it is bad.

BLACKBURN, J.—I am of the same opinion. The effect of the statute is, that a debt due from one set of overseers may be recoverable from their successors in office. I am certainly inclined to the opinion, that the construction put upon the statute by the Court of Ex. in *Chambers v. Jones* is correct, and that the subsequent overseers are not personally liable for the former debts. But it is quite plain that they would be the persons who would ultimately have to raise the money. Then, that being the case, they may certainly have set up that they were not liable for the debt, but they were not bound to set up such a defence. In the former action the plt. not only claimed for the first, but for the subsequent amount. Then the payment of the 60*l* into court is general, and it seems to me that payment should be allowed as against both portions of the claim. The plea says that the 60*l* was paid into court "to satisfy all the said claims made by the plt. in his said action, including his claim in this action." If that was so, this is a perfectly good plea.

MELLOR, J.—I agree with the Court of Ex. that the section of the statute does not transfer the contract; and in the former action the overseers may have supported a defence as to the sums incurred in the time of their predecessors, but they were justified in not choosing to do so. Then, the two claims being mixed together, a payment is made for the whole. The plt. thereupon takes the sum out of court, and a fresh action is brought, on the ground that a portion that was claimed in the first action could not have been recovered. I will not say how that might be, but it is now said by the plea that the amount was paid into court upon the whole demand. I think this is a good plea.

*Judgment for the debts.*

*Plt.'s attorney, Thomas E. Penfold.*

*Defts.' attorney, Bartrop, Kingston-on-Thames.*

Thursday, Jan. 21, 1864.

REG. v. CLEWORTH.

*Sunday labour*—29 Car. 2 c. 7, s. 1.—*A farmer not within it.*

*By the 29 Car. 2, c. 7, s. 1, it is enacted that "no tradesman, artificer, workman, labourer, or other*

*person whatever," shall do or exercise any worldly labour, business, or work of their ordinary calling upon the Lord's day or any part thereof (works of necessity and charity only excepted), &c.:*

*Held, that "a farmer" is not within the operation of this enactment.*

This was a rule for a *certiorari* to bring up the conviction of one Peter Cleworth by two justices. The conviction stated, "For on the 19th day of July, at West Leigh, in the parish of Leigh, in the county of Lancaster, being the Lord's day, Peter Cleworth being a farmer, did unlawfully do and exercise certain worldly labour, business and work of his ordinary calling of a farmer aforesaid, by then and there haymaking in a certain field in West Leigh aforesaid, not being a work of necessity or charity, contrary to the form of the statute." The rule was moved upon the ground that the conviction shows upon the face of it that the justices had no jurisdiction to convict the said Peter Cleworth, who is therein described as "a farmer," of the offence stated.

By the 29 Car. 2, c. 7, s. 8, it is enacted that "no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary calling upon the Lord's day, or any part thereof (works of necessity and charity only excepted)," &c.

*Mellish*, Q.C. and *Baylis* now showed cause.—The only question is, whether a farmer who works on his own farm is a labourer within the statute; and whether, if he is not strictly a labourer, he does not come within the operation of the words "or other person whatsoever?" It is clear that an agricultural labourer is within the Act, for at the time of its passing they were the most numerous class of labourers. A farmer who works is the same as a labourer, except that instead of working for wages he works for profit. [COCKBURN, C. J.—There is a difficulty in saying that, according to common acceptance, a farmer means a labourer.] But he certainly comes within the operation of the words "or other person whatsoever," for although those words must be construed *ejusdem generis* with the words preceding, such an occupation as that of a farmer must have been intended to have been included. They must include any person who has an ordinary manual calling. [BLACKBURN, J.—A clerk who makes up his books upon a Sunday would be within it; but it would be hard to say, that if a merchant did so he would be.]

*Fennell v. Ridler*, 5 B. & C. 407, *Bayley*, J.'s judgment;

*Rex v. Whitnash*, 7 B. & C. 596.

[BLACKBURN, J.—In the reign of Charles II., the farmers must greatly have outnumbered the other classes, and it is strange, therefore, if the Legislature intended to have included them, it should not have said so.] It would be a strange state of things if the labourer should be liable, and the farmer who employs him not be liable. [CROMPTON, J.—I take the case of a man shaving another; the one who shaves would be liable, whilst the one who is shaved would not.] That might come under the exception of a case of necessity. [COCKBURN, C. J.—Judging from what one sees all around, it can hardly be said that shaving is an act of necessity.]

*Scaise v. Morgan*, 4 W. & M. 270;

*Sandimas v. Breach*, 7 B. & C. 96,

relied upon on the other side, turned upon a different provision of the statute. If a farmer is not included he might go into town and sell his corn on a Sunday, whilst the corndealer would be prohibited. It could not be intended that a farmer might do what a tradesman is prohibited from doing. [CROMPTON, J.—The Legislature may have thought that there were cases in which, though not coming under the denomination of "necessity," might yet be properly exempt from the

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penalty. BLACKBURN, J.—Large classes of working people must have been considered as exempt; such as sailors, who are certainly labourers, and yet who could not be expected on a voyage to cease from navigating the ship.]

The *Solicitor-General* (Sir R. P. Collier) and *Walsby* in support of the rule.—The Legislature has proceeded upon a descending scale: it begins with a tradesman—not a merchant, then artificer, meaning a skilled workman, then a workman, and then comes to the lowest degree, namely, a labourer, who is supposed to be engaged in low and toilsome work, and it would be strange indeed if, under the words “or other person whatsoever,” it had intended to jump back and include such a large class as farmers. If a farmer is to be included, all kinds must be so, and then it would include the private gentleman who occupies his own land. The popular notion of a farmer is that of one who superintends farming operations:

*Paste v. Dicker*, Cro. M. & R. 428.

(They were stopped by the Court.)

COCKBURN, C. J.—I am satisfied that this conviction cannot be supported. I think that the persons who are within the enactment may be divided into two classes—the employers and the employed. The only persons under the first head are “tradesmen,” and under the second they are “artificers, workmen, and labourers.” Then comes a general expression of “or other person whatsoever.” But according to the general construction of statutes, where general words follow particular ones they are to be construed *ejusdem generis* with the particular ones which have preceded them, and are to be held to be of the same nature. Now, assuming for the present purpose what it is unnecessary to decide—that the term “labourer” includes an agricultural labourer—it is plain that the term “tradesman” does not reasonably include a farmer. We are, then, to construe the words only as referring to employers and employed. There being these two descriptions, I cannot say that “a farmer” is *ejusdem generis* with “tradesman.” The case may be open to the inconvenience of an agricultural labourer being liable to punishment for labouring, whilst the farmer who employs him or takes part is not subject to any penalty. I feel the force of this, but as the Legislature has not provided for it, we must not extend the operation of the statute.

CROMPTON, J.—I cannot look upon this person, who is described as “a farmer,” as coming within the Act. A labourer means one who labours for another, and it is therefore too much to say that a farmer is a labourer. The statute no doubt presses more strongly against the labouring classes than the upper classes, as where a gentleman sells his horse upon a Sunday, in which case he would not be liable, though a horsedealer would be. However, it is not a legitimate argument that hardships exist; the real question is, whether “a farmer” is *ejusdem generis* with what goes before. It is quite clear he is not so with respect to “a tradesman,” and he cannot be with respect to “a labourer.” The ground of my opinion is, that “a farmer” is not *ejusdem generis* with any of the other persons named, and I think there may be very good reasons why the Legislature intended not to include him.

BLACKBURN, J.—I am of the same opinion. Whether or not the term “labourer” applies to an agricultural labourer is not material in this case, for it is quite clear that it does not apply to a farmer. Then with reference to the other descriptions of persons named in the section; I think he is not within any one of them. Does he come then within the words “or other person whatsoever?” I think he does not, and that it was not the intention of the Legislature that farmers, who were a very numerous class at the time the Act passed, should be included.

MELLOR, J.—If this was a question of whether or not the Act applies to an agricultural labourer, I should like to have it further argued, for I am by no means satisfied. But it is quite clear that a farmer, who is one of a well-known class, is not included.

*Rule absolute.*

Attorney for the prosecutor, *Myne*, for *Marsh*, of Leigh.

Thursday, Jan. 21, 1864.

REG. v. PETTITMANGIN.

*Justice—Interest—Watch committee—Borough fund—Conviction.*

*A borough magistrate of a town which has a municipal corporation, of the watch committee of which he is a member, is not thereby disqualified from adjudicating upon an information instituted with the sanction of such watch committee, even though the fine imposed in the case goes into the borough fund.*

In this case the deft. had been convicted by two justices of Liverpool of the offence of suffering prostitutes to assemble on his premises, and he was fined 20l. It appeared that one of the two convicting magistrates, a Mr. Rathbone, was a member of the watch committee of the town council, and that information was laid by one of the police inspectors in pursuance of instructions which he and the other members of the police had received from the watch committee, to see that the public-houses in the borough are properly kept; directing also, that informations of this description should be submitted to the law clerk for his opinion.

*E. James*, Q.C. (Temple with him) now applied for a rule for a *certiorari* to remove the conviction into this court, with the view to its being quashed, on the ground that one of the justices (Mr. Rathbone) was interested, inasmuch as he was a member of the watch committee, and interested also in the borough fund, into which the fine was paid. [COCKBURN, C. J.—The watch committee are a part of the general governing body of the town, and they give the police authorities general powers upon the subject, with directions to lay the cases before the law clerk. BLACKBURN, J.—I don't see how that can render every member of the watch committee disqualified. CROMPTON, J.—If a magistrate took an interest in discovering a murder and set the police in motion, would he be, therefore, disqualified from dealing with the charge?] Then the magistrate was interested in the fine, as it went into the borough fund. [BLACKBURN, J.—If this be a disqualification, the borough magistrates would be disqualified in all cases where a fine is imposed which goes into the borough fund.]

COCKBURN, C. J.—This is not such an interest as disqualifies; it is much too remote. *Rule refused.*

Saturday, Jan. 23, 1864.

THE REV. R. CONGREVE AND ANOTHER (apps.) v. THE OVERSEERS OF THE TOWNSHIP OF UPTON.

*Paor-rate—Houses of chaplain and medical superintendent of a county lunatic asylum—17 § 18 Vict. c. 97, ss. 35, 55.*

*The chaplain to a county lunatic asylum is not required by law to reside upon the premises; therefore where such chaplain did in fact reside within the precincts of such asylum, pursuant to the requisition of the committee of visitors, in a house provided for him for the purpose:*

*Held, that such house is not privileged to be rated at the lower scale provided by sect. 35 of the Lunatic Asylums Act 1853 (17 § 18 Vict. c. 97).*

*The medical superintendent of a county lunatic asylum is required by law to reside in the asylum; there-*

*fore, where he resided in a house built for him by such committee within the precincts of the asylum: I find, that such house is privileged to be rated at the lower scale provided by the above-mentioned section.*

This was a case stated under sect. 11 of the 12 & 13 Vict. c. 45, upon an appeal against a poor-rate for the parish of Upton in the county of Chester.

The rate in question assessed the Rev. Ralph Congreve to the sum of 15s. for a house, building and gardens, of which he was the occupier, and the trustees of the Chester County Lunatic Asylum were owners, of the gross estimated annual value of 34l. per acre, and it assessed Mr. Brushfield (the other app.) also to the sum of 15s. for a house and garden of the same gross estimated annual value per acre, occupied and owned in like manner. The case stated that the Chester County Lunatic Asylum is situate in the resps.' township; that it was built before the passing of the Lunatic Asylums Act 1853 (16 & 17 Vict. c. 97), under the statutes then in force, upon a site purchased for the purpose, containing about 18 acres; that the visitors have since from time to time purchased other adjacent land, the whole area possessed by them now consisting of about 56 acres; that the buildings coloured brown in the plan accompanying the case are, except a small portion of the female department and a very small part of the laundry, situate on the land originally purchased; that the red lines indicate walls, those round the outside of the buildings coloured brown in the plan are about 7½ feet high, except that with the black marks across it in front of the asylum, which is only 2 feet 7 inches high; that recently, owing to increased accommodation being required, a large additional building has been erected for male patients outside the before-mentioned walls, also a chapel; that one of the purchases recently made as before stated was a piece of land purchased in the year 1859, on a portion of which, at the extreme north-eastern boundary of the asylum land, a house has been erected for the residence of the chaplain of the asylum, and an acre or upwards of land (including the site of the house and outbuildings) has been appropriated and fenced off as garden ground to the said house. The app., Ralph Congreve, has for many years been, and now is, the chaplain of the asylum and resides in and has the exclusive occupation of the said house, garden and premises, which are entirely detached from the asylum buildings, and are at a distance of 200 yards therefrom. That the house is a good well-arranged modern residence, and contains a study, a dining-room, and a drawing-room, kitchen, five bedrooms, cellar, and the usual domestic offices; nearly adjoining are a stable for two horses, a coach-house, and a wooden shed used as a shippon; that a small portion of the garden ground is used as a flower-garden, and the remainder, being the principal portion, as a kitchen-garden, the fruit and vegetables produced by which are consumed by the app. Ralph Congreve and his household. That the chaplain is not required by any Act of Parliament to be resident at the asylum, and until the said house was provided for him he resided at a considerable distance from the asylum, out of the resps.' township; that he is now required by the committee of the visitors of the asylum to reside in such house, and he is not permitted by them to hold any other cure; that he devotes the whole of his time and attention to the office of chaplain; that he pays no rent for his residence, but his occupation thereof forms part of the emoluments of his office, the property-tax, inhabited house duty and tithe commutation rent-charge are assessed thereon, and are paid in respect thereof by the committee of visitors of the asylum; that at the time of the purchase the said land was valued and assessed to the relief of the poor of the

resps.' township at the gross estimated annual value of 2l. 10s. per annum. That the said visitors in the year 1855 built upon a portion of the ten acres of land before mentioned (being the land purchased when the asylum was first erected) another house and premises for the resident medical superintendent of the asylum, and appropriated thereto (including the sale of the house and outbuildings) about three-quarters of an acre of land for garden ground. That the app. Thomas Nandall Brushfield is the present resident medical superintendent, and resides in and has the exclusive occupation of the last-mentioned house, garden and premises, which are entirely detached, as shown on the plan, and are divided from the asylum buildings by one of the walls coloured red on the plan, and are fenced on all other sides by an ornamental hedge, &c. That the house contains kitchen, scullery, laundry and cellar on the basement, a library, a dining-room and a drawing-room on the first floor, four bedrooms and dressing-room on the second floor, and two servants' bedrooms and two storerooms in the attics besides the usual domestic offices; that it is a good, well-arranged modern residence; that a small portion of the garden ground is used as a flower-garden, and the remainder as a kitchen-garden, the fruit and vegetables produced by which are consumed by the app. T. N. Brushfield and his household. That by sect. 55 of the Lunatic Asylum Act 1853, it is provided that the medical officer shall be resident in the asylum; that, in 1854, when the app., who had previously been assistant medical officer, was appointed superintendent, it was arranged that a residence should be provided for him at the asylum; that until the erection of the house which he now occupies he continued to occupy the two rooms in the block of buildings coloured brown on the plan, which he had occupied whilst assistant medical officer, and which are now occupied by the present assistant medical officer; that there is another room on the ground-floor of the same building which is called the surgery, but which is used as an office, but the said app. discharges a portion of his official duties in the library of his house, which in all other respects he uses as a private residence only. That at the time of the purchase of the land now appropriated to the superintendent's residence, the same was valued and assessed to the relief of the poor of the resps.' township at the gross estimated annual value of 5l. an acre. That the app. T. N. Brushfield devotes the whole of his time and attention to his office of medical superintendent; he pays no rent for his residence, but his occupation thereof forms part of the emoluments of his office; that the property-tax, inhabited house duty and tithe commutation rent-charge are assessed thereon, and are paid in respect thereof to the committee of visitors of the asylum. The app. contend that the lands which are the sites of the said residences and gardens respectively, with the buildings erected thereon, and so occupied by them, are not, according to the 35th section of the said Lunatic Asylums Act 1853, liable to be assessed at a higher value than the value or rent at which such lands were respectively assessed at the time of such purchase as aforesaid, viz., at the sum of 2l. 10s. in respect of the land the site of the said house and premises occupied by the said Ralph Congreve, and in respect of the sum of 3l. 15s. in respect of the land the site of the said house and premises occupied by the said T. N. Brushfield. The resps. contend that the occupation by the said apps. respectively of the said houses, gardens and premises is a beneficial and exclusive occupation by them respectively rendering them liable to be assessed to the rate for the relief of the poor in respect thereof, and that the said house and buildings are not such "additional buildings" as come within the exception contained in the 35th section of the said Lunatic Asylums Act 1853; and the resps.

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further contend, that if the said houses and premises or either of them are used for the purposes of the asylum, the same are not wholly and exclusively so used, and therefore the said apps. are respectively liable to be rated in respect of their respective occupations so far as such occupations respectively exceed the accommodation necessary for the performance of the official duties of the said apps. respectively.

The question for the opinion of the court is, whether the lands and houses occupied by the apps., or either of them, ought or ought not to be rated only at the value or rent at which the same lands were assessed at the time of the purchase or acquisition of such lands respectively under the provisions of any Act of Parliament relating to public lunatic asylums, and if not, then at what amount the same or either of them should be rated? &c.

By sect. 35 of the Lunatic Asylums Act 1853 (16 & 17 Vict. c. 97), it is enacted that "no lands or buildings already, or to be hereafter purchased or acquired under the provisions of any former Act, or this Act, for the purposes of any asylum (with or without any additional building erected or to be erected thereon), shall, while used for such purposes, be assessed to any county, parochial, or other local rates, at a higher value, or more improved rent, than the value or rent at which the same were assessed at the time of such purchase or acquisition."

*Welsby* (*M<sup>c</sup>Intyre* with him) appeared for the resps., and contended that the rating at the higher value was correct, first, with reference to the chaplain, because, as he was not required by law to reside upon the premises, the house and premises provided for him were not provided for the purposes of the asylum within the meaning of the statute; and secondly, with reference to the house and premises provided for the medical superintendent, although by law he is required, by the 55th section, to reside in the asylum, yet, as his house was distinct from the main building, it is rateable, or, at all events, it is rateable as being in excess of what is required for his accommodation:

*Gambier v. Lydford*, 3 Ell. & B. 346.

*Mellish*, Q.C. (*Beavan* with him) appeared for the apps., and argued that the houses and premises provided for both chaplain and medical superintendent were within the meaning of sect. 35, and that with reference to neither was the accommodation greater than was proper for persons in their station of life:

*Reg. v. Stewart*, 8 Ell. & Bl. 360.

*Welsby* in reply.

BLACKBURN, J. (a)—I think that in this case we must give our judgment in favour of the rate as regards the chaplain, but that in the case of the medical superintendent the rate must be that only upon the value of the land at the time it was purchased. The case turns upon the construction to be put upon the 35th section, which says, that "no lands or buildings already or to be hereafter purchased or acquired under the provisions of any former Act, or this Act, for the purposes of any asylum (with or without any additional building erected or to be erected thereon), shall, while used for such purposes, be assessed to any county, parochial, or other local rates, at a higher value or more improved rent than the value or rent at which the same were assessed at the time of such purchase or acquisition." If lands are purchased for the purpose mentioned, it matters not who are the occupiers, as they are to be rated at the old value. Now the lands here were purchased for the asylum, and it is a question whether they are used for the purposes of the asylum? I think that the gentlemen who have the management of the asylum have done very right in having a chaplain upon the spot, and that it is not a misapplication of the

funds to provide a house for him. But then I cannot think that it is used for the purposes of the asylum within the meaning of the section. It is certainly for the convenience of the parties, but is not within the words of the Act. I think, therefore, that the parish officers are right in saying that the house and premises of the chaplain were not used within the meaning of the section. But when we come to the case of the medical superintendent, there is a difficulty in coming to the same conclusion, for it is expressly enacted that he "shall be resident in such asylum." Mr. Welsby argued that the residence must be within the building of the asylum or its curtilage, but I do not think that that is the meaning of the section; I think it means within the precincts of the asylum. It is not necessary to go into the question of whether or not his premises really adjoin the asylum, as in no sense of the word can they be said not to be within the precincts of the asylum. Then, as he occupies the premises for the purposes of his office, that is sufficient. I quite agree with Mr. Welsby that if the committee gave the medical superintendent a residence at a distance from the asylum it would not be exempt from the higher rating, but that is not so here, and I agree with the *Portsmouth* case (*R. v. Stewart*), that the residence must be such as is proper for such a person. Here there is a comfortable residence for a gentleman and his family, with a kitchen-garden and a flower-garden; but it is only such a residence as would be reasonable for a gentleman of station and education with his wife and family. As he therefore uses this residence for the purposes of the asylum, it must be rated according to the old value. As to the chaplain's premises, they will be rated at the improved value.

MELLOR, J.—I am entirely of the same opinion. Upon a fair construction of the Act I think that, as regards the medical superintendent, he should have such accommodation as is reasonable with respect to such an asylum. Now, his premises are clearly within the grounds of the asylum, and I think he is entitled to be rated at the old rate only. With reference to the chaplain that is a different case. No doubt he uses it for the purposes of the asylum, and it was very right in the committee to provide it; but when we look at the terms of the Act, it is not to be such a house merely as would be convenient, but such as is required by the statute itself for the purposes of the asylum. Now there is nothing in the statute which requires the chaplain to reside in the asylum, and therefore the house is not a building acquired for the purposes of the Act within the meaning of the section.

*Rate to stand as regards the premises occupied by the chaplain, but to be reduced as regards those occupied by the medical superintendent.*

#### REG. v. COUSINS.

*Poor-law—Appointment under the 43 Eliz. c. 2, s. 1, of one overseer—Extra-parochial place—20 Vict. c. 19, ss. 1 and 2.*

*By the 43 Eliz. c. 2, s. 1, which directs the appointment of overseers of the poor, it is enacted that "four, three, or two substantial householders there as shall be thought meet, . . . shall be called overseers of the poor of the same parish." Held, that an appointment of only one overseer for a parish is bad.*

*By the 20 Vict. c. 19, s. 1, every place entered separately in the report of the Registrar-General on the last census, which now is, or is reputed to be, extra-parochial, and wherein no rate is levied for the relief of the poor, shall, for all the purposes of the assessment to the poor-rate, the relief of the poor . . . be deemed a parish for such purposes: Held, that such report of the Registrar-General is not*

(a) Cockburn, C. J. and Crompton, J. were engaged in the Court for Crown Cases Reserved.



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*conclusive of a place being reputed to be extra-parochial.*

This was a rule to quash an order of justices appointing Mr. Cousins overseer for the parish of Upper Eldon.

It appeared that the place called Upper Eldon was entered separately in the report of the Registrar-General in the last census as a place reputed to be extra-parochial, and wherein no rate is levied for the relief of the poor, and by an order of the Poor Law Commissioners such place was added as a parish to the Stockbridge Union, Hampshire, and Mr. Cousins was appointed overseer of the poor for such extra-parochial place. It was stated upon affidavits that the said place comprised one farm occupied by the said Mr. Cousins, who was the only householder there, there being in all only thirteen inhabitants; that the place had always been a rectory, and was considered to be a parish, though it never had any poor nor a poor-rate, and the church was in ruins; and that in the King's books it was called a rectory and valued at 2*l*.

By sect. 1 of Vict. 20, c. 19, it is enacted that, "after the 31st Dec. 1857, every place entered separately in the report of the Registrar-General in the last census, which now is or is reputed to be extra-parochial, and wherein no rate is levied for the relief of the poor, shall for all the purposes of the assessment to the poor-rate, the relief of the poor . . . be deemed a parish for such purposes, and shall be designated by the name which is assigned to it in such report; and the justices of the peace having jurisdiction over such place, or over the greater part thereof, shall appoint overseers of the poor therein;" and by sect. 2 it is enacted, "if in any extra-parochial place it shall appear to the justices that two overseers cannot conveniently be appointed from the inhabited householders thereof or are not required for such place, such justices may appoint one only, and if it shall appear to them that there is no such householder liable or fit to be appointed, they shall appoint some inhabitant householder of an adjoining parish willing to serve to be such overseer," &c.

By the 43 Eliz. c. 2, s. 1, it is enacted "that the churchwardens of every parish, and four, three, or two substantial householders there as shall be thought meet . . . shall be called overseers of the poor of the same parish," &c.

*Bullar* now showed cause, and contended, first, that the report of the Registrar-General was conclusive as to this place being extra-parochial, and that therefore the appointment of one overseer was good as provided for by sect. 2 of the 20 Vict. c. 19. Secondly, that if this were not an extra-parochial place, still the appointment of one overseer would not be bad, the statute of the 43 Eliz. c. 2, being only directory upon the subject:

*Mytton v. Churchwardens of Thornbury*, 29 L.

J. 109, M. C.; 2 L. T. Rep. N. S. 12;

*R. v. Morris*, 4 T. R. 550;

*R. v. Sparrow*, 2 Stra. 1123;

*Staple-inn v. The Holborn Union*, 8 L. T. Rep. N. S. 464.

He also referred to the 13 & 14 Vict. c. 21, s. 4, which enacts, "that in all Acts words importing the masculine gender shall be deemed and taken to include females, and the singular to include the plural," &c.

*Poulden* appeared for the justices.

*Giffard*, in support of the rule, argued that the report of the Registrar-General is not conclusive as to a place being extra-parochial, and that in the present case it sufficiently appears that the place called Upper Eldon was a parish, and that therefore the appointment of one overseer only is bad: (*Ree v. Clifton*, 2 East, 168.) And that the 13 & 14 Vict. c. 21, s. 4, does not apply.

*BLACKBURN, J. (a)*—I think that we must say that this appointment of overseer is bad and must be quashed. The question is, does this place come within the 20 Vict. as being such a place referred to in the 2nd section as may have only one overseer appointed? Upon that point the 1st section says that, "every place entered separately in the report of the Registrar-General on the last census, which now is or is reputed to be extra-parochial, and wherein no rate is levied for the relief of the poor, shall for all the purposes of the assessment to the poor-rate, &c., be deemed a parish." Now, if this had proved to have been a district which had acquired the reputation of being extra-parochial, and the Registrar-General had so put it in his report, then the effect of the statute would have been to treat it as an extra-parochial place. But when we look at the affidavits made in the case, it would appear not to be such an extra-parochial place. It was a rectory, but as there were few inhabitants the church had fallen into ruin, and it was not so much not a parish as that it had no poor, and in the King's books it was called a rectory, and valued at 2*l*. Therefore it was not reputed to be extra-parochial, although the Registrar-General reported it as such. The evidence shows that it is not extra-parochial; therefore it is not within the operation of the 20 Vict. c. 19. Then we must look at the statute of Elizabeth, and it may very well be that the inability to appoint one overseer only in certain cases may be a *casus omissus*, but there is certainly nothing in that statute which authorises the appointment of one only; there must be two at least. In *Steer's Parish Law* I find it distinctly laid down that there cannot be less than two overseers appointed. I think the justices had no power to appoint only one overseer.

*MELLOR, J.*—I am of the same opinion. This is a case in which I would have held, if possible, that the appointment of one overseer was sufficient; but the statute of Elizabeth is express upon the point, and I cannot agree with Mr. Bullar that it is merely directory.

*Rule absolute.*

## COURT OF COMMON BENCH.

Reported by W. MAYN and LUMLEY SMITH, Esqrs.  
Barristers-at-Law.

Wednesday, Jan. 13, 1864.

HEATH v. BREWER.

*Notice of action*—*Cab Act*—6 & 7 Vict. c. 86, s. 47—*Belief*—*Acting bonâ fide*.

*To entitle a person to notice of action under the 6 & 7 Vict. c. 86, s. 47, on the ground that he bonâ fide believed that he was entitled under that Act to do what he did, the belief must not only be bonâ fide, but also reasonable, and therefore, where the Act gave the deflt., a cab proprietor, power to summon the plt., a cab driver, before a magistrate for any misconduct, and the deflt., instead of doing so, made an indorsement on the plt.'s licence which had the effect of depriving the plt. of employment as a cab driver,*

*Held, that the deflt. was not entitled to notice of action, on the ground that he believed that he was putting the law in motion.*

The plt. in this action was a cabdriver, and the deflt. a cab owner, in whose service the plt. had been. On discharging the plt., the deflt. wrote on his licence, "For damaging cab and not bringing home money," the effect of which was, that the plt. could not obtain employment as a cab driver, and he therefore brought this action against the deflt. for damaging his licence. At the trial before Byles, J., at the sittings after last term, a verdict was found for the plt. for 20*l*.

(a) Cockburn, C.J. and Orompton, J. were in the Court for Crown cases Reserved.

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*Kemp* now moved for a rule to set aside this verdict and enter a non-suit, on the ground that the deft. *bonâ fide* believed that he was entitled to do what he did under the provisions of the 6 & 7 Vict. c. 86, and therefore was entitled to notice of action under the 47th section of that act. By the 21st section of that act it is enacted that "Every proprietor of a hackney-carriage, and of every metropolitan stage-carriage who shall permit or employ any licensed person to act as the driver or conductor thereof, shall require to be delivered to him, and shall retain in his possession the licence of such driver or conductor while such driver or conductor remains in his service," &c.; and by sect. 24, "When any licensed driver or conductor shall leave the service of any proprietor, such proprietor shall, upon demand thereof, return to him his licence: provided always that if the said proprietor shall have any complaint against the said driver or conductor, it shall be lawful for such proprietor to retain the licence for any time not exceeding twenty-four hours after the demand thereof, and within that time to apply to the police-court of the district in which the said proprietor shall dwell, &c., for a summons against him," &c.; and by sect. 47, "All actions and prosecutions which shall be brought or commenced against any person for anything done under the authority of this act, or of such orders or regulations as aforesaid, shall be commenced and prosecuted within three calendar months next after the fact committed and not afterwards . . . and notice in writing of such action and of the cause thereof shall be given to the deft. one calendar month at least before the commencement of the action, &c." It was now contended that the deft. was entitled to notice of action under this section, on the ground that he *bonâ fide* believed that he had a right to indorse the licence of the plt. without summoning him before a magistrate, under the 24th section. [ERLE, C. J.—The belief must be a rational belief. WILLIAMS, J.—The rule has been laid down that he must believe facts which, if they were true, would justify him.]

ERLE, C. J.—I am of opinion that there should be no rule. The cab-owner had indorsed on the licence words which would deprive the plt. of his profits as a cab-driver, and this action is brought for damaging the plt.'s licence. Then it is said that the deft. was entitled to notice of action, on the ground that he had done this thinking that he was acting in pursuance of the Act of Parliament. Now can it be said that the deft. honestly believed that he was acting within the provisions of the statute? I think that the law on this subject is very clearly laid down by my brother Williams in the case of *Hermann v. Seneschal*, 13 C. B., N. S., 393. The only thing that would bring the deft. within the rule there laid down, would be that he honestly believed that he was a magistrate, or that the indorsement of a magistrate was a superfluity, and that he had a right to be a judge in his own cause. There is nothing in the statute which says that, and I think this rule ought to be refused.

WILLIAMS, WILLES and KEATING, JJ., concurred.  
Rule refused.

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,  
Barristers-at-Law.

Wednesday, Jan. 20, 1864.

REG. v. D'EYN COURT.

*Benefit building society—Application of funds—Freehold land society—Arrears of subscriptions.*

*A society was registered under 6 & 7 Will. 4, c. 32, as a benefit building society, but was converted into and called a freehold land society, and a plot of*

*land bought and allotted among its members. The land was paid for partly by members' subscriptions and partly by borrowed money, for which the society was liable. The society did not appear to have been conducted at any time in the usual way benefit building societies are:*

*Held, that though the funds had been misapplied, the society was not illegal, and that subscriptions due under the rules could be enforced from members:*

*Semble, that the remedy of members not assenting to the conduct of affairs by the society was in a court of equity for a breach of trust or injunction against future misapplication of the funds:*

*Held, that the shares of a member did not become forfeited on his merely ceasing to pay his subscriptions, &c., until so declared by the society in pursuance of the rules.*

On the 10th May 1852 about 300 persons formed themselves into a society intended to be established under the provisions of the Benefit Building Societies Act, 6 & 7 Will. 4, c. 32.

At the first meeting held for the establishment of the society it was stated that the object of the society was to enable those persons who might join it to procure a vote for the county by obtaining the allotment of a piece of land. The deft. Mr. Layton was not present at the meeting, but he was aware at the time when he took shares in the society that one of its objects was the purchase of land.

Rules for the conduct of the society were prepared and certified by the barrister-at-law appointed to certify the rules of savings banks, &c., on the 20th May 1852, and the society was on the same day registered under the 6 & 7 Will. 4, c. 32, by the name of the North London Benefit Building Society.

The deft. joined the society as an investing member (there being at that time no other class of members by subscribing for two shares on 31st May 1852, and he made payments on account of his subscriptions at various times up to the 9th Oct. 1854, amounting together to 4l. 7s., when he ceased to make such payments, being then 8l. 1s. in arrear in respect thereof.

A freehold estate at Enfield was purchased for 8200l. under the authority of the directors by three persons named by the directors, and was conveyed to those three persons in July 1853. They were trustees appointed by the directors to purchase and take the conveyance, and although the name of the society does not appear in the conveyance, the land was bought partly with money belonging to the society and partly with money borrowed for this purpose by the directors from a banking firm.

The title of the estate was examined and approved and the conveyance prepared by the solicitor of the society.

The land was paid for in part by the subscriptions of the members of the society, and in part from moneys borrowed from the bankers of the society.

The estate at Enfield was divided into allotments amongst such of its members as desired to have land, and the whole was allotted amongst the members, and many of the allotments have been conveyed to the members, who thus became entitled thereto. The members who had no allotments made to them continued as investing members, as contradistinguished from the other members who were allottees.

On the 26th March 1855 Edward Layton became one of the allottees of the said land, and on that day he signed and delivered to the board of the society a memorandum, of which the following is a copy:

"No. of Register 501.—I, Edward Layton, of 12, Upper-street, Islington, do agree to take two allotments on the said society's land situate at Enfield.—Dated March 26, 1855. Edward Layton. The weekly subscription as usual."

This last memorandum was an answer to a question

put upon the same paper to ascertain whether the deft. would complete at once by paying the remaining purchase-money due upon the allotments, or would continue his weekly subscriptions and give a mortgage. When the deft. signed this memorandum his subscriptions were twenty-four months in arrear, and such arrears, including fines, amounted to 8*l.* 1*s.*, and the same form part of the amount of the award hereinafter mentioned.

At an annual public meeting held on 23rd May 1855 the deft. was in his absence elected a member of the board of directors. Previously to his election he had, however, had notice from the secretary of the society that it was intended to place his name on a list of members, from which list it was usual to choose the directors. During the year ending in May 1856 he regularly received notice of each monthly meeting, and did not in any way assent to or dissent from such election. But in the autumn of 1855 he joined in the following requisition to the board which is entered on the minutes of the next meeting:—

“Islington, Aug. 27, 1855.

“Sir,—We the undersigned members of the North London Building Society hereby request you to convene a general meeting of the members of this society, to be held at the Denmark Schools, Pentonville, on Tuesday, Sept. 10 next, at eight o'clock in the evening, to take into consideration the following resolution: ‘That Mr. Thomas Lewis, the purchaser of the Enfield estate, having stated to the meeting of members assembled at the Denmark Schools Aug. 14th last that he had received an indemnity with which he was satisfied, and was ready to convey to the allottees, hereby request the board of directors to cause the conveyances to be prepared for signature without delay, and hereby rescind any resolution passed contrary to the same.’ (Signed) by E. LAYTON (and others.)”

This document refers to a dispute that had been originated by Lewis, who refused to convey to allottees unless he was indemnified against some fancied liability as to making roads and sewers.

Early in the year 1855 the deft. wrote and sent by post to the secretary of the society a notice stating his intention to withdraw from the said society, but it was never received by him.

On the 14th June 1858 the society sent to all its members who were not allottees, and to them also, when they happened to be also investing members, a circular, containing the following passage:—

“The directors have also decided not to receive any further subscriptions from investing members, but to consider such as withdrawing members in future, the same as if they had now given notice of withdrawal. For the convenience of those members who desire to sell or to purchase shares, and of withdrawing members who are prepared to purchase any plots of land that may be for sale, a book will be provided in which, on every subscription night, their wishes may be recorded.”

Up to the 16th July 1862, the date of the award hereinafter mentioned, fines had accrued under the rules from the deft. (if he is to be deemed to have continued a member) to the amount of 4*l.* 12*s.*; but the society has only charged against the deft. fines up to the same date to the amount of 3*l.* 6*s.* 10*d.* Since the date of the award additional fines, to the amount of 10*s.* 8*d.*, have accrued due and remain unpaid.

No act was done by the directors to forfeit the shares of the deft.

The amount borrowed by the society as aforesaid to pay for the said land was 4800*l.* This sum has been partly repaid, the amount now due being only 2090*l.*, for which sum the society is liable.

The society has no fund out of which it can pay off the above-mentioned balance except the subscriptions in arrear from the deft. and other allottees.

The deft. did not, after the said 26th March 1855, continue the payment of his weekly subscriptions, but he disputed his liability.

In order to obtain a settlement of the dispute between the society and the deft., and to obtain payment of what was alleged to be due from him, the said board proceeded to arbitration before the arbitrators who had been appointed in pursuance, as alleged, of the said rules, and the deft. was served with a notice of choosing arbitrators.

Three arbitrators were chosen, and notice of their meeting served on Mr. Layton, but he did not attend. They heard evidence and investigated the claim of the society, and made their award, ordering Mr. Layton to pay to the society 69*l.* 8*s.* 4*d.*

The award was served upon Mr. Layton personally, and the amount thereof demanded, but he has not paid the said amount or any part thereof.

A summons was afterwards, on the 29th Oct. 1862, taken out at the Clerkenwell Police-court, to compel performance of the said award.

The said summons, after several adjournments, came on for hearing before Lonis Tennyson D'Eyncourt, Esq., and was finally disposed of on the 18th Dec. 1862. At the hearing of the summons the award and the refusal to comply therewith, and the other facts aforesaid were proved, but Mr. Layton objected to the jurisdiction of the magistrate to enforce the said award on the ground that the society was not a benefit building society within the meaning of the 6 & 7 Will. 4. c. 32, and that the said society had no power to buy land or to make its members contribute to the purchase thereof, and that he had ceased to be a member of the said society, and that the said notices of arbitration and of meeting were bad and insufficient, and that the said award was bad by reason of its including charges and matters not within the provisions of the said Act of Parliament, and generally that the said magistrate had no jurisdiction in the premises, and thereupon the said magistrate decided that he had no jurisdiction in the premises, and declined to make an order enforcing the said award.

The question for the opinion of the Court was, whether the said magistrate had jurisdiction.

The following rules of the society were cited during the argument:—

1. This society shall be denominated the North London Benefit Building Society.

2. The principal object of this society shall be to enable its members by weekly subscriptions to purchase freehold property in shares not exceeding in value the sum of 30*l.* each.

7. On every weekly subscription night each member shall pay at the rate of 1*s.* per week for every share he may hold, and on every subscription evening during the quarter an additional sum of not more than 1*s.* per share towards the necessary expenses of the society. Any member being in arrears to the amount of 6*s.* per share shall forfeit 2*d.* per share per fortnight until his arrears are under that sum; and the cash steward is hereby empowered to deduct the amount due for fines or expenses from the first money tendered by such member; but should the member tender no subscription until his fines amount to the sum which he shall have already paid in, the same shall be forfeited to the society.

10. All advances on shares shall be made to the members according to the seniority of membership; but should the senior member prefer waiting until a future time, his allotment shall then be offered to the other members upon the subscription-book in order and according to their seniority of their membership. If all the members refuse to take such allotment, then the senior member shall take the same.

11. Every member upon receiving the money advanced to him shall execute to the trustees a mort-

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gage of the property offered as security to secure to them all principal moneys, subscriptions, fines and other payments due and to become due according to these rules upon the share or shares in respect of which the money shall have been advanced. (The rule then specified certain provisions to be contained in the deed.)

15. This rule gave power to members to withdraw upon giving a month's notice, &c.

In the title-page of the rules the society was called "The North London Freehold Land Society."

Hoyes, Serjt. (*M. Lloyd* with him) for the appa.—Assuming the change of the society to a freehold land society to have been an act *ultra vires*, it does not make the society illegal. It is like the case of the railway company which had applied part of its funds to the business of steamboat proprietors, which was held not thereby to lose its powers as a railway company. So here, also, it may be conceded that, according to *Grimes v. Harrison*, 26 Beav. 435; 28 L. J. 823, Eq., the application of the funds of this building society to the purchase of land was a breach of trust, yet it did not lose thereby the powers conferred on it as a building society under the 6 & 7 Will. 4, c. 32. Here the resp. has signed an agreement to take two allotments: (*Mullock v. Jenkins*, 14 Beav. 628.) Secondly, as to the forfeiture of the resp.'s shares. The shares are not by the nonpayment of subscriptions forfeited, but the society may elect to treat them as forfeited on that ground. (The Court intimated that the objection was untenable.)

*M. Smith* (*Doy* with him).—The Building Societies Act, 6 & 7 Will. 4, c. 32, is the foundation of all these societies, and the case is the same as *Grimes v. Harrison*, where, after registering as a benefit building society, the directors took a fresh name, and inserted it on the title-page of the rules as a freehold land society. Here this society was never constituted as a building society, and the object of this award is to get money from Mr. Layton to pay off the money borrowed to purchase the land. Here there is no other class of members besides the allottees of land, the society having resolved not to receive any further subscriptions from investing members, but to treat them as withdrawing members. [CROMPTON, J.—That resolution was inoperative against a member not assenting to it.] The powers of the magistrate were sought to be used for a totally different purpose from that of a benefit building society. Mr. Layton was an allottee and not an investing member, and the subscriptions were not due from him in accordance with the rules:

*Reg. v. Trafford*, 4 E. & B.

COCKBURN, C.J.—I am of opinion that the rule ought to be made absolute, and that the magistrate ought, under the circumstances, to have made an order for enforcing payment of the money due under the award. This was a society registered under the Benefit Building Societies Act, and, according to the rules, certain subscriptions became payable by Mr. Layton which have not been paid. Two answers were given, and the main one was that the society was dissolved. It was said that the society was improperly registered as a benefit building society, and that the members by an arrangement among themselves had converted it into a freehold land society. Now, if that is so, it is a misappropriation of the funds, and a matter for the intervention of a court of equity, but the society itself does not therefore cease to exist. Such a misappropriation of the funds may be prevented by an application to a court of equity, and the directors be restrained from perverting the funds. So long as the society exists its members are bound by the rules. If the society was in existence, the question whether or not the funds are about to be applied for the purposes of the Act is a matter for another court. Can it be said that because a benefit building society proposes to

apply its funds to the purposes of a freehold land society, that puts an end to the benefit building society? I think not. Then it was said that the resolution not to call on the investing members for further subscriptions left no shareholders but those participating in the freehold land scheme. That might or might not have been within the scope of the power of the directors, but it did not dissolve the society, but only lessened the number of members. But I am inclined to think that it was inoperative. The members might say, "We insist on going on." Some of them might have estopped themselves from saying so by their conduct and acquiescence in the proceedings of the society. But all these considerations are matters for a court of equity. The question the magistrate had to consider was, whether the society was in existence, and whether the members were bound to pay subscriptions, and whether Mr. Layton was in default under the award. Therefore it seems to me that the magistrate ought to have made an order in this case.

CROMPTON, J.—I am of the same opinion. The prosecutor seems to me to have made out that the society had a legal right to have the money paid. He says this is a society under the Benefit Building Societies Act, and that Mr. Layton was liable to pay his subscriptions, and that he had not paid them, and that the arbitrators having awarded against him the society was entitled to call on the magistrate to enforce the award. It has not been made out to my mind that the society has been dissolved, or that it has ceased to exist. The turning it into a freehold land society is not in the nature of an illegal conspiracy to do an illegal act; it is rather like a contrivance to take whatever powers they could get under the Benefit Building Societies Act, and then to purchase land and allot it among the members. There is nothing immoral or illegal in that. It is true the Legislature only gives certain powers when the society is conducted in a certain way, but the converting this into a freehold land society does not make the society illegal from the beginning. The society could not compel a member to take an allotment: he has a right to say, "I do not claim at all through this contract for allotting the land, but under the rules of the society." This departure from the rules of the society is not like making a rate for an illegal purpose, which is wholly void from the beginning. Here, in its origin, it was a legal benefit building society, and I agree that under the rules the members are bound to make certain payments. The application of them is a different matter. It would be a monstrous thing to say that because one member chooses to take out his subscriptions in land, another is not bound to pay the subscriptions and fines that may be due from him. A court of equity is the proper tribunal to restrain the misappropriation of the funds. Then if the society was not illegal in its inception and is still in existence, it being conceded that the notice of withdrawal was inoperative, it follows that the magistrate ought to have made the order.

BLACKBURN, J.—I am of the same opinion. This was a benefit building society registered under the Act, and by the 7th rule of the society the members were bound to pay weekly subscriptions, and in default fines. The resp. having become a shareholder, and become *primâ facie* liable to pay subscriptions, has not paid them, and thereby has incurred fines. The society referred the matter to arbitration, and the arbitrators have awarded that he should pay 69l., and the society sought to enforce the award before a magistrate. The magistrate had only to see whether this was a matter within the Building Society Act for reference to arbitration, and if it was, it was his duty to enforce the award. The magistrate had no jurisdiction to inquire into matters of discretion or propriety, but only whether the arbitrators had jurisdiction to make

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the award. In my judgment the award was properly made. It was objected that the society was dissolved, for, in point of fact, the members had agreed among themselves that the funds and credit of the society should be applied to purchasing a tract of land to be afterwards allotted among the members. The case of *Grimes v. Harrison* shows that this was not an illegal act in a moral sense, although it was one the members had no right to do, and a breach of trust. The resp., however, was a party to that proposition, and signed an agreement to take two allotments of the society's land at Enfield on the terms of paying his weekly subscriptions as usual. If that agreement had been carried out, it would have amounted to this: it would have been as if he had paid down his money for the land and the society had returned it by way of loan. It was not carried out, and all remained *in fieri*. How does that prevent him being a member of the society and liable to pay subscriptions under the 7th rule? He was a party to an agreement which was *ultra vires*, but that does not prevent his being a member of the society and owing the money. The other point was, that the society had issued circulars to the investing members informing them that they would cease to be members of the society. This resp. is not within that class: this offer was not made to him, and was not acted upon by him. That does not amount to his not being a member, and did not, in my opinion, dissolve the society.

MELLOR, J. concurred.

*Judgment for the app.*

Attorneys for the society, *Hughes and Son*.

Attorney for Layton, *Wright*.

#### REG. v. HEANE.

*Indictment—Jurisdiction—Motion to quash—Perjury*  
—22 & 23 Vict. c. 17, s. 1.—24 & 25 Vict. c. 115, s. 57.

*When an indictment is found by a grand jury having no jurisdiction, it may be quashed at any stage, at the instance of the deft., even after he has pleaded to it.*

*But where there is any doubt as to its validity, the court will not decide the question upon motion, but will leave the deft. to his writ of error.*

*By sect. 57 of the 24 & 25 Vict. c. 115 (an Act for the government of the Navy) it is enacted that "every person who upon any examination upon oath or upon affirmation before any court-martial held in pursuance of this Act shall wilfully and corruptly give false evidence shall be liable to the penalties of wilful and corrupt perjury."*

*Quære, whether this enactment makes the giving of such false evidence the offence of perjury?*

On a former day *M. Chambers*, Q.C. obtained a rule calling upon the prosecutor to show cause why this indictment for perjury, found at the Central Criminal Court, should not be quashed upon the ground that "perjury" being one of the offences named in the 1st section of the 22 & 23 Vict. c. 17 (an Act to prevent vexatious indictments for certain misdemeanors), the indictment had been preferred at once before the grand jury without any preliminary authority.

By the before-mentioned section it is enacted that "after the 1st Sept. 1859 no bill of indictment for any of the offences following, viz., perjury . . . shall be presented to or found by any grand jury unless the prosecutor or other person presenting such indictment has been bound by recognisances to prosecute or give evidence against the person accused of such offence," &c.

By sect. 57 of the 24 & 25 Vict. c. 115 (an Act for the government of the Navy) it is enacted that "every person who upon any examination upon oath or upon affirmation before any court-martial held in

pursuance of this Act, shall wilfully, wrongfully and corruptly give false evidence shall be liable to the penalties of wilful and corrupt perjury."

It appeared that the offence charged was committed upon a trial before a naval court-martial on board ship in the harbour of Malta.

The deft. had pleaded to the indictment, which had been removed at his instance into this court.

*Ballantine*, Serjt., *Gifford* and *Lewis* showed cause, and contended, first, that after pleading to the indictment it is too late to move to quash it, that such application should be made before plea, and that now the deft. should be left to his writ of error; secondly, that the 22 & 23 Vict. c. 17, s. 1, does not apply, inasmuch as this is not an indictment for perjury, but for giving "false evidence" under sect. 57, the offence of perjury not being one that can be committed in evidence before such a tribunal as a court-martial:

*Archbold's Practice*, p. 80;

*Foster's Crown Law*, 230;

*Bookwood's case*, 13 State Trials;

*R. v. Fearnley*, 1 T. R. 316;

*R. v. Marsh*, 6 A. & E. 236;

*Johnstone v. Sutton*, 1 T. R. 548;

*R. v. Foster*, 1 Russ. & Ry. 460;

*Spicer v. Reed*, Hobart, 62;

*R. v. Chapman*, 1 Den.;

22 Geo. 2, c. 33, s. 17;

17 & 18 Vict. c. 104, s. 52Q;

7 & 8 Vict. c. 2, ss. 2, 3;

12 & 13 Vict. c. 106, s. 250.

*M. Chambers*, Q.C. and *West*, in support of the rule, argued that the indictment was wholly void, as being found by a grand jury, who had no authority to deal with it; and that the deft. could come at any time to quash it, inasmuch as it would be idle to go on with proceedings which must in the end prove abortive, and also that the charge was in fact one of perjury:

*Hawk. P. C. b. 2, c. 25*;

*Com. Dig. "Indictment," H.*;

*Bac. Ab., "Indictment," K.*;

*R. v. Williams*, 1 Burr. 885.

*Ballantine*, Serjt. undertook to supply the deft. with a copy of all the intended evidence upon the trial.

*Cockburn*, C. J.—If we quash this indictment it can only be upon the ground that we are clearly of opinion that it is bad, which we are not; but if we refuse to do so, and leave the deft. to his writ of error, then the question will be again fairly open to discussion. I think that it is open to considerable doubt whether this indictment is within the statute of the 22 & 23 Vict. c. 17. Then that being so, the question is, whether we are now to put an end to the indictment, and so prevent all further discussion upon it? Now, as this application is made to our discretion, we must see that we do not prejudice the parties. I think we ought to say, with reference to the preliminary objection, that it ought not to prevail. As regards that objection, that the motion to quash cannot be made after plea, pleaded, I think if it is made to appear clearly that there was no jurisdiction, we have power to quash the indictment at any stage; but when we come to consider whether the offence charged is within the statute, it turns upon whether this is an indictment for perjury or not. If the deft. had been indicted for perjury in the ordinary way, I think it doubtful if such an indictment could have been sustained. Formerly there was an undoubted right in the prosecutor to go before the grand jury in the first instance, but that right is taken away in certain cases, and we must see if it is taken away in the present one. I think that is a matter of much doubt, and it would not be right in us therefore to do anything whereby the question may be prevented from being considered by a court of error.

*BLACKBURN* and *MELLOR*, J.J. delivered similar opinions.

*Rule discharged.*

Q. B.]

NASH v. THE QUEEN.

[Q. B.]

Wednesday, Jan. 27, 1864.

NASH v. THE QUEEN.

*Bankruptcy—Indictment—Not discovering estate on examination.*

An indictment against a bankrupt under 24 & 25 Vict. c. 134, s. 221, for not upon his examination discovering all his property, alleged, that on, *gc.* N. was adjudged bankrupt by the Court of Bankruptcy for the L. district, the court duly authorised to adjudicate, and that the said N. upon his examination in the said court, to wit, on, *gc.*, with intent to defraud and defeat the rights of the creditors, did not fully discover to the best of his knowledge and belief all his property, to wit, all his personal property in money and in goods, and did not, as to part of his the said N.'s property not being sold in the way of trade or laid out in ordinary family expenses, fully discover to the best of his knowledge and belief how and to whom and for what consideration and when he had disposed of them, to wit, 1000*l.* sterling, 1000 sacks of corn, 10 horses, *gc.*, *gc.* :

Held, a good indictment, on error after conviction and judgment :

Held, also, that the objection of duplicity to a count of an indictment is not open on a writ of error :

Held, also, that where the offence is charged in the words of the statute creating it, the want of averments specifying the property, or time, number and value, is cured, after verdict, by the 7 Geo. 4, c. 64, s. 21.

The above indictment did not aver what the property was which the bankrupt did not disclose, or allege that he had property, although it charged him with not disclosing how he had disposed thereof :

Held, that the indictment was sufficiently certain after verdict.

Writ of error, after conviction and judgment, upon an indictment under the Bankruptcy Act (24 & 25 Vict. c. 134), s. 221.

The following was the first count of the indictment: Lancashire to wit.—The jurors for our Lady the Queen upon their oath present, that heretofore, to wit, on the 14th day of March 1863, Samuel Nash was duly declared and adjudged bankrupt by the Court of Bankruptcy for the Liverpool district, the said court being then the court duly authorised and competent to adjudicate as aforesaid. And the said jurors upon their oath present, that the said S. Nash having been so declared and adjudged bankrupt upon his examination in the said court, to wit, on the 18th day of March 1863, with intent to defraud and defeat the rights of the creditors of the said S. Nash, did not fully and truly discover to the best of his knowledge and belief, all his property, to wit, all his personal property in money and in goods, and did not, as to part of his the said S. Nash's property, not being part fully and *bond fide* before sold or disposed of in the way of his trade or business, and not laid out in the ordinary expenses of his the said S. Nash's family, fully and truly discover to the best of his knowledge and belief as aforesaid, how and to whom and for what consideration and when he had disposed of, assigned, or transferred such part thereof, to wit, 1000*l.* sterling, 1000 sacks of corn, 1000 sacks of flour, ten horses, ten carriages, five clocks, five boxes, and other goods and effects, being part of the property of the said S. Nash as aforesaid, contrary to the statute in such case made and provided, and against the peace of our Lady the Queen.

The indictment contained several other counts (not now material).

The prisoner pleaded not guilty and was tried, but convicted on the first count only, and judgment passed.

Whereupon the prisoner brought a writ of error upon

the judgment, and assigned the following grounds of error :—

"The said S. Nash sayeth, there is manifest error in this, to wit, that the first count of the indictment charges that the plt. upon his examination in the Court of Bankruptcy for the Liverpool district, did not, as to part of the property of the plt., fully and duly discover to the best of his knowledge and belief how and to whom and for what consideration and when he had disposed of, assigned, or transferred such part of his property, whereas it is not alleged in such first count that the plt. had in fact disposed of, assigned, or transferred such part of his property; therefore in that there is manifest error. There is also error in this, to wit, that it is not alleged in the said first count that the plt. on the examination alleged in such first count was examined upon the matters in such first count alleged and referred to, or that on such examination he was required and bound to discover the matters and things which the said first count charges that the plt. did not discover. That it is consistent with the allegations in the first count, that the plt. was on the occasion alleged examined as to other matters and things and could not have discovered the matters and things which the said first count charges that the plt. did not discover; therefore in that there is manifest error. There is also error in this, to wit, that the said count is double and multifarious; therefore in that there is manifest error."

Joinder in error.

*Aspinall* for the plt. in error.—It is submitted that the first count is bad upon writ of error. That count is founded on the second clause in sect. 221 of the 24 & 25 Vict. c. 134, which, after enacting that a bankrupt who shall do any of the acts specified in the section with intent to defraud or defeat the rights of the creditors shall be guilty of a misdemeanor, provides in clause 2: "If he shall not, upon his examination, fully and truly discover to the best of his knowledge and belief all his property real and personal, inclusive of his rights and credits, and how and to whom and for what consideration and when he disposed of, assigned, or transferred any part thereof, except such part as has been really and *bond fide* before sold or disposed of in the way of his trade or business, if any or laid out in the ordinary expenses of his family, or shall not deliver up to the court, or dispose as the court directs of all such part thereof as is in his possession, custody, or power, except the necessary wearing apparel of himself, his wife and children, and deliver up to the court all books, papers and writings in his possession, custody, or power relating to his property or affairs:" This clause consists of three parts, and the first part is governed by the second. The first part is not disclosing all his property, and the second is the not disclosing how he had disposed, &c. of any part of his property. The first and second parts are connected by the conjunction "and," whereas in the commencement of the third part the disjunctive "or" is used. If the first and second parts are construed as distinct offences, then the count is bad for duplicity and multifariousness. If the first part is a distinct offence, that part of the indictment is bad for want of certainty and not giving reasonable information as to the charge. The specific thing must be charged which it is said has not been discovered. In cases of this kind, where the prosecution is ordered by the Bankruptcy Court, there are no depositions, and the first intimation is the notice of the bill having been found by the grand jury. As to the second part of the count, that the bankrupt did not discover how he had disposed of part of his property, it is not alleged that he had property to dispose of. [BLACKBURN, J.—Is not that cured by the verdict? The jury could not have convicted without finding that he had property.] Then, assuming the count to be

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double as containing two distinct offences, it is bad. Again, another objection is, that it does not appear on the face of the count that the bankrupt had been examined as was intended by the statute. The offence is not committed until the entire examination is over. The examination does not necessarily take place in the district court or the court where the adjudication takes place. The proceedings may be transmitted to other courts. [MELLOR, J.—Why are we to assume that the proceedings were transferred from the Liverpool Court?] Consistently with the averment there may have been other examinations of the bankrupt in other courts, and the bankrupt ought not to know in what count the offence is said to have been committed:

*Courtivron v. Meunier*, 6 Ex. 74;

*Rex v. Walters*, 5 C. & P. 138.

*Milward (R. G. Williams with him)*.—This case falls within the intent of 7 Geo. 4, c. 64, ss. 20, 21. Sect. 20 specifies certain things, the want of which is cured by the statute after the verdict, &c., including time where time is not of the essence of the offence. And sect. 21 enacts that where the offence charged has been created by any statute, the indictment shall after verdict be held sufficient if it describe the offence in the words of the statute. No distinction is shown between the language of this count and the words of the statute creating the offence. The 14 & 15 Vict. c. 100, s. 24, was also relied upon. [CROMPTON, J. referred to *Reg. v. Forsyth*, R. & R. 274.] In *Rex v. Warshamer*, 1 Moo. C. C. 466, where, upon an indictment for having in possession plates upon which was engraved a Polish promissory note for the payment of five florins, "purporting to be a promissory note for payment of money of a certain foreign prince, that is to say, of Nicolas, then being king of a certain foreign country called Poland," and the objections were that the note ought to have been stated to be a note in the foreign language and then the meaning of it in English; that it ought to have been stated to be for the payment of foreign money, and that the value in English money should then have been stated: it was held that these objections were cured after verdict by the 7 Geo. 4, c. 64, s. 21.

*Hamilton v. The Queen*, 9 Q. B. 271;

*Reg. v. —*, 1 Chit. 698.

Here the count follows the language of the section, and charges the substance of the offence. As to the averment of the examination, that must be taken in the same sense as in the statute, and it will be assumed to have taken place in the Liverpool district court, as alleged.

BLACKBURN, J.—I think that in this case our judgment should be for the Crown, on the ground that the count in the indictment on which the deft. was convicted is good after verdict, and that the objections made to it are cured by the 7 Geo. 4, c. 64, ss. 20, 21. The offence for which the prisoner was indicted is created by the B. A. (24 & 25 Vict. c. 134), s. 221, which enacts, "that any bankrupt who shall do any of the acts following with intent to defraud or defeat the rights of his creditors, shall be guilty of a misdemeanor;" and among the acts enumerated is this one, on which the indictment is framed: "If he shall not, upon his examination, fully and truly to the best of his knowledge and belief discover all his property, real and personal, inclusive of his rights and credits, and how or to whom and for what consideration and when he disposed of, assigned, or transferred any part thereof," &c. Now, the meaning of that, there can be no reasonable doubt, is, that the offence is complete if the bankrupt does not, with intent to defraud, on his examination, fully and truly discover all his property real and personal. And in order to commit that offence, it is plain that he must have property real and personal, and that he must keep it with intent to defraud his creditors; and probably no such

offence could be committed until his examination is quite over, for it is also plain that if, during any part of his examination, he should make a complete discovery of his property, he has failed to commit the offence. The question now is, is the offence properly charged in the indictment? The old rules of pleading required that in every indictment you should state every matter with a certain accuracy as regards number, time and value; but in very early times it was held that it was not necessary to prove these averments exactly, except where number and value were of the essence of the offence. In the present case the count alleges that Nash was duly declared and adjudged bankrupt by the Court of Bankruptcy for the Liverpool district, the said court being then the court duly authorised and competent to adjudicate. The count goes on to allege that, upon his examination in the said court, with intent to defraud and defeat the rights of his creditors, he did not fully and truly discover, to the best of his knowledge and belief, all his property, to wit, all his personal property in money and in goods. According to the rule, it would be necessary to allege with certainty the number, value and time, though it would not be necessary to prove them strictly, and so the count would be bad; but then arises the question, is the want of these averments cured by the 7 Geo. 4, c. 64? And does the indictment, as it stands, describe the offence in the words of the statute creating it? If the matter had to be considered now for the first time, a good deal might be said upon it; but in *Rex v. Warshamer* the question distinctly arose and was decided, and we ought to follow and be guided by that decision. In that case a count was held good after verdict, which stated that the prisoner had in his possession two plates upon which was engraved in the Polish language "a certain promissory note for payment of five florins purporting to be a promissory note for payment of money of a certain foreign prince, that is to say, of Nicolas, then being king of a certain foreign country called Poland." At first there was a difference of opinion among the judges—of seven to six—whether the count ought not to have shown what money florins were, and their value, but subsequently they all agreed that the defect was cured by the 7 Geo. c. 64, s. 21, the offence being described in the words of the statute. I do not think it necessary to say whether the objection is cured by Lord Campbell's Act (14 & 15 Vict. c. 100). Mr. Aspinall further contended that the offence was not described in the words of the statute, because the indictment alleges, that on his examination in the said court, that is, the Bankruptcy Court, and it might be that the examination took place in the County Court. The words of the statute and of the indictment seem also to point to the whole examination being over, and we are to assume rather that the normal state of things went on in the Bankruptcy Court at Liverpool than that the proceedings were removed into the County Court. Then it was objected that, because the count, proceeded to state in the last part of the clause of the section, what was perhaps a distinct offence it was bad for duplicity. It may be urged that, in point of fairness, pleadings should not be double, and the prosecutor may be put to elect as to what part of the indictment he will proceed upon. After verdict, it must be taken that the jury found that all that was substantially part of the offence was proved, and though the jury do not know what is the substance of the offence, the judge must be taken to have told them. The latter part of the count may be treated as surplusage and may be struck out. For these reasons I think our judgment should be for the Crown.

MELLOR, J.—I am of the same opinion. No authority has been cited to show that duplicity is a fatal objection in a criminal case; but, whether that

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be so or not, I am not aware of any case that decides that the objection is open on a writ of error. It might be open to doubt whether the offence was properly laid in the count, if it had been necessary to decide on the objection before the verdict; but I think that the 7 Geo. 4, c. 64, was intended to cure objections to indictments for want of certainty, and objections that had no bearing on the merits of the case. It is sufficient after, if, in describing the offence, the language of the indictment follows the words of the statute. Then if the offence here is, as I think, sufficiently described in the words of the statute, the count is not rendered bad by what is added. It is admitted that, unless steps are taken by the creditors to remove the proceedings to the County Court, the examination of the bankrupt must take place in the Court of Bankruptcy. No circumstances are stated to show how the jurisdiction arose in this case; the count alleges the examination to have been "in the said court," which refers to the Bankruptcy Court in Liverpool, which, I think, must be taken to have been the right court. I also think that the entire examination of the bankrupt must have concluded before the bankrupt can be said to have committed an offence under sect. 221. We cannot say that the objections are not cured by the 7 Geo. 4, c. 64, without overruling *Reg. v. Warshaner*.

*Judgment for the Crown.*

Monday, Feb. 1, 1864.

*Ex parte* THE GUARDIANS OF THE BRIDGEND AND COWBRIDGE UNION.

*Poor law—Contribution from parish to the union—Refusal of overseer to pay—Discretion of justices.*

*Although this court will not interfere with the justices in the exercise of their discretion; yet where they have exercised that discretion by declining to execute a provision in an Act of Parliament, upon grounds manifestly unsound, this court will interfere.*

*An order of a board of guardians was made upon an overseer for contribution, which he refused to comply with, and upon an application to justices for a warrant of distress, they refused to grant it:*

*Held, that this court would review and control their discretion.*

This was a rule calling upon John S. Boteler and John S. Gibbon, Esqrs., justices of Glamorganshire, and Robert Charles N. Carne, overseer of the poor of the parish of Nash in the Bridgend and Cowbridge Union, to show cause why the said justices should not issue their warrant to levy by distress and sale of the goods and chattels of the said R. C. N. Carne the several sums of 14*l.* 1*l.*s. and 3*l.* 10*s.* 11*d.* the amount ordered by the guardians of the poor of the said union to be paid by the said R. C. N. Carne from the poor-rates of the said parish towards the relief of the poor thereof, and to the contribution of the said parish to the common fund of the said union.

It appeared that the parish of Nash had been an extra-parochial place, and had been constituted a parish under the provisions of 20 Vict. c. 19, s. 1, and had by an order of the Poor Law Board been annexed to the adjoining Bridgend and Cambridge Union, and Mr. Carne, who was the sole proprietor of the land in such parish, and the overseer thereof, had been ordered to pay the before-mentioned amounts, which he had declined to do, whereupon application was made under sect. 1 of 2 & 3 Vict. c. 84, to the before-named justices for their warrant of distress, and upon the hearing it was urged, on the part of the overseer, that as there were no paupers it was unreasonable to make the demand; and that the ordering of the warrant being in the discretion of the justices, they should, under the circumstances, refuse to grant it. The

justices thereupon considered their determination, and, by their chairman, said, "We have given the matter our best consideration, and think you have shown sufficient cause to justify us in refusing the warrant," and it was refused accordingly.

By sect. 1 of the 2 & 3 Vict. c. 84, it is enacted that in every case in which any contribution by overseers of moneys required by the board of guardians shall be in arrear, it shall be lawful for any two justices acting within the district wherein such parish shall be situate, on application, to summon the said overseer to show cause why such contribution has not been paid; and after hearing the complaint "if the justices at such sessions shall think fit," by warrant under their hands and seals, to cause the amount of the contribution so in arrear, together with the costs to be levied and recovered from the said overseer.

*Giffard* now showed cause and contended that, as the statute 2 & 3 Vict. c. 84, s. 1, gave the justices a discretion, and as they had exercised it by refusing the warrant, this court will not interfere:

*Reg. v. Mills*, 2 B. & Ald. 578.

*Lush*, Q. C. (*Poland* with him) argued that, although in general the court will not interfere with the discretion of justices, yet if they do not exercise that discretion according to law, but wilfully refuse to carry out the provisions of the Legislature, and act obviously from mistaken or unsound motives, the court will interfere; that in the present case there could be no sufficient reason for withholding the warrant, the real reason being undoubtedly their feeling that it was unfair to call upon the parish of Nash, which had no paupers, to contribute to the union expenses:

*Newbold v. Colman*, 6 Ex. 189; 20 L. J. 149, M. C.;

*Reg. v. Staples Inn*, 32 L. J. 181, M. C.; 8 L. T. Rep. N. S. 464.

COCKBURN, C. J.—I certainly do not desire to trench upon the ordinary rule that where the justices have a discretion this court will not interfere; but here it is plain they have not really exercised it. Now this extra-parochial place having become a parish, and been annexed to the neighbouring union, it became liable to the expenses of that union, and the justices ought to have issued their warrant; but they declined to do so, and it is quite clear that they so decided because they thought the introduction of this parish into the union was unjust. It is quite clear that they had no right to enter into that question. They have acted upon the principle that as the law was unjust they would not execute it. That is a principle we cannot recognise. There being all the grounds upon which they ought to have issued their warrant, they seem to have declined because they thought the Act of Parliament a bad one. The rule, therefore, must be made absolute; and although it is unusual to give costs as against justices, in this case I think the rule should be absolute, with costs.

BLACKBURN and MELLOR, JJ. concurred.

*Rule absolute with costs.*

REG. V. HARRINGTON.

*Bastardy—Second application for an order after dismissal of the first.*

*Where an application for an order of affiliation is dismissed not upon its merits, the woman is not barred from making another application.*

*A dismissal upon the ground of there being no sufficient corroborative evidence is not a dismissal upon the merits.*

This was a rule calling upon two justices of Somersetshire and one Sarah Burton to show cause why a *certiorari* should not issue to remove into this court an order of affiliation, whereby the said deft. was



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[Ex.]

adjudged to be the putative father of a bastard child. It appeared that one Sarah Burton having been delivered of a bastard child, she applied to justices for an order of affiliation upon the deft., and upon the hearing she not being prepared with corroborative evidence the application was dismissed. Subsequently (within the twelve months) she made another application for a summons, which came on to be heard before other justices, but in the same petty sessional division, and upon the hearing an order of affiliation was made.

The present rule was obtained upon the ground that the dismissal of the first application was a bar to any subsequent application.

*Holl* showed cause, and contended that a prior application was no bar to a second application, if made within twelve months after the birth of the child, as was the case here. He referred to

*Reg. v. The Justices of Buckinghamshire*, 18 L. J. 113, M. C.;

*Reg. v. Brisby*, 18 L. J. 157, M. C.;

*Reg. v. Machen*, 14 Q. B. 74; 18 L. J. 213, M. C.;

*Ex parte Westerman*, 16 L. T. Rep. 420;

*Reg. v. Pickford*, 30 L. J. 133, M. C.; 4 L. T. Rep. N. S. 210;

*Reg. v. Myott*, 32 L. J. 138, M. C.; 7 L. T. Rep. N. S. 785;

*Reg. v. Thomas*, 8 L. T. Rep. N. S. 460.

*H. T. Cole*, contra, argued that the case was distinguishable from *Reg. v. Machen*, and that if not, the court should overrule that decision; that a decision upon the merits should be a bar to further applications, or the deft. may be continually harassed by fresh applications. He referred to the various cases already cited.

COCKBURN, C. J.—I am of opinion that this rule should be discharged. In the first place I agree with the former decision in *Reg. v. Machen*, that where an application of this nature is dismissed upon the ground that there has been no sufficient corroborative evidence, it is not a dismissal upon the merits, and therefore a fresh application, if made within the statutable time, may be made. But it is not necessary to rest our decision upon that ground. If there has been a hearing upon the merits, and a dismissal upon the merits, and if that be brought to the notice of the justices upon a second application, and there is no other evidence produced, I think that ought to be a sufficient answer, and if in this case it had been brought to the attention of the justices that the case had before been dismissed upon the merits, and that there was no other evidence in support of the application than was before submitted to them, I should have been disposed to give effect to the present application. But that was not so in the present case.

BLACKBURN, J.—I am of the same opinion.—In *Reg. v. Machen* it was decided that a *mandamus* should go to the justices to hear the case on a second application, without regard to the former decision being upon the merits. The Court there said that the analogy was to a nonsuit. I by no means say that if it appeared that the former decision were really upon the merits, I should not hold that it was final; but as it appears that the first application was dismissed for want of sufficient corroborative evidence, we cannot, without overruling *Reg. v. Machen*, hold that they had not jurisdiction to adjudicate upon the second application. The case of *Reg. v. Thomas* has no application.

MELLOR, J.—We are certainly not justified in overruling *Reg. v. Machen*, and we must hold ourselves to be bound by it, and in this particular case there is not the slightest reason why we should not follow it; for although in one sense the former application was dismissed upon the merits—that is, not upon any merely

technical grounds—they were not merits in the sense in which we understand them in relation to this question.  
*Rule discharged with costs.*

## DUBLIN.

Tuesday, Nov. 17, 1863.

(Before LEFROY, C. J., HAYES and FITZGERALD, JJ.)

CONWAY v. RICHARDSON.

*Appeal from justices—Costs.*

*Where an appeal had been lodged with the officer of the court, but due notice had not been given by the app. to the resp., the court has no jurisdiction over it, and therefore cannot give costs to the resp.*

This was a case stated by the justices of Tyrone, under the 20 & 21 Vict. c. 43.

*Featherston H. Lowry* moved, on notice, that the case stated be struck out of the Crown Paper, on the grounds that the app. had not served the resp. with a notice and a copy of the case stated within three days after receiving it from the justices, and had not within three days transmitted the case to this court. The affidavits of the resp. and petty sessions clerk of Cookstown deposed that the justices signed the case on the 24th Oct.; that by the direction of the app. it was forwarded on that day by post to his attorney and the letter registered, and in due course of delivery came to hand on the 26th Oct., before twelve o'clock a.m. The resp. was not served with the notice and copy of the case until the 2nd Nov., and on the same day the officer of the court received the case, and relied on

*Morgan v. Edwards*, 5 H. & N. 415; 29 L. J. 108, M. C.; and

*Woodhouse v. Woodhouse*, 29 L. J. 149, M. C. *McCausland*, Q. C.—The court having struck out the case for want of jurisdiction, cannot give costs:

*Fraser v. Fothergill*, 14 C. B. 298.

*F. Lowry*.—The app., by transmitting the case, has brought himself within the jurisdiction; and, per Alderson, B., in *Peters v. Sheemas*, 10 M. & W. 214, every person who comes before a court is liable to the jurisdiction as to costs. But the cases of *Carr v. Stringer*, 1 E. B. & E. 125, and *Reg. v. Padwick*, 8 E. & B. 704, are clearly authorities, that where a case has been dismissed for want of jurisdiction the court has power to give costs. *Fraser v. Fothergill* is clearly distinguishable. The court never had any jurisdiction, and the resp. had done no act to bring himself within the jurisdiction.

LEFROY, C. J.—Strike out the case. The court says nothing about costs.

## COURT OF EXCHEQUER.

Reported by F. BAILLY and H. LEIGH, Esqrs., Barristers-at-Law.

Monday, Jan. 18, 1864.

MASON (Clerk to the Waterloo-with-Seaforth Local Board of Health), app., v. BIBBY, resp.

*Public Health Act 1848* (11 & 12 Vict. c. 63) s. 69 and 150—*Service of notice on "owner" or some "inmate of his place of abode."*

*By the Public Health Act 1848, s. 69, it is provided that in case any street or any part thereof (not being a highway) be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the "owner" of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, &c., require him to sewer, &c., within a time to be specified in such notice; and if not complied with, the local board may do it and charge it to the "owner."*

*The service of such a notice upon a clerk at the office*

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of the "owner," where the owner carries on his business, is a sufficient service, and is a service upon some "inmate of his place of abode" under sect. 150 of that Act.

This was a case stated by magistrates pursuant to 20 & 21 Vict. c. 43, for the opinion of this court.

A local board of health for the district of Waterloo-with-Seaforth, in Lancaster, had been duly constituted under the provisions of the Public Health 1848 (11 & 12 Vict. c. 63). By sect. 69 it is enacted "that in case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged and channelled, to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, &c., the same, within a time to be specified in such notice, and if such notice be not complied with the local board may, if they think fit, execute the works mentioned therein, and the expenses incurred by them in so doing shall be paid by the owners in default, according to and as therein specified; and by sect. 150 in all cases in which any notice is by this Act required to be given to the owner or occupier of any premises, it shall be sufficient to address the notice to them by the description of the "owner" or "occupier" (as the case may require) of the premises (naming them) in respect of which the notice is given without further name or description, and the notice shall be served upon them, or one of them, as the case may require, either personally or by delivering the same to some inmate of his or their place of abode."

At a petty sessions at Liverpool, for the division of Kirkdale, on the 24th March 1863, an information claimed of the app. 245*l.* as his share of expenses incurred by the board in the repair of a certain street, not being a highway, he being the owner of certain premises there. An objection was taken to the service of the notice, and the justices having decided that it was insufficiently served, upon the application of the complainant they submitted the following

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Upon the hearing of the information it was proved on the part of the app. and found as a fact, that the resp.'s home or place where he and his family dwelt was not within the district of the said local board of health on the date or at the time of service of the said notice as to the sewerage, &c. the said premises; that the resp. dwelt with his family at Wavertree, near Liverpool, and had also an office or place of business in Liverpool, neither of which places was within the district of the said local board, &c. The evidence on the hearing of the information as regards the service of notice upon the resp. was as follows: Wm. Berks being sworn said—"I served a copy of a notice I produce (being the said notice of the 3rd Sept. 1861) on Mr. Bibby at his office in Water-street in Liverpool, on the 3rd Sept. 1861. I asked a clerk if Mr. Bibby was in? and he said, 'He is engaged, and may be so for some time.' I told the clerk I wanted to serve Mr. Bibby with the notice. I read a part of it to him (the clerk). It commenced by being addressed to Mr. James Bibby. I then gave it to the clerk, and he read it and seemed to understand it. I explained to him that it was to do some sewerage works at his premises in Waterloo. I waited a quarter of an hour for Mr. Bibby; he was not disengaged, and I did not see him. He (the clerk) said, 'I'll see and give it to Mr. Bibby;' who, on being cross-examined, said—"I only saw one clerk, I saw him through a small window in the partitioning of the office. I cannot say, from what I saw of this clerk, what his occupation was." Upon this

the resp. contended that, as the notice of the 3rd Sept. 1861 was proved to have been served by being left with a clerk of the resp. at the office or place of business of the resp. in Liverpool, the same not being the place of his residence, and not being within the district of the said Waterloo-with-Seaforth local board of health, it was not legally served, and that it ought to have been served in one of the modes prescribed by the 150th section of the Public Health Act 1848, and that the words "inmate" and "place of abode" in the section referred to service on an "inmate" at the house or place of residence or dwelling-place of the resp. and his family, and that the said clerk was not "an inmate" and the said place of business was not a "place of abode" within the meaning of the said Act, and that accordingly no legal service of the said notice had taken place. The app. contended that the words "place of abode" meant a place where the resp. abides or carries on his business, where he was usually to be found in matters of business, and that the clerk was an "inmate" and the said place of business was a "place of abode" within the meaning of the said Act, and consequently that the service of the said notice was legal. We being of opinion that the said notice had not been legally served, dismissed the information accordingly.

The question of law arising on the above statement for the opinion of the court is—

Whether we are correct in point of law in finding that the notice was not served as required by the 150th section of the Act of Parliament. Therefore the judgment of this court is requested thereon, or what should be done in the premises.

*Leo. Temple* for the app.—The only question to be determined is, whether the service of the notice referred to was a legal and good service? Nothing appears in the case, nor was there any evidence before the justices, to show that he did not receive it. The presumption is, that he did get it, as he was in court before the justices when the case was heard, and might have deposed to the fact if he did not get it. Delivery of the notice to a clerk at the place of business satisfies the words of the 150th section of the Public Health Act 1848, the resp. being in his office at the time, but, as it was said, then, engaged. In *Ablett v. Busham*, 25 L. J. 239, Q. B., "place of abode," as used in the C. L. P. A. 1852 (15 & 16 Vict. c. 76), sect. 6, is satisfied by giving the place of business. In *Attenborough v. Thompson*, 2 H. & N., Pollock, C. B. said a place of abode is the place where a man abides, and residence is where he resides, and a man may abide or reside not where he sleeps, but in some other place. In *Haslope v. Thorne*, M. & S. 103, Lord Ellenborough said, the words "place of abode" did not necessarily mean the place "where the party sleeps." In *Blackwell v. England*, 8 E. & B. 54, it was decided, that under the Bills of Sale Act (17 & 18 Vict. c. 36), s. 1, the words residence and occupation were satisfied by "W. R. Cuthbert, of King's-bench-walk, Inner-temple, in the city of London, clerk to Messrs. B. and R. of the same place, solicitors." Lord Campbell there said, "his residence is where he is likely to be found." Coleridge, J.: "The strict construction does not apply where the object of the Legislature is to give parties such information as may lead to the finding of the attesting witness." Wightman, J. said: "If he had described himself as residing at his lodgings, his occupation being clerk to an attorney, such a description would not be so convenient as that of the place where he performed his ordinary duties." Erle, J. said that "in *Lambe v. Smythe*, 15 M. & W. 433, it was held a man's actual domicile was where he had his household goods, that that was his place of residence, but it does not decide that the place of actual business was not also a man's residence." In order to ascertain the meaning of the

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words "place of abode" in the Act of Parliament, it is necessary to see the object the statute had in view, and it intended only that the person to be affected by the neglect to sewer, &c., should have notice of what was required of him by the local board, authorised in case of continued neglect to do the requisite work. The notice was more likely to reach him if left with a clerk at his office, and where he then actually was at the time the notice was left, than if given to a servant at his private residence. The cases above referred to show such service was sufficient.

*Lushington*, for the resp., contended that the question whether the resp.'s office in Water-street was the resp.'s place of abode was not a question of law but a question of fact only, and for the justices alone to determine. An office or place of business belonging to the resp., not being his residence or dwelling-place, was not the resp.'s "place of abode" within the meaning of the statute 11 & 12 Vict. c. 63, s. 150. That the question whether the clerk or other person mentioned in the case to whom the notice was personally delivered was an "inmate" of the resp.'s "place of abode" was not a question of law but a question of fact only, and that a clerk acting as such to the resp. in the resp.'s office or place of business, that not being the residence or dwelling-place of the clerk or of the resp., was not an "inmate" of the resp.'s place of abode within the meaning of that statute. That the notice mentioned in the case was not duly served upon or given to the resp. according to the requirements of the Act of Parliament, s. 150, or otherwise. In *Rea v. The Inhabitants of North Curry*, 4 B. & C. 953, Bayley, J., at p. 959, says: The question is, what is the meaning of the word 'reside?' I take it that that word, where there is nothing to show that it is used in a more extensive sense, denotes the place where an individual eats, drinks and sleeps, or where his family or his servants eat, drink and sleep. An affidavit verifying a plea in abatement of the non-joinder of a contractor under the 3 & 4 Will. c. 42, s. 8, must state the place of residence of the contractor, and not merely his place of business." In *Maybury v. Mudie*, 5 C. B. 283, Maule, J., delivering the considered judgment of the court, said: "The place that is described as the place of residence of D. is in some sort of popular sense his residence; he had until very lately actually resided there, his name was still over the door, and he continued to carry on his business there. We think, however, that it is not, within the meaning of this (the 8th) section, his place of residence." [MARTIN, B.—There are two cases which have been cited by Mr. Templequite in point upon this question; why should we depart from them?] Because the cases I have just referred to are entirely to the contrary, and give the customary meaning to the words used in this statute.

POLLOCK, C.B.—The question put to us by the magistrates is, whether they were correct in point of law in finding that the notice was not served as required by the 150th section of the Act of Parliament, requesting the judgment of this court thereon, or what should be done in the premises. I own I am clearly of opinion that the notice referred to in this case, which was served on one of the resp.'s clerks at his office where his business is carried on, and where the resp. then was, he being at that time there in the inner office, the clerk promising to give it to the resp. as soon as the resp. was disengaged, was a perfectly good service, and the justices should be directed to deal with it accordingly, the 150th section providing that the notice may be served upon the owner either personally or by delivering the same to some inmate of his place of abode; with a proviso that although his place of abode be known to the local board, yet, if he be not within the limits of their district, it shall be sufficient for them to transmit any notice directed to him by name through

the post, or if his place of abode be unknown, upon any inmate of the premises, the service was perfectly good, independent of that section; and as to his place of abode, his place of business was here his place of abode, and that without any reference to the 150th section of this Act at all. Our judgment, therefore, will be in favour of the appa.

MARTIN, B.—This notice was served by delivering it to a clerk of the resp. at his office and place of business. A man may have two places of abode, one where he stays by day, and another where he sleeps by night. In my judgment the question put to us—whether the justices were correct in finding that the notice was not served as required by the 150th section—should be answered that they were not correct. I think they were not correct, and I am quite prepared to say that the notice was sufficiently served upon the resp., the owner, as by the 150th section of the statute is required.

PIGOTT, B.—I am of the same opinion, and think there was a sufficient service of the notice in this case.

*Judgment for the app. without costs (as it is not usual under such circumstances to grant costs).*

Attorney for the appa., *Joseph Mason, Liverpool.*  
Attorneys for the resp., *Simpson and North, Liverpool.*

### EXCHEQUER CHAMBER.

Reported by H. LEIGH, Esq., Barrister-at-Law.

Saturday, Nov. 28, 1863.

(Before POLLOCK, C.B., BRAMWELL, CHANNELL and PIGOTT, BB., BLACKBURN and MELLOR, JJ.)

GORE V. SIR GEORGE GREY AND OTHERS.

*Lunatic*—5 & 6 Vict. c. 22, s. 14 (*Queen's Prison Act*)—Removal of lunatic prisoners to *Bethlehem Hospital*—1 & 2 Vict. c. 100; and 16 & 17 Vict. c. 96.

*A prisoner of unsound mind in the Queen's Prison was removed therefrom in 1856 to Bethlehem Hospital under sect. 14 of 5 & 6 Vict. c. 22:*

*Held, in an action for false imprisonment, that the removal was justifiable under that Act, as the Act was not qualified by the previous statute, 1 & 2 Vict. c. 110, s. 102 (the Insolvent Debtors' Act), nor repealed or altered by the subsequent statutes 8 & 9 Vict. c. 100; and 16 & 17 Vict. c. 96 (Lunatic Acts).*

Error from the Court of C. B.

This was an action for false imprisonment for having removed the plt. on the 9th Feb. 1856 from the Queen's Prison where he was confined for debt to Bethlehem Hospital, and having kept him there as a lunatic.

The defts. pleaded, 1. Not guilty; 2. A justification under the Queen's Prison Act (5 & 6 Vict. c. 22).

The cause was tried before Erle, C.J., at the Middlesex sittings after Trinity Term 1862, when a verdict was found for the defts. on the second plea, the learned judge having directed the jury to consider, if they were of opinion that the plt. was a lunatic, whether the defts. had duly complied with the Queen's Prison Act without regard to the Insolvent Debtors' Act (1 & 2 Vict. c. 110) or to 8 & 9 Vict. c. 100, and 16 & 17 Vict. c. 96 (statutes relating to lunatics).

A rule having been obtained for a new trial on the grounds *inter alia* of non-direction and misdirection, or for judgment *non obstante veredicto*, and discharged by the court below, the plt. now brought error and appeared in person to support his case.

The *Solicitor-General* (the *Attorney-General*, *Wesby* and *T. Jones* with him) for the defts. were not called on.

POLLOCK, C.B.—I am of opinion that the judgment of the court below must be affirmed. The plt. has contended that being an insolvent debtor he was en-

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titled to be treated as such according to the provisions of the Insolvent Debtors' Act, 1 & 2 Vict. c. 110, s. 102. But the Queen's Prison Act virtually repeals that Act so far as it is inconsistent with it, neither is it overridden by 16 & 17 Vict. c. 96. At sect. 4 of that Act, which enacts that no person not a pauper shall be received into a hospital, &c., contains the saving clause, viz., "Save where otherwise provided or authorised under this or any other Act;" and as in the present case it has been "otherwise provided" by the Queen's Prison Act, the judgment of the court below must be affirmed. *Judgment affirmed.*

PARRY v. THE CROYDON COMMERCIAL COKE COMPANY.

*Act of Parliament—Penalty—Common informer—* 10 Geo. 4, c. 73 (*Croydon Improvement Act*)—10 & 11 Vict. c. 15 (*Gas Works Clauses Act 1847*)—*Repeal by implication.*

*By the Croydon Improvement Act (10 Geo. 4, c. 73), a penalty of 200*l.* is imposed upon any gas or other company for suffering any impure matter to flow into any stream, &c., to be sued for by any common informer. By the 21st section of the Gas Works Clauses Act 1847 (10 & 11 Vict. c. 15), a like penalty is imposed for the same offence, such penalty (by sect. 22) "to be recovered by the person into whose water such substance shall be conveyed, or whose water shall be fouled by any such act."*

*Held (confirming the decision of the court below), that the latter provision was pro tanto a repeal of the former.*

This was an action, brought by the plt. as informer, against the Croydon Gas Company for the penalty given by 10 Geo. 4, c. 73, to any common informer, in case of pollution of water by a gas company within the limits of the local Act.

The defts. pleaded that the acts and things complained of were committed and happened after the passing and coming into operation of the Croydon Commercial Gas and Coke Act (10 & 11 Vict. c. 124) and after the 1st Aug. 1849; and that the said acts and things were and are such and the like acts and things as are described in the 21st section of the Gas Clauses Act 1847 (10 & 11 Vict. c. 14), and noother, and that the plt. is not and never has been the person into whose water the washings or other substances produced in making or supplying gas in such Act mentioned, being the washings and other waste liquids, substances and things in the declaration mentioned, were conveyed or flowed, or the person whose water was fouled.

To this plea the plt. demurred, on the ground that the plt.'s right to sue for the penalty given by 10 Geo. 4, c. 73, s. 27, was not taken away by 10 & 11 Vict. c. 124 incorporating the 10 & 11 Vict. c. 15, s. 21, and that the two penalties were cumulative. The Court of C. B. having given judgment for the defts., the plt. now brought error.

Joyce appeared for the plt., and

Honyman for the deft., and referred to the following cases:—

*Goldson v. Buck*, 15 E. 372;

*Clarke v. Great Central Gas Company*, 13 C. B. 838;

*Reg. v. Trustees of Northleach and Witney Roads*, 5 B. & Ad. 939.

POLLOCK, C. B.—We are all unanimous in our opinion that the judgment of the court below should be affirmed. My own opinion is, that in construing a penal statute of any kind no effect ought to be given to a penal clause beyond that which it is clear the Legislature meant. Whatever one is satisfied is the true construction of the Act, that construction ought

to prevail; but if there be any reasonable doubt, whether the subject be a penalty, or confiscation, or a penal infliction of any kind—one is not to construe the Act so as to make it penal. Something more might have been urged in favour of the plt., if he could have shown from any clause that the second penalty was given in lieu of an action for damages. But the new statute creates precisely the same penalty of 200*l.*, and it does not say that it is to be additional. The meaning, I think, is that the second penalty is substituted *pro tanto* for the first.

BRAMWELL, B.—I am of the same opinion. The Croydon Gas Company was not in existence till created by the statute with which the Consolidation Act of 1847 is incorporated, and the penal enactment as to the company may be read thus: that for every such offence committed by the company they shall forfeit 200*l.*; this is the penalty to which they are subjected. But it is said that is not to be the only consequence; but there is another forfeiture, which clearly is not repealed, as to the rest of the world, and is not therefore to be taken as repealed as to the company. It seems, however, to me, that when it is said the company are to forfeit 200*l.*, it means 200*l.* only. It is not necessary to say that the old Act is abrogated; in fact, it is not. There are cases in which it might be put in force. But why should the gas company be liable to two penalties, when nobody else offending under the old Act has to suffer more than one? Lastly, what my brother Williams has said in the court below as to the 23rd section of the Gas Clauses Act 1847 seems to me to be entirely conclusive.

The rest of the Court concurred.

*Judgment affirmed*

ERROR FROM THE EXCHEQUER.

Wednesday, Dec. 2, 1863.

(Before WILLIAMS, WILLES, BLACKBURN, KEATING and MELLOR, JJ.)

ORCHARD v. ROBERTS.

*False imprisonment—Notice of action—Apprehension on charge of felony without warrant—"Found committing"—*24 & 25 Vict. c. 96, ss. 103, 113.

*In an action for arrest and false imprisonment of plt. upon a charge of stealing his employer's money, where the evidence was that deft. gave plt. (his shopman) into custody within five minutes after finding a marked florin in plt.'s possession, which plt. had received ten minutes before, and which in due course of business he ought to have immediately handed to the deft.'s cashier, it was*

*Held, by the Ex. Ch., that the plt. was not "found committing" the offence under sect. 103 of the 24 & 25 Vict. c. 96, and that deft. was not entitled to notice of action under sect. 113 of the same statute.*

*The deft. in the above action pleaded "not guilty" (by stat. 24 & 25 Vict. c. 96, ss. 4, 68, 103, 113), and the learned judge directed the jury that under the issue and evidence aforesaid as to the circumstance of deft.'s not having had the notice of action provided for by the statute, was not an answer to the action, and that the bona fides or mala fides of the deft. was immaterial to the right to the verdict, although it might affect the amount of the damages in the event of a verdict for the plt., and the Court of Ex. Ch. held that this was no misdirection.*

*Where the question is whether a deft. is entitled to notice of action on the ground of his having acted in conformity with the provisions of an Act of Parliament, the proper mode of leaving the question to the jury is, "Did the deft. honestly believe in the existence of those facts which, if they did exist, would afford a justification under the statute and so be a defence to the action."*

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*Hermann v. Seneschal*, 6 L. T. Rep. N. S. 646; 13 C. B., N. S., 252; 32 L. J. 43, C. P., discussed and approved.

Error from the Ex. on bill of exceptions.

This was an action for assaulting the plt., and giving him into custody, and causing him to be imprisoned on a charge of felony, whereby plt. suffered pain of body and mind, and was injured in his credit, and prevented from obtaining a situation as a silk salesman, and incurred expense in obtaining liberation from the said imprisonment; and he claimed 200l.

Plea (by stat. 24 & 25 Vict. c. 96, ss. 4, 68, 103, 113.) not guilty. Issue thereon.

At the trial before Martin, B., at Westminster, on the 29th Nov. 1862, it was contended that the deft. was entitled to notice of action under the statute, sect. 113. The following, amongst other evidence, was given on the part of the plt. The plt. himself deposed as follows:—I went into the deft.'s service as principal silk salesman on the 8th May 1861, at two guineas a-week, with perquisites and board. The salesman keeps a book numbered, in which he enters his sales, and on making a sale he takes a bill to the cashier with a duplicate, gives him the money, and gets the change, passing a piece of paper with the amount and number of the sale to the cashier. The salesman has to go to the desk himself. On 8th Feb. I sold to a customer to the amount of 8s. 5½d. I took a sovereign in payment and took it to the desk, and received the change and brought it to the customer without counting the change. The next sale was to the amount of 18s. or 1l, for which I received a sovereign. I took it to the cashier and gave the change to the customer. The cashier could see the sale. In less than ten minutes after the deft. called out, "Mr. Roberts, I want to speak with you." He said, "Mr. Roberts, what silver may you have about you?" I walked into the counting-house and took from my pocket all the silver money I had loose in that pocket. It was half-a-crown, a two-shilling piece, one shilling, and threepence. He said, "You have more than this." I said I had not. He said, "Oh yee, you must have." I took my portmanteau out and showed it to him. There was 4l. 10s. in gold and 6s. in silver in it. He said "You must have more." I began to be anxious, and said, "Do you suppose I have anything belonging to you in my possession?" He said, "Well, I don't say so." He looked at the money. I said, "If you think I have you had better take the usual course, and I will remain here." The deft. took the florin and returned in about five minutes with a constable, and said, "I give this man in charge for purloining this" (the florin). The constable took me in custody to Marlborough-street Police-station, where I was searched. I was taken to the Marlborough Police-office, where the deft. attended and preferred a charge against me before Mr. Yardley. I was discharged. It was 4:30 p.m. before I was discharged. I had changed a sovereign at the desk for my own purposes the day before, and received half-a-sovereign and silver in change. This florin was part of the change. I received it from the cashier, a boy called Mills, who had come lately into deft.'s employ. It was alleged to be marked. The magistrate said he could find no resemblance in the florin to the marked money. Several mistakes had been made by a previous cashier. I mentioned three cases of wrong change being given to me by the cashiers. The last was three months before this charge.

On cross-examination plt. said:—I told deft. I had got the florin the day before. He did not say it had been marked. I put no portion of the customer's change that morning into my pocket. I did not look what the change was. Excess of change was often given. It is the salesman's duty to take it back directly. If too little change be given the salesman goes back to get it corrected. I got the change this

morning from Gifford, and did not see Mills at the desk that morning. I have got perhaps twenty times change in excess, perhaps three times change short. Deft. examined the money carefully, and looked at the florin several times.

Two of deft.'s salesmen, who were called on plt.'s part, proved the fact of mistakes in change frequently occurring, and change being often given in excess, and that plt. had often taken money back.

On the part of the deft. the following evidence was given:—

John Orchard, the deft., deposed:—Gifford, a cashier in my employ, made a communication to me. I gave him marked money on the 8th Feb., all silver. I called plt. into the counting-house in consequence, and he showed me this florin. I recognised it with some little difficulty. This is the florin. I thought it had been purloined. I have delivered marked money before to the cashier. The mark I made that morning was not the same I had made upon money before. I am not positive whether I marked money the day before. I had marked to the number of twenty pieces of money.

Charles Mills, one of deft.'s cashiers, said:—Plt. had applied to me many times on account of his alleging I had given him short change. He has done so fifty times. I and my brother cashier had conversations about this, and I communicated with my master, the deft. I received some money from deft. on 8th Feb. Gifford and I were at the desk.

The witness Gifford said:—I was one of the cashiers. I gave money to the plt.

Martin, B., in summing up, directed the jury that upon the issue and evidence aforesaid the circumstance of the deft.'s not having had the notice of action provided for by the statute 24 & 25 Vict. c. 96, was not an answer to the action, and that the *bona fides* or *mala fides* of the deft. was immaterial to the right to the verdict, although it might possibly affect the amount of the damages to be assessed by them in the event of their finding a verdict for the plt. Whereupon deft.'s counsel interposed and requested the learned judge to direct the jury that the question for them was whether the deft. honestly believed that the plt. had wrongfully taken the said florin, and that in giving the plt. into custody, he, the deft., was exercising a legal power, and that if they believed so, the deft. was entitled to the verdict, on the ground that the notice of action required by the statute 24 & 25 Vict. c. 96, had not been given to the deft. This the learned judge refused to do, and directed the jury that the *bona fides* or *mala fides* of the deft. was immaterial to the right to the verdict on the issue joined. To that rule the deft.'s counsel tendered this bill of exceptions. The jury found for the plt. with 200l. damages.

D. D. Keane (with whom was Ballantine, Serjt.) for the plt. in error (the deft. below), appeared in support of the exceptions.—The case of the deft. below was presented to Martin, B., at the trial, on the authority of *Hermann v. Seneschal*, 6 L. T. Rep. N. S. 646; 13 C. B., N. S., 252; 32 L. J. 43, C. P., which is applicable. There it was held that an honest and *bona fide* belief on a deft.'s part that he was acting in pursuance of the Act 24 & 25 Vict. c. 96, entitled him to notice of action for the thing so done. A deft. mistaken in supposing a person was "found committing" is nevertheless entitled to the benefit of the Act. [WILLIAMS, J.—A difficulty with me is, that counsel should have put it to the court at the trial below. If a felony in truth was committed, and there were reasonable grounds for giving the plt. into custody, it is not by virtue of the Act, but by a common law right, that he does so.] The attention of the judge having been drawn to *Hermann v. Seneschal*, it was misdirection to say *bona fides* was immaterial. Deft. found his servant (the plt.) with marked money in

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his pocket ten minutes after he had received it from a customer. His keeping it during that ten minutes was a continuing conversion up to the moment it was found on him, and he was therefore "found committing" within the meaning of sect. 113 of the Act. [BLACKBURN, J.—Would you say that a summary arrest would be justified upon the ground of a continuing conversion by the person keeping the stolen property in his possession during, say, a whole month?] As in embezzlement, concealment and not force, is the essence of the offence, so here the concealing the money and giving a false account was evidence of the felony. The words "Do you suppose I have any money of yours?" were equivalent to "I have no money of yours." *Cunn v. Clipperton*, 10 A. & E. 582; 8 L. J., N.S., 268, Q.B., decided that a person was entitled to notice if he *bona fide* believed that a felony had been committed. [WILLIAMS, J.—Did the deft. here believe that the plt. was "found committing?" It would have been misdirection to direct the jury as contended for by the plt. in error, unless they had been asked whether deft. honestly believed that plt. was "found committing."] The only proper mode of putting it, so as to prevent the Act being a nullity, is, "Did he believe he was exercising a legal right?" Sects. 68 and 69 are relied on, together with sect. 113. According to *Cunn v. Clipperton* it is not material whether he was "found committing" or not. The result of that case is stated by Talford, J., in *Read v. Coker*, 22 L. J., N. S., 204, C. P.; 13 C. B. 850. "Found committing" is involved in what is put as the proper direction in the exception. [MELLOR, J.—I take the term "found committing" to be equivalent to being found in the fact. What is there to show that this florin had not been stolen the day before? WILLIAMS, J.—It is not enough that deft. should think him a thief simply, but a thief caught in the fact.] It is not necessary the master should know his particular power or the section of the Act. Enough if he believed he had the legal power to do what he did. [WILLIAMS, J.—Suppose a master is told that his servant stole an article two days ago, and finding it to be true, sends for a policeman, is he therefore entitled to notice?] I would not go so far as to say that. It is enough that he *bona fide* believed he was doing something protected by the Act, and that what the law is was found afterwards. [WILLES, J. refers to the case of a keeper giving a party into custody under the Fishery Act, where it turned out that the ground was not within the fishery, and yet the deft. was held protected and entitled to notice: *Hughes v. Buckland*, 15 M. & W. 346; 15 L. J., N. S., 233, Ex.]

*Joseph Brown* (with *Laxton*), contra, for the deft. in error, the plt. below.—The exception is not sustainable. It was not pretended, at the trial, nor is it here to-day, that plt. really committed the offence, and so *Hermann v. Seneschal* is not applicable. Where the case rests on a deft.'s belief, it must be such a belief as would bring it strictly within the Act. In *Hermann v. Seneschal* and *Read v. Coker*, it was an undisputed fact that the party was taken in the act. No question could be raised there as to the deft.'s belief. [WILLES, J.—The whole and real question, and the true test is, as put by Williams, J. in *Hermann v. Seneschal*, whether the deft. honestly believed in the existence of a state of facts which, if they had existed, would have justified the deft.'s action.] (He was then stopped by the Court.)

*D. D. Keane* in reply.—The circumstances here are similar to those in the cases cited, and such as to show that plt. was necessarily "found committing." It is enough to put the question generally, Did he believe he was exercising a legal right? and if so, it is fantastic

hypercriticism to say that the question must be put specifically, Did he believe that plt. was "found committing." If those words are necessary, they are involved in deft.'s belief that he was acting legally; and it is for the judge to expand them. If deft. was bound to believe that the man was "found committing," he was bound to know the chapter and particular section of the Act which would protect him in giving him into custody.

WILLIAMS, J.—The court are all of opinion that the judgment of the Court of Ex. must be affirmed, inasmuch as there is no foundation for the errors assigned by the bill of exceptions. I apprehend that the result of the cases cited (and I believe most of the principal cases have been mentioned in the argument) is this, that where the question is, whether a deft. is entitled to notice of action on the ground of his having acted in conformity with the provisions of an Act of Parliament, the proper way of leaving the question to the jury is, "Did the deft. honestly believe in the existence of those facts which, if they did exist, would afford him a justification under the Act for what he had done, and so be a defence to the action?" I am reading the words of Erle, C.J. and my own words in the judgment in the case of *Hermann v. Seneschal* (*ubi sup.*), which have already been read by Willes J. in the course of the argument. I continue to think that case to be good law and the result of the authorities. It is said by Mr. Keane that it is enough if the deft. *bona fide* thought that he was acting according to law, and that it is not necessary that he should have any specific state of facts in his mind at the time. To a certain extent that argument is well founded; that is to say, it is not necessary that he should know of the existence of the statute or of the precise enactment under which he is entitled to notice. But all difficulties of that sort are gotten rid of by the rule laid down by Erle, C.J. in *Hermann v. Seneschal*, and which seems to me to be a very convenient rule and in accordance with the intention of the Legislature. Taking that, then, to be the law, how is it to be applied to the present case? The ordinary course is to suggest that a felony has been committed, and that the deft. had reasonable ground for believing the plt. to be the guilty person. That was not, however, the course taken in the present case. We have only to deal with the question raised on the bill of exceptions, namely, whether the deft. could avail himself of the want of notice. In the present case, if the deft. had chosen to raise that defence, it would be raised by the inquiry being submitted, not simply whether the deft. believed the plt. to be guilty of stealing the florin, but whether he believed that plt. had been "found committing" that offence. If that had been left to the jury, it is plain they might have come to a conclusion on one part of the inquiry in favour of the plt., and on another part of it in favour of the deft.; that is to say, they might find affirmatively that the plt. had committed the felony, but negatively that deft. did not believe that plt. was "found committing" it; and it is clear, on the doctrine of the cases, that on that finding the deft. would have been disentitled to notice of action. At the trial, in the present case, the learned judge was asked to leave to the jury, not both the questions, but whether the deft. honestly believed that the plt. had wrongfully taken the florin, or that in giving him into custody he, the deft., was exercising a legal power. Now, had the learned judge left the question to the jury in those terms, as it is suggested he should have done, it would have been wrong, and open, as a misdirection, to a bill of exceptions on the part of the plt., because then the inquiries of the jury would have been confined to the single fact of the theft, and their belief of deft.'s belief therein, and their attention would not have been directed to the equally essential inquiry whether the deft.

[BAIL.] REG. 9. JUSTICES OF HANTS—REG. 9. WEDNESBURY LOCAL BOARD OF HEALTH. [BAIL.]

honestly and *bona fide* believed that the plt. had been "found committing" it. If the facts of the case had been such that the jury could not possibly have thought that the deft. believed that the plt. had committed the felony without believing that he had been "found committing" it, I should be inclined to agree with Mr. Keane's argument that this exception would be good; but upon the facts of this case such an assumption cannot, I think, be made; because on the true facts of the case, if the jury had found that the deft. had chosen to believe in the existence of the theft, but on looking at the circumstances they did not believe that the deft. believed that the plt. was "found committing" the theft, it would come to this, that the learned judge is to be held to be wrong because he did not put to the jury a question which, if he had submitted to them, would have been misdirection, and an answer to which would not have involved a reply to both branches of the question.

WILLES, J.—I am entirely of the same opinion, and I will only add that I concur in treating that part of the exceptions as immaterial which states the question deft.'s counsel urged the learned judge to leave to the jury. It would have been improper, in my opinion, and a misdirection, if the learned judge had so left the question to the jury.

The rest of the Court (BLACKBURN, KEATING and MELLOR, JJ.) concurred. *Judgment affirmed.*

Plt.'s attorney, *Wm. Venn.*

Def't.'s attorneys, *Lumley and Lumley*, 2, Clifford-street, Bond-street.

### BAIL COURT.

Reported by T. H. JAMES, Esq., Barrister-at-Law.

#### REG. 9. THE JUSTICES OF HAMPSHIRE.

*Order of quarter sessions, quashing rate—New rate—Taxation of costs—Adjourned sessions.*

*The order of quarter sessions quashing a rate need not proceed to direct a new rate to be made.*

*Costs may be taxed at any time between the quarter sessions and the adjourned sessions.*

*Bullen* moved for a rule calling upon the defts. to show cause why an order made by them on the 28th Dec. 1863 should not be quashed.

At the Michaelmas Quarter Sessions held at Winchester, an appeal against a poor-rate (*Thurlow v. The Churchwardens of Newport*) was heard, and the rate was quashed with costs. An entry to that effect was made in the minute-book of the court, but the costs were not ascertained and taxed at once, nor any order made for a new rate. The sessions were adjourned until the 19th Nov., but before that day the app. gave notice to the resps. that he would proceed with the taxation of his costs; they declined to attend, and the costs were accordingly taxed in their absence, and an order made at the adjourned sessions granting the app. a certain sum for his costs.

*Bullen* contended that the taxation could not take place between the quarter and the adjourned sessions, and that the order for quashing the rate was deficient because it did not proceed to order a new rate to be made. [CROMPTON, J.—The order for a new rate need not be in the order for quashing an old rate. SHEK, J.—If we quash the order, the app. would have to pay his own costs, although he succeeded before the justices. CROMPTON, J.—Another difficulty is this: if we quash the order by which the rate was originally quashed, the rate which is admitted to be bad would be left. The app. has brought up the order for execution; you might move for a rule  *nisi* to set it aside.] He admitted that he could find no authorities or precedents in his favour.

[CROMPTON, J.—No authorities have been cited in

support of the proposition that the order for quashing a bad rate must contain an order for a new one, and I do not see why it should do so. The technical objection as to the taxation is also, in my opinion, bad, for the court is the same at the adjourned as at the quarter sessions, and the taxation of costs may take place at any time between the two.

SHEK, J. concurred.

*Rule refused.*

#### REG. 9. THE WEDNESBURY LOCAL BOARD OF HEALTH.

*Costs of appeal—Resp. not appearing.*

*Where an appeal is affirmed, the resp., though he does not appear, will be ordered to pay the costs. The authority of Lee v. Strain questioned.*

This was a rule calling upon the app. to show cause why a rule of this court should not be amended by striking out so much of it as ordered the resp. to pay the costs.

The app. having made some alterations in or near the resp.'s house, under the powers conferred on them by a local Act, summoned him before the magistrates to pay the expenses of the same. An objection was then taken on his behalf, that the surveyor of the board of health was an interested party, and this objection was held good, and the summons dismissed.

Against this decision the Board of Health appealed, but the resp. was no party to the appeal and did not appear.

The Court held, that the decision of the magistrates was wrong, and affirmed the appeal with costs. A rule to that effect was accordingly drawn up, and it was to strike out of it so much as ordered the resp. to pay the costs, that this rule was obtained.

*Gray*, Q.C. showed cause.—This rule was moved for upon the ground that the court does not give costs where the resp. does not appear. [CROMPTON, J.—In this case, they were specially asked for.] The rule, if it is a rule, applies in cases of convictions only. 20 & 21 Vict. c. 43, s. 2, gives the court power to order the resp. to pay the costs: (*Moore v. Smith*, 28 L. J. 126, M. C.) [CROMPTON, J.—We cannot tell what may have been passing in the minds of our brother judges in the full court when they granted the costs; they may not have thought of the rule.] The costs were expressly asked for. [CROMPTON, J.—I do not know of the existence of any such inflexible rule as that alleged here.] *Robinson v. Lawrence* and *Hunt v. Ray* apply to convictions only. The general rule acted upon in appeals from the ruling of County Court judges ought to be applied here.

*H. Mathews* in support of the rule.—*Lee v. Strain*, 28 L. J. 291, M. C., is an authority directly in my favour. It is admitted that the court has discretion in the matter. The rule acted upon and laid down in *Lee v. Strain* was the foundation of the advice given to the resp. by his attorney. He was advised not to appear, because, on the authority of that case, unless he appeared he would have to pay no costs. [CROMPTON, J.—It would be a very dangerous practice to allow frivolous objections to be taken before magistrates, on the chance of getting a favourable decision; then not appearing in case of an appeal, and so paying no costs.] All that the court did was to remit the matter to the justices. No cases have been cited in which a distinction has been taken between civil and criminal cases, as affecting this rule. The statute makes no distinction. The board of health appealed; the resp. gave notice that he would not appear. [CROMPTON, J.—There is no rule such as you allege; it may be the ordinary practice.] In *Moore v. Smith* both parties appeared: (*Venables v. Hardman*, 28 L. J. 33, M. C.) The practice in the Ex. Ch. is analogous to this; if the decision of the inferior court is reversed, the app. gets the

[BAIL.]

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[BAIL.]

costs in the court below only. [Gray referred to *Schroeder v. Ward*, 32 L. J. 150, C. P.; 7 L. T. Rep. N.S. 825.] The reason why the party who appeals from the ruling of a County Court Judge gets his costs is, because the costs of the appeal are in many cases so much greater than the sum in dispute, that the power of appeal would be otherwise a *damnoosa hereditas*.

Jan. 30.—SHEK, J. delivered judgment.—This was a rule argued before my brother Crompton and myself, calling upon the apps. to show cause why so much of a rule of this court as ordered the resp. to pay the costs of it should not be struck out. [His Lordship then stated the facts.] The ground upon which it was asked that the rule should be amended was, that the case of *Lee v. Strain* had not been brought to the notice of the court at the time the order for costs was made. That was a case in which it was stated by the court "our practice is, where no one appears on behalf of the resp., not to give costs." Now we have consulted the other judges of this court, and they say the rule *nisi* was granted because *Lee v. Strain* had not been brought to their notice before, and they therefore thought that it was a matter which should be reconsidered. We do not mean to lay down any general rule that where the resp. does not appear the costs will follow the event; but, on the argument, cases of appeal from the decisions of County Court Judges were cited, in which it was held that, in such cases, as a general rule, the successful party is entitled to costs. We think these cases more analogous to the present one than that which was referred to and relied on. The rule will, therefore, be discharged.

*Rule discharged.*

REG. v. THIRLWIN.

*Quo warranto—Relator—Affidavit.*

*The affidavit upon which the rule for a quo warranto is moved must show upon the face of it that the "relator" is duly qualified, and no amendment is allowed afterwards.*

This was a rule calling upon the deft. to show cause why a *quo warranto* should not issue to show by what authority he exercised the office of a councillor in Bolton.

The grounds on which the rule was obtained was, that several persons who voted for the election of the deft. as councillor personated burgesses.

Manisty, Q. C. (with him Milward) showed cause.—The relator must be a burgess, or subject to the jurisdiction of the borough:

*Rea v. Cunliffe*, 6 T. R. 503;

*Rea v. Parry*, 6 Ad. & E. 810;

Rule 8, Nov. 1839.

The affidavits state that the relator is a tailor in Bolton; they do not show, as they ought to do, that he is a householder, and subject to the jurisdiction of the corporation.

*Welby* in support of the rule.—A man who is stated in the affidavit to be "a tailor in Bolton," must *prima facie* be assumed to be a householder there, especially as he goes on to say that "he applies as relator."

CROMPTON, J.—The rule is imperative, that there must be a good relator at the time the rule is moved for; therefore no amendment can be allowed.

*Rule discharged without costs.*

*Ex parte* SIR G. EAST.

10 & 11 Vict. c. 38—*Drainage—Costs—Inclosure Commissioners.*

*The 10 & 11 Vict. c. 38, s. 6, authorises the Inclosure Commissioners to require such security to be given as they shall think fit for the payment by the*

*applicant of all costs incident to the inquiries and proceedings in relation thereto:*

*Held, that the commissioners have no power under this section to direct the costs incurred by a party who successfully opposes the application, to be paid out of such security.*

Cooke, Q.C. moved for a rule calling upon the Inclosure Commissioners of England and Wales, to show cause why they should not direct the costs incurred in a certain inquiry to be ascertained and paid. The owner of Castle-Eaton, a parish situate between Wiltshire and Gloucestershire, had applied under the 10 & 11 Vict. c. 38, to the Inclosure Commissioners, in order to have his land drained. Sir George East, the owner of land on the opposite side of the river, opposed the application, which was refused by the commissioners, after hearing both parties. The 6th section of the Act in question is as follows:—"And be it enacted, that the commissioners may in every case, before they shall proceed to act or inquire of or in relation to any such memorial as aforesaid, require such provision or security to be made or given as they shall think fit for the payment by the parties making the application, of all costs incident to or to be occasioned by the inquiries and proceedings in relation thereto." The commissioners were perfectly willing to direct the costs incurred by Sir G. East to be paid out of the security; but they doubted their power to do so under the Act. He submitted that the word "inquiries" refers to what is done preliminarily by the commissioners, and "proceedings" includes the subsequent steps, such as the opposition, &c. [SHEK, J.—The words "inquiries and proceedings" seem to me to apply to the words "before they shall proceed to inquire."]

CROMPTON, J.—I think that the words are not strong enough to give the commissioners the power you would wish them to have. If the Legislature had wished to give the party who opposes successfully his costs, they might have said so in explicit terms.

SHEK, J. concurred.

*Rule refused.*

*Ex parte* MASTERS.

52 Geo. 3, c. 209—*Newgate prison for criminal offenders—Civil process.*

*By the 52 Geo. 3, c. 209, Newgate is made a prison for the reception of criminal offenders only. Therefore a person, committed by civil process cannot be detained there.*

This was a rule calling upon the Income Tax Commissioners for the parish of Kensington, the Commissioners of Inland Revenue, and the keeper of Whitecross-street Prison, to show cause why a writ of *habeas corpus* should not issue to bring up the body of George Masters.

The facts were these:—Masters was the collector of the income tax for Kensington, and became a defaulter. He was thereupon committed to Newgate, but removed himself by *habeas corpus* to the Queen's prison.

Upon the passing of the Queen's Prison Discontinuance Act, he was removed by order of the Chief Justice to Whitecross-street. The question was whether the original commitment to Newgate was good.

Keane showed cause.—The commitment took place under the 3 Geo. 4, c. 88, by which authority was given to imprison a defaulter and seize his estate. No particular gaol is mentioned in the Act; therefore the common gaol of the county is the proper prison. By the 52 Geo. 3, c. 209, Newgate was declared to be the common gaol of the county of Middlesex; therefore the commitment to Newgate was proper. The 4 Geo. 4, c. 64, s. 4, gives power to classify prisoners, and if there is any prison where there are



no means of classifying all the prisoners, such prisoners may be removed to other gaols, where they may be kept in particular classes; but it is not necessary to name the other gaol in the warrant. [CROMPTON, J.—The prisoner ought to be sent to a gaoler who has a right to detain him.]

*Wolaby* in support of the rule.—The question is, whether this person could lawfully have been committed to the gaoler of Newgate. It was not a criminal process; it was a committal under a civil process until he had paid the money. The 3 Geo. 4, c. 88, s. 3, gave the commissioners power to imprison a defaulting collector; if a person refused to pay the tax, they might commit him to the common gaol. It is admitted that Newgate is the common gaol for the county of Middlesex. There were other provisions for transferring prisoners who were not felons or other offenders, from Newgate to other prisons. Newgate was a criminal prison only. Persons committed for contempt could not be kept there. The original commitment ought to have been to Whitecross-street.

CROMPTON, J.—I am sorry that this case has been argued before a single judge, for it involves the construction of difficult Acts of Parliament; but I have received much assistance from the lucid arguments of the learned counsel, and it is a case which admits of no delay, as the liberty of the subject is involved in it. I am of opinion that Newgate is, under the Act, intended for criminal offenders only, and it is clear that the party in whose behalf this application is made was not committed as such. Then the question arises, was the warrant good when it issued? It can be good only if it issued to the proper gaoler and the prisoner was taken into the proper custody. Mr. Keane says, that when once the prisoner was in Newgate the sheriff could deal with him, but I cannot accede to that proposition. The preamble of the statute, the 52 Geo. 3, c. 209, shows that its object was to constitute Newgate a prison for persons committed for crime, while other prisons might receive persons committed under civil process. Sect. 56 refers to "felons and other persons not by this Act authorised to be confined;" but the "other offenders" must mean such prisoners as misdemeanants who are alluded to in the 1st section. Then the 57th section says that prisoners for contempt shall be treated as committed under civil process. I was perplexed at first with the language of the 58th section, but the words "or others" must mean persons charged with a *delictum* or crime; it cannot be intended that any persons may be sent to Newgate under civil process. The warrant, therefore, ought not to have been sent to Newgate, nor could the gaoler say that the prisoner was rightfully in his custody. He must therefore be discharged. It is practically of no great consequence to the prisoner, for I suppose he can be apprehended afresh on a good warrant.

*Rule absolute.*

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Jan. 23, 1864.

(Before COCKBURN, C.J., CROMPTON and WILLES, JJ., CHANNELL, B. and KEATING, J.)

REG. v. EPHRAIM GRAY.

*Indictment—Felony—Omission of "feloniously."*

*An indictment under the 24 & 25 Vict. c. 97, s. 15, for the felony of damaging a machine, with intent to destroy the same, charged the offence to have been committed "unlawfully and maliciously," in the language of the statute, but omitted the word "feloniously;"*

*as the word feloniously was a term of art*

*and necessary in all indictments for felony, whether at common law or created by statute.*

Case reserved for the opinion of this Court.

At the Michaelmas Quarter Sessions for Essex, held at Chelmsford, on Oct. 20, 1863, Ephraim Gray was put upon his trial upon the following indictment

Essex, to wit.—The jurors for our Lady the Queen, upon their oath present, that Ephraim Gray, late of the parish of Romford, in the county of Essex, labourer, on the 29th Oct. A.D. 1862, with force and arms, at the parish aforesaid, in the county aforesaid, did unlawfully and maliciously damage with intent to destroy certain machines, then and there being and used for ploughing and performing other agricultural operations, to wit, two ploughs and one scarifier, the property of John Samuel Finch, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

He pleaded not guilty.

His counsel objected to the validity of the indictment that the word "feloniously" was omitted from it; and also contended that as the ploughs which he was charged with unlawfully and maliciously damaging were one of them a patent plough of Bastall, and the other an ordinary plough, both of them of a description commonly in use in agriculture, and worked by horses, and the scarifier also was of a description commonly in use, the damaging was not an offence within the statute 24 & 25 Vict. c. 97, s. 15.

The Chairman left the facts to the jury, who found the prisoner guilty; and the Court directed that the prisoner should enter into a recognisance of bail, with a surety in the sum of 50*l.*, conditioned to appear and receive judgment when called upon, and reserved the two questions of law for the consideration of the Justices of either Bench and Barons of the Ex.

C. G. ROUND, Chairman.

Amended pursuant to the order of the court, bearing date, Nov. 21, 1863.

C. G. ROUND, Chairman.

*Murphy* for the prisoner.—The indictment is bad for the omission of the word "feloniously." It is founded on the 24 & 25 Vict. c. 97, s. 15, which enacts that whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless any machine or engine, &c., shall be guilty of felony. This being a charge of felony, it is necessary to allege that the person charged feloniously committed the act. The old law, that all felonies must be laid to have been done "feloniously," is not altered by the Consolidated Criminal Statutes. (He was then stopped.)

*Philbrick* for the prosecution.—The indictment is sufficient, and follows the words of sect. 15, charging that the prisoner did unlawfully and maliciously damage, &c., and alleges what that section declares to be a felony. In a note by Hammond to Com. Dig. "Indictment" G. 6, "So an indictment for felony ought to say *felonice*," referring to *Res v. Johnson*, 3 M. & S. 539, where the word feloniously was omitted before the word *embezzle*, it was doubted whether it was necessary to aver it if the offence was described in the words of the statute. [By the COURT.—But the indictment in that case concluded, "And so the jurors say that he did 'feloniously' *embezzle*," and that was held sufficient.] *Res v. Crighton*, Rna. & Ry. 62. [WILLES, J.—In *Holford v. Bailey*, 13 Q. B. 426, the Court said, that where the words are words of art, you cannot use equivalent expressions. That was in a case where the argument was whether equivalent expressions would do. Parks, B. said: "If, indeed, the words 'several fishery' were terms of art, such as the words 'felony,' 'murder,' 'burglary,' equivalent expressions could not be used."] If this were an indictment at common law I admit nothing could cure the defect. [COCKBURN, C. J.—What distinction can there be between the unwritten

law, which attaches the crime of felony to a given state of facts, and the statute law which does the same?"] He referred to Hawk. P. C. "Indictment," ss. 55, 110.

COCKBURN, C. J.—All the text-books lay it down as a general rule, without any distinction as to felonies at common law or by statute, that in an indictment for felony the word "feloniously" must be used. I think that principle is well founded in substance, and that it is a wholesome rule that there should be on the face of the indictment an intimation whether the offence charged is a felony or misdemeanor. It would produce great confusion if it were not so, and it is safer to adhere to the old rule. Therefore the indictment not having laid the offence to have been "feloniously," it is bad.

CROMPTON, J.—I am of the same opinion. This is not a mere technical rule. According to all the precedents and text-books it is necessary to show on the indictment whether a felony or misdemeanor is charged.

The rest of the Court concurring,

Conviction quashed.

Saturday, Jan. 23, 1864.

(Before COCKBURN, C.J., CROMPTON and WILLES, JJ., CHANNELL, B. and KEATING, J.)

REG. v. FUIDGE.

*Vexatious Indictments Act—Indictment preferred without leave—Quashing objectionable part—Inadmissibility of evidence thereon.*

*A prisoner was committed upon one charge only of false pretences, but an indictment was preferred without leave as required by 22 & 23 Vict. c. 17, s. 1, and found by the grand jury containing a second charge of false pretences. The prisoner refused to plead, and the Court directed a plea of not guilty to the whole indictment to be entered for him, and received evidence of both charges:*

*Held, that the proper course was to have quashed the part of the indictment relating to the second charge: Held, also, that as evidence upon that charge would not then have been admissible, the conviction could not be supported.*

Case reserved for the opinion of this court.

William Varley Fudge was tried before me at the Quarter Sessions for the town and county of the town of Southampton, holden by me on the 11th Jan. 1864, on an indictment containing two counts. He was charged in the first count of the indictment with having obtained on the 26th Sept. 1863 a shawl from Henry Smart by false pretences, and in the second count with having obtained on the 29th Sept. 1863 another shawl from Henry Smart by false pretences.

The false pretences were in each case similar.

When the prisoner was placed at the bar his counsel applied to have the indictment or its second count quashed on the ground that the order of committal reciting only one case of obtaining a shawl by false pretences, namely, the one on the 26th Sept., the prisoner could not be tried for the subsequent false pretence, the subject of the second count, because the prisoner had not been committed for that specific offence, but only for the one of the 26th Sept.

None of the other provisions of the Vexatious Indictments Act had been complied with (22 & 23 Vict. c. 17.) I refused to quash the indictment or its second count, and ruled that the trial should proceed.

On the prisoner being called on to proceed he refused to do so, whereupon I directed the proper officer of the court to enter a plea of not guilty.

When, on the trial, evidence was tendered by the counsel for the prosecution in support of the second count it was objected to by the counsel for the prisoner, but was admitted by me.

In summing up I left the evidence on the two counts to the jury, as evidence in two separate and distinct

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cases; and I asked them to return a separate and distinct verdict on each of the counts. They did so, and returning a verdict of guilty on the first count I sentenced the prisoner on that count to three months imprisonment, and returning a verdict also of guilty on the second count I sentenced the prisoner on that count to a week's imprisonment, to commence at the expiration of the sentence passed on the former count.

The questions for the consideration of the Hon. the Justices of either Bench and the Hon. the Barons of the Exchequer are:

1. Ought the indictment or its second count to have been quashed?

2. If the second count ought to have been quashed or not proceeded upon, was evidence relating to it admissible or inadmissible on the trial of the first count, and if inadmissible can the conviction on the first count be upheld or not?

MONTAGUE BERN,

Jan. 16, 1864. Recorder of Southampton.

No counsel was instructed on either side.

Yonge, who had been counsel for the prisoner at the trial, by permission made the following suggestions:—It was clearly wrong and contrary to the Vexatious Indictments Act to try the prisoner upon the indictment. Leave should have been obtained to insert the second count: (*Reg. v. Bray*, 9 Cox C. C. 218.) The trial was *in itinere* so far as the prisoner was concerned, he having refused to plead. [CROMPTON, J.—In a case tried before me at the Monmouthshire Assizes I, on a similar objection, after consulting my brother Channell, quashed the objectionable counts, leaving the good counts standing. (c)]

(c) The following is the case alluded to:—

OXFORD CIRCUIT.

MONMOUTH, March 31, 1862.

David Davies, Edward Davies, John Evans, Thomas Phillips, John Williams, and Isaac Vaughan surrendered to take their trial upon a charge of riot and assault, and destroying furniture, &c., on the 12th Sept. 1861, at Abercorn.

The indictment contained a great many counts, including several which charged a conspiracy.

Huddleston, Q.C., W. H. Cooke and H. James conducted the prosecution; R. Sargery defended David and Thomas Davies; Smythies defended Evans and Phillips; and J. J. Powell defended Williams and Vaughan.

When the defendants were arraigned Smythies objected that the indictment was bad, upon the ground that it contained counts for conspiracy, without showing that such counts were admissible under the recent statute (22 & 23 Vict. c. 17), passed to prevent vexatious indictments for certain misdemeanors. The 1st section of that statute enacts that no indictment for certain offences therein named (including conspiracy) shall be presented to or found by a grand jury, unless the prosecutor has been bound over to prosecute or the deft. has been committed or bound by recognisance to appear to answer to an indictment for such offence, or unless such indictment for such offence be preferred by the direction or with the consent in writing of a judge of a superior court, or of the Attorney or Solicitor-General.

It was admitted that the counts in question had been improperly introduced into the indictment, but, after a long discussion,

CROMPTON, J. decided that he had power to quash the objectionable counts, and ordered them to be quashed accordingly.

Powell (on the part of Williams and Vaughan) then pleaded a plea to the jurisdiction of the court to try the indictment, alleging that the indictment, as found by the grand jury, contained the objectionable counts, which had been introduced without the necessary legal authority.

Huddleston, on the part of the prosecution, then handed in a demurrer to the defts.' plea.

A discussion then took place upon the demurrer, but CROMPTON, J., after consulting Channell, B., gave judgment for the Crown. His Lordship said he thought he had power to quash some of the counts without quashing the whole indictment, though there was no authority for so doing.

Powell said it was the intention of the prisoners whom he represented to sue out a writ of error.

The four prisoners, David and Edward Davies, Evans and Phillips, then pleaded "not guilty," and the trial proceeded as to them, the judgment given by the court upon demurrer being conclusive as to the other two prisoners.

A writ of error was not sued out.

The great error was in directing a plea of not guilty to the whole record to be entered for the prisoner. COCKBURN, C. J.—I doubt whether this is not a matter for the discretion of the court, and whether all that a prisoner could ask was that the objectionable count might be quashed.] Then, assuming that the second count ought to have been quashed, the prisoner was entitled to be in the same position, as if there had been but one charge before the court, and if so the evidence on the objectionable count could not have been given, and was inadmissible: (*Reg. v. Holt*, 8 Cox C. C. 411; 1 Bell C. C. 280.) There the prisoner was charged with obtaining a specific sum from A. by false pretences, and it was held that evidence of obtaining another sum from B. by similar pretences within a week was inadmissible to prove guilty intent. The reception of evidence of the charge in the objectionable count operated to the prejudice of the prisoner.

COCKBURN, C. J.—We are of opinion that the first question asked of the court, whether the second count ought to have been quashed, must be answered in the affirmative. As regards the second question, we are of opinion that the evidence relating to the second count was inadmissible on the trial of the first; and the majority of the court are of opinion that the conviction upon that count cannot be upheld.

Conviction quashed.

Jan. 23 and 20, 1864.

(Before COCKBURN, C. J., CROMPTON and WILLES J.J., CHANNELL, B. and KEATING, J.)

REG. V. BUCKNELL.

*Larceny—Bailee—Purchase by agent of goods for prosecutor—Appropriation to prosecutor.*

*A person was employed to fetch home coals from the dépôt in his own horse and cart, for remuneration. The prosecutor gave him 8s. 6d. to buy and fetch for him half-a-ton of coals. He went and told the coal merchant to load 9 cwt. in the cart, and 1 cwt. in a sack, and paid 8s., and subsequently the other stipence. He delivered only 9 cwt. to the prosecutor, retaining the other 1 cwt.:*

*Held, that there was evidence of appropriation of the coals so as to vest the possession in the prosecutor, and support a conviction for larceny as bailee.*

Case reserved for the opinion of this court.

The prisoner was indicted at Swaffham Sessions, on the 28th Oct. 1863, for embezzling eight stone of coals, the property of his master. A second count charged a larceny of the same, laid also as the property of his master.

The prisoner, who had a horse and cart of his own, used from time to time to bring small quantities of coals for the prosecutor and others from the coal merchants at a railway-station, and he received at the rate of 4s. per ton from the prosecutor by way of remuneration.

On one occasion the prosecutor asked the prisoner to fetch him half-a-ton of coals, and on the morning after a servant of the prosecutor's, by his master's orders, gave the prisoner 8s. 6d. of his master's money to pay for them.

The prisoner went to the station with his own horse and cart, and there saw a man in the employ of the coal merchants. This man's evidence was to the effect that the prisoner came to him and said, "I want half-a-ton of coals; put nine hundredweight in the cart and one hundredweight in a sack," as he said the cart "would hang;" that he paid 8s. and since paid 6d. more, which was the full price.

In cross-examination the witness said that he sold the coals to the prisoner, and gave him credit for the balance: nothing was said as to the coals being for anybody else than the prisoner, nor was the name of the

prosecutor mentioned, and the receipt was made out to the prisoner.

The prisoner delivered 9 cwt., and the prosecutor, on weighing them, found them 1 cwt. short. On the same evening the prisoner confessed to taking the coals, and afterwards pointed out 1 cwt. of coals in his shed of the same kind as those delivered to the prosecutor as his (the prosecutor's) property.

The prosecutor's evidence was to the effect that the horse and cart were the property of the prisoner, and that he was at liberty to fetch the coals when and how he liked, and that save as aforesaid he had never been in any way in the employment of the prosecutor or received any wages from him.

His counsel objected that he could not be convicted of embezzlement, as he was not employed as a servant, nor were the goods delivered to him on account of the prosecutor as his employer within the 24 & 25 Vict. c. 96. Nor of larceny, as the goods had never been in the possession, constructive or otherwise, of the prosecutor; nor was he bound to deliver the specific goods.

On the facts the prisoner was convicted of larceny on the second count, the point being reserved as to whether he could be rightly convicted of larceny under the above circumstances.

*Drake* for the prisoner.—It is submitted that the conviction for larceny cannot be sustained, as the coals had not been in the possession, actual or constructive, of the prosecutor. In *Reg. v. Reed*, 1 Dears. C. C.; 6 Cox C. C. 284, the coals were placed by his servant, the prisoner, in the prosecutor's own cart. And in *Spear's* case, 2 Leach, C. C. 962, the oats the subject of the larceny, were put in the prosecutor's own barge, and the prisoner was the servant. Here the coals were bought by the prisoner, who was not the servant of the prosecutor, and put in his own cart, over which the prosecutor had no control. In *Re v. Walsh*, 4 Taunt. 376, Heath, J. said: "*Spear's* case, on which *Reg. v. Reed* a good deal depended, went upon the ground that the corn was in the prosecutor's barge, which was the same thing as if it had been in his granary." The case finds that the prisoner was to fetch the coals how and when he liked; and credit was given to the prisoner. In *R. v. Reed* the coals were expressly bought for the prosecutor, and credit given to him. It may be contended, in this case, that the prosecutor not only had not possession, but not even a property in the coals. [CROMPTON, J.—If I run to my agent, and tell him to buy and send me timber, and he does buy timber, but misappropriates, could I not sue for it as a bailee? It comes almost within the principle of *Sir Thomas Plumer's* case, *Taylor v. Plumer*, 3 M. & S. 562.] It is submitted that, until the prisoner had done something more than put the coals in the course of transition no property vested in the prosecutor. [COCKBURN, C. J.—There can be little doubt that when he took the cwt. of coals he meant to take them as part of the prosecutor's property.] It is by no means clear that the coals were bought with the identical money given to the prisoner by the prosecutor; he paid for part and part was on credit. Secondly, with reference to the *Bailee* Act, 20 & 21 Vict. c. 54, s. 4. Notwithstanding that Act, the goods must have been in prosecutor's possession to support larceny. Again, he was not bound to deliver this specific half-ton of coals, which he must have been to support larceny as a bailee:

*Reg. v. Hassall*, 8 Cox C. C. 491; 1 L. & C. 38. There was no bailment here at all.

No one was instructed on behalf of the prosecution.

*Cur. adv. vult.*

Jan. 30.—COCKBURN, C. J.—We have considered this case, and think the conviction good. It turns on the construction of the 20 & 21 Vict. c. 54. Sect. 4 provides: "If any person, being a bailee of any property, shall fraudulently take or convert the same to his

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own use, or the use of any person other than the owner thereof, although he shall not break bulk, or otherwise determine the bailment, he shall be guilty of larceny." The prisoner was entrusted with money to buy coals, and to bring them home to the prosecutor, for remuneration, with the prisoner's own horse and cart. The prisoner having purchased coals and loaded them, on his way home abstracted part, with intent to convert the same and to deprive his master of the same. Some members of the court think that if even there was no evidence of specific appropriation by the prisoner, yet the coals having been purchased with the money, given for that purpose to the prisoner, would *ipso facto* vest the property in the prosecutor, and there would be a bailment within the terms of the statute. Others are of opinion that a specific appropriation is necessary, but that there is evidence here of such appropriation. Here the prisoner goes with the prosecutor's money to buy the coals, puts them into a cart and takes a portion for himself, pretending to the prosecutor that he had brought him all the coals. We are all of opinion that there is sufficient evidence of appropriation to warrant a jury in coming to the conclusion they did.

Conviction affirmed.

## COURT OF QUEEN'S BENCH.

Reported by JOHN THORNTON and T. W. SAUNDERS, Esqrs.,  
Barristers-at-Law.

Wednesday, Jan. 27, 1864.

STAFFORD (app.) v. PILCHER (resp.)

Vaccination—Neglect to have child vaccinated—

Second offence.

The 16 & 17 Vict. c. 100, s. 9, enacts that notice shall be given to the parent or guardian of a child, on the registration of the birth, that it is the duty of such parent or guardian to take care that the child shall be vaccinated in the manner directed by the Act; and if, after such notice, the parent or guardian shall not cause such child to be vaccinated, then such parent or guardian "so offending" shall forfeit a sum not exceeding 20s.

Sect. 2 directs the parent, within three months after the birth, and the guardian within four, to take the child to the medical officer for the purpose of being vaccinated.

A father, having neglected to comply with the Act, was convicted and fined. He was, after the lapse of the time mentioned in sect. 2, summoned a second time in respect of the same child, for continued neglect to have the child vaccinated:

Held, that he could not be convicted of a second offence under the above enactment.

Case stated by Justices under 20 & 21 Vict. c. 43.

At a petty sessions holden at Margate, in the liberties of the Cinque Ports, on Nov. 25, 1863, an information was preferred by C. R. Pilcher, registrar of births and deaths, and the person appointed by the guardians of the Isle of Thanet Union (in which Margate is situate), pursuant to 24 & 25 Vict. c. 59, to institute and conduct proceedings for the purpose of enforcing obedience to the Vaccination Acts within Margate, against W. G. Stafford, under sects. 2 and 9 of the 16 & 17 Vict. c. 100 (a) alleging that the resp. on the 23rd Nov. 1863,

at Margate aforesaid, in the liberties aforesaid, then being the father of a certain child called Albert Alfred Kennett Stafford, born after the 1st Aug. 1853, to wit, on the 16th July 1862, unlawfully did not within three calendar months after the birth of the said child take or cause to be taken the said child (which had not been previously vaccinated by some duly qualified medical practitioner) to one of the medical officers duly appointed in that behalf in Margate aforesaid, for the purpose of being vaccinated according to the 16 & 17 Vict. c. 100, although one Henry Wootton, the late registrar of births in Margate aforesaid, did on the registration of the birth of the said child give due notice in writing to the said resp. in manner and form directed by the said Act.

At the hearing it was proved that proper notice had been given to the resp. pursuant to the 9th section of the 16 & 17 Vict. c. 100, that he had failed to comply therewith in not having the said child vaccinated within the three months allowed him for the purpose in sect. 2 of the said Act, and the deft. admitted that the said child had not even at the time of such hearing been vaccinated. The resp. then stated, and the fact was admitted by the app., that he the said resp. had already been previously convicted by certain justices for the liberties aforesaid at Margate, on the 18th Feb. 1863, upon a similar information laid by the said app. against him for not having the said child vaccinated, and that he was then fined and subsequently paid 2s. 6d. for penalty and 9s. 6d. for costs; he therefore contended that he could not again be punished for the same offence. In reply to this objection the app. referred to the concluding words of 24 & 25 Vict. c. 59, viz., "and proceedings for enforcing penalties under any of the said Acts on account of neglect to have a child vaccinated may be taken at any time during which the parent or guardian is in default," and submitted that it was the manifest intention of the Legislature, by a series of Acts, to make vaccination compulsory, and that the words "at any time" must be construed to mean that a parent so in default might be convicted again and again until he obeyed the directions of the statute, and he produced an opinion emanating from the vaccination department of the Privy Council in support of his view.

The justices however formed a different opinion and dismissed the information, and stated the grounds of their determination to be as follows:—That the resp. having been previously convicted for the same offence a

vaccinated by some duly qualified medical practitioner, and the vaccination duly certified, and the said medical officer or practitioner so appointed shall, and he is hereby required thereupon, or as soon after as it may conveniently and properly be done, to vaccinate the said child.

Sect. 9. The registrar of births and deaths in every sub-district shall on or within seven days after the registration of the birth of any child not already vaccinated within the said sub-district give notice in writing in manner hereinafter directed, and according to the form of schedule hereinafter inserted, marked C., to the father or mother of such child, or in the event of the death, illness, absence, or inability from sickness or otherwise of the father and mother, then to the person upon whom the care, nurture, or custody of such child shall have devolved, that it is the duty of such father or mother, or person having the care, nurture, or custody of such child as aforesaid, to take care that the said child shall be vaccinated in the manner directed by this Act, and shall together therewith deliver to such person a notice of the days, hours and places within the district of such registrar, at which the medical officer or practitioner as hereinbefore provided will attend for the purpose of vaccination, and if after such notice the father or mother of the said child, or the person so having as aforesaid the care, nurture, or custody of the said child shall not cause such child to be vaccinated, or shall not on the eighth day after the vaccination has been performed, take, or cause to be taken, such child for inspection, according to the provisions in this Act respectively contained, then such father or mother, or person having the care, nurture, or custody of such child as aforesaid, so offending, shall forfeit a sum not exceeding twenty shillings.

(a) Sect. 2. The father or mother of every child born in England and Wales after the first day of August in the year of our Lord one thousand eight hundred and fifty-three, shall, within three calendar months after the birth of the said child, or in the event of the death, illness, absence, or inability of the father and mother, then the person who shall have the care, nurture, or custody of the said child, shall within four calendar months after the birth of such child, take or cause to be taken the said child to the medical officer or practitioner appointed in the union or parish in which the said child is resident, according to the provisions of the first recited Act, for the purpose of being vaccinated, unless he shall have been previously

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second conviction could not take place, as the common law principle "that no man ought to be twice punished for one and the same offence" must prevail in the absence of any express legislative enactment to the contrary.

That the words "at any time" must be construed strictly, and are not sufficient to embrace the view contended for by the app., they appearing to them to be directed to the object of preventing the limitation of six months for proceeding summarily (as prescribed by Jervis's Act, 11 & 12 Vict. c. 43, which is incorporated in the Vaccination Acts) commencing to run. And herupon the opinion of this court is requested as to whether they were correct in point of law as aforesaid, or as to what should be done in the premises.

J. Thompson for the app.—This case is stated for the opinion of the court as to whether the present Vaccination Acts are sufficient to compel the vaccination of a child. The title of the 16 & 17 Vict. c. 100 is "An Act to extend and make compulsory the practice of vaccination." And sect. 2 it is contended imposes on parents and guardians, as long as the guardianship of the child continues, the duty of having the child vaccinated. The periods of three or four months prescribed in the section as those within which the child is to be taken to the medical officer to have the operation performed are prescribed for convenience, and are not imperative conditions, so that the parent or guardian is relieved from the duty of having the child vaccinated by the lapse of those periods. There is no discharge of the duty of the parent until the operation has been successfully performed: (sect. 4.) The former Acts, 3 & 4 Vict. c. 29, and 4 & 5 Vict. c. 32, required unions and parishes to provide properly qualified medical practitioners for the voluntary vaccination of *all* persons, without regard to age, resident in such unions or parishes. The parents' duty to the child and to the public is to have the child vaccinated, and the object of the 16 & 17 Vict. c. 100, was to render that compulsory. The penalty provided by sect. 9 may be incurred as often as the parent has a reasonable opportunity of having the child vaccinated and neglects so to do. The 43rd Eliz. requires overseers to be appointed within a certain time, yet this court will enforce the appointment at a subsequent period; and so where a statute directs a conviction to be sent to the next court of quarter sessions, this court will upon omission compel it to be sent subsequently.

No one appeared for the resp.

COCKBURN, C. J.—I am of opinion that our judgment must be for the resp. I agree that it is clear that the continuous omission of a parent or guardian of a child to get it vaccinated according to the duty imposed by the 16 & 17 Vict. c. 100, ss. 2 and 9, after the expiration of the prescribed time, is as much within the mischief which the Legislature intended to remedy as the not performing the duty within the prescribed time. But it is equally clear that this mischief is not reached by the 9th section of the Act as it stands. And I think that the only remedy is by application for further legislation on the subject. The 2nd section of the Act imposes the duty, and it also requires that, when a birth is registered, the registrar shall give notice to the parent or guardian of the child that this duty must be performed. And it provides, that if notice is given and the duty is not performed within the prescribed time, the offence punishable by the Act is created. But the duty prescribed by the Act, upon the non-performance of which the offence arises, is to get the child vaccinated within the prescribed time, and when once that offence is complete, and has been dealt with, and the party has been punished for the offence which the Act creates, no further offence can be committed. It is not enough to say that the case is within the mischief which the Act

is intended to remedy. The answer is, that the Act has not provided a remedy for that case. The registrar cannot give a second notice, and the notice which he gives is to bring the child to be vaccinated within the prescribed time. If any other construction was held to be admissible, it would follow that for every day that the party whose duty it is to get the child vaccinated omits to perform that duty a new offence would be committed, and the penalty imposed by the Act for the non-performance of the duty would attach every day, and the penalties thus accumulated might amount to a very serious sum indeed, which the Act never intended. If it is absolutely necessary that this mischief (which I quite agree to be a very serious mischief) should be remedied, it must be so by further legislation. It cannot be done by creating a new offence which the Act of Parliament does not create.

BLACKBURN, J.—I am also of opinion that the justices have decided rightly. I think that there is probably a considerable mischief in existence; but it must be remedied by the Legislature.

MILLER, J. concurred. *Judgment for the resp.*  
Solicitor for the app., T. H. Gore.

Friday, Jan. 29, 1864.

REG. v. HODGSON.

*Justices—Interested—Conviction—Certiorari—Time for moving for.*

*A prosecution under the Salmon Fisheries Act was instituted and conducted by the agents of a Salmon Fisheries Preservation Society, and a conviction was obtained before justices who were members and subscribers to the association.*

*This Court quashed the conviction on the ground of the justices being interested parties as members of the association.*

*If a party attends with all necessary materials for making an application for a certiorari on the last day of the six months allowed by the 13 Geo. 2, c. 18, s. 5, for making such an application, and leaves his papers with the judge's clerk for the purpose of being laid before the judge, and states the nature of his application, the application will be considered in time, even though no judge should be at chambers on that day, and no decision given till a subsequent day.*

*Rule nisi for a certiorari to bring up a conviction of the deft. Hodgson, dated 23rd Feb. 1863, under the Salmon Fisheries Act (24 & 25 Vict. c. 109), s. 20, with a view to the same being quashed, on the ground that the justices before whom the case was determined were interested parties.*

*A rule was refused in the first instance (see ante, p. 290), but on a subsequent day a rule nisi was granted on its being more fully explained to the court what Byles, J. meant by his indorsement on the summons.*

The deft. Hodgson was tenant of a mill and fishery on the river Tees (Durham), and had fish-locks there called Dimadale Fish-locks. The information on which this conviction was founded was laid at the instance of a watcher of the Tees Salmon Fisheries Landowners' Association, and at the hearing the prosecution was conducted by the solicitor of the association, and it was not denied by the affidavits that the prosecution was at their instance. The justices before whom the information was heard, J. L. Smith, Esq., R. H. Allan, Esq., and H. Pease, Esq., were members of the association and subscribers to its funds.

The 13 Geo. 2, c. 18, s. 5, enacts, that no writ of certiorari shall be granted, &c., to remove any conviction, &c., had or made by or before any justice or justices of the peace, unless such certiorari be moved or applied for within six calendar months next after

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such conviction, &c., and unless six days' notice thereof be given in writing to the justices that they may show cause (if they shall think fit) against the issuing or granting of such *certiorari*.

On the 15th Aug. six days' notice was served in pursuance of the above enactment on the convicting justices. On the 21st the deft.'s attorney attended at the judge's chambers to apply for a *certiorari*, and the affidavits to be used were left with the judge's clerk, and the nature of the application explained to him, who said he would take them to the judge, as the judge was not in attendance on that day, it being vacation time, during which period attendance was given on Tuesdays and Fridays only, and he was told to call on the following day. He did so, and was told the affidavits were still before the judge. On the 25th the learned judge, on the application being made, refused to grant a *certiorari*, indorsing the summons "No order, without prejudice to any application to the court." It was afterwards explained by Byles, J., that he intended that the applicant should be in the same position before the court as if the application were made to him.

*Davison* showed cause.—First, there is an objection to the issuing of the *certiorari*, as there is an appeal against the conviction under 30 & 31 Vict. c. 43, pending in the C. P. An appeal under the 30 & 31 Vict. c. 43, is analogous to an appeal to the quarter sessions:

*Res v. Sparrow*, 2 T. R. 196;

*Paley* on Conv. 361.

[COCKBURN, C.J.—The C. P. have only before them the facts as found by the justices, but if the justices have no jurisdiction to find the facts the *certiorari* must issue.] The deft. delayed until the last moment the time for making the application; his attorney ought to have known and fixed a day when the judge was at chambers:

*R. v. St. Mary, Whitechapel*, 2 Dowl. N. S.

*Manisty and Matthews* in support of the rule.—There was an actual attendance at the judge's chambers within the limited time for making the application, and so far as could be done an application was made:

*R. v. Abergyle*, 5 A. & E. 796 (note a).

(The argument on the facts is omitted.)

COCKBURN, C.J.—It is impossible to hold, consistently with established principles, that these magistrates were competent to exercise jurisdiction upon this charge. It appears that the prosecutors were an association of landowners who had an interest in the fishery of the river Tees. Of that association certain members were acting as magistrates upon the hearing of this case, although they were essentially the prosecutors, being a portion of the prosecutors. It is impossible to say that magistrates who are proceeding criminally as prosecutors can act as magistrates in their own case. The only difficulty is as to the time for moving for the *certiorari*. The statute says that the *certiorari* must be moved or applied for within six calendar months next after such conviction. It was intended to give the whole six months down to the last day to the party moving, and he is entitled to the last day. He must have all his tackle right so that he may be in a position to make the application either directly or virtually within that time. He is not to suffer because a judge may not be at chambers in the discharge of his duties on the last day of the six months; it is enough if he has all his machinery ready and makes known to the persons in attendance at chambers the object and purpose of his application. There is some dispute between the parties as to what took place. It is, however, positively sworn by the clerk who conducted the matter that he attended the next day after he had left the affidavits at chambers. It is not at all unlikely that

the clerk considered it an *ex parte* proceeding, which it clearly is not. I think that a judge at chambers, in exercising this jurisdiction, should see that proper notice had been given to the justices, and if the parties do not appear before him he may direct that a summons should issue to those justices that they may have an opportunity of showing cause against the issuing of the *certiorari*. The application, however, is not the less made if within the prescribed time the party applying goes to the proper quarter and takes such steps as virtually amount to an application. On the whole, I think that enough was done here to make this an application within the six months, and this rule will therefore be absolute.

BLACKBURN, J.—I am of the same opinion. On the merits I entertain no doubt that the justices who sat and heard this case were some of the parties who instituted the proceedings. Magistrates who connect themselves with associations like this for prosecuting offences must not sit as justices on the hearing of the prosecutions instituted by the associations. Then, was the *certiorari* moved or applied for within the six months? Probably the clerk thought it was an *ex parte* application, and that there was no one to show cause. Then it is said that the justices are to have six days' notice of the application, that they may show cause against the granting or issuing of the *certiorari*. I think it has been determined, in a case *Re Flounders*, 4 B & Ad. 865, that such a notice is not sufficient without letting the justices know when and where to show cause. (After recapitulating the facts.) I agree with my Lord that upon the whole the application was virtually made in time in this case.

MELLOR, J.—I am of the same opinion. It is highly desirable that the proceedings of magistrates in such cases as this should be free from the suspicion of interested motives, and it would be very mischievous if justices should act under such circumstances. On the other point, I think it would be very hard if we could not give effect to this application. It was no fault of the party that the judge was not at chambers. And what was done in this case amounted, I think, virtually to an application.

*Rule absolute.*

## COURT OF COMMON BENCH.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

Friday, Feb. 5, 1864.

HACKETT (app.) v. THE CHURCHWARDENS AND  
OVERSEERS OF LONG BENNINGTON AND J. W.  
ANDREWS AND C. ANDREWS (resps.)

*Parochial assessment—Poor-rate—Annual value—  
Corn rentcharge payable to vicar in lieu of tithes—  
Union Assessment Act 1862—Costs.*

By an Act passed in 1794 commissioners for inclosing the parish of L. B. were directed to set out from the lands to be inclosed a certain portion to be taken and accepted as full compensation for and in lieu of all tithes both great and small; of this portion they were directed to allot thirty acres to the vicar and his successors, and all the residue to the rector and his heirs, subject to a corn rentcharge payable out of the same to the vicar and his successors, the amount of which was to be estimated in the following manner: the commissioners were required to ascertain what part of the lands so to be set out for tithes should, with the above-mentioned 30 acres, be a fair and equitable compensation for the vicarial tithes, and to ascertain what quantity of wheat at an average price, based upon the prices during the last twenty-one years, was equal to the yearly value of that part of the land, exclusive of the 30 acres. A corn rent equal to the value of the

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*quantity of wheat so to be ascertained was to be paid annually to the vicar and his successors clear of all parochial rates and taxes. It was further enacted that the tithes should be for ever extinguished. After the passing of the Union Assessment Act 1862, the resps., who were occupiers of the lands so allotted to the rector, were assessed at the full annual value of the lands, less the amount of the corn rent charged on the land and payable to the vicar. On an appeal against the rate, on the ground that the resps. were underrated:*

*Held, that, according to the terms of the Act, the vicar was not liable to be rated on the amount of his rent-charge, and that the resps. were rateable at the full annual value of their lands, without deduction for the rent-charge charged thereon.*

Special case stated pursuant to 11 & 12 Vict. c. 45, s. 11, with the consent of the parties, and by order of Willes, J.

This is an appeal against an assessment for the relief of the poor of the parish of Long Bennington, in the county of Lincoln, made the 16th July 1863, against which assessment the applicant duly gave notice of appeal to the resps. the churchwardens and overseers of the poor of the said parish, and John Wood Andrews and Cyrus Andrews, both of Long Bennington aforesaid, on the ground that the resps. John Wood Andrews and Cyrus Andrews were underrated in respect of the yearly value of the house and land occupied by them the said John Wood Andrews and Cyrus Andrews in the said parish.

The parish of Long Bennington was inclosed under an Act, the 34 Geo. 3, entitled "An Act for dividing, allotting and inclosing the open fields, meadows, pastures, commonable lands and waste grounds within the parishes of Long Bennington and Foston, in the county of Lincoln." This Act is to be taken as forming part of this case, and may be referred to by either party.

By that Act, after reciting that Sir W. Manners, Bart., was improprator or owner of and entitled to receive and take such tithes arising within the said parishes of Long Bennington and Foston, or customary payment in lieu thereof, as were of right due and payable to the improprator of such parishes, and that the Rev. R. Lock, clerk, was vicar of the vicarage of the said parishes, and as such was entitled to receive and take such tithes arising within the said parishes, or customary payment in lieu thereof, as were of right due and payable to the vicar of the said vicarage for the time being, it was enacted that the said commissioners should, and they were thereby required as soon after the survey therein previously mentioned should have been laid before them as conveniently might be (after setting out public drains and public and private roads and ways, and lands for getting materials for repairing thereof, as thereinbefore was mentioned), to set out from the then residue of the lands and grounds by that Act directed to be divided and inclosed, two or more plots or parcels of land in the parish of Long Bennington aforesaid, and one or more plot or parcel, plots or parcels of land in the parish of Foston aforesaid, which in the judgment of the said commissioners should be equal in value to one-fifth part of all the lands that were open and uninclosed lying within the respective boundaries of the then open arable fields, and to one-fifth part of the several ancient inclosures and homesteads within the said respective parishes that were arable, and to one-eighth part of the residue of the lands and grounds (except glebe land) lying and being within the said parishes respectively, subject or liable to the payment of tithes in kind, or to any modus or composition in lieu thereof, and that the lands so to be set out as aforesaid should be deemed, taken and considered as equal to the value of, and should be accepted in full bar,

satisfaction and compensation of and for all tithes, both great and small, and all compositions and payments in lieu of tithes arising, renewing, or payable within the said parishes of Long Bennington and Foston (Easter offerings, mortuaries, and other surplice fees, which were thereby reserved to the said vicar of Long Bennington and Foston, only excepted). And it was thereby also enacted that out of the same lands so to be set out in lieu of tithes in the said parish of Long Bennington as aforesaid, the said commissioners should and they were thereby required to allot unto the said R. Lock and his successors, vicars as aforesaid, two plots or parcels of land in the parish of Long Bennington aforesaid, containing together 30 acres statute measure, 5 acres whereof should be situate in a place called the Green (to adjoin the turnpike road) opposite or nearly so to the dwelling-house of John Benington, and the residue thereof at no greater distance than half a mile from the said five acres, and that all the residue of the said land to be set out for tithes as aforesaid should be allotted to the said Sir W. Manners or his heirs, subject nevertheless to the payment of the corn rents thereafter reserved, and the said commissioners were thereby required to ascertain what part of the said lands so to be set out for tithes as aforesaid within the said parish of Long Bennington should (with the said thirty acres thereinbefore directed to be allotted to the said R. Lock and his successors vicars as aforesaid) in their judgment be a fair and equitable compensation for the vicarial tithes and other payments in lieu of tithes arising or payable within the parish of Long Bennington aforesaid to the said vicar of Long Bennington and Foston aforesaid, and what part of the same lands within the parish of Foston aforesaid should in their judgment be a fair and equitable compensation for the vicarial tithes and other payments in lieu of tithes arising or payable within the parish of Foston aforesaid to the said vicar; and it was further enacted that the said vicar, in lieu of such parts or proportion of land and of the vicarial tithes appertaining to the said vicarage, should have and be entitled as well to the said thirty acres thereinbefore directed to be allotted to him, as to the corn rents to be ascertained and paid in manner thereinafter mentioned (that is to say); the said commissioners should from the *London Gazette* and by such other ways and means as they should think most proper, inquire what had been the average price of good marketable wheat, in the county of Lincoln, during the term of twenty-one years next preceding the passing, of that Act, and should in and by their said award ascertain and set forth what respective quantities should in their judgment (according to such average price as aforesaid) be equal to the yearly value of the lands in each of the said respective parishes (except the said thirty acres thereinbefore directed to be allotted to the said R. Lock), to be ascertained as the fair and equitable compensation for the vicarial tithes and other payments in lieu of tithes appertaining to the said vicarage, and that there should be paid and payable to the vicar of the said parishes of Long Bennington and Foston, and his successors, for ever, out of the whole of the lands thereby directed to be allotted to the said Sir W. Manners for tithes within the parish of Long Bennington aforesaid, according to the value of the vicarial tithes and other payments in lieu of tithes arising within the same parish, and appertaining to the said vicarage, such sum of money as should be equal to the value of the quantity of wheat so ascertained according to the average price aforesaid, and out of the whole of the lands thereby directed to be allotted to the said Sir W. Manners for tithes within the parish of Foston aforesaid, according to the value of the vicarial tithes and other payments in lieu of tithes within the same parish, and appertaining to the said vicarage

such sum of money as should be equal to the value of the quantity of wheat so to be ascertained according to the average price aforesaid, which said respective rents or sums of money should be payable and paid to the said vicar and his successors, either at the vicarage house in the parish of Long Bennington aforesaid, or at such other place or places within the said respective parishes, or either of them, as the vicar thereof for the time being should appoint by four equal quarterly payments in every year for ever, that is to say, the 25th Dec., the 25th March, the 24th June, and the 29th Sept., clear of all parochial taxes, rates, dues and assessments whatsoever (and the amount of the land-tax to be paid in respect thereof to be ascertained according to the proportion in which the lands respectively therewith should contribute), the first payment whereof should grow due and be made on the 25th Dec. next after the execution of such award, or such earlier quarterly day of payment as the said commissioners should by any writing under their hands direct or appoint. And it was enacted that the tithes in lieu whereof the said 30 acres of land were theretofore directed to be allotted and such rents were to be paid should cease and be for ever extinguished on or before the 29th Sept., or such earlier quarterly day as should next precede the first quarterly payment.

The commissioners accordingly, by their award, set out 684 acres 2 roods and 28 perches in the parish of Long Bennington, being, with certain herbage also awarded to the improprator, in their judgment equal in value to one-fifth part of all the lands that were then open and uninclosed, lying within the boundaries of the then open arable fields, and to one-eighth part of all the residue of the lands and grounds lying and being within the said parish, subject or liable to the payment of tithes in kind, or to any modus or composition in lieu thereof (none of the titheable parts of the ancient inclosures and homesteads being then arable), and declared that the said lands so set out were, according to the directions of the said Act, to be deemed, taken and considered as equal to the value of and to be accepted in full bar, satisfaction and compensation of and for all tithes both great and small, and all compositions and payments in lieu of tithes arising, renewing, or payable within the said parish of Long Bennington (Easter offerings, mortuaries and surplice fees, which were by the said Act reserved to the said vicar of Long Bennington and Foston, only excepted).

The commissioners allotted to the vicar of the said parishes 30 acres, part of the said 684 acres 2 roods and 28 perches, and they awarded the residue of the said last-mentioned lands to Sir W. Manners, as improprator, subject nevertheless to the payment of the sum of 147*l.* 16*s.* 6*d.* by the year to the said Robert Lock and his successors the vicars as aforesaid, as a corn rent or yearly payment of money to be paid by four equal quarterly payments, clear of all parochial taxes, rates, dues and assessments whatsoever, except the land-tax, which said yearly sum of 147*l.* 16*s.* 6*d.*, together with the said 30 acres awarded to the said vicar, they declared to be in their judgment a fair and equitable compensation for the vicarial tithes and other payments in lieu of tithes appertaining to the said vicarage, arising or payable within the parish of Long Bennington aforesaid, to the said vicar.

The commissioners further declared that 70 quarters 3 bushels 4 quarts and 1 pint of good marketable wheat were, according to the then ascertained average price of 5*s.* 3*d.* per bushel, equal to the said yearly sum of 147*l.* 16*s.* 6*d.*, and in further pursuance of the said Act, they declared the mode in which the value of the said corn rent should be re-ascertained from time to time.

From the making of the said award the vicar of Long Bennington and Foston has always been assessed

to the poor-rate for the parish of Long Bennington in respect of the 30 acres so awarded to him as aforesaid, but he has not of late years been assessed to the poor-rate for the parish in respect of his said corn rent. The occupier of the land allotted to the improprator as aforesaid has always been assessed to the said poor-rate in respect of the said land since the said award, but it cannot be ascertained whether, in estimating the rateable value of the said land, any deduction has ever been claimed or made in respect of the corn-rent so charged thereon as aforesaid.

The present value of the said corn rent, ascertained by the mode prescribed by the said Act, is 204*l.* 14*s.*

At the time of the coming into operation of the Union Assessment Committee Act 1862 (25 & 26 Vict. c. 103), the land so allotted to the improprator was in the occupation of the resps. John Wood Andrews and Cyrus Andrews, and is the land mentioned in the notice and ground of appeal already referred to.

In pursuance of the last-mentioned Act, the churchwardens and overseers of the poor of the parish of Long Bennington made a list of all the rateable hereditaments in their parish, with the annual value thereof respectively, including therein the house and land in the occupation of the resps. John Wood Andrews and Cyrus Andrews, which were assessed at the full annual value of the said house and land, without making any deduction or allowance in respect of the corn rent charged on the said land by the said Inclosure Act. The parish officers, in fact, valued the house and land just as if they were tithe free, and were not charged with any corn rent.

The resps. John Wood Andrews and Cyrus Andrews, gave to the assessment committee of the Newark Union, in which Long Bennington is situate, and to the overseers of the parish, notice in writing that they objected to the valuation-list, and claimed that in assessing the rateable value of the said house and land, the amount of the corn rent which they paid to the vicar under the Inclosure Act should be deducted.

The committee admitted the objection, and amended the valuation-list by reducing the assessment upon the house and land occupied by the resps. John Wood Andrews and Cyrus Andrews, by the said sum of 204*l.* 14*s.* the present value of the said corn rent.

The churchwardens and overseers of Long Bennington thereupon made the rate appealed against, and assessed the resps. John Wood Andrews and Cyrus Andrews thereto at the said reduced sum.

The question for the opinion of the court is, whether, in estimating the annual value of the said house and land for the purpose of ascertaining the gross estimated rental, or the net annual value thereof under 25 & 26 Vict. c. 103, s. 15, and 6 & 7 Will. 4, c. 96, s. 1, the amount of the said corn rent ought to be deducted.

If the court should be of opinion that the amount of such corn rent ought to be deducted, the rate is to be confirmed; but if the court should be of opinion that it is not to be deducted, then the rate is to be amended by increasing the rateable value of the said house and land by the said sum of 204*l.* 14*s.*

A judgment in conformity with the decision of the court, and for such costs as the court shall adjudge, is to be entered on motion by either party at the sessions next or next but one after such decision shall have been given.

Cave appeared for the app., and contended that the tithes had been extinguished by the statute, and that the occupiers, J. W. and C. Andrews, were liable to be assessed at the full value of their lands on the ground that they were tithe free; and that even if the tithes had not been extinguished they were the occupiers of the lands which had been substituted for the tithes,



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and were, therefore, occupiers in fact of the tithes themselves. He cited

- 6 & 7 Will. 4, c. 96, s. 1;  
 6 & 7 Will. 4, c. 71, ss. 17, 37;  
 23 & 24 Vict. c. 93, s. 1;  
*Reg. v. Shaw*, 12 Q. B. 419;  
*Lovendes v. Horne*, 2 W. Bl. 1252;  
*R. v. Boldero*, 4 B. & C. 467;  
*Chatfield v. Ruston*, 3 B. & C. 863;  
*Chanter v. Glubb*, 9 B. & C. 479;  
*R. v. Wilson*, 5 Nev. & Man. 119;  
*R. v. Great Hambleton*, 1 A. & E. 145.

*Poland* for the resps. J. W. and C. Andrews.—The corn rentcharge is a tithe commutation rentcharge within the meaning of 6 & 7 Will. 4, c. 96, s. 1, and 25 & 26 Vict. c. 103, s. 15, and ought to be deducted from the annual value of the rectorial lands. In addition to the above cases, he referred to

- R. v. Joddrell*, 1 B. & Ad. 403;  
*R. v. Lumsdaine*, 10 A. & E. 157;  
*R. v. Capel*, 12 A. & E. 382, 402;  
*R. v. Adams*, 4 B. & Ad. 61.

*ERLE, C. J.*—I am of opinion that the app. in this case is entitled to succeed, and I say this after listening to an able argument on behalf of the resps. by Mr. Poland, in which every argument of which the case was capable was brought forward. In the parish of Long Bennington thirty acres of land were by the statute allotted to the vicar in addition to a corn rent issuing out of certain other lands in the parish in lieu of all vicarial tithes, which were thereupon to cease and be for ever extinguished. The statute provides, that the corn rent is to be paid to the vicar "clear of all parochial taxes, dues and assessment rates." One thing is clear, that if this last clause had not been inserted in the statute, the corn rent would have been rateable as being a parliamentary compensation in lieu of tithes, which has been held by many decisions to be rateable as the tithes themselves would have been. Mr. Poland said that there was a strong analogy between this case and the case of a tithe commutation rentcharge, which is by statute subject to rates, and which by the Parochial Assessment Act is to be deducted from the amount upon which the occupier of lands is charged. But my judgment turns entirely on the effect of the statute creating the corn rent here in question. It clearly would be an unjust thing in the Legislature, when a large fund has to be made up by contribution, to exempt any person from contribution, and it would be inequitable to the other persons who would have to make up the deficiency. There is a presumption against the Legislature's doing this, and where it has been possible to put a construction in a statute so as to avoid such an injustice, it has always been done. Mr. Poland says that the object of the Legislature was to benefit the vicar. Now, the thing to be done on the inclosure was to give a portion of land in lieu of the tithes rectorial and vicarial of the parish. The whole of this was to go to the owner of the rectorial tithes, for we may keep out of question the thirty acres which were convenient to the vicar's occupation, and which do not bear upon this question of rentcharge. How, then, was the vicar to be compensated for the loss of his tithes? The effect of the arrangement is this: The commissioners are to find out the ratio of the value of the vicarial tithes to the value of the rectorial tithes; to pick out so much land as bears the same ratio to the remainder, and go through the ordinary process of estimating the quantity of corn equivalent to the money rent, and to allot to the vicar so much as is equal to the yearly value of the lands so to be ascertained, as a fair and equitable compensation for vicarial tithes and other payments in lieu of tithes. The commissioners were bound, as between the vicar and the

rector and the rest of the parish, to treat the arrangement made by the Legislature to be in accordance with the Tithe Commutation Act, that the vicar should not have the anxieties of agricultural speculation accompanying the holding of much land. The rector has a statutory lease of the land for ever, and it is the duty of the commissioners to ascertain the fair rack-rent to be paid as if the vicar had let the land to the rector. In that case the rector would have been the occupier, and would have had to pay the rates. It would be an injustice, after the Legislature had exempted the vicar, for us to shift the burden on to the vicar from the occupier of the vicarial lands. Upon the special terms of the statute our judgment ought to be for the app.

*WILLIAMS, J.*—It was not the intention of the Legislature to give a bounty to the vicarage. The tithes are to be rated in some manner or other for the benefit of the parish. The Act exempts the vicar from the payment of rates in respect of tithes, but the corn rentcharge is to be measured on the foundation of what would be a quantity of land which would be a fair and equitable compensation for the tithes, to be ascertained plainly, not by giving the vicar the full value of the tithes, which would be to make him a present of the rates, but by deducting the amount of the rates. He receives compensation for the tithes *minus* the rates, and there is no hardship in assessing the rector's lands to the full value, for the rector has been compensated for the payment of rates for the vicarial tithes, inasmuch as the burden on his land is so much the less. The proper arrangement is that the lands which the lay rector gets should be charged on their annual value, without any deduction for the rates for which the vicarial lands were liable. If the Parochial Assessment Act had never been passed, it would not have been right to take the value otherwise, and that statute does not affect the present case, as the corn rent here is not a tithe commutation rentcharge within the words or spirit of the Act.

*WILLES, J.*—The local Act, passed in 1794, deals with the tithes and not with the rates, and it does not interfere with the ordinary rule that the occupier of tithes should be rateable in respect of them. There was no intention on the part of the Legislature to benefit the vicar. The compensation could not be ascertained without considering the deductions to be made for rates, which must be paid by some one unless the statute expressly enacts that they shall drop. Our judgment will be, that the rate be amended as stated in the words of the 15th paragraph of the case.

*Cave* applied for costs. [*ERLE, C. J.*—The resps. have come here to support the decision of the assessment committee.] In reality the overseers took the same view of the matter as the app., and no one supports the rate besides J. W. and C. Andrews.

By the COURT.—Practically it is a litigation between two individual ratepayers, and the ordinary rule is that the party who succeeds should have his costs.

*Judgment for the app., with costs against the resps. J. W. and C. Andrews.*

Attorney for app., *P. Hodgkinson.*

Attorney for resp., *T. Roberts.*

[PRIV. CO.]

WILLIAMS v. BISHOP OF SALISBURY. WILSON v. FENDALL.

[PRIV. CO.]

JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL.Reported by JAMES PATTERSON, Esq., of the Middle Temple,  
Barrister-at-Law.

Monday, Feb. 8, 1864.

(Present—The ARCHBISHOP of CANTERBURY, LORD  
CHANCELLOR, ARCHBISHOP of YORK, BISHOP of  
LONDON, LORDS CRANWORTH, CHELMSFORD and  
KINGSDOWN.

WILLIAMS v. BISHOP OF SALISBURY.

WILSON v. FENDALL.

*Clergy—Unsound doctrine—Liberty of opinion—In-  
spiration of the Holy Scriptures—Eternity of final  
punishments.**When a clerk is charged with unsound doctrine, the  
court has no jurisdiction to settle matters of faith  
or to determine what ought in any particular to be  
the doctrine of the Church of England, but its  
province on the one hand is to ascertain the true con-  
struction of those articles of religion and formula-  
ries referred to in each charge, according to the  
legal rules for the interpretation of statutes and  
written instruments; and, on the other hand, to  
ascertain the plain grammatical meaning of the  
passages which are charged as being contrary to or  
inconsistent with the doctrine of the Church, ascer-  
tained in the same manner.**The court will not ascribe to the Church any rule or  
teaching which is not found expressly and distinctly  
stated, or which is not plainly involved in or collected  
from that which is written.**That only is matter of accusation which is advisedly  
taught or maintained by a clergyman; and he is not  
to be held responsible for more than the conclusions  
which are directly involved in the assertions made.**The assertion that the Bible was an expression of de-  
vout reason, and therefore to be read with reason  
in freedom, taken along with an assertion in the  
context, that the Holy Spirit dwelt in the sacred  
writers of the Bible, does not warrant the accusation  
that the Bible is the work of pious men and nothing  
more.**The proposition or assertion that every part of the  
Scriptures was written under the inspiration of  
the Holy Spirit is not to be found either in the  
Articles or in any of the formularies of the Church.**There is not in the formularies of the Church of  
England any such distinct declaration upon the  
eternity of final punishment as to require the  
court to condemn as penal the expression of a hope  
by a clergyman that even the ultimate pardon of the  
wicked who are condemned on the day of judgment  
may be consistent with the will of Almighty God.*

WILLIAMS v. BISHOP OF SALISBURY.

This was an appeal from a sentence or decree of the  
Dean of Arches, pronounced on the 15th Dec. 1862.  
A cause of office was promoted by the Right Rev.  
Bishop of Salisbury under 3 & 4 Vict. c. 86, in virtue  
of letters of request from the said bishop against the  
Rev. Rowland Williams, D.D., clerk, and vicar of the  
vicarage and parish church of Broad Chalk, with the  
chapel of Burr Chalk, in the county of Wilts, for  
having offended against the laws ecclesiastical of this  
realm by having written, published, and set forth in a  
book entitled "Essays and Reviews" a certain article,  
or essay, or review, with divers notes thereto, entitled  
"Bunsen's Biblical Researches," and by having in  
such article, and in the notes thereto, advisedly main-  
tained and affirmed certain erroneous, strange and  
heretical doctrines, positions and opinions, contrary and  
repugnant to the doctrine and teaching of the said  
United Church of England and Ireland as by law esta-  
blished, and thereby contravening the statutes, consti-

tutions and canons ecclesiastical of the realm, and  
against the peace and unity of the Church.

The only articles insisted on against the deft were  
the 7th and 15th, as follows:—

7. That in the said article, essay, or review are con-  
tained the following passages at pages 60, 61: "As in  
his Egypt our author sifts the historical date of the  
Bible, so in his Gott in der Geschichte he expounds its  
directly religious element. Lamenting like Pascal the  
wretchedness of our feverish being when estranged  
from its eternal stay, he traces, as a countryman of  
Hegel, the Divine Thought bringing order out of con-  
fusion. Unlike the despairing school who forbid  
us trust in God or in conscience unless we kill our  
souls with literalism, he finds salvation for men and  
states only in becoming acquainted with the Author of  
our life, by whose reason the world stands fast, whose  
stamp we bear in our forethought and whose voice our  
conscience echoes. In the Bible, as an expression of  
devout reason, and therefore to be read with reason  
in freedom, he finds record of the spiritual giants whose  
eloquence generated the religious atmosphere we  
breathe." At pages 77 and 78: "But if such a notion  
alarms those who think that apart from omniscience  
belonging to the Jews, the proper conclusion of reason  
is atheism; it is not inconsistent with the idea that  
Almighty God has been pleased to educate men and  
nations employing imagination no less than conscience,  
and suffering his lessons to play freely within the limits  
of humanity and its shortcomings; nor will any fair  
reader rise from the prophetic disquisitions without  
feeling that he has been under the guidance of a  
master's hand. The great result is to vindicate the  
work of the Eternal Spirit; that abiding influence  
which, as our Church teaches us in the Ordination  
Service, underlies all others, and in which converge all  
images of old time and means of grace now: temple,  
scripture, finger and hand of God; and again, preach-  
ing, sacraments, waters which comfort and flame which  
burns. If such a spirit did not dwell in the Church,  
the Bible would not be inspired, for the Bible is before  
all things the written voice of the congregation. Bold  
as such a theory of inspiration may sound, it was the  
earliest creed of the Church, and it is the only one to  
which the facts of Scripture answer. The sacred  
writers acknowledge themselves men of like passions  
with ourselves, and we are promised illumination from  
the Spirit which dwelt in them. Hence, when we find  
our Prayer-book constructed on the idea of the Church  
being an inspired society, instead of objecting that every  
one of us is fallible, we should define inspiration con-  
sistently with the facts of Scripture and of human  
nature. These would neither exclude the idea of  
fallibility among Israelites of old, nor teach us to  
quench the Spirit in true hearts for ever. But if any  
one prefers thinking the sacred writers passionless  
machines, and calling Luther and Milton 'uninspired,'  
let him co-operate in researches by which his theory  
if true will be triumphantly confirmed." That in the  
passages hereinbefore recited, being portions of the  
said article, essay, or review, the said Rev. Rowland  
Williams did advisedly maintain and affirm that the  
Bible or Holy Scripture is an expression of devout  
reason and the written voice of the congregation, not  
the Word of God, nor containing any special revelation  
of His truth or of His dealings with mankind, nor the  
rule of our faith, or that he did therein advisedly main-  
tain and affirm doctrines, positions, or opinions to that  
or the like purport and effect, and that the said doc-  
trine, positions, or opinions are contrary to and incon-  
sistent with the 6th, 7th and 20th Articles of Religion  
and contrary to and inconsistent with that part of the  
Nicene Creed which declares in substance that the  
Holy Ghost spake by the prophets.

15. That in the said article, essay, or review, is con-  
tained the following passage at pp. 80, 81, in the words

following, to wit: "For though he embraces with more than orthodox warmth New Testament terms, he explains them in such a way that he may be charged with using evangelical language in a philosophical sense; but in reply he would ask what proof is there that the reasonable sense of St. Paul's words was not the one which the Apostle intended? Why may not justification by faith have meant the peace of mind or sense of Divine approval which comes of trust in a righteous God rather than a fiction of merit by transfer? St. Paul would then be teaching moral responsibility as opposed to sacerdotalism, or that to obey is better than sacrifice. Faith would be opposed not to the good deeds which conscience requires, but to works of appeasement by ritual justification, would be neither an arbitrary ground of confidence nor a reward upon condition of our disclaiming merit, but rather a verdict of forgiveness upon our repentance and of acceptance upon the offering of our hearts." That in the passage hereinbefore recited, being portion of the said article, essay, or review, the said Rev. Rowland Williams did advisedly maintain and affirm that justification by faith means only the peace of mind or sense of Divine approval which comes of trust in a righteous God, and that justification is a verdict of forgiveness upon our repentance and of acceptance upon the offering of our hearts; or that he did therein advisedly maintain and affirm a doctrine, position, or opinion to that or the like purport or effect, and that such doctrine, position, or opinion is contrary to or inconsistent with the 11th of the said Articles of Religion.

The Judge of the Court of Arches held the contents of those allegations was sufficiently proved, and declared the deft. to be suspended for the space of one year; whereupon the deft. appealed to Her Majesty in Council.

Dr. Williams in person contended that he did not deny the inspiration of Scripture. The freedom of opinion allowed by the formularies of the Church on this head allowed him to assert that though Scripture contained inspired writings, yet, being written by fallible men, some parts of them must of necessity be an expression of devout reason; and the expression "written voice of the congregation" did not imply a negation of inspiration. The essay did not include the theory of inspiration. As regarded the doctrine of justification, the main expression, "a fiction of merit by transfer," simply meant the same thing as the expression "phantasy of faith," used in the Homilies, and not as implying anything in the nature of deceit or pretence.

The *Queen's Advocate*, Coleridge, Q.C., and Dr. *Swabe* contended, on the first point, that the doctrine of plenary inspiration was part of the doctrine of the Church of England, and a miraculous and supernatural inspiration was implied. Any other hypothesis amounted to rationalism. It might be that details of the Holy Scriptures were capable of criticism on scientific or geographical grounds, but not as regards doctrine.

#### WILSON v. FENDALL.

This was an appeal in a similar suit charging the deft. (the now app.) for having written and published, in a book entitled "Essays and Reviews," a certain article or essay, or review, entitled "Séances Historiques de Genève—the National Church," and for having in such article, essay, or review, and in the notes thereto, advisedly maintained and affirmed certain erroneous, strange and heretical doctrines, positions and opinions contrary and repugnant to the doctrine and teaching of the said United Church of England and Ireland, as by law established, and thereby contravening the statutes, constitutions and canons ecclesiastical of the realm, and against the peace and unity of the Church.

The articles material were the 8th and 14th, as follows:—

8. And we further article and object to you, the said Rev. Henry Bristow Wilson, that in the said article, essay, or review, is the following passage at pp. 175, 6, 7: "It has been matter of great boast within the Church of England, in common with other Protestant churches, that it is founded upon the 'Word of God,' a phrase which begs many a question when applied collectively to the books of the Old and New Testament, a phrase which is never so applied to them by any of the scriptural authors, and which, according to Protestant principles, never could be applied to them by any sufficient authority from without. In that, which may be considered the first Article of the Church, this expression does not occur, but only 'Holy Scripture,' 'Canonical Books,' 'Old and New Testament.' It contains no declaration of the Bible being throughout supernaturally suggested, nor any intimation as to which portions of it were owing to a special Divine illumination, nor the slightest attempt at defining inspiration, whether mediate or immediate, whether through or beside, or overruling the natural faculties of the subject of it, nor the least hint of the relation between the divine and human elements in the composition of the Biblical books. Even if the Fathers have usually considered 'canonical' as synonymous with 'miraculously inspired,' there is nothing to show that their sense of the word must necessarily be applied in our own sixth Article. The word itself may mean either books, ruled and determined by the Church, or regulative books, and the employment of it in the Article hesitates between these two significations. For at one time Holy Scripture and canonical books are those books of 'whose authority never was any doubt in the Church'; that is, they are 'determined' books; and then the other, or uncanonical books are described as those which 'the Church doth not apply to establish any doctrine,' that is, they are not 'regulative' books. And if the other principal Churches of the Reformation have gone further in definition in this respect than our own, that is no reason we should force the silence of our Church into unison with these expressed declarations, but rather that we should rejoice in our comparative freedom. The Protestant feeling among us has satisfied itself in a blind way with the anti-Roman declaration that 'Holy Scripture containeth all things necessary to salvation, so that whatsoever is not read therein nor may be proved thereby is not to be required of any man that it should be believed as an article of the faith, &c.," and without reflecting how very much is wisely left open in that Article. For this declaration itself is partly negative and partly positive: as to its negative part it declares that nothing—no clause of creed, no decision of council, no tradition or exposition—is to be required to be believed on peril of salvation unless it be scriptural; but it does not lay down that everything which is contained in Scripture must be believed on the same peril. Or it may be expressed thus: the Word of God is contained in Scripture, whence it does not follow that it is co-extensive with it. The Church to which we belong does not put that stumblingblock before the feet of her members; it is their own fault if they place it there for themselves, authors of their own offence." And we article and object to you the said Rev. Henry Bristow Wilson, that in the passage hereinbefore recited, being portion of the said article, essay, or review, you did advisedly declare and affirm in effect that the Scriptures of the Old and New Testament were not written under the inspiration of the Holy Spirit, and that they were not necessarily at all and certainly not in parts the Word of God, or that you did therein advisedly declare and affirm a doctrine, position, or opinion to that or the like purport and effect. And that such doctrine, position, or opinion, is

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contrary to or inconsistent with the 6th and 20th of the said Articles of Religion, and contrary to and inconsistent with the teaching of the said church contained in that part of the Nicene Creed which declares in substance that the Holy Ghost spake by the prophets; and as set forth in the Ordering of Priests in the said Book of Common Prayer, to wit in the words following: "The Bishop shall deliver to every one of them the Bible into his hands, saying, Take thou authority to preach the Word of God," and we article and object as before.

14. And we further article and object to you the said Rev. H. E. Wilson, that in the said article, essay, or review is contained the following passage, at page 206: "The Christian Church can only tend on those who are committed to its cure, to the verge of that abyss which parts this world from the world unseen. Some few of those fostered by her are now ripe for entering on a higher career; the many are but rudimentary spirits, germinal souls. What shall become of them? If we look abroad in the world and regard the mental character of the multitude we are at a loss to apply to them either the promises or the denunciations of revelation. So the wise heathens could anticipate a reunion with the great and good of all ages; they could represent to themselves at least in a figurative manner the punishment and the purgatory of the wicked; but they would not expect the reappearance in another world for any purpose of a Therites or Hyperbolos—social and poetical justice had been sufficiently done upon them. Yet there are such as these, and no better than these, under the Christian name—babbler, busybodies, livers to get gain, and mere eaters and drinkers. The Roman Church has imagined a *limbus infantium*; we must rather entertain a hope that there shall be found after the great adjudication receptacles suitable for those who shall be infants, not as to years of terrestrial life, but as to spiritual development, nurseries as it were and seed grounds where the undeveloped may grow up under new conditions, the stunted may become strong and the perverted be restored. And when the Christian Church in all its branches shall have fulfilled its sublunary office, and its Founder shall have surrendered His kingdom to the Great Father—all, both small and great, shall find a refuge in the bosom of the Universal Parent to repose or be quickened into higher life in the ages to come according to His will." And we article and object to you the said Rev. H. B. Wilson, that in the passage hereinbefore recited, being a portion of the said article, essay, or review, you did advisedly declare and affirm in effect that after this life, and at the end of the existing order of things on this earth, there will be no judgment of God awarding to those men whom he shall then approve everlasting life or eternal happiness, and to those men whom he shall then condemn everlasting death or eternal misery; or that you did therein advisedly declare and affirm a doctrine, position, or opinion to that or to the like purport and effect, and that the said doctrine, position, or opinion is contrary to or inconsistent with the teaching of the said church, as contained in the creeds commonly called the Apostles' Creed, the Nicene Creed, and St. Athanasius' Creed; and as contained in the absolution or remission of sins which forms part of the Morning Prayer in the said Book of Common Prayer, and in which the priest says, "Wherefore let us beseech Him to grant us true repentance and his Holy Spirit, that those things may please Him which we do at this present; and that the rest of our life hereafter may be pure and holy, so that at the last we may come to his eternal joy, through Jesus Christ our Lord." And as contained in the following part of the Catechism which forms part of the said Book of Common Prayer. "Question. What desirest thou of God in this prayer? Answer.

I desire my Lord God, our Heavenly Father, who is the giver of all goodness, to send His grace unto me and to all people. And I pray unto God that He will keep us from all sin and wickedness, and from our ghostly enemy, and from everlasting death." And as contained in the following portions of the Order for the Burial of the Dead, which forms part of the said Book of Common Prayer: "In sure and certain hope of the resurrection of eternal life through our Lord Jesus Christ, who shall change our vile body that it may be like unto His glorious body, according to the mighty working whereby He is able to subdue all things unto Himself." "O merciful God, the Father of our Lord Jesus Christ, who is the Resurrection and the Life, in whom whosoever believeth shall live though he die; and whosoever liveth and believeth in Him shall not die eternally; who also taught us by His holy Apostle Saint Paul not to be sorry as men without hope for them that sleep in Him; we meekly beseech Thee, O Father, to raise us from the death of sin unto the life of righteousness; that when we shall depart this life we may rest in Him as our hope as this our brother doth; and that at the general resurrection in the last day we may be found acceptable in Thy sight and receive that blessing which Thy well-beloved Son shall then pronounce to all that love and fear Thee, saying, Come, ye blessed children of my Father, receive the kingdom prepared for you from the beginning of the world." And as contained in the following portions of the Communion Service, which form part of the said Book of Common Prayer. "The day cometh as a thief in the night." "Then shall it be too late to beseech when the door shall be shut, and too late to cry for mercy when it is the time of justice. O terrible voice of most just judgment, which shall be pronounced upon them when it shall be said unto them, Go, ye cursed, into the fire everlasting, which is prepared for the devil and his angels." "This, if we do, Christ will deliver us from the curse of the law and from the extreme malediction which shall light upon them that shall be set upon the left hand, and He will set us on His right hand, and give us the gracious benediction of His Father, commanding us to take possession of His glorious kingdom." And we article and object as before.

The Dean of the Arches pronounced the same judgment as in the former case, whereon Mr. Wilson appealed to Her Majesty in Council.

Mr. Wilson, the app. in person, contended that the rules applicable to the interpretation of the formularies of the Church were the ordinary legal rules, and it was no part of the business of the court to inquire into what ought to be the doctrine of the Church. The sole question was, what the language used in its formularies meant. This rule was laid down by the *Gorham* case, Moore, 1072. Hence it was competent to maintain distinct doctrines under the grammatical construction of the formularies. As regarded the meaning of terms, they were properly explained by a view of their history as used in controversy, as in *Shore v. Wilson*, 9 C. & F. 355. The Articles and formularies did not lay down any definite rule as to the nature of the inspiration of the Holy Scriptures. The word "inspiration" and the word "miraculous" were not used in those formularies. The charge against him founded on inspiration did not definitely define the meaning imputed to the words he had used: (*Burder v. Heath*, 8 Jur. 237, *Gorham* case.) He had never denied, in the proper sense of the term, that the Scriptures contained the Word of God; but merely, that every part of the word was inspired. As regarded the eternity of final punishment, the point was referred to in so ambiguous terms by the formularies of the Church that no accusation could be founded on that head, seeing that the offence could not be defined. Many ancient theologians totally denied the doctrine in

the literal sense in vogue in modern times, and even such authorities as Tillotson, Le Clerc, Law, Horsley, Whately and Milman variously modified the doctrine.

*Curr. adv. vult.*

Feb. 8.—The LORD CHANCELLOR.—These appeals do not give to this tribunal the power, and therefore it is no part of its duty, to pronounce any opinion on the character, effect, or tendency of the publications known by the name of "Essays and Reviews;" nor are we at liberty to take into consideration, for the purposes of the prosecution, the whole of the essay of Dr. Williams or of the essay of Mr. Wilson. A few short extracts only are before us, and our judgment must by law be confined to the matter which is therein contained. If, therefore, the book, or these two essays, or either of them as a whole, be of a mischievous and baneful tendency, as weakening the foundations of Christian belief, and likely to cause many to offend, they will retain that character, and be liable to that condemnation, notwithstanding this our judgment. These prosecutions are in the nature of criminal proceedings, and it is necessary that there should be precision and distinctness in the accusation. The articles of charge must distinctly state the opinions which the clerk has advisedly maintained, and set forth the passages in which those opinions are stated; and further, the articles must specify the doctrines of the Church which such opinions or teaching of the clerk are alleged to contravene, and the particular Articles of Religion or portions of the formularies which contain such doctrines. The accuser is, for the purpose of the charge, confined to the passages which are included and set out in the articles as the matter of the accusation; but it is competent to the accused party to explain from the rest of his work the sense or meaning of any passage or word that is challenged by the accuser. With respect to the legal tests of doctrine in the Church of England, by the application of which we are to try the soundness or unsoundness of the passages libelled, we agree with the learned judge in the court below that the judgment in the *Gorham* case is conclusive: "This court has no jurisdiction or authority to settle matters of faith, or to determine what ought in any particular to be the doctrine of the Church of England. Its duty extends only to the consideration of that which is by law established to be the doctrine of the Church of England, upon the true and legal construction of her Articles and formularies." By the rule thus enunciated it is our duty to abide. Our province is, on the one hand, to ascertain the true construction of those Articles of Religion and formularies referred to in each charge, according to the legal rules for the interpretation of statutes and written instruments; and, on the other hand, to ascertain the plain grammatical meaning of the passages which are charged as being contrary to or inconsistent with the doctrine of the Church, ascertained in the manner we have described. It is obvious that there may be matters of doctrine on which the Church has not given any definite rule or standard of faith or opinion; there may be matters of religious belief on which the requisition of the Church may be less than Scripture may seem to warrant; there may be very many matters of religious speculation and inquiry on which the Church may have refrained from pronouncing any opinion at all. On matters on which the Church has prescribed no rule, there is so far freedom of opinion that they may be discussed without penal consequences. Nor in a proceeding like the present, are we at liberty to ascribe to the Church any rule or teaching which we do not find expressly and distinctly stated, or which is not plainly involved in, or to be collected from, that which is written. With respect to the construction of the passages extracted from the essays of the accused parties, the meaning to be

ascribed to them must be that which the words bear, according to the ordinary grammatical meaning of language. That only is matter of accusation which is advisedly taught or maintained by a clergyman in opposition to the doctrine of the Church. The writer cannot in a proceeding such as the present be held responsible for more than the conclusions which are directly involved in the assertion he has made. With these general remarks we proceed to consider in the first place the charges against Dr. Williams. All the charges against Dr. Williams were rejected by the learned judge in the court below, or given up at the hearing before us, except the charges contained in the 7th and 15th articles. The 7th article, as reformed, sets forth certain passages extracted from pages 60 and 61, and from pages 77 and 78, of the volume containing Dr. Williams's essay, and charges that in the passages so extracted Dr. Williams has advisedly maintained and affirmed that the Bible or Holy Scripture is an expression of devout reason, and the written voice of the congregation—not the Word of God, nor containing any special revelation of His truth or of His dealings with mankind, nor the rule of our faith. Dr. Williams has nowhere in terms asserted that Holy Scripture is not the Word of God; and the accusation therefore must mean that by calling the Bible "an expression of devout reason, and therefore to be read with reason in freedom," and stating that it is "the written voice of the congregation," Dr. Williams must be taken to affirm that it is not the word of God. Before we examine the meaning of these expressions it is right to observe what Dr. Williams has said on the subject of Holy Scripture in the second of the passages included in this charge. Dr. Williams there refers to the teaching of the Church in her Ordination Service as to the abiding influence of "the Eternal Spirit," and then uses these words, "If such a Spirit did not dwell in the Church the Bible would not be inspired;" and again, "The sacred writers acknowledge themselves men of like passions with ourselves, and we are promised illumination from the Spirit that dwelt in them." Dr. Williams may not unreasonably contend that the just result of these passages would be thus given: "The Bible was inspired by the Holy Spirit that has ever dwelt and still dwells in the Church, which dwelt also in the sacred writers of Holy Scripture, and which will aid and illuminate the minds of those who read Holy Scripture trusting to receive the guidance and assistance of that Spirit." The words that the Bible is an expression of devout reason, and therefore to be read with reason in freedom, are treated in the charge as equivalent to these words: "The Bible is the composition or work of devout or pious men and nothing more;" but such a meaning ought not to be ascribed to the words of a writer who, a few lines further on, has plainly affirmed that the Holy Spirit dwelt in the sacred writers of the Bible. This context enables us to say that the words "an expression of devout reason, and therefore to be read with reason in freedom," ought not to be taken in the sense ascribed to them by the accusation. In like manner we deem it unnecessary to put any interpretation upon the words "written voice of the congregation," inasmuch as we are satisfied that whatever may be the meaning of the passages included in this article, they do not, taken collectively, warrant the charge which has been made that Dr. Williams has maintained the Bible not to be the Word of God, nor the rule of faith. We pass on to the remaining charge against Dr. Williams, which is contained in the 15th article of charge. The words of Dr. Williams, which are included in this charge, are part of a supposed defence of Baron Bunsen against the accusation of not being a Christian. It would be a severe thing to treat language used by an imaginary advocate as advised speak-

ing or teaching by Dr. Williams. Against such a general charge as that of not being a Christian, topics of defence may be properly urged, although not in conformity with the doctrines of the Church of England. But, even if Dr. Williams be taken to approve of the arguments which he uses for this supposed defence, it would, we think, be unjust to him to take his words as a full statement of his own belief or teaching on the subject of justification. The 11th Article of Religion, which Dr. Williams is accused of contravening, states, "We are accounted righteous before God only for the merits of our Lord and Saviour Jesus Christ, by faith, and not for our own works or deservings." The Article is wholly silent as to the merits of Jesus Christ being transferred to us. It asserts only that we are justified for the merits of our Saviour by faith, and by faith alone. We cannot say, therefore, that it is penal in a clergyman to speak of merit by transfer as a fiction, however unseemly that word may be when used in connection with such a subject. It is fair, however, to Dr. Williams to observe that in the argument at the bar he repudiated the interpretation which had been put on these words, that "the doctrine of merit by transfer is a fiction," and he explained fiction as intended by him to describe the phantasy in the mind of an individual that he has received or enjoyed merit by transfer. Upon the whole we cannot accept the interpretation charged by the promoter as the true meaning of the passages included in this 15th article of charge, nor can we consider those passages as warranting the specific charge, which, in effect, is that Dr. Williams asserts that justification by faith means *only* the peace of mind or sense of divine approval which comes of trust in a righteous God. This is not the assertion of Dr. Williams. We are therefore of opinion that the judgment against Dr. Williams must be reversed.

We proceed to consider the charges against Mr. Wilson. These have been reduced to the 8th and 14th articles of charge. The other articles of charge were either rejected by the court below, or have been abandoned at the hearing before this tribunal. In the 8th article, an extract of some length is made from Mr. Wilson's essay, and the accusation is, that in the passage extracted Mr. Wilson has declared and affirmed *in effect* that the Scriptures of the Old and New Testament were not written under the inspiration of the Holy Spirit, and that they were not necessarily at all, and certainly not in parts, the Word of God; and then reference is made to the 6th and 20th Articles of Religion, to part of the Nicene Creed, and to a passage in the Ordination of Priests in the Book of Common Prayer. This charge therefore involves the proposition, "That it is a contradiction of the doctrine laid down in the 6th and 20th Articles of Religion, in the Nicene Creed and in the Ordination Service of Priests, to affirm that any part of the canonical books of the Old or New Testament, upon any subject whatever, however unconnected with religious faith or moral duty, was not written under the inspiration of the Holy Spirit." The proposition or assertion that every part of the Scriptures was written under the inspiration of the Holy Spirit is not to be found either in the Articles or in any of the formularies of the Church. But in the 6th Article it is said that Holy Scripture containeth all things necessary to salvation, and the books of the Old and New Testament are therein termed canonical. In the 20th Article, the Scriptures are referred to as "God's Word written;" in the Ordination Service, when the Bible is given by the Bishop to the Priest, it is put into his hands with these words, "Take thou authority to preach the Word of God;" and in the Nicene Creed are the words, "the Holy Ghost who spake by the prophets." We

are confined by the article of charge to the consideration of these materials, and the question is, whether in them the Church has affirmed that every part of every book of Scripture was written under the inspiration of the Holy Spirit, and is the Word of God. Certainly, this doctrine is not involved in the statement of the 6th Article, that Holy Scripture containeth all things necessary to salvation. But inasmuch as it doth so from the revelations of the Holy Spirit, the Bible may well be denominated "Holy," and said to be "the Word of God," "God's Word written," or "Holy Writ," terms which cannot be affirmed to be clearly predicated of every statement and representation contained in every part of the Old and New Testament. The framers of the Articles have not used the word "inspiration" as applied to the Holy Scriptures; nor have they laid down anything as to the nature, extent, or limits of that operation of the Holy Spirit. The caution of the framers of our Articles forbids our treating their language as implying more than is expressed; nor are we warranted in ascribing to them conclusions expressed in new forms of words involving minute and subtle matters of controversy. After an anxious consideration of the subject, we find ourselves unable to say that the passages extracted from Mr. Wilson's essay, and which form the subject of this article of charge, are contradicted by or plainly inconsistent with, the Articles or formularies to which the charge refers, and which alone we are at liberty to consider. We proceed to the remaining charge against Mr. Wilson, namely, that contained in the 14th article. The charge is, that in the portion of his essay which is set out in this article, Mr. Wilson has advisedly declared and affirmed, *in effect*, that after this life and at the end of the existing order of things on this earth, there will be no judgment of God, awarding to those men whom He shall then approve everlasting life or eternal happiness, and to those men whom he shall then condemn everlasting death or eternal misery; and this position is affirmed to be contrary to the three Creeds, the Absolution, the Catechism, and the Burial and Communion Services. In the first place we find nothing in the passages extracted which in any respect questions or denies that at the end of the world there will be a judgment of God awarding to those men whom He shall approve everlasting life or eternal happiness; but with respect to a judgment of eternal misery, a hope is encouraged by Mr. Wilson that this may not be the purpose of God. We think that it is not competent to a clergyman of the Church of England to teach or suggest that a hope may be entertained of a state of things contrary to what the Church expressly teaches or declares will be the case; but the charge is, that Mr. Wilson advisedly declares that after this life there will be no judgment of God awarding either eternal happiness or eternal misery,—an accusation which is not warranted by the passage extracted. Mr. Wilson expresses a hope that at the day of judgment those men who are not admitted to happiness may be so dealt with as that "the perverted may be restored," and all, "both small and great, may ultimately find a refuge in the bosom of the Universal Parent." The hope that the punishment of the wicked may not endure to all eternity is certainly not at variance with anything that is found in the Apostles' Creed, or the Nicene Creed, or in the Absolution, which forms part of the Morning and Evening Prayer, or in the Burial Service. In the Catechism the child is taught that in repeating the Lord's Prayer he prays unto God "that He will keep us from all sin and wickedness, and from our ghostly enemy, and from everlasting death;" but this exposition of the Lord's Prayer cannot be taken as necessarily declaring anything touching the eternity of punishment after the resurrection. There remain the Communion Service and the Athanasian Creed. The

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[Q. B.]

material passage in the Communion Service is in these words: "O terrible voice of most just judgment which shall be pronounced upon them, when it shall be said unto them, Go, ye cursed, into the fire everlasting which is prepared for the devil and his angels." In like manner the Athanasian Creed declares that they that have done evil shall go into everlasting fire. Of the meaning of these words "everlasting fire," no interpretation is given in the formularies which are referred to in the charge. Mr. Wilson has urged in his defence that the word "everlasting" in the English translation of the New Testament, and of the Creed of St. Athanasius, must be subject to the same limited interpretation which some learned men have given to the original words which are translated by the English word "everlasting," and he has also appealed to the liberty of opinion which has always existed without restraint among very eminent English divines upon this subject. It is material to observe that in the Articles of King Edward VI., framed in 1552, the Forty-second Article was in the following words:—"All men shall not be saved at the length."—They also are worthy of condemnation who endeavour at this time to restore the dangerous opinion, that all menne, be they never so ungodlie, shall at length be saved, when they have suffered paines for their sinnes a certain time appointed by God's justice." This Article was omitted from the Thirty-nine Articles of Religion of the year 1562, and it might be said that the effect of sustaining the judgment of the court below on this charge would be to restore the Article so withdrawn. We are not required, or at liberty, to express any opinion upon the mysterious question of the eternity of final punishment, further than to say that we do not find in the formularies, to which this article refers, any such distinct declaration of our Church upon the subject as to require us to condemn as penal the expression of hope by a clergyman, that even the ultimate pardon of the wicked, who are condemned in the day of judgment, may be consistent with the will of Almighty God. We desire to repeat that the meagre and disjointed extracts which have been allowed to remain in the reformed articles are alone the subject of our judgment. On the design and general tendency of the book called "Essays and Reviews," and on the effect or aim of the whole essay of Dr. Williams, or the whole essay of Mr. Wilson, we neither can nor do pronounce any opinion. On the short extracts before us, our judgment is that the charges are not proved. Their Lordships, therefore, will humbly recommend to Her Majesty that the sentences be reversed, and the reformed articles rejected in like manner as the rest of the original articles were rejected in the court below, namely, without costs; but inasmuch as the apps. have been obliged to come to this court, their Lordships think it right that they should have the costs of this appeal.

His Lordship added: I am desired by the Archbishop of Canterbury and the Archbishop of York to state, that they do not concur in those parts of this opinion which relate to the 7th article of charge against Dr. Williams, and to the 8th article of charge against Mr. Wilson.

*Sentence reversed.*

*Proctors: Brooks and Son; Toller.*

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS,  
Esqs., Barristers-at-Law.

Wednesday, Jan. 20, 1864.

REG. v. CARRUTHERS.

*Metropolitan Building Act—Public building—Church—Construction of walls.*

*A district surveyor required the builder of a new church to make the footings double the width of the proposed walls, according to No. 8 of the preliminary rules in schedule 1, and for omitting to do so laid an information against him, and a magistrate made an order under sect. 46 requiring the builder to comply with the requisition:*

*Held, that the order was bad, as a church was a public building and exempted by sect. 30 from the operation of the rules of construction in schedule 1.*

Rule nisi to quash an order made Aug. 29, 1863, by one of the metropolitan police magistrates, under the Metropolitan Building Act (18 & 19 Vict. c. 122), s. 46, on the deft. Wm. Carruthers, directing him within fourteen days to comply with a notice served on him by Mr. Legg, the district surveyor, and to pay 2*l.* for costs.

The deft., a builder, was engaged in building a church in Lamb-lane, Hackney, Middlesex, and was charged in an information by Mr. Legg with omitting to make the footings double the width of the proposed walls of the church, as he had given him notice to do.

The information and complaint were heard on the 29th Aug. last, before John Leigh, Esq., one of the magistrates of the police courts of the metropolis, and it was then proved that the building referred to in the said information and complaint was a public building, namely, a church, and the magistrate's attention was drawn to sect. 30 of the Metropolitan Building Act, 18 & 19 Vict. c. 122, which enacts "that notwithstanding anything contained in that Act, every public building, including the walls, roofs, floors, galleries and staircases, shall be constructed in such manner as may be approved of by the district surveyor, and in the event of disagreement in such manner as may be determined by the Metropolitan Board of Works." It was contended that the rules of construction contained in the Act were expressly confined to private buildings and buildings of the warehouse class, and were not applicable to public buildings at all, and that the Act gave the magistrate no jurisdiction over and no power to interfere with the construction of any public building, but that all public buildings were to be constructed under the supervision and responsibility of the district surveyor, subject in the event of disagreement between him and the architect to an appeal to the Metropolitan Board of Works.

The magistrate overruled the objection and adjudged William Carruthers, within fourteen days from the date of the said order, to comply with the requisitions of the said notice, and to make the said footings double the width of the walls of the said building.

The following is a copy of the notice referred to in the said order and in the said notice.

"Metropolitan Building Act 1855 (18 & 19 Vict. c. 122), s. 45.

"District Surveyor's Office.

"To Mr. William Carruthers, of Reigate,

"Surrey, builder.

"With reference to the works at the building under mentioned, and now in progress under your superintendence as the builder engaged in executing the same, I hereby give you notice that they are not conformable to the rules of the Building Act in the particulars hereunder stated, and I require you, within forty-eight hours from the date hereof, to render the same

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conformable to the rules of the said Act in such particulars. Building referred to, Church. Situation of building, Parish of Hackney. Street, Lamb-lane. Number in street (if any). Description of the locality (if the site be vacant ground).

"Particulars of work done contrary to the Act and to be amended :

"The footings not being double the width of the intended walls of the said building.

"Particulars of work required to be done by the Act, but omitted, but now to be done :

"The footings to be made double the width of the proposed wall.

"Particulars of work to be cut into, laid open, or pulled down to ascertain the nature of the works executed.

"Dated this 5th day of Aug. 1863.

(Signed)

"GEORGE LEGG,

"District Surveyor of West Hackney."

*Lush* (*Phear* with him).—It is contended that the rules for the construction of buildings and walls in the first schedule to the Act apply to all public as well as private buildings. A church is a public building within the interpretation clause, sect. 3; but in the buildings specified in sect. 6 as those which are to be exempted from the operation of part I. of the Act, a church is not mentioned; a church therefore remains subject to the provisions of part I. of the Act: (sect. 7.) Then sect. 12 enacts that walls shall be constructed of such substances and of such thickness and in such manner as are mentioned in the first schedule of the Act. And therefore the walls of a new church are to be constructed according thereto. Sect. 30 only gives discretion to the district surveyor, subject to appeal to the Metropolitan Board in case of disagreement in matters which are not provided for by the Act; but the present is a case which is provided for by the first schedule to the Act. Then, if that be so, the district surveyor having given the notice required by sect. 45, calling on the builder to construct the walls in conformity to the Act, the magistrate had power, under sect. 46, to make the order in question.

*C. G. Addison* contra.—The buildings specified in sect. 6 are buildings which are to be wholly exempt from the control of the Act. It is not contended that a church is wholly exempt, but that it is a public building within sect. 30, and to be erected in such manner as may be approved of by the district surveyor, subject to appeal to the Metropolitan Board in case of disagreement. Here the builder contends that it is unnecessary to have the walls of the thickness required by the district surveyor. The surveyor's judgment is not to be arbitrary, but to be subject to appeal to the Metropolitan Board. If so, the magistrate had no jurisdiction to make the order.

*COCKBURN, C. J.*—I am of opinion that the order of the magistrate must be quashed. The question turns upon the 30th section of the Metropolitan Building Act, 18 & 19 Vict. c. 122. That section, in effect, enacts that the Metropolitan Building Act shall apply to all buildings not included in the term "public building;" but that in the case of a public building, instead of being within the general provisions of the Act, the questions which may arise as to the manner in which such building shall be constructed shall be determined by the district surveyor, subject to appeal, in the case of disagreement, to the Metropolitan Board of Works. In the Act there are various enactments upon the subject of the construction of buildings; and with reference to walls, the rules applicable to the construction of that part of every building, the first schedule relates to the construction of the walls of dwelling-houses and houses of the warehouse class. In addition to these general rules, there are special rules applicable to each of these classes respectively. The subject of walls is treated

in the Act as a matter of construction, and rules are laid down with reference to such construction. As a wall is necessarily part of a building, it seems to me that the matters relating to walls form part of the rules of construction, and are to be determined by the general rules of the Act when the building is not a public building; but to be excluded from them when we are dealing with a public building. Mr. Lush argued that sect. 30 is merely a cumulative provision, and that you must start with the assumption that whatever the Act says with reference to the walls of private buildings must apply also to the case of public buildings, with this addition, that the district surveyor may impose any condition which he thinks fit. That, I think, is straining the language of the section. We should have expected it to have assumed a very different form if such had been the intention of the Legislature, and that then it would have said that public buildings shall be subject to the general rules of construction provided for other classes of buildings; and in addition, the district surveyor may impose such terms and conditions as he may think proper. But that is not the language of the Act. It begins by saying that the construction of public buildings shall be according to the requirements of the district surveyor, and that the other requirements of the Act, independently of the construction of public buildings, shall be subject to the provisions of this Act. Mr. Lush argued that there were no other provisions in the Act which could apply to public buildings. Upon a closer inspection of the Act, that turns out to be erroneous. Whether any addition to or alteration of a building would make it a new building within the conditions of the Act is one question; the provision as to the removal of dangerous structures would be another. Another argument urged by Mr. Lush is, that whereas, with reference to private buildings in case of any violation of the provisions of the Act there is a summary remedy pointed out by invoking the jurisdiction of a magistrate, that does not apply to the case which we are now considering, in which there has been, on the part of the builder of a public building, a contravention of the requirements of the district surveyor. It has been suggested that the 46th section would apply to such a case. I do not desire to be understood to give any opinion upon that one way or the other. It may be a matter of doubt. After having looked carefully at the words of the section, I can come to no other conclusion than that, whereas all buildings of a private character must be constructed according to the provisions contained in the Act, as regards public buildings, the construction is independent of those provisions, and is controlled by the discretion of the district surveyor, subject to the correction of the Metropolitan Board. Taking that view of the 30th section, I am clearly of opinion that the proceeding in this case before the magistrate was wrong, and that the order must be quashed.

*BLACKBURN, J.*—I am of the same opinion. The order proceeds upon the supposition that the party complained against has omitted to do certain things, viz., to make the footings of the church double the width of the wall. I think that the conviction is wrong, upon the ground that no such duty is imposed in the case of a public building. In the case of an ordinary building it is imposed by the 12th section. The 30th section applies to public buildings. The effect of that section is that, as to public buildings, the only rule of construction is that they shall be constructed in the manner approved by the district surveyor, and in the event of disagreement, by the Metropolitan Board. And though I listened with great attention to Mr. Lush's argument, I cannot construe the words "rules of construction of the building" in such a sense as not to include within it a rule providing in what manner, and of what size and materials, the walls of a building



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shall be constructed. I am sorry to be obliged to do this, because I see great difficulty about the subsequent proceedings in such a case. I do not see any provision in this Act as to the manner in which the district surveyor, or the Metropolitan Board, are to determine how the building is to be constructed, nor when this determination is to be made, nor, in the event of its being made, how it is to be enforced. But it is plain that the magistrate could not convict unless the Act in words directed that, in the case of a public building, the footings of the walls are to be made double the thickness of the upper wall, and that I think it does not do.

MELLOR, J.—I am of the same opinion. The construction suggested by Mr. Lush is *primâ facie* a reasonable one, and one which I should have been glad to have been able to uphold; because it is possible that the effect of the construction which we are giving to the Act may give very extensive power to the district surveyor, subject only to the Metropolitan Board, and that the powers might well have been limited by subjecting public buildings to the authority of the district surveyor *plus* the rules of the Metropolitan Building Act. But the section carefully includes in the words "public buildings," not only the building itself in the aggregate, but "the walls, roofs, floors, galleries and staircases," and words are inserted for the purpose of preventing the surveyor's discretion from being bound or limited by the rules of construction which are to be found in the Act. I cannot impose any limitation upon those provisions. The preliminary rules contained in the first schedule are rules of construction, and the general words at the commencement of that schedule are satisfied by saying that they are general rules of construction, applicable to the two classes of buildings which follow, viz., dwelling-houses and houses of the warehouse class.

*Conviction quashed.*

Attorneys for the complainant, *Hawks, Wilmott and Stokes.*

Attorneys for the deft., *C. and J. Allen and Sons.*

Wednesday, Jan. 27, 1864.

REG. v. HANDLEY.

*Mines and Collieries Act—Employment of girls at mine-shaft—Contractor—Evidence—Appeal.*

*The 5 & 6 Vict. c. 99, s. 21, which gives an appeal against convictions under the Act to the quarter sessions, makes the judgments and determinations of the quarter sessions final:*

*Held, that this court had power to entertain a special case sent by the quarter sessions for their opinion, they having confirmed a conviction appealed against, subject to the opinion of this court.*

*To make a contractor for working a mine liable to a conviction for allowing females to have charge of the machinery or tackle by means of which persons are brought up or passed down a vertical shaft of a mine, contrary to the 5 & 6 Vict. c. 99, ss. 8 and 13, knowledge of or acquiescence in their being so employed must be brought home to him.*

*Evidence of females being found in charge of such machinery and tackle on one occasion only is not sufficient.*

Case from the Court of Quarter Sessions for Staffordshire, for the opinion of this court, on an appeal from a conviction under the 5 & 6 Vict. c. 99, "An Act to prohibit the employment of women and girls in mines and collieries," sects. 8 and 13.

The following is a copy of the conviction:—

"County of Stafford, to wit.

"Whereas, on the 29th Nov. 1862, an information and complaint was laid and made by Abraham Roper, of Bilston, in the said county, miner, before, &c., for that John Handley, at Wolverhampton, in the said county, charter-master, being the contractor for work-

ing a certain mine in a colliery called the Snow-heath Colliery, situated, &c., the entrance to which mine was by a vertical shaft, did, on the 13th Nov. in the year aforesaid, allow two persons, neither of whom was a male of the age of fifteen years or upwards, to wit, two female persons, to have charge of part of the machinery or tackle of the engine by means whereof persons were brought up and passed down the said vertical shaft, contrary to the form of the statute in such case made and provided. And whereas, it being made to appear to the satisfaction of the said justice that the said offence was committed by or under the authority of the said John Handley as such contractor as aforesaid, without a personal consent, concurrence, or knowledge of the owner of the said mine, the said justice thereupon issued his summons to the said J. Handley, requiring him to be and appear at the police-court in Wolverhampton aforesaid on this day, before such of Her Majesty's justices of the peace in and for the said county as might be then and there present, to answer for such offence. Now, be it remembered that, on this 3rd Dec. 1862, at the said police-court, &c., the said J. Handley duly appeared, in pursuance of the said summons, before us, the undersigned, &c.; and it being proved to our satisfaction that he is guilty of the offence charged against him in and by the said information and complaint, and that such offence was committed by or under his authority as such contractor as aforesaid, without the personal consent, concurrence, or knowledge of the owner of the said mine, we, the said justices, do hereby convict the said J. Handley of such offence, and do adjudge the said J. Handley for his said offence to forfeit and pay the sum of 50*l.*, to be paid and applied according to law; and also to pay the said Abraham Roper the sum of 1*l.* 3*s.* for his costs in this behalf. And if the said several sums be not paid immediately, we order that the same be levied by distress and sale of the goods and chattels of the said J. Handley, and in default of sufficient distress we adjudge the said J. Handley to be imprisoned in the house of correction at Stafford, in and for the said county, and there kept to hard labour for the space of two calendar months, unless the said penalty and costs shall be sooner paid.

On the trial of the appeal it was proved that J. Handley, the app., was the charter-master and contractor for working a coal-mine called the Snow Heath Colliery, of which mine William Hambury Sparrow was the owner, he being the immediate proprietor within the meaning of the statute 5 & 6 Vict. c. 99, s. 14.

The relation in which a charter-master stands to the owner of a colliery is this. The charter-master gets and raises the coal. He is paid by the owner a certain sum per ton, called a royalty, for the coal gotten and raised to the pit bank. The owner is the proprietor of the steam-engines, and machinery and tackle, and provides the steam power and engine-man. The charter-master employs the workmen or miners, and also all persons at the surface of the colliery necessary for conveying the miners to and from the mine, and for removing the coal brought to the surface into waggons.

The entrance to the mine in question was by means of a vertical shaft. Two women, Sarah Banks and Emma Wade, on the 13th Nov. 1862 were found in charge of part of the machinery and tackle of an engine worked by steam power, by means of which engine, machinery and tackle, persons were brought up and passed down the vertical shaft. Sarah Banks and Emma Wade were so in charge without the personal consent, concurrence, or knowledge of W. H. Sparrow, the owner of the mine. They were the servants of and employed by Handley as bank girls on the surface of the colliery, and their duty was to load the coal

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brought up the shaft in ships, and to transfer it from the ships to waggons. It was no part of their duty to interfere with the machinery or tackle or engine by means of which persons were brought up and passed down the shaft. Handley employed a deputy or doggy, and also a banksman. Part of the duty of a banksman is to see the workmen employed in the mine pass up and down the shaft.

At the time Sarah Banks and Emma Wade were found in charge as above mentioned, no other person was within fifteen yards of them. A man was seen at that distance, but no evidence was given who that person was, and there was no reason for supposing, nor was it suggested, that the app. was such person.

Rules, a copy of which is annexed to the case, and may be referred to, were produced by the banksman, and stated to be in force in the colliery. No evidence was given of the personal consent, concurrence, or knowledge on the part either of Handley or of his deputy, or of the banksman, of Sarah Banks and Emma Wade having charge of part of the machinery and tackle as above mentioned, or of any authority to them to take such charge, otherwise than as such consent, concurrence, knowledge, or authority is capable of being inferred from the above facts.

The Quarter Sessions confirmed the conviction, subject to a case for the opinion of the Court of Q. B. as to whether there was evidence before the Court of Quarter Sessions on which that court could and ought to have acted, of an offence under the 5 & 6 Vict. c. 99, s. 8, having been committed by or under the authority of the app., as alleged in the conviction.

*G. Brown and Gibbons* for the resp.—There is a preliminary objection. Sect. 21 enacts that the determination of the quarter sessions shall be final and not subject to review; and by sect. 22 the writ of *certiorari* is taken away in such case. By the 12 & 13 Vict. c. 45, s. 11, parties may by consent agree to a special case after notice of appeal; but here the appeal has been heard, and the sessions have confirmed the conviction. [CROMPTON, J.—In this case they have not come to a decision; they have decided subject to our opinion.] The 9 & 10 Vict. c. 99 is to prohibit the employment of women and girls in mines and collieries; and sect. 8 enacts that where the entrance to a mine shall be by means of a vertical shaft, it shall not be lawful to allow any persons other than males of the age of fifteen to have charge of any part of the machinery or tackle by which persons are brought up or passed down such vertical shaft. Sect. 13 makes agents, servants, workmen, and contractors by whose authority any offence against the Act is committed, responsible. [COCKBURN, C. J.—It is not found that these women were employed with the knowledge of the contractor, or that they were usually so employed, or even so employed on any previous occasion. Is the fact of their having been simply found on this occasion so employed sufficient to lead to the inference that they were acting under the authority of the contractor?] The app. offered no evidence to negative knowledge on his part. These two women were lowering persons into the pit, and it did not appear that any one else was employed to do the work. The words of sect. 8 are "not to allow," and it is submitted that the contractor is responsible for allowing it to be done. [BLACKBURN, J.—He is not to be responsible if he has no knowledge of what was going on. COCKBURN, C. J.—When the act is done by the contractor without the knowledge of the owner, then the contractor is liable; but if it is done by the contractor and as the servant of the owner, and acting under his orders, then the owner is liable. Sect. 13

he would not be so.] There was clearly some evidence on which the sessions could act.

*Matthews*, contra, was not called upon.

COCKBURN, C. J.—If evidence had been adduced and admitted, as I think it ought to have been, of these girls having been frequently seen performing this work, so that the inference would arise that the contractor must have known of the proceeding, the case would have been within the Act. He is prohibited by the Act from so employing girls, but the employment must be with his knowledge or by his tacit acquiescence. As the evidence stands it is more consistent with probability, that it was the act of the man whose business it was to do this particular work, than that they were employed by or with the knowledge of the contractor. There is not sufficient evidence that it was done with the concurrence or knowledge of the contractor for us to say that it had been allowed by him contrary to sect. 8. The conviction will therefore be quashed.

CROMPTON, J.—I am of the same opinion. The contractor must have allowed these girls so to act in order to render himself liable to a conviction. The only evidence is, that the girls were found so acting on one occasion. That is no evidence that he allowed them so to act.

BLACKBURN, J.—A very little additional evidence might have done, but merely showing that on one occasion the girls were found so engaged is not sufficient.

MELLOR, J. concurred.

*Conviction quashed.*

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Jan. 23, 1864.

(Before COCKBURN, C. J., CROMPTON and WILLES, JJ., CHANNELL, B. and KEATING, J.)

REG. v. MATTHEW KNIGHT.

*Autrefois acquit—Evidence of larceny—Recent possession.*

*Prisoner, a servant, was committed to take his trial at the April sessions on a charge of stealing copper from his masters. He was tried and acquitted. Two days before his trial the prosecutors laid an information and obtained a warrant under which the prisoner was apprehended, immediately after the acquittal, for stealing other things (five shovels and a riddle) from them previous to his apprehension on the first charge. He was committed for trial on the second charge.*

*On the second trial the prisoner pleaded autrefois acquit, and his advocate contended that the prisoner was entitled to succeed on that plea on the ground that both charges might have been included in the indictment on the first trial. The jury gave their verdict that the prisoner was not acquitted of the second charge on the first trial.*

*The riddle was not proved to have been in the prosecutors' possession for eighteen months before the trial, and the shovels for eight months, and the evidence was, that the prisoner was first seen about January with the things in his possession, the second trial being in June. The jury convicted the prisoner:*

*Held, that the conviction was right, and that there was no ground for the verdict being entered for the prisoner on the plea of autrefois acquit; or for an acquittal on the ground that there was no recent possession traced to the prisoner.*

Case stated for the opinion of the court.

Lincolnshire, Kesteven.—At the General Quarter Sessions of the Peace of our Sovereign Lady the Queen

hollen at Bourn in and for the said parts and county, on Monday, 29th June 1863, before the Right Hon. Sir John Trollope, Bart., chairman, William Parker, Esq., and other justices of the peace of our said Lady the Queen :

The prisoner Matthew Knight was tried before me at the Easter Quarter Sessions for the parts of Kesteven aforesaid, held at Bourn aforesaid, on the 6th April 1863, upon an indictment charging him with having on the 22nd Jan. 1863, at Spittlegate, in the said parts, feloniously stolen twenty-five pounds weight of copper, of the value of 1*l.* 3*s.*, of the goods and chattels of one Richard Hornsby the younger and others.

From the evidence produced by the prosecution in support of this indictment, it appeared that the prosecutors' foreman first became acquainted with the loss of the copper on the 12th Jan. 1863, and that on the 17th of the same month of January the prisoner was apprehended on a warrant charging him with having committed the larceny on the 6th Dec. 1862; he was then remanded until the 22nd Jan., and on that day further remanded until the 6th Feb., when he was fully committed for trial at the then ensuing sessions to be held on the 6th April.

At the trial the attorney for the prisoner took exception to evidence being given of certain admissions made by the prisoner concerning the copper prior to the day named in the indictment, and the objection being allowed, the attorney for the prosecution thereupon withdrew from the case and the prisoner was acquitted.

Immediately after his acquittal on the 6th April the prisoner was again apprehended on a warrant granted upon an information preferred by the same prosecutors on the 4th April, charging him with having on the 22nd Jan. 1863, at Spittlegate aforesaid, in the parts and county aforesaid, feloniously stolen five shovels and one riddle of the value in the whole of 10*s.*, of the goods and chattels of the said Richard Hornsby the younger and others.

In the depositions taken previous to the second commitment on the 18th April 1863 the prisoner is therein charged with having feloniously stolen the shovels and riddle on the 22nd Jan. 1863.

At the present Midsummer Quarter Sessions for the said parts and county aforesaid, held at Bourn aforesaid on the 29th June 1863, the prisoner was indicted before me with having at Spittlegate aforesaid stolen the said riddle on the 20th Sept. 1862, and in a second count he was charged with having, at Spittlegate aforesaid, stolen the said five shovels on the 16th Jan. 1863.

From the evidence adduced at this second trial it appeared that one of the prosecutors' witnesses saw a riddle branded R. H. and X. (similar to the one produced) on the prisoner's premises in the summer time of 1862, and that both the riddle and shovels were found by a police constable in the prisoner's possession on the 21st Jan. 1863. There was no evidence in either case to show on what particular day or month either the copper, riddle, or shovels were stolen.

For several years and up to the time of his apprehension the prisoner had been in the employ of the prosecutors, Messrs. Hornsby, of Grantham, who are machine makers in a large way of business, employing about four hundred hands. The evidence against the prisoner in the first case was chiefly the prisoner's own admission in producing the stolen copper on an implied promise from prosecutors' foreman, which evidence was rejected. In the second case there was no admission or confession. The stolen property was found on the prisoner's premises by the police whilst in custody on remand upon the first charge.

The grand jury having found a true bill, the prisoner pleaded in due form *autrefois acquit*, and in support of such plea his attorney raised the following point of

law, viz., that the first indictment ought to have included all the articles which the prosecutors on or previous to the 6th Feb. (the day of first commitment) or the 6th April (the day of trial) knew to have been stolen by the prisoner from them; and that they (the prosecutors) could not by an alteration of dates prefer different indictments against the prisoner for offences of the same sort committed at the same place and against the same person. And that therefore an acquittal of the offence charged in the first indictment was an acquittal of the offence or offences charged in the second.

In support of this argument prisoner's attorney relied upon the law of including any number of articles in one indictment; and also further cited sect. 16 of 14 & 15 Vict. c. 100, to show that the prosecutors could have inserted any number of cases not exceeding three, provided they were committed within six months; and the *dictum* of Parke, B., as reported in the case of *Reg. v. Bird*, 20 L. J. 94, M. C.

The jury gave their verdict that the prisoner was not acquitted of the second offence.

The prisoner then pleaded not guilty to the felony.

The riddle and shovels were clearly identified to be the property of the prosecutors, and were found in the possession of the prisoner—the riddle in his back yard, one shovel in his coal-house, another shovel in his garden covered over with ashes, and three other shovels locked up in a distant pigsty in prisoner's occupation, and one of the prosecutors' witnesses stated that in the beginning of January, about half-past seven o'clock in the morning, the prisoner brought some tools in a barrow into his (the witness's) yard where the pigsty was, and stated "he had brought them to put at the top of the pigsty to be out of the way." The brand mark had been erased from some of the shovels, and the letters M. K. (the prisoner's initials) had been substituted. In cross-examination the foreman stated it was impossible to say when the articles were taken.

The attorney for the prisoner then asked the court to direct an acquittal on the ground that the riddle not being proved to have been in their possession for the period of upwards of eighteen months and the shovels for not less than eight months, there was no recent possession by the prisoner as contemplated by the law, and that therefore the prisoner was not bound to account how he came by the property stolen.

I left the whole question to the jury, who returned a verdict of guilty.

The Court sentenced the prisoner to be imprisoned for one calendar month to hard labour, subject to the opinion of the Court of Criminal Appeal upon the following points, taking bail for his rendering himself in execution if the decision of the court should be against him.

1. Whether an acquittal of the offence charged in the first indictment was an acquittal of that charged in the second; and if so, ought the prisoner to have been acquitted on the plea of *autrefois acquit*?

2. Whether the court ought to have directed an acquittal upon the law of recent possession or otherwise, as requested, and upon the grounds stated by the prisoner's advocate. JOHN TROLLOPE, Chairman.

O'Brien, Serjt., for the prisoner, admitted that he could not sustain the objections made for the prisoner, and reserved for this Court.

By the COURT,

*Conviction affirmed.*

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REG. v. KERRIGAN.

[C. CAS. R.]

*Saturday, Jan. 23, 1864.*

(Before COCKBURN, C. J., CROMPTON and WILLES, JJ., CHANNELL, B. and KEATING, J.)

REG. v. KERRIGAN.

*False pretences—Evidence of acts of accomplices not included in the charge.**An indictment charged K. and W. with falsely pretending to B. that they had a quantity of tobacco, which they proposed to sell, and did sell to him, and thereby obtained money from him. The evidence was, that K. and another person P. acting together, were the chief parties by whom the false pretences had been made:**Held, that the acts of P. were the acts of K., and admissible against him upon the indictment.**Case reserved at the Quarter Sessions of the county of Derby for the opinion of this Court.*

On the 17th Sept. 1863 John Kerrigan was committed by E. Wilmot, Esq. and L. E. Mann, Esq., magistrates for the county of Derby, to take his trial at the Michaelmas Quarter Sessions. The commitment charged him with one William Wilson, "for that they the said John Kerrigan and William Wilson, on the 7th Sept. inst., at Belper, in the said county, did unlawfully, knowingly and falsely pretend to sell to Daniel Barlow two bales of tobacco, containing three hundred pounds weight, at and for the sum of 49*l.*, whereas, in truth and in fact, the said bales contained about half-a-pound of tobacco only, by which said false pretence the said John Kerrigan and William Wilson did unlawfully obtain from the said Daniel Barlow the sum of 31*l.*, with intent then and there to cheat and defraud him, the said Daniel Barlow, of the same, contrary to the statute in such case made and provided."

The first count of the indictment charged that Kerrigan and Wilson, "on the 7th Sept. 1863, unlawfully, knowingly and designedly did falsely pretend to Daniel Barlow that they, the said John Kerrigan and William Wilson, were possessed of a large quantity of good tobacco, to wit, two bales of tobacco, containing 3 cwt., of the value of 2*l.* per stone weight, and which they the said John Kerrigan and William Wilson proposed to sell, and did sell and deliver to the said Daniel Barlow, by means of which said false pretences the said John Kerrigan and William Wilson did then unlawfully obtain from the said Daniel Barlow the sum of 31*l.* of the moneys of him the said Daniel Barlow, with intent thereby then to defraud, whereas, in truth and in fact, the said John Kerrigan and William Wilson were not possessed, and had not in their possession a large quantity of good tobacco, to wit, two bales of tobacco containing 3 cwt., of the value of 2*l.* per stone weight, as they, the said John Kerrigan and Wm. Wilson, did then so falsely pretend, but only two bales which contained half-a-pound weight of tobacco, together with a large quantity of stones, bricks and sawdust, as they the said John Kerrigan and William Wilson, at the time they so falsely pretended as aforesaid, well knew against the form of the statute in such case made and provided.

Second count.—That Kerrigan and Wilson, "being evil-disposed persons and wickedly devising and intending to defraud, on the 7th Sept. 1863, did, amongst themselves and divers other persons, to the jurors unknown, conspire, contrive, confederate and agree together falsely and fraudulently to cheat and defraud one Daniel Barlow of a large sum of money. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said John Kerrigan and William Wilson, and other persons as aforesaid, in pursuance of and according to the said conspiracy, combination, confederacy and agreement, did, on the day and year aforesaid, represent to the said

Daniel Barlow that they, the said John Kerrigan and William Wilson, had in their possession a large quantity of tobacco of good and valuable quality, to wit, of the value of 2*l.* per stone, and would sell and deliver to the said Daniel Barlow two bales of the said tobacco, containing 3 cwt., for the sum of 49*l.*, and that they, the said John Kerrigan and William Wilson, did deliver to the said Daniel Barlow two bales which they represented and alleged to contain three cwt. of good tobacco, of such value as aforesaid, but which said bales contained half-a-pound weight of tobacco only, together with a large quantity of stones, bricks and sawdust, with intent to cheat and defraud the said Daniel Barlow of a large sum of money, to wit, of the sum of 31*l.*, against the peace of our Lady the Queen, her crown and dignity.

Wilson was acquitted, Kerrigan was found guilty on both counts.

All the counts referred to the same transaction.

The prisoner pleaded not guilty, and his counsel (Mr. Stephen) then moved the court to quash the count charging a conspiracy, on the ground that the prisoner had not been committed nor the prosecutor bound over to prosecute on that charge, nor had the leave of a judge or of the Attorney or Solicitor-General been obtained to prefer it, as required by 22 & 23 Vict. c. 17 s. 1. After hearing the counsel for the prosecution (Mr. Huish) the Court determined to retain the count, and left it to the jury, because they were of opinion that such leave was not necessary when a count for conspiracy was merely a variation of the same charge as that laid in the first count, but only in cases in which conspiracy was an original and distinct offence. The counsel for the prisoner admitted that there was evidence of a conspiracy for the jury, if they had power to try the prisoner on the count in question. The jury convicted the prisoner.

The evidence was as follows:—

Daniel Barlow sworn: I live in Derby. On Aug. 21 a man called Philip came to my house; he said something about some tobacco. On Aug. 24 J. Kerrigan called and wanted to sell me some silk. I said, "One of your men has been the Friday before." He said "Yes, it is one of our men; we have forty men in this country getting orders." He talked in a foreign accent. He said they had a large firm in Liverpool, and dealt in tobacco, tea and other things; they could sell tobacco cheaper than any other firm, because they imported it all from abroad; they could sell it for 2*l.* a stone. I said I had a friend in the wholesale trade, and I would see him about it. I had asked Philip for a sample. On Friday Aug. 28 some one left a sample of two ounces of superior tobacco at my house. Kerrigan did not say where they were staying. I afterwards went to a chophouse next door to the York Hotel, Derby. I found Philip next door, and he took me to Kerrigan to the chophouse. I told them I had seen my friend, and he would take 3 cwt. a week if it was as good as the sample. They said they could supply him with a ton. I agreed for 3 cwt., at 2*l.* a stone, 48*l.* in all. Kerrigan said it was in bales; there might be a stone over or under, but it could be rectified when we settled. He said it was about two miles out of Derby. He said I should have it in two or three days. On Sept. 2 I went again to the eating-house, the tobacco had not been delivered. I found Kerrigan alone; and asked why it had not been delivered; he said Philip had hurt his foot. He (Kerrigan) was going to Liverpool. I must pay Philip for the tobacco; it would be just the same as paying himself; he had left his address with Philip. On the 7th Sept. Philip came and gave me a piece of paper. (This was not produced in court.) I went with him to Belper in a trap to the Angel Inn. He showed me the way.

C. CAS. R.]

REG. v. KERRIGAN.

[C. CAS. R.]

I paid him there 31l. on account of 49l. I refused to pay him the whole price until I had weighed the tobacco. He gave me no receipt. He went out of the door, I followed; one bale was in the trap; two men, of whom Wilson was one, were lifting in another. I drove to Mr. Mayers, at Derby, and we opened both bales. The first contained half-a-pound of tobacco spread out at the top, brown paper, stones, bricks, old hay, and sawdust; the other contained no tobacco at all; the bales were wrapped up in canvas and tied with tarred cord. I paid Philip in consequence of what Kerrigan said to me. I did not then know Kerrigan's name.

John Barber sworn: I keep the Angel Inn at Belper. On Thursday, 3rd Sept., Kerrigan came, some other men were there. All used to go out with packs on their backs. Kerrigan went on Friday. On Saturday Philip came; he asked leave to put two bales in an outhouse, this was done; they were canvas bales tied with tarred cord. On Sunday Kerrigan came. Philip and some other men came with him. Kerrigan and Philip went away. On Monday, 7th Sept., Mr. Barlow and Philip came about dusk in a trap. Philip asked for the key of the outhouse, and I gave it him. Kerrigan employs and supplies hawkers; there were four at my house; he said his men had gone off with his goods.

Rebecca Kirkland sworn: I keep a shop at Belper, and sell cord, next door but one to Mrs. Cooper's. On 4th Sept. three men brought some tarred cord. Kerrigan was one of them; he paid for it; the cord produced is similar to it.

Hannah Cooper sworn: I let lodgings in Belper. On 5th Sept. Kerrigan came. Two men called Philip and Bill were in the house. On the morning of that day I went out. Philip and Bill were in bed. I returned about nine, and found the door locked; they said I could not come in, they were packing china and glass. I went away for an hour and returned; the men were gone; two bales, wrapped in sacking and tied with tarred cord, were in the house; the packages had been recently tarred; some tar was in a pot on the hob of the fireplace; I found some hay and sawdust at the back door. Between three and four p.m. two men took the packages away in a wheelbarrow. On Monday, 7th Sept., Kerrigan came in drunk. Next morning he went out about six and soon came in again; he said, "Has any policeman been?" I said "Why?" He said, "Because I have been fighting." He left some things in my charge and went away, and I saw him no more. He said he was going to Chesterfield.

George Carter sworn: I apprehended both the prisoners on 8th Sept., at Chesterfield station. Kerrigan got out of the carriage first, and I took him and charged him with obtaining money by false pretences from Doctor Barlow. Kerrigan said, "I don't know any one of that name." I searched him and found a pill-box with Dr. Barlow's name on it. Next morning

Barlow came and identified him. He said to Kerrigan, "Good morning, Monsieur Antonio de Monti." Kerrigan said, "I don't know you."

At the conclusion of the case for the Crown the prisoner's counsel objected that there was no evidence to go to the jury that the prosecutor had obtained any money by false pretences, as the only false pretence within the meaning of the statute was the pretence by the man Philip that the parcel contained tobacco. The counsel for the prosecution argued that the false pretence was, that the prisoner pretended to be possessed of 3 cwt. of tobacco, worth 2l. per stone, that this was so laid in the indictment, and that there was evidence for the consideration of the jury, not only that he made such false pretence and obtained the money of the prosecutor by it, but that he (the prisoner) knew it to be false when he made it. The Court held that there was evidence to go to the jury on both counts of the indictment. The jury convicted the prisoner on both counts. The court sentenced him to twelve calendar months' imprisonment upon each count, the sentences to run together.

The questions for the Court of Criminal Appeal are, 1st. Whether the count charging a conspiracy ought to have been left to the jury. 2nd. Whether there was evidence to go to the jury in support of the count charging a false pretence.

*F. Stephen* for the prisoner.—First, with regard to the count for obtaining money from the prosecutor by false pretences, the only false pretence proved was that the specific bales at the Angel, Belper, contained tobacco. [CROMPTON, J.—That they were tobacco.] It was not proved that the prisoner Kerrigan took any part in that false pretence. The statement that the prosecutor paid Philip in consequence of what Kerrigan said to him may apply to the conversation between Philip and Kerrigan and the prosecutor at Derby, when they said, they could supply a ton; or it may apply to the transaction at the Angel, Belper; if it applies to the former, that was not the false pretence by which the money was obtained. There was no case if the prosecutor was induced by a false statement to enter into the contract, and by a subsequent independent fraud of Philip he was defrauded. The original lie was not the false pretence by which the money was obtained. The money was not obtained by what passed at Derby, but by the representations made at the Angel, Belper. [CROMPTON, J.—As soon as a connection was shown between Philip and Kerrigan, the act of one was the act of the other in misdemeanor. Philip and Kerrigan are the same for this purpose.] If that is so the objection is untenable, and it becomes unnecessary to argue the first question. (a)

*Buzzard*, for the prosecution, was not called upon.

By the COURT:

*Conviction affirmed.*

(a) As to this objection, see *Reg. v. Fudge*, *supra*, p. 493.

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OF

RELATING TO

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## Superior Courts

RELATING TO THE

# LAW ADMINISTERED BY MAGISTRATES

AND TO

## PAROCHIAL AND MUNICIPAL LAW.

COMMENCING HILARY TERM 1864.

PRIV. CO.]

RICHARDS v. BIRLEY.

[PRIV. CO.]

### JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by JAMES PATTERSON, Esq., of the Middle Temple, Barrister-at-Law.

Thursday, Feb. 18, 1864.

(Present—The Right Hon. Lord KINGSDOWN, KNIGHT BRUCE, L. J., TURNER, L. J., and Dr. LUSHINGTON.)

RICHARDS v. BIRLEY.

*Church-rate—Illegal items in estimate—Irregularity at vestry meeting—Duty of chairman—Costs of resisting illegal rate—Discretion of Ecclesiastical Court—Appeal on the point of costs only.*

*Where a vestry meeting is held for the purpose of passing a church-rate, and the churchwardens produce an estimate containing items alleged to be illegal, such as an item for warming the church, the chairman ought to allow the question of these items, and of the quantum of the rate, to be first disposed of, before the motion for a church-rate is put.*

*It is no legal ground for refusing a vote tendered at the poll that the voter's rates had been paid, not by himself but by other persons in order to enable him to vote; but in order to vitiate the vote on that ground, the rejected voter ought to have tendered his vote.*

*Where the Ecclesiastical Court in a suit for subtraction of church-rate holds the rate to be void on the ground of irregularities at the vestry meeting, but nevertheless in its discretion refuses to give the deft. ratepayers their costs of the suit, if this discretion has been bona fide exercised by such court, the Privy Council will not entertain an appeal solely on the ground of this refusal of costs.*

This was an appeal from a decree of the Chancery Court of York in a cause of subtraction of church-rate.

The apprs., the defts. in the court below, were co-partners, being householders and parishioners of the parish of Kirkham, in the county of Lancaster, and province of York. The resps. were the churchwardens of the said parish.

The parish of Kirkham, previous to 1840, consisted of fifteen townships, but by order in council all except two were formed into separate ecclesiastical districts.

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The parish now consisted of the townships of Kirkham and Medlar with Wesham. Since 1840 the inhabitants of these townships have been accustomed to repair the parish church of Kirkham, and to provide things necessary for divine service, &c.

On the 10th Jan. 1861 the churchwardens and parishioners of the parish of Kirkham met in the vestry of the church, pursuant to due notice, for the purpose of laying a rate for the requisite repairs, cleansing and support of the said church, and for the purpose of providing bread and wine for the celebration of the Holy Communion, and for all other customary and incidental expenses connected with the due celebration of divine service in the said church, or incidental to the office of churchwardens. The vicar of the parish took the chair, and the churchwardens produced the following estimate of expenses.

The Churchwardens' estimate of expenses for the year.

Wine for Holy Communion .....	£2	0	0
Bread do. ....	0	10	0
Moore Michael, Copying Parish Register.....	1	10	0
Gas Company's Account for lighting.....	6	0	0
Vestry Clerk .....	3	3	0
Oakey, Rate book.....	0	5	0
Coal and Coke for heating Church.....	7	10	0
Jno. Ward for Candles, Brushes, &c. ....	2	5	0
Swarbrick, Washing .....	1	12	0
Jno. Wray, Salary .....	7	10	0
Do. for heating the Church.....	2	10	0
Do. for winding Clock .....	1	5	0
Do. Sundries .....	0	15	0
Ringers .....	12	4	0
Wardens for collecting Rate, and other expenses.....	2	14	0
Stidemen .....	1	2	6
Court Fees .....	12	10	0
Davis, repairing Organ .....	3	0	0
Guardian Assurance Office.....	4	2	6
Rd. Lund .....	0	16	9
Roberts .....	0	13	1
Winstanley .....	0	11	6
Ward (Smith) .....	0	12	10
Catterall .....	5	8	7
Ward, Rd.....	0	14	5

8 17 2

70 8 0

3 3 0

£67 5 0

An original motion for a rate of 1½d. per pound was duly seconded; whereupon an amendment was



moved and seconded that the item in the said estimate relative to warming the church should be struck out of the estimate; but the vicar, who was chairman, refused to put such amendment, and it never was put.

It was next moved and seconded by way of amendment to the said original motion for a rate, that such vestry meeting should be adjourned for six weeks, for the purpose of affording reasonable opportunity to the parishioners and inhabitants of Kirkham to raise and pay to the said churchwardens by voluntary subscriptions the said amount estimated by the churchwardens to be necessary; but the chairman refused to put, and never did put to the meeting the said amendment.

It was further moved and seconded that no rate be made; but the said chairman refused to put, and never did put this motion.

At the said vestry meeting, when the churchwardens' estimate was read, the same was not duly or at all put to the said meeting for their approval; and exception being made to the estimate, the said chairman ruled that such exception was then out of order.

The said estimate contained divers items which were not necessary or proper to be, and which could not legally be, included in a rate made for the repair of the said church and for the performance of divine service therein, and in particular the said estimate and rate so contained one item in the words and figures following, to wit: "Vestry Clerk, 3*l.* 3*s.*, and one other item in the words and figures following, to wit: "Guardian Assurance Office, 4*l.* 2*s.* 6*d.*"

The chairman refused to put the items of the said estimate of the churchwardens to the meeting *seriatim*, or at all except as once hurriedly read by the said Thomas Langton Birley, one of the churchwardens, and one of the promovents, and the chairman also declared that he would not allow the said items, or any consideration of them, or any amendment to any motion to be gone into before or until the resolution to lay a rate moved and seconded by the churchwardens was determined. And thereby the vestry meeting was prevented and precluded from taking into consideration the matters of intended amendments, which were necessary and proper to be considered by the said meeting in determining what amount was necessary to be provided for the repair of the parish church and the performance of divine service therein, and how such amount was to be raised.

The original motion being put from the chair and negatived by a show of hands, a poll was duly demanded and fixed for the 14th Jan. 1861. Michael Sharry, who was then a parishioner and inhabitant of the parish, and then resident and rated to the poor thereof, and who had not refused or neglected to pay any rate for the relief of the poor of the said parish of Kirkham, which had been made or become due within three calendar months then immediately preceding, tendered his vote at the poll; the chairman refused to receive or record the same, and in consequence of such refusal the proper vote of the said Michael Sharry was neither received nor recorded thereat. It was then urged upon the said William Law Hussey that the said vote was a legal and proper vote, and ought to be received and recorded; the chairman insisted that the said Michael Sharry was not entitled to have his vote recorded in the said poll, because the rate of the said Michael Sharry had not been paid by himself, but had been paid for him by some other person, namely, by the landlord of the said Michael Sharry, who paid the said rate by reason of some private arrangement between them for that purpose.

Divers other parishioners and inhabitants whose rates had in point of fact been paid for them by

other persons by reason of certain private arrangements between such ratepayers were within the sound and hearing of the voice of the said chairman when he so stated and refused, and were thereby deterred and prevented from so tendering their said votes by reason of such declaration and refusal.

The numbers at the close of the poll were for the church-rate 198, against the rate 156, leaving a majority in favour of the rate of 1*l.* 4*d.* in the pound.

At the time the rate was made Messrs. Richards and Bowdler jointly occupied a coal hill and office in the parish at the rateable value of 6*l.* 10*s.* and they were duly rated to the said church-rate at the sum of 9*l.* 3*d.* This sum was duly demanded and refused, and a summons was taken out before the justices to enforce payment; but they gave notice that they disputed the validity of the rate, whereupon the summons was dismissed.

The churchwardens then instituted the present suit of subtraction of church-rate in the Chancery Court of York.

The suit duly came on for hearing in the Chancery Court of York on the 29th May 1863; and the Chancellor of the court, after hearing counsel on both sides, said it was not necessary that he should give his general views on the question of church-rates, but there was one point in this case which he could not hesitate to say he thought was so fatal to the rate, that without entering into the other four or five objections (and there were two or three that he should hesitate about) he must decide against it, and it was very possible the result of that decision would be to carry it up to the court above, because there might be an objection to his decision as to the costs. He could not establish the rate, because the course adopted, to his mind, was radically wrong. It was quite clear that means ought to have been afforded to the discontents to test the quantum of the rate by the preliminary objections, and one of the material ones he considered to be that which related to the warming of the church; for though the sum was not large, the principle was one which it was quite material to maintain. There was no attempt altogether to render the meeting an abortion; and when they came to enter into the question of supply, it was according to common sense that these things should be determined by *seriatim* objections which might have been made to a vast many of the items. The result might have been that the sums might be 1*l.* 4*d.* or 1*l.* in the pound; it was depending on that principle. The main thing was the principle; and before they came to the question of how much must be granted, must depend on the proposition of the quantity. Churchwardens have an onerous and invidious duty to perform; and in this case, there being no appearance whatever of any conscious irregularity or desire to obstruct the reasonable views of the ratepayers in the vestry, he should make no order as to costs, and leave both parties to pay their own costs. He was certainly decidedly of opinion that the vote of Michael Sharry should have been taken. He stated this because it was important for the regulation of churchwardens and vicars who might preside on any future similar occasion. Had the others tendered their votes, he thought it was quite clear it would have vitiated the rate at once.

And the said Chancellor finally decreed accordingly on the 11th June 1863.

The debts. now appealed to Her Majesty in Council.

Dr. Deane, Q.C. and Quain, for the apps., contended that the decision of the judge below in refusing the costs was erroneous. He seemed to proceed on the assumption that because the churchwardens did their duty in one sense they ought to be exempted from paying costs. But he lost sight of the important fact that the rate was entirely bad

V.C. W.]

MACEY v. THE METROPOLITAN BOARD OF WORKS.

[V.C. W.]

and the irregularities were gross, and the defts. had done only their duty in resisting it. The rate contained items clearly illegal, and yet no opportunity was allowed the apps. to dispute those items. [Lord KINGSDOWN.—How can you get over the case of *Attenborough v. Kemp*, 5 L. T. Rep. N. S. 67? You are appealing only on a question of costs.] That case does not preclude us from maintaining this appeal. There the facts were very different. In the present case the apps. had done all they could to resist the rate, and they were held to be right. The ordinary rule therefore ought to have effect that they should get their costs. The judge has proceeded on a misapprehension or mistake, and the court in *Attenborough v. Kemp* expressly excepted such a case from the rule that no appeal is allowed on a question of costs merely.

Sir H. Cairns, Q.C. and S. Shepherd, for the resps., were not called upon.

Dr. LUSHINGTON.—Their Lordships are of opinion that it is expedient and necessary to adhere to the rule which was laid down, and the principles enunciated in the case of *Attenborough v. Kemp*, and they think that the apps. on the present occasion have not brought themselves fairly within the meaning of that rule. According to that case it was stated, "Their Lordships do not wish to lay down as a general rule that in no case could there be an appeal in respect of costs, and of costs alone; because there might be cases where discretion has not been fairly exercised upon the question at issue, and the decision of the court below has proceeded upon mistake or misapprehension." Now, whether the discretion exercised by the court below in this case was wise or not, is a question which it is not necessary to discuss; for their Lordships do not discover that that discretion has not been fairly exercised. Neither can they find out that the decision of the court below proceeded upon any mistake or misapprehension. The judgment in that case goes on to say: "Such cases their Lordships desire to leave untouched; but where there has been *bonâ fide* care and discretion exercised on the part of the judge who has decided the case, their Lordships have no hesitation in stating their opinion to be that, in such a case, no appeal will lie in respect of costs alone." Their Lordships have no reason whatever to doubt that on the present occasion *bonâ fide* care and discretion was exercised, therefore the case merely resolves itself into this, not, as their Lordships say, in that case, whether the discretion was exercised fairly or *bonâ fide*, but whether the discretion was exercised wisely or not; and that is a ground upon which their Lordships will not permit an appeal to be prosecuted. We are therefore of opinion that it is not necessary to trouble the counsel for the resps., and we must dismiss this appeal with costs.

*Decree affirmed with costs.*

Apps.' solicitors, Toller and Sons.

Resp.'s solicitors, Lloyd and Chevallier.

#### V. O. WOOD'S COURT.

Reported by W. H. BENNET and EDWARD LLOYD, Esqrs.,  
Barristers-at-Law.

March 3 and 4, 1864.

**MACEY v. THE METROPOLITAN BOARD OF WORKS.**  
*Thames Embankment Act 1862—Injury to owner of wharf—Compensation—Injunction.*

*Where damage is occasioned to a party whose premises are not entered upon, but are injuriously affected by the exercise of the powers given by the Thames Embankment Act (25 & 26 Vict. c. 93), and for*

*which damage compensation is required to be made by sect. 14 of that Act, the payment, ascertaining, or depositing of the amount of compensation is not a condition precedent to the commencement of the works which occasion the damage.*

The plt. in this suit, James Mugford Macey, is a builder, who occupies a wharf and premises known as Milford-wharf, situate in Milford-lane in the Strand, and having a frontage to the river Thames. The plt. holds the premises under a lease for a term of which about twenty-five years are unexpired. The plt. carries on his business at the said wharf, and a great part of his business consists in sawing up and utilising large balks of timber, which are brought by barges to the river front of his said wharf, and are there unloaded and placed on the wharf.

By the Act 25 & 26 Vict. c. 93, known as the Thames Embankment Act 1862, the defts. are empowered to embank the left bank of the river Thames from Westminster-bridge to Blackfriars-bridge.

By sect. 1 of that Act the Lands Clauses Consolidation Act 1845 (with certain exceptions) is incorporated therewith; and by sect. 4 the word "lands" is made to include easements, interests, rights and privileges in, over, or affecting lands.

Sect. 8 defines the works authorised by the Act, among which are, "the making and maintaining an embankment and viaduct on the left bank of the river Thames, to be constructed in whole or in the greater part on the bed or foreshore of the river Thames;" and, "the reclaiming and inclosing all or so much of the bed or foreshore of the river Thames as shall lie between the present left bank of such river and the said intended embankment."

Sect. 14 provides, that it shall be lawful for the board to inclose and fill up the bed and shore of the river Thames, as shown in the deposited plans; and also to remove, destroy, alter, divert, stop up, or inclose such wharves, jetties, quays, or other property as shall in the judgment of the board be necessary to be removed, destroyed, altered, diverted, stopped up, or inclosed for the purposes of this Act, making compensation to all persons having any interest in any wharves, jetties, quays, or other property taken for or injuriously affected by such works, or other the exercise of the powers of the Act.

By the 39th section, the provisions of the Acts relating to the local management of the metropolis, viz., the Acts 18 & 19 Vict. c. 120; 19 & 20 Vict. c. 112; and 21 & 22 Vict. c. 104, are extended and applied to the objects of the present Act, so far as not inconsistent with the provisions thereof.

Part of the plt.'s wharf and premises, and the whole of his river frontage, with such rights and easements as he might be entitled to over, or in respect of the bank, or shore, or waterway of the Thames, lie within the limits of deviation defined by the Act.

In Oct. 1863 the defts. gave notice in writing to the plt., that they were about to construct the embankment in the manner shown on a plan accompanying the notice, and to exercise the powers given them by the above 14th section, and requested the plt. to give notice whether he made any, and, if any, what claim for compensation in respect of the construction of the works, and on what account; the defts. offering to treat with the plt. in respect of any compensation to which he might be entitled.

The defts. did not propose to take any part of the plt.'s wharf, but only to construct the embankment along the foreshore in front thereof.

The plt. in reply, on the 9th Nov. 1863, stated the nature of his interest in the said wharf and premises, and claimed the sum of 12,600*l.* in respect of his premises being injuriously affected by the intended works. On the 24th Feb. 1864 the

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defts.' agent called on the plt., and read to him a letter, by which it appeared that the defts. had given orders that steps should be at once taken to fill up the bed of the Thames in front of Milford-wharf to the height of four feet above high-water mark.

The plt. thereupon stated that if the defts. did anything in contravention of the powers of their Act he should at once apply to the Court of Ch. for an injunction.

On the 26th Feb. 1864, by the defts.' order, a barge containing sixty tons of chalk was moored opposite to the plt.'s wharf, and workmen began throwing the chalk into the river close to the frontage of the wharf.

On the 27th Feb. 1864 the plt. filed his bill in this suit, which stated the above facts, and alleged that the defts. had not yet made or offered to make him any compensation, that they refused to do so, and that his business would be most seriously affected, and in some respects utterly destroyed, by the execution of the intended works, and the bill prayed that the defts. might be restrained by injunction from entering on or taking or continuing in possession of or carrying on their works on, or disturbing the plt. in his quiet enjoyment of the bed or foreshore of the river in front of his premises, unless and until they should have complied with the provisions of the Lands Clauses Consolidation Act so far as the same are incorporated with the special Act. An interim order had been obtained, and the cause now came on upon a motion to continue the injunction until the hearing of the cause.

*Osborne, Q.C. and Pontifer, for the plt.,* contended that the compensation to which the plt. was entitled ought to be ascertained by a jury, under the provisions of the Lands Clauses Consolidation Act, as a condition precedent to the defts.' commencing their works in front of the plt.'s wharf. The plt. is entitled to an easement over the foreshore in front of his wharf, and as, by sect. 4 of the special Act, the word "lands" is made to include "easements," the case is brought within sect. 84 of the Lands Clauses Act. The plt. is also entitled to the actual support of his barges on the mud of the foreshore at low water. If the defts. are right the plt. might not obtain any compensation till the works are entirely finished. They cited

*Attorney-General v. Conservators of the Thames,*  
1 Hem. & Mil. 1;

*Hutton v. London and South-Western Railway, 7*  
*Hare, 259.*

*Rolt, Q.C., Sir H. Cairns, Q.C. and C. Hall, for the defts.,* contended that the plt.'s argument would equally apply to the case of a yard abutting on a road leading down to the river. The plt.'s case is no higher in principle; the only difference is in the amount of damage. The keeping barges lying at a wharf would be a nuisance if the river were not wide enough for every one; just as a cart standing on a highway beyond a reasonable time. The plt. has no right to keep his barges resting on the mud, except as incident to the right of unloading. The powers of sect. 14 in the special Act are much larger than would be given to a company, because it is a great public work that is to be executed. It must be seen what the damage is before the compensation can be assessed. They cited

*North London Railway Company v. Metropolitan Board of Works, John. 405;*

Sects. 27, 39, 75, 77, 78, 81 of the special Act, and sects. 69, 150, 151, 165, 225 of the Act 18 & 19 Vict. c. 120, were also referred to.

*Osborne, Q.C. in reply.*

The VICE-CHANCELLOR—The principles applicable to this case have been so fully argued before, that the

court would not be justified in interfering with the exercise of the powers of this Act. In this particular case it appears that the plt. has neither an easement over nor a right in land. He has no land nor any other peculiar right on the foreshore. He has nothing beyond the right of access from the river to his wharf, and of loading and unloading his barges there. This is no right in the soil of the foreshore. It is a right like that of the occupier of a house which abuts on a highway, of access from his house to the highway, and passage along the highway. If prevented from entering his own house, he would have a right to compensation for special damage, but he has no right to the soil of the street. The right of passing over the river is exactly similar. The plt. has nothing but this right, in common with other occupiers of wharves. He has no right of keeping his barges on the mud, except for the purpose of loading and unloading, which might not always be possible in one tide. He has no right to block up the highway of the river. The 84th section of the Lands Clauses Consolidation Act relates to cases in which lands are required to be purchased or permanently used, and the 68th section to works injuriously affecting lands; and by the Thames Embankment Act it is enacted that "lands" shall include "easements." The question to be asked here is, are the board about to take and permanently use "lands" (including therein "easements"), or are they only about to affect "lands" injuriously? In building this embankment they are not going to take any land or any easement belonging to the plt.; but they are going injuriously to affect his right of access to his wharf. The case does not rest only on the Lands Clauses Act, but on the special Act, the 39th section of which virtually incorporates the Local Management and Main Drainage Acts. This being so, the 14th section gives power to fill up the bed and shore of the river, and the 15th section to purchase lands, and to purchase and extinguish rights or easements over the shore or bed of the river. Under this power the board might purchase such an easement as a pier; but a general right like the present one was not intended by this section. The Drainage Acts, which are incorporated with the special Act, provide a method of ascertaining the compensation for damage by means of arbitration. But in whatever way the amount of compensation is to be ascertained, the real question in this case is, must the compensation, to which the plt. may be entitled, be paid or deposited before the works can be commenced at all? He really has no right in land which is to be taken; but his property will be injuriously affected by the proposed works. If it were necessary that the compensation should be first paid, it would be necessary that the extent of a contingent damage should be first estimated. On the balance of convenience and inconvenience, it is certainly more convenient that the amount of compensation should be ascertained after the injury has taken place. The court will make no order on this motion.

Solicitors: for plt., *Boys and Twerdies*; for defts., the Solicitor to the Metropolitan Board of Works.

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SANDERS, Esqrs.,  
Barriers-at-Law.

Wednesday, Jan. 27, 1864.

MAWBY (app.) v. HOPKINSON (resp.)

Turnpike—Repairs of road—Trust deficiency—  
Highway rates.

A Turnpike Act provided for the application of the tolls to payment of (1) expenses of the Act, (2) salaries, (3) interest of debt, (4) repairs of road

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not exceeding 800*l.*, (5) reduction of principal debt, (6) further repairs of road.

The estimated revenue of the trust was 1087*l.*, and expenditure 1017*l.*, and, after allowing for salaries, interest and 800*l.* towards repairs, the surplus, 83*l.*, was applied towards reduction of principal debt. That left a deficiency of 217*l.* to be raised by parochial contributions, and 22*l.* 3*s.* 11*d.* was the contribution claimed from parish B. under 4 & 5 Vict. c. 55:

Held, that justices might make an order under that statute for payment of such contribution from parish B.

Case for the opinion of this court.

At the special sessions of the highways holden for the Petty Sessional Division of Bourn, in the parish of Kesteven, in the county of Lincoln, on the 21st May last, William Hopkinson (hereinafter called the resp.), as clerk to the trustees of the Bourn District of the Lincoln Heath and Market Deeping roads, exhibited an information in writing pursuant to the provisions of the stat. 4 & 5 Vict. c. 59 (which has since been periodically re-enacted, and was last renewed by the statute 23 & 24 Vict. c. 67), before the justices then present, alleging that the funds of the said Bourn district were insufficient for the repair of the said turnpike-road within the said parish of Bourn, and applying for an order for the appropriation of a portion of the highway rate levied or to be levied in the said parish of Bourn, towards the repair of the said turnpike-road. Upon the hearing of the said information an order was made by the said justices that the sum of 22*l.* 3*s.* 11*d.*, part of the rate or assessment levied or to be levied for the repair of the highways in and for the said parish of Bourn, should by the said Robert Osborn Mawby and George Phillips, the surveyors of the highways for the parish of Bourn (hereinafter called the apps.), on the 2nd July then next be paid to the trustees of the said turnpike trust called the Bourn district, which sum of 22*l.* 3*s.* 11*d.* to be wholly laid out in actual repair of such part of the said turnpike-road as lies within the said parish of Bourn.

The apps. being dissatisfied with our determination upon the hearing of the said information, as being erroneous in point of law, have, pursuant to sect. 2 of the said statute, 20 & 21 Vict. c. 43, duly applied to us in writing to state and sign a case setting forth the facts and grounds of such our determination as aforesaid for the opinion of this court.

Upon the hearing of the said information it was proved on the part of the resp., and admitted and found as facts, that by the Lincoln Heath and Market Deeping Roads Act 1860, after repealing the former local Act, 3 Geo. 4, it is enacted (sect. 31), that the tolls and other moneys payable to and received by the trustees in virtue and for the purposes of the said Act, within the Bourn district, shall be appropriated and applied as follows:—

1. In paying the proportion to be contributed by the said district of the expenses of and incident to the procuring and passing of the said Act.

2. In paying the salaries of the clerk, surveyor and other officers employed by the trustees in and for the same district, and the other expenses of and incident to the management of the roads therein not exceeding in any one year 150*l.* (exclusive of the costs of prosecuting and defending actions, suits, indictments and proceedings before magistrates, and of the wages of toll collectors, and of the costs of newly erecting toll-houses when necessary.)

3. In paying interest from the commencement of the said Act after the rate of 3*l.* per cent. per annum on the sums of 1775*l.* and 25*l.* borrowed under the provisions of the repealed Act as therein men-

tioned and still subsisting, or on so much thereof as should for the time being be unpaid.

4. In paying the expenses incurred and to be incurred in repairing and maintaining the roads within and constituting the said district, but not exceeding in any one year 800*l.*

5. In reducing and paying off in manner therein-after provided, the said sums of 1775*l.* and 25*l.*, or so much thereof respectively as should for the time being be unpaid.

6. In paying the further expenses of maintaining, repairing and improving the roads within the said district, and of putting the said Act into execution in relation thereto.

And that by sect. 35 it is enacted that when and so often as the sum applicable to the discharge of the same principal moneys respectively shall amount to 200*l.*, the trustees shall apply the same in payment in manner therein mentioned of a proportionate part of such principal moneys.

That the said sums of 1775*l.* and 25*l.* are still subsisting and unsatisfied, there not having been hitherto any sum to be set apart towards payment thereof.

That the proportion to be contributed by the said Bourn district of the expenses of and incident to the procuring and passing of the said Act have been paid off and discharged.

That the annual revenue from tolls, &c., within the said district for the current year will amount to 1087*l.*, a sum exceeding the estimated expenses of maintenance and repairs.

That the salaries of the clerks, surveyor and other officers employed by the trustees in and for the said district, and the other expenses of and incident to the management of the roads therein, will amount for the current year to 150*l.*

That the interest on the said sums of 1775*l.* and 25*l.* for the current year will amount to 54*l.*

That the expenses of repairing and maintaining the roads within and constituting the said Bourn district during the current year are estimated by the surveyor to amount to 1017*l.*, of which sum 163*l.* 3*s.* 7*d.* will, it is estimated, be expended within the said parish of Bourn, the estimate being founded upon the actual expenditure within each parish during the past year.

It was admitted by the apps. that due notice of the intended application had been given.

It was contended on behalf of the apps. that the revenue from tolls, &c. within the said district is sufficient for the repairs and maintenance of the said roads within and constituting the said district, and that by the fourth paragraph of sect. 31 of the Act of 1860 the trustees of the said road are at present limited to 800*l.* in their expenditure upon the maintenance and repairs of the said roads, and they state the account thus:—

An estimated receipt of .....	£1087	0	0
Costs of repairs as per local Act .....	£200	0	0
Salaries .....	150	0	0
Interest of debt .....	54	0	0
	•		
	1004	0	0
Balance of cash in hand .....	83	0	0

Whilst on the other hand the resps. contended that the said local Act merely limited their expenditure out of the revenues of the said trust to the said sum of 800*l.*, and that they were entitled to spend a sufficient sum to keep and maintain the said road in a good state of repair, and to call upon the different parishes to contribute a sufficient sum to make up the difference between the sum allowed to be deducted by the said Act from the revenues of the said trust, and the amount required to keep the said roads in a good and sufficient state of repair, and they state the account thus:—

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Annual revenue .....	£1087 0 0
Salaries and management .....	£150 0 0
Interest .....	54 0 0
Amount to be applied towards the repairs and maintenance of the road (the principal debt being still unpaid) .....	800 0 0
	1004 0 0
Surplus revenue to be applied towards debt being still unpaid .....	83 0 0
Estimated expenses of repairs.....	1017 0 0
Amount to be applied towards such expenses from the annual revenue of the district .....	800 0 0
Deficiency to be raised by parochial contri- butions .....	217 0 0

Our judgment was in favour of the resp., we being of opinion that the said trustees were not limited by the said Act to the expenditure of the said sum of 800*l.* upon the said roads, but that the said Act merely limited the amount to be expended out of the revenues of the said trust to that sum, and that the said trustees were entitled under the provisions of the said Act, 4 & 5 Vict. c. 59, to call upon the different parishes to make up the difference between that sum and the amount required to be expended in keeping and maintaining the said roads in a good state of repair within the said district, and we accordingly made an order on the said apps. for payment by the said apps. of 22*l.* 3*s.* 11*d.*, being part of the rate or assessment levied or to be levied for the repair of the highways in and for the said parish of Bourn, such sum of 22*l.* 3*s.* 11*d.* to be wholly laid out in the actual repair of such part of the said turnpike-road as lies within the said parish of Bourn from which the same is received. The case then set out the order above mentioned.

The question for the opinion of the court is, whether our judgment was in point of law correct, and whether the trustees are limited by the said Act in their expenditure upon the said turnpike-road to the said sum of 800*l.*, or whether they may lawfully expend a larger sum in keeping and maintaining the said turnpike-road in a good and sufficient state of repair, and call upon the different parishes to make up the difference between the said sum of 800*l.* and the amount required for such purpose; and whether the trustees of the said road can call upon the surveyors of the highways of the said parish of Bourn, under these circumstances, to appropriate a portion of their rate to its repairs.

If the court should be of opinion that the said order was legally and properly made, then the said order to stand; but if the court should be of opinion otherwise, then the said information is to be dismissed.

The 4 & 5 Vict. c. 59 (an Act to authorise for one year the application of a portion of the highway rates to turnpike-roads: continued by 23 & 24 Vict. c. 67, to Oct. 1865), sect. 1, enacts, that justices, upon information exhibited before them by the clerk or treasurer of any turnpike trust that the funds of the said trust are insufficient for the repairs of the turnpike-roads within any parish, &c., may examine the state of the revenues and debts of such turnpike trusts and inquire into the state and condition of the repairs of the road within the same, &c., and if after such information it shall appear to the said justices necessary or expedient for the purposes of any turnpike-road so to do, then they may adjudge and order what portion (if any) of the highway rates, &c., shall be paid by the parish surveyor, &c. to the said trustees, such money to be wholly laid out in the actual repairs of such part of such turnpike-road as lies within the parish from which it was received.

*Field* for the resp.—The order of the justices was

properly made. Sect. 31 of the private Act of 1860 merely directs how the expenditure of the money to be raised under the Act is to be made. It does not limit the repair of the roads to the sum of 800*l.* The roads are not to be left out of repair, and if the funds raised by the Act were not sufficient, the justices had power to make the order in question.

*Beasley* for the app.—The limit of repairs is 800*l.* If this is a good order, the effect of it is to cast on the parish of Bourn an additional burden, which is applied virtually in paying off the turnpike trust debt.

COCKBURN, C. J.—The road is not to be left out of repair, and if the trust-funds are not sufficient, the justices had power to make the order in question.

BLACKBURN and MELLOH, J.J. concurred.

*Order confirmed.*

Monday, Feb. 22, 1864.

CATOR v. THE LEWISHAM BOARD OF WORKS.

*Metropolis Local Management Act—Works causing damage beyond the district—Remedy for—18 & 19 Vict. c. 120, ss. 51, 86.*

*A board of works, in executing drainage works in their district, authorised by the Metropolitan Local Management Act, polluted a stream which in its progress onward flowed through the plt.'s land out of the district:*

*Held, that the plt.'s remedy for damage from the pollution of the stream was under the compensation clauses of the Metropolitan Local Management Act, and not by action.*

Special case for the opinion of the Court.

The facts are stated in the judgment of the Court. The main facts were, that the board of works drained certain offensive ditches, &c. into a stream in their district which flowed through plt.'s land out of the district, whereby the water of the stream was rendered unfit for cattle and ordinary domestic purposes.

*Bovill* (*Lush* and *Murphy* with him) for the plt.

—The nuisance in this case is admitted, and the only question is whether it was lawfully done in the execution of the powers of the Metropolitan Local Management Act. If it was, no doubt the plt.'s remedy is under the compensation clauses. But it is submitted that the local board has no power beyond its own district, and for any injury caused by them out of their own district, as in this case, the aggrieved party has a remedy by action. Again, they were bound so to execute their works as not to create a nuisance: (18 & 19 Vict. c. 120, ss. 32, 38, 42, 68, 69, 86, 135, 136.)

*Mellish* (*Raymond* with him) for the defts.—The board by sect. 86 were compelled to drain these places, and if so the compensation clauses apply: (ss. 63, 86.)

*Stainton v. Lewisham District Board of Works*, 26 L. J. 300, Ch.

*Reg. v. Metropolitan Board of Works*, 32 L. J. 105, Q. B.; 9 L. T. Rep. N. S. 139.

Sect. 86 of the Metropolitan Local Management Act (18 & 19 Vict. c. 120) enacts that

"Every vestry and district board shall drain, cleanse, cover or fill up all ponds, pools, open ditches, sewers, drains and places containing or used for the collection of any drainage, filth, water, matter, or thing of an offensive nature or likely to be prejudicial to health which may be situate in their parish or district;" and further empowers such board (after notice to and refusal by the owner or occupier of the premises) "to execute such works as may be necessary for the abatement of such nuisance. "Provided that where any work by any vestry or district board done or required to be done in pursuance of the provisions of this Act interferes with or prejudicially affects any ancient mill or any right connected therewith or other right to the use of water, full compensation shall be made to all persons sustaining damage thereby in manner hereinbefore provided; or it shall be lawful for the vestry or board, if they think fit, to contract for the purchase of

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such mill, or any such right connected therewith or other right to the use of water, and the provisions of this Act with respect to the purchases by the vestry or board hereinafter authorised shall be applicable to every such purchase as aforesaid.

By sect. 58 of the 24 & 25 Vict. c. 102, it is enacted that,

Whenever it may become necessary for any vestry or district board, for the purpose of carrying out the drainage works, authorised in the Act of 18 & 19 Vict. c. 120, to carry any sewer or work beyond the limits of the Metropolis as defined by that Act, it shall be lawful for any such vestry or district board to execute works in parts situate beyond or without such limits, and to cleanse, maintain and repair such works as they shall from time to time deem necessary, provided always that no work shall be performed or commenced by any vestry or district board beyond the limits of the metropolis as above defined, except for the purpose of continuing or forming part of a work commenced or executed within their respective parish or district.

*Cur. adv. vult.*

BLACKBURN, J.—In this case, which was heard before my Lord, the late lamented Mr. Justice Wightman and myself, and in which no decision had been come to before the death of our late lamented colleague, we have come to the conclusion, though not without some hesitation, that our judgment should be for the defts. The point may be very shortly stated. The drainage of the district of Lewisham has for many years been carried into a stream called the County Bridge Stream, which stream flows into the river called the Poole river, both of which in their progress onwards flow through land belonging to the plt. beyond the limits of the Lewisham district. The population and the number of houses in a part of the Lewisham district having of late years greatly increased, and the want of additional drainage having occasioned an accumulation of offensive matter and caused serious inconvenience, the defts., the Board of Health for the district, executed the drainage works stated in the case, availing themselves, as heretofore, of the County Bridge Stream to carry off the sewage matter. The effect of the additional and more effective branch has been to cause a quantity of offensive matter to pass down into the County Bridge Stream and the Poole river sufficient to pollute the river, which before was affected by the drainage only in an inappreciable degree, to such an extent as to cause substantial injury to the plt. It is not disputed that for such injury the plt. is entitled to compensation, but the question is whether his remedy is by action or by proceeding to obtain compensation under the 86th section of the 18 & 19 Vict. c. 120. The drainage works executed by the defts. were, beyond all question, such as they were authorised, and indeed required, to make, and it cannot, we think, be disputed that had the damage to the plt. occurred in the district, the only redress to which he would have been entitled would have been by compensation under the 86th section of the 18 & 19 Vict., for it is plain that section contemplates and provides for the possibility of damage being done to water rights by the execution of sewage works, and would comprehend a case in which a stream was polluted by offensive matter being discharged into it. But it was contended for the plt. that the authority and power of the board to carry out the drainage of the district is confined to the limits of the district, and that they are not authorised to do anything that will cause any injury to those who are beyond the local boundary of their jurisdiction. And the 58th section of the subsequent Act, the 25 & 26 Vict. c. 102, is referred to as showing that such a board, in the absence of express statutory enactment, would have no authority beyond the limits of the district for which they are appointed. It is however to be observed that the 58th section of the 25 & 26 Vict. c. 102, has reference to works to be executed beyond the limits of the district, not to an injury arising within the district for

works executed within it. Here all that has been actually done by the board has been done within the district. The injury of which the plt. has reason to complain is only in consequence of what has been done within the district, and, so far as the district itself is concerned, rightly done. Now the words of the 86th section of the 18 & 19 Vict. are sufficiently large to embrace an injury done by the pollution of a stream, whether within the local limits of the district or without; and to hold that the present case does not fall within the provisions would be virtually to establish that no Board of Health or vestry could ever avail themselves, for the purpose of drainage, of a stream flowing beyond the local limits, if any damage should occur to the proprietors or occupiers further down the stream. For if the work causing such injury beyond the boundary ceases, because of such injury, to be within the powers of the local authority, and therefore is actionable, the injury being a continuing one, fresh actions might from time to time be brought and the work causing the damage would have been undone. We cannot think that the Legislature intended to place this restraint on the power conferred by the Act, and we think, therefore, that it will be safer and better so to construe the Act as to make the powers of the local authority and the provisions for compensation embrace such a case as the present. It follows that the proceeding by action was not open to the plt., and consequently that our judgment must be for the defts.

*Judgment for the defts.*

Saturday, April 23, 1864.

REG. V. THE WORKSOP BOARD OF HEALTH.

*Public Health Act—Rate—Non-corporate district—Rate not signed by five members, nor under seal.*

By sect. 149 of the Public Health Act (11 & 12 Vict. c. 63) it is enacted that, whenever the consent, sanction, approval, or authority of the local board of health is required by the provisions of the Act, "the same shall (in the case of a non-corporate district) be in writing under their seal and the hands of five or more of them."

*Held, that this provision applies only to cases where something is to be done by others requiring the authority of the local board, and not to that which the local board themselves do.*

*Where, therefore, a local board of a non-corporate district resolved to make a general district rate, and made it accordingly, but neither the resolution nor the rate was signed by five members, nor under seal,*

*Held, that the rate was not, on that account, invalid.*

This was a case stated by the Nottinghamshire Quarter Sessions for the opinion of this court.

It appeared that one Alfred Broadhurst was assessed to a general district rate under the 11 & 12 Vict. c. 63 (Public Health Act), and that he appealed to the quarter sessions on the grounds, first, that the rate was for past as well as for future expenses; secondly, that the purposes for which the rate was made were not set forth in the estimate with sufficient particularity; and thirdly, that the rate was not under the seal and hands of five members of the local board. The sessions decided against the app. with reference to the first two objections, and for him with reference to the third, and therefore quashed the rate subject to the present case.

The 87th section empowers the local board to make a general district rate.

The 98th section enacts that the local board of health, before proceeding to make any general rate, &c.,

Shall cause an estimate to be prepared of the money required for the purposes in respect of which the rate is to be made,

showing the several sums required for each of such purposes, the rateable value of the property assessable, and the amount of rate which for those purposes it is necessary upon each pound of such value; and the estimate so made shall forthwith, after being approved of by the said local board, be entered in the rate-book and be kept in their office open to public inspection during office hours therat.

By sect. 35 it is enacted that the local board shall, in the case of a non-corporate district, cause to be made a seal for the use of such board in the execution of the Act:

And documents, or copies of documents, purporting to proceed from the said local board, and to be signed by any five or more members thereof and to be sealed or stamped with such seal or (in case of a corporate district) to be sealed with the common seal, shall be received as *prima facie* evidence in all courts and places whatsoever.

#### The 149th section enacts

That whenever the consent, sanction, approval, or authority of the general board of health is required by the provisions of this Act, the same shall be in writing under their seal and the hands of two or more members thereof; and whenever the consent, sanction, approval, or authority of the local board of health is so required, the same shall (in the case of a non-corporate district) be in writing, under their seal and the hands of five or more of them, or (in case of a corporate district) under their common seal.

The district in question was a non-corporate district, and the rate was made by a resolution of the local board, which was signed only by the chairman and was not under seal, and the rate also was signed only by the chairman and was not under seal.

The estimate upon which the rate was made contained the items as follows:

Salaries of officers .....	£178	10	0
Rents, rates and collectors' poundage .....	70	18	2
Watering the public streets and expenses of fire engines .....	61	0	0
Election expenses, filling in and covering old sewers and drains, and cleansing sewers and outfall .....	65	0	0
Law charges, surveyors' estimates and incidental expenses .....	74	0	0

Welsby (Cave with him) now appeared in support of the order of sessions, and contended, first, that the rate was void inasmuch as neither the resolution for making it, nor the rate itself, was signed by five of the members of the local board, nor under seal. [COCKBURN, C.J.—Is not the meaning of the section, that where others rely upon the authority of the local board for an authority for what they do, that authority shall be under the hands and seal of the board, and can it be necessary where the act in question is that of the local board itself?] No such distinction is made in the section. Secondly, that the rate was void inasmuch as the estimate upon which it was made did not show the several sums required for each purpose, "election expenses, filling in and covering old sewers and drains, and cleansing sewers and outfall," being all included in one item. He abandoned the objection of the rate being as well for past as future expenses.

Bovill, Q.C., in support of the appeal, argued, first, that the provision requiring the consent, sanction, approval, or authority of the local board to be under their seal, and the hands of five of them, does not apply to an act done by themselves, but only applies to their consent, sanction, approval, or authority when required to give validity to the acts of others, and that the course to be adopted by the local board with reference to their own acts is pointed out by the 34th section, which only requires that questions shall be decided by a majority of votes; secondly, that the provision of sect. 98, relative to the estimate, is directory only and not compulsory, and its non-observance does not invalidate the rate:

*Reg. v. The Justices of Leicester*, 7 B. & C. 6;

*Lejever v. Miller*, 26 L. J. 175, M. C.;

*Reg. v. Fordham*, 11 A. & E. 73;

*Noel v. Mayor of Worcester*, 9 Ex. 457.

COCKBURN, C. J.—We have no difficulty whatever as to the objection taken with reference to the ab-

sence of the signatures of five members of the local board, and the seal, being of opinion that there is no foundation for it, and that the view we early took in the argument of the meaning of the 149th section is the correct one, namely, that the section applies only to cases where something is to be done by others, requiring the authority of the local board, and not to that which the local board themselves do. With regard to the other objection, it will be more satisfactory to consult the authorities relied upon before giving judgment.

*Cur. adv. vult.*

Attorney for app., Clough, Workop.

Attorney for resps., Appleton, Workop.

Saturday, April 30, 1864.

SHARP (app.) v. FIELDS (resp.)

"Seafaring person"—Who is—Exemption from toll under a local Act.

By a local Act, passed in 1834, the company of proprietors of the Southampton and Itchen Floating Bridge and Roads was incorporated, and certain tolls were payable for passing over such bridge, there being an exemption from toll in favour of "any fisherman or seafaring person being an inhabitant of the said parish of St. Mary Extra." By a section in a subsequent Act it is enacted that the words "fishermen, seafaring men and seafaring persons" in the said recited Acts or any of them shall not be deemed or construed to extend to or include any person who shall not be *bona fide* a fisherman, seaman, mariner, sailor or pilot."

The resp. — had for many years been engaged upon one of the Peninsular and Oriental Company's steamships trading between Southampton and Alexandria, and was an inhabitant of the said parish of St. Mary Extra; he signed articles like all other seamen employed on board, and was bed-cabin steward; he was liable to do what the captain ordered him to do either above or below deck, but, without special orders, his duties were confined to the bed-cabins; he had occasionally lent a hand in making and shortening sail and in heaving the capstan when weighing anchor, but he never kept watch on board and never steered:

Held, that he was "a seafaring person" within the statute, and so entitled to exemption from toll.

This was a case stated by justices under the 20 & 21 Vict. c. 43, upon a decision by them under the provisions of a local Act. The case stated as follows:—

The company of proprietors of the Southampton and Itchen Floating Bridge and Roads was incorporated by an Act of Parliament, passed in 1834, which Act was amended by other Acts passed in 1835, 1839 and 1851 respectively. All these Acts were repealed by an Act passed in 1863 (26 & 27 Vict. c. 102, local and personal), except some few clauses which were retained in the schedules to the last-named Act. Certain tolls are payable to the said company for the passage of passengers, horses, and vehicles over the ferry at Itchen, but certain persons claim to be entitled to exemption under the following clauses, which are retained in the schedule to the Act of 1863.

By the 81st section of the Act of 1834 it is enacted

That no toll whatever shall be demanded or taken for passing upon the said bridge or from any fisherman or seafaring person being an inhabitant of the said parish of Saint Mary Extra.

By the 82nd section of the same Act it is enacted

That nothing in this Act contained shall extend, or be construed to extend, to take away from any fisherman, seafaring man, or other handicraft inhabitants of the village of Itchen aforesaid, or their respective wives or families, or to



[Q. B.]

REG. v. KAYLEY—KIDDLE v. KAYLEY.

[Q. B.]

deprive them, or any of them, of any right which they now enjoy of passage across the said river, or of carrying across the said river any goods, wares, merchandise, or chattels.

By the 25th section of the Act of 1851 it is enacted

That the words fisherman, seafaring man and seafaring persons in the said recited Acts or any of them shall not be deemed or construed to extend to or include any person who shall not be *bond fide* a fisherman, seaman, mariner, sailor, or pilot, or who should not have been such fisherman, seaman, mariner, sailor, or pilot, and be incapacitated by age or infirmity.

By the 28th section of the same Act it is enacted

That if any dispute or difference shall arise between the said company, and any person claiming the benefit of any exemption or privilege under the provisions of the said recited Acts or of this Act, the same shall be decided by two justices of the peace of the county of Southampton, or of the town and county of the town of Southampton, who upon information or complaint made to them by any person claiming such exemption or privilege shall issue his summons to the clerk of the said company, and on hearing such complaint shall determine whether such claim should be allowed by the said company and shall either dismiss the said summons, or shall order and direct that the name and residence of such claimant shall be registered in manner by the said Act provided, subject to a penalty in default.

Charles Frederick Fields claimed to be exempt from the payment of toll for passing across the river Itchen upon and by the bridge and boats of the said company by reason of his being a seafaring person, to wit, a mariner, and being an inhabitant of the parish of St. Mary Extra; and having claimed to be registered as exempt from such toll, but such claim having been disputed by the said company, an information was preferred by him against the company, and upon the hearing the justices decided the dispute in favour of the resp., and determined that his claim should be allowed by the company, and that the name and residence of the resp. should be registered accordingly.

It was proved that the resp. was an inhabitant of the parish of St. Mary Extra, and that he was bed-cabin steward on board the Peninsular and Oriental Company's steamship *Ceylon*, trading between Southampton and Alexandria; that he had made thirty-nine consecutive voyages in such ship, and each voyage had signed articles like all other seamen employed on board; that he considered himself liable to do what the captain ordered him, either above or below deck, but, without special orders, his duties were confined to the bed-cabins. It appeared that, although his ordinary duties were confined to the bed-cabins, he had occasionally lent a hand in making and shortening sail, and in heaving at the capstan when weighing anchor, but that he never kept watch on board, and never steered. He stated that he was not a fisherman, seaman, sailor, or pilot; but he claimed to be a mariner and a seafaring person. On the part of the resp. it was contended that, the resp. having upon each voyage signed the articles required to be signed by seamen, and being liable to all the privileges, immunities and liabilities attaching to seamen in the ship in which he had served, was a seafaring person within the meaning of the above-recited Acts and of the Merchant Seamen's Act. On the part of the app. it was contended that the resp. was neither a fisherman, seaman, mariner, sailor, or pilot, but simply a steward, or waiter, or chamberlain, and that the fact of his acting as such on board a ship would not entitle him to the exemption above mentioned.

The justices, however, being of opinion, that the resp. was a seafaring person within the meaning of the above-mentioned Acts, gave their determination against the app.

The question of law is—

Whether the resp. Charles Frederick Fields is a seafaring person or mariner within the meaning of the above-mentioned Acts (all of which are to be taken as part of the case), and entitled to the

exemption he claims from toll while living in the parish of St. Mary Extra?

*H. James* appeared for the resp., but

*Phinn*, Q. C. (*Mellor* with him) was called upon to support the case of the app. [BLACKBURN, J.—Is not the resp. a seafaring man?] In the first Act "seafaring man" has a very wide meaning, but this is cut down by the subsequent Act. These vessels carry in fact a host of hotel officials. [BLACKBURN, J.—A ship's cook is nevertheless a seaman, although he may attend only to the cooking.] He would in the royal navy be subject to the Mutiny Act. [COCKBURN, C.J.—But here the resp. does occasionally the ordinary duties of a sailor.] So would a marine upon certain occasions, but he would not be called a seaman. This person is a bed-chamber steward. [BLACKBURN, J.—Still he assists in the ship.] So upon an emergency would every one. [BLACKBURN, J.—Here it is his duty to do so when called upon: (*Wilson v. Zulueta*, 14 Q. B. 405.) COCKBURN, C.J.—What would you say to a ship's carpenter?] In the navy he is a warrant officer. [COCKBURN, C.J.—If a man had entered simply, say as cook, with a stipulation that he was not to do any other duty, I should agree with you, but here he is liable to do ordinary duty.] His ordinary duties are to attend the bed-cabins.

COCKBURN, C.J.—It is said in the case that he signed the articles required to be signed by seamen. If he signed them merely collusively for some indirect purpose, that would not do; but if he has really signed as ordinary articles, he would be a seaman and liable to perform the duties of a seaman. We are all of opinion that the justices were right.

*Judgment for the resp.*

REG. v. KAYLEY.

KIDDLE (app.) v. KAYLEY (resp.).

*Game—Trespass—Bonâ fide claim of right—Jurisdiction of justices ousted—1 & 2 Will. 4, c. 32, ss. 8, 30.*

*An information was laid against the app. under sect. 30 of the 1 & 2 Will. 4, c. 32, for a trespass in pursuit of game. At the hearing he gave in evidence a lease, dated 1794, for ninety-nine years of the land upon which the trespass was alleged to have been committed, to a party through whom he claimed, the lessor being the party through whom the informant claimed the right to the game. The lease contained the following reservation to the lessor: "and also liberty to hawk, hunt, set and fowl in and upon the said demised premises during the term hereinafter granted." The app. having set up his title through the lessee to take game upon the land, and so disputed the right of the justices to adjudicate, they held that the claim of right was not sufficient to oust their jurisdiction and convicted the app.:*

*Held, that the objection being made bonâ fide it was a reasonable one, and that the jurisdiction of the justices was ousted.*

This was a case stated under the 20 & 21 Vict. c. 43, upon a conviction by justices at petty sessions of the app. for a trespass on lands in search of game, without the licence or consent of the owner of such lands. The facts stated were the following:—

At the hearing of the information on the 8th June last *Bishop* appeared for the resp. and *Floud* for the app. The following evidence was given:

*William Holcombe* said: I am a gamekeeper. I live in the parish of East Budleigh. On the 21st May I saw *Louis Kiddle* on *Shutwood Farm*; it is occupied by *Kiddle's* father.

*Floud* asked Mr. *Bishop* if he admitted that the



estate was a leasehold one for ninety-nine years determinable on lives?

*Bishop* said he did admit it.

Examination continued.—There was a Mr. Kendall with Louis Kiddle; they had a gun each and two dogs, and a ferret was in the hedge. Mr. Kiddle asked if I was the keeper in Hayes Wood? I said "Yes." He then said he had a right to shoot over the property from his father, as it was leasehold property. He had a bag with him, and said he had got six or seven rabbits. Mr. Bishop then relied upon the 42nd section of the 1 & 2 Will. 4, c. 32.

For the defence,

William Kiddle said: I am the father of Louis Kiddle, and the occupier of the Shutwood estate. I rent it of Mr. John Wilson of Exeter. He holds under Prescott, who was the original lessee. I have had permission from him to kill the game on that estate, and we have continually done so for the last five years. I gave my son permission to kill the rabbits on the estate. I produce a copy of the lease that was handed to me by my landlord.

*Bishop* objected to the document being put in, as not being a copy.

The hearing was ultimately adjourned, that the trustees of Lord Rolle might be summoned to produce the original lease. At the adjourned hearing, Mr. Bishop produced the counterpart of the original lease of the Shutwood estate, signed by the lessee, dated the 3rd Sept. 1794, and made between Denys Rolle of Bicton, in the county of Devon, Esq., of the one part, and Robert Prescott of East Budleigh, in the said county, yeoman, of the other part. The lease witnessed that, in consideration of 200*l.* and the yearly rent reserved, he, the said Denys Rolle, demised unto the said Robert Prescott all that, &c. (the premises in question), reserving the timber, &c., "and also liberty to hawk, hunt, set and fowl in and upon the said demised premises during the term hereinafter granted, . . . "for and during the full term and time of ninety-nine years," if certain parties named should so long happen to live.

*Bishop* relied on the 8th section of the 1 & 2 Will. 4, c. 32.

*Floud* renewed his objection to the jurisdiction of the bench to decide the case, on the ground that his client claimed a *bonâ fide* right. He contended that the words in the lease were only a reservation to Denys Rolle, his heirs and assigns, which means himself and friends, but not servants. He referred to the case of *Reg. v. Cridland and others*, 27 L. J. 30, M. C. Secondly, he contended that the app. was not in pursuit of game, as under sect. 2 rabbits are not game, and he referred to *Spicer v. Barnard*, 28 L. J. 176, M. C. Thirdly, he contended that, as W. Kiddle, the father and occupier, had given the son leave to kill the rabbits, that of itself was an answer to the summons.

The following evidence was then given:—

John Wilson:—I am the owner of the Shutwood estate. W. Kiddle is my tenant. My uncle Vinnicombe purchased it of Prescott and bequeathed it to me by will. I have given Kiddle all the right to the game that there is in it. During my uncle's life I recollect a Mr. Gascoyne, who took Tidwell's house, asking my uncle to let him shoot on Shutwood, and he gave him permission to do so. I always understood the right was in my uncle, and upon that understanding I have given Mr. Kiddle leave to shoot there.

By the Bench.—I never heard that my uncle's right was disputed.

*Bishop* said, under sect. 8, he put in the lease and claimed the exclusive right to the game.

The 30th section decidedly brings "rabbits" within the meaning of the word "game."

We being of opinion that the claim of right set up was not sufficient to oust our jurisdiction, as the counterpart of the lease showed a reservation of the right to hunt, hawk, &c., and that the evidence given before us brought the case within the said 30th section of the Act, gave our determination against the app. in the manner before stated.

The questions of law arising on the above statement for the opinion of the court therefore are:

1st. Whether the claim of right set up by the app. was such a *bonâ fide* claim as to oust our jurisdiction.

2nd. Whether the words in the lease, to "hawk, hunt, set and fowl," amount to an absolute reservation to the lessor, his agents, &c., of the right of shooting and sporting over the said closes of land in exclusion of the lessee and his assigns, agents, &c.

If the court should be of opinion that the said conviction was legally and properly made, and the app. is liable as aforesaid, then the said conviction is to stand. But if the court should be of opinion otherwise, then the said information and complaint is to be dismissed.

By sect. 8 of the 1 & 2 Will. 4, c. 32, it is enacted:—

That nothing in this Act contained shall authorise any person seized or possessed of, or holding any land, to kill or take the game, or to permit any other person to kill or take the game upon such land in any case where by any deed, grant, lease, or any written or parol demise or contract a right of entry upon such land for the purpose of killing or taking the game hath been or hereafter shall be reserved or retained by or given or allowed to any grantor, lessor, landlord, or other person whatsoever; nor shall anything in this Act contained defeat or diminish any reservation, exception, covenant, or agreement already contained in any private Act of Parliament, deed, or writing relating to the game upon any land, nor in any manner prejudice the rights of any lord of any manor, lordship, or royalty, or of any steward of the Crown, of any manor, lordship, or royalty appertaining to His Majesty.

By sect. 80, after imposing a penalty upon any person trespassing in the pursuit of game, it is provided,

That any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass: save and except that the leave and licence of the occupier of the land so trespassed upon shall not be a sufficient defence in any case where the landlord, lessor, or other person shall have the right of killing the game upon such land by virtue of any reservation or otherwise, as hereinbefore mentioned, &c.

*M. Smith*, Q. C. (Yonge with him), now appeared in support of the conviction, and argued that the defence set up by the app. was altogether untenable, since it was clear from the lease of 1794 that the right to the game was reserved to the lessor. [COCKBURN, C. J.—Can it be said that the lessor has an exclusive right; has he anything more than a concurrent right with the lessee to the game?] The statute was intended to give landlords greater rights over the game than before: (*Spicer v. Barnard*, 1 El. & El. 874.) [BLACKBURN, J.—If under the lease the lessee had a right to kill game, the statute does not take that right from him.] I contend he never had the right. [BLACKBURN, J.—But if there is a well-founded ground for doubt, it is not a case for the justices to determine.]

*Reg. v. Thurlstone*, 1 El. & El. 502;

*Cornwall v. Saunders*, 3 Best & S. 206.

[BLACKBURN, J.—Where an impossible right is set up the *bonâ fides* is immaterial, but can you say that here there was not reasonable ground?] Under sect. 30 the landlord has the right to the game. It is contended that the lease gives an exclusive right to the game to the landlord. [COCKBURN, C. J.—Before the Game Act, under this lease the lessee would have had a right to the game, reserving, however, permission to the lessor to take it; does the statute take away the right from the lessee?]

[Ex.]

HUXHAM v. WHEELER.

[Ex.]

Kingdon, for the app., was not called upon, but he mentioned

*Wickham v. Hawker*, 7 M. & W. 108.

COCKBURN, C. J.—The only question asked is, whether the claim of right set up by the app. was such a *bona fide* claim as to oust the jurisdiction of the justices? and as they do not find *malu fides*, I assume that they mean, is there enough on these facts to give colour to the claim? I must say that I think there is, and that it is so far from being clear that the lessee had not the right to take game, he might very well suppose from the clause in the lease that he had a right of sporting concurrently with the lessor, and the question was, therefore, one in which the justices ought not to have interfered.

BLACKBURN, J.—When in such a case a *bona fide* and probable right of property is set up, the justices ought to hold their hands. Now, under this old lease, I think it is very questionable whether or not the whole right to the game was given to the lessor, and it is, moreover, very doubtful whether or not the 8th section affects the rights of the parties. I don't say that these doubts must be decided in favour of the app., but it is a matter sufficiently doubtful to take it out of the jurisdiction of the justices.

SHEE, J. concurred.

*Judgment for the app.*

Attorney for the app., *Floud*.

Attorney for the resp., *Bishop*.

## COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Wednesday, April 20, 1864.

HUXHAM (app.) v. WHEELER (resp.).

*Excise—Selling beer at fairs without licence.*

The 29th section of 1 Will. 4, c. 64 (the Beerhouse Act), by which the selling of beer at any lawful fair was excepted out of the general operation of the Act, is repealed by the 12th section of 25 & 26 Vict. c. 22, and therefore the sale of beer without an excise licence at a lawful fair, in exercise of a right by grant which had existed since the reign of Edward III., is no longer lawful, nor is such sale any longer exempted from the operation of the Excise Licensing Acts.

Special case stated by three justices of the city of Gloucester under 20 & 21 Vict. c. 43, upon the application of the app., an officer of Excise, acting on behalf of the Crown, who was dissatisfied with the decision of the said justices dismissing an information exhibited by him against the resp. under 4 & 5 Will. 4, c. 85, charging him with retailing beer to be consumed upon the premises without a licence; and the question raised for the opinion of the court was, whether persons can sell beer at fairs without an excise licence.

The case set out the information and summons, and then stated as follows:—That it was proved on behalf of the app. that on the 12th Oct. 1863 an officer of excise went to resp.'s house in the city of Gloucester (the door being open), and asked for and was served by resp. with a glass of beer, which he drank in the house, and paid resp. 1½d. for, and that resp. had no licence to sell beer on or off the premises. The app. admitted that a mop or hiring fair was then being held in the street in which resp. lived.

By the 7th section of 11 Geo. 4 & 1 Will. 4, c. 64, any person not being licensed as the keeper of a common inn, alehouse, or victualling house, who shall sell any beer by retail without an excise

licence, shall forfeit 20l., but the 29th section of the same Act provides,

That nothing in that Act contained shall prohibit any person from selling beer in booths or other places, at the time and within the limits of the ground or place in or upon which is holden any lawful fair in like manner as such person was authorised to do before the passing of that Act.

The Act 4 & 5 Will. 4, c. 85 (under which the information was laid), after reciting the 11 Geo. 4 & 1 Will. 4, c. 64, enacts, by sect. 11,

That all the penalties, forfeitures and provisions contained in the said recited Act, with reference to persons doing the things thereby prohibited without the licence required by the said recited Act, should (except where they were altered by the Act now in recital, or were repugnant thereto) be deemed and taken to be applicable to all persons doing without the licence required by the Act now in recital things of the same description as the things prohibited without the licence required by the said recited Act, as fully and effectually as if all the said penalties, forfeitures and provisions had been repeated and reenacted in the Act now in recital.

And by sect 17

Every person not being duly licensed to sell beer by retail, to be drunk or consumed in or upon the houses and premises where sold, without having an excise retail licence in force authorising him to do so, is liable to a penalty of 20l.

It was admitted by resp. that he sold beer at the place and on the occasion in question without having a licence, but he alleged that he was entitled to sell beer by retail at and during a fair annually held in Barton-street, Gloucester, on the 28th and 29th Sept. and the three following Mondays, the same being mop or hiring days, and that such custom had prevailed since the grant next mentioned.

It was proved that, in the reign of Edward III. a grant of the manor and lordship of Dudstone and King's Regis was made by the Crown to the abbot of St. Peter, Gloucester, with a right to hold fairs, and mops, and that such fairs and mops were held from that time to the reign of Charles II., when a grant of the manor, with all rights, privileges and immunities belonging thereto, was made to the corporation of Gloucester, which rights were confirmed by a charter of Charles II., granted in 1672, as follows:—"We do grant, approve, ratify and confirm to the aforesaid mayor, &c., such and the like fairs, marts, markets, customs, liberties, franchises, immunities, exemptions, &c., and to their successors, for ever."

Evidence was given by old inhabitants that the fairs had been held in Gloucester for sixty years and upwards, and that during that time beer had been sold during the fairs and mops, without licence, by persons living in Barton-street, where such fairs had been usually held.

The app. contended that, by sect. 12 of 25 & 26 Vict. c. 22, which enacts, that "*so much of any Act as permits the sale of beer, spirits, or wine at fairs or races without an excise licence shall be and the same is hereby repealed*," whatever right resp. had to sell beer by retail without a licence by virtue of the saving clause in 1 Will. 4, c. 4, was repealed, and therefore the justices ought to convict the resp. But the justices dismissed the information on the ground that resp. was entitled by prescriptive right and by charter to sell beer by retail without an excise licence, and that such right was not taken away by 25 & 26 Vict. c. 22, s. 12, or by any of the said Acts. And thereupon this case was stated by the justices, who decided that if the court should be of opinion the information had been wrongfully dismissed, the resp. should be convicted in the mitigated penalty of 5l.

App.'s points:—1. That inasmuch as 4 & 5 Will. 4, c. 85, s. 17, expressly subjects to a penalty every person selling beer by retail to be drunk, &c., without having any excise retail licence, and as it is admitted that resp. sold beer to app. to be drunk, &c., having no such licence, it follows that he is liable to the penalty for so doing, unless he can show some exemption therefrom. 2. That the exemption given by

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11 Geo. 4 & 1 Will. 4, c. 64, s. 29, being repealed by 25 & 26 Vict. c. 22, s. 12, such exemption cannot avail resp. 8. That the supposed prescription to sell beer in Barton-street during the fairs could not have any operation against the express enactment of an Act of Parliament. 4. That such supposed prescription is not valid in law.

Resp.'s points:—1. That resp. was entitled by custom, prescription, or charter, to sell beer by retail without a licence at his house in Barton-street, during the holding of the fairs and mops in the case mentioned. 2. That neither by 25 & 26 Vict. c. 22, nor by any other Act or Acts of Parliament, was he prevented from so doing.

Locke, Q. C. (with whom were the *Attorney-General*, the *Solicitor-General* and *Welsby*) for the app.—The decision of the justices was wrong, because the right reserved in the old statute was repealed by the 25 & 26 Vict. c. 22, sect. 12. Until 11 Hen. 7, c. 2, anybody might sell beer anywhere, when it was enacted that “two justices might reject common ale selling in any place, and take security from all sellers for behaviour.” Then the 5 & 6 Edw. 6, c. 25, s. 6, permitted the selling of beer “in booths or other places at fairs and races in such like manner and sort as it hath been used or done in time passed.” The Magistrates’ Licensing Act (9 Geo. 4, c. 61) repealed all former Acts, but retained the right of selling beer in booths at fairs, “in like manner as such persons were authorised to do before the Act.” Similar reservations or exceptions from the operation of the Acts of the right to sell at fairs were contained in all the licensing Acts to 1 Will. 4, c. 64, under sect. 7 of which, and also under sect. 17 of 4 & 5 Will. 4, c. 85, resp. would be liable, were it not for sect. 29 of the 1 Will. 4, c. 64 reserving the right as heretofore. But the right was now abolished by sect. 12 of 25 & 26 Vict. c. 22, which in terms expressly repeals “so much of any Act as permits the sale of beer at fairs or races without an excise licence.” It is all one whether the previous Acts “permitted” the sale or created an exception to the prohibition of it. The word “permit” includes everything, and nobody (whether heretofore privileged or not) can now sell beer anywhere without a licence.

Powell, Q. C. (with *Gilmore Evans*) for resp.—Everybody originally might brew and sell beer at pleasure. The right in question did not depend on and was not affected by any statute. It had existed since the grant of Edw. I. to the present day, notwithstanding the numberless Acts of Parliament which had been passed relating to the sale of beer and to excise licence. The case finds that mops and fairs had been held for sixty years and upwards, at which beer was sold without a licence. The exception in the 6 Edw. 6 was not a *permission*, because, originally, everybody might sell beer. Subsequently, for revenue and police purposes, alehouses and beerhouses were licensed, but all the Acts relating to licences, from 6 Edw. 6 downwards, contained exceptions in favour of the right to sell at fairs, &c., “as such persons had previously been accustomed to do.” But these were not *permissive* exceptions, for they left the *status* of the excepted persons untouched. All having originally the right to sell, and the statutes prohibiting ninety from selling, but leaving the other ten as they were, the latter continued to sell under their original right, and not by *permission* of the statutes, the effect of the Acts being not to “*permit*” the excepted persons to sell, but to *prohibit* all others from doing so. [Pigott, B. refers to Webster’s Dictionary for the meaning of the word “*permit*.”] The exceptions in the various Acts saved the sellers from the penalties; but no Act that had passed, since the original grant, had in any way affected the right to

sell, and such an ancient right could not on a forced construction of the word “*permit*” be taken away except by clear and positive enactment. He cited

*The Mayor of Leicester v. Burgess*, 5 B. & Ad. 246;  
*Rez v. Pugh*, 1 Doug. 188;  
*Reg. v. Archdall*, 8 A. & E. 281.

Locke, Q. C. was not called on to reply.

POLLOCK, C. B.—There can be no doubt that the construction of Acts of Parliament, and especially of repealing Acts, ought to be strictly confined to the language of the Act, which it is for the court to construe, and to gather therefrom the intention of the Legislature, and to see whether what was intended can be reasonably collected from the words of the statute, notwithstanding any apparent defect or discrepancy in the language used. No doubt, where an Act of Parliament is passed which is to bring about a particular result, we are bound by our office to give that construction to it which we believe to be the true construction, that is, what was meant by the Legislature; and I think we can arrive at that in the present case without much difficulty. There is no doubt that *prima facie* the permission to sell beer, is not, grammatically speaking, the same thing as the prevention of a prohibition from applying to a person selling. All these persons have continued to sell beer by reason of the original power to sell, which has never, strictly speaking, been taken away. I cannot accede to the view of the Act of Parliament (the 1 Will. 4, c. 64) suggested by Mr. Locke in his argument, that the power was taken away by one clause (sect. 7), and given again by another (sect. 29). The Act must be taken and read as a whole altogether. With regard to the 12th section of the 25 & 26 Vict. c. 22, I think the Legislature, in saying, “so much of any Act which *permits* the sale of beer, &c., without a licence, shall be repealed,” may well have meant also “or which creates an exception to the prohibition of the sale of beer,” for we find that no other meaning can be attributed to the language of the section than an intention to prohibit under all circumstances the sale of beer without a licence. As my brothers Martin and Pigott have both observed, in the course of the argument, that is a sensible and reasonable meaning of the words used. We ought not to make it a question of weighing syllables, or to prevent the natural meaning of the words having that construction which any sensible and reasonable person would say the Legislature really meant; we are not to prevent the reasonable operation of the words used because of some fancied grammatical difficulty. We are to take what is the broad meaning of the Legislature; and I agree with the rest of the court, that there can be no doubt the Legislature meant this because they could not have meant anything else. For these reasons it appears to me that the appeal in this case should be allowed, and the decision of the magistrates, dismissing the information, reversed, and that the conditional conviction which they pronounced should be affirmed.

MARTIN, B.—I am very clearly of the same opinion. The real question is, what is the meaning of the 12th section of the 25 & 26 Vict. c. 22? and I agree with Mr. Powell that it is an imperfection of language, perhaps, to say the question is, what the Legislature meant. The real question is, what is the meaning of the Legislature to be collected from the words they have used? It is not what we may suppose passed in their minds, or what they meant to have said; but what is the real meaning, to the best of our judgment, of the words they have used? Now the origin of these excise licences with respect to the sale of beer, is the Act of 1 Will. 4, c. 64, and that Act enacts that all persons may procure licences to sell

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beer, and it states that any one may apply for and obtain an excise licence for that purpose. An excise licence is a thing created by a modern Act of Parliament (1890), and it is not a thing that can be referred to the common law or to any permission given by the common law, but it is a modern parliamentary excise licence. Now the 7th section of that Act enacts "that if any person not being duly licensed to sell beer as the keeper of a common inn, alehouse, or victualling house, shall sell any beer by retail without having an excise retail licence," he shall forfeit a certain sum. That is a general enactment—if any person shall do so and so. And if the statute were that no person could sell beer without having got that excise licence, I apprehend it would clearly cover any person who lived in a borough where there was some peculiar privilege or custom. The Act, having created the power to sell beer which did not exist before, would have subjected everybody to pay for a retail licence for the purpose of contributing to the revenue of the State. But I collect, and it is clear from the Act of Parliament, that it had long been the practice for persons at fairs to open booths, and there to sell beer without a licence; and if they sold beer at fairs, like any other commodity, it was not thought fit to interfere with them. Accordingly the last-mentioned Act (1 Will. 4, c. 64), in the 29th section enacts, "that nothing in this Act contained shall extend to prohibit any person from selling beer in booths or other places at the time and within the limits of the ground or place in or upon which is holden any fair, in like manner as such person was accustomed to do before the passing of this Act." I have very little doubt that it was by virtue of such exemptions as have been referred to in the Act of 6 Edw. 6 and all the other Acts. Now would there be any difficulty, supposing any one wished to explain what was the true effect of that 29th section? Would it not be a proper explanation of it to say that, by virtue of that section, persons are at liberty and are permitted to sell beer in booths at a fair? Would not that be the mode in which any person, desirous to explain this Act of Parliament (which it is the duty of the court and of the judges to do) would explain it? What would be meant by saying that by one section of the Act, which is general, all persons are required to take out a licence to sell beer, but by a subsequent section the Act is not to prohibit persons from selling beer on a fair or race-ground? Surely it would be a correct and as reasonable an explanation of the Act as could well be given to say that, by its operation, persons are permitted to do so. And then comes the 12th section of the 25 & 26 Vict., that "so much of any Act as permits the sale of beer, spirits, or wine, at fairs or races, without a licence shall be and the same is hereby repealed." Mr. Powell was unable to point out anything to which that could by possibility apply except to a case like the present; but then, he says, that section does not apply to this case, because, he says, the word "permit" is not, critically speaking, the proper word to have been used; but he leaves us there without pointing out anything to which it can apply. It seems to me that the exemption he claims is one which ought not to be permitted to exist, and that we ought to give our judgment on what we really believe to be the meaning of the Legislature, and their intention as expressed in words by them in this Act, which no doubt does state what was the purpose, and there is no doubt that it effects the purpose intended.

BRAMWELL, B.—I am of the same opinion. I confess I cannot agree with Mr. Powell in the critical objection which he has taken to the word used in the statute. I doubt whether it is not verbally accurate. The words of the statute are, "So much

of any Act as permits the sale of beer, spirits, or wine at fairs or races, without an excise licence." Surely it is a correct expression to say, that those sections of the Act do permit it without a licence, because they continue the permission that the common law gives to everybody everywhere, and at those places without a licence. No human being can doubt what the meaning of the thing is, because some meaning must be attributed to it, and the only possible meaning that can be given is that contended for by the Crown. It must be admitted that, if any secondary interpretation is put upon the word "permit," which I do not believe there was, it is but a very little way removed from the primary interpretation. I cannot help thinking that the case is a very plain one. It has been said that the word "allow" might have been used. Suppose it had been, would that have been applicable? I think it would, and yet I cannot see the difference between it and the word "permit."

PIGOTT, B. had gone to chambers before the judgment was given.

*Judgment for the Crown.*

Attorney for app., *The Solicitor of Inland Revenue.*  
Attorneys for resp., *Rogerson and Ford*, 31, Lincoln's-inn-fields, agents for *P. and C. Cooke*, Gloucester.

### EXCHEQUER CHAMBER.

Reported by JOHN THOMPSON and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

ERROR FROM THE QUEEN'S BENCH.

*Wednesday, Feb. 3, 1864.*

(Before ERLE, C.J., WILLIAMS and WILLES, JJ.,  
and CHANNELL, B.)

GRIFFIN v. DEIGHTON AND ANOTHER.

*Church—Right of incumbent to access to all parts of the church—Lay rector—Chancel.*

*The possession of the parish church is in the incumbent and churchwardens, who have a right of access to every part of it. Where, therefore, there was a door leading from without into the chancel upon which the lay rector had placed a lock which he kept locked except during divine service:*

*Held, that the incumbent (the vicar) had a right of access to the chancel through the door at all times.*

This was a writ of error from the Q. B. (see 8 L. T. Rep. N. S. 500), where the facts are fully stated. *Bridge* (Lush, Q.C. with him) appeared for the plt. *Manisty*, Q.C. appeared for the deft.

The following cases were cited:

*Clifford v. Wicks*, 1 B. & Ald. 498;  
*Burton's Comp.* 466;  
*Jones v. Ellis*, 2 Y. & Jer. 265;  
*Godbolt's Rep.* 200;  
*Spooner v. Brewster*, 3 Bing. 136;  
*Jarrett v. Steele*, 3 Phil. 170;  
*Lee v. Matthews*, 3 Hagg. 173;  
*Rich v. Bushnell*, 4 Hagg. 164;  
*Gibson's Codex*, 224;  
*Morgan v. Curtis*, 3 M. & Sel.

ERLE, C. J.—This was an action of trespass by the lay rector against the vicar for taking off a lock of a door leading into the chancel, and the substance of the plea is, that the vicar claimed a right to go through all parts of the church and through all the doors, and that the lay rector put a lock upon the door leading into the chancel to prevent him from doing so, and that he took it off to secure his ingress and egress, and this defence on the part of the vicar was held to be a good defence, and I am of opinion that the judgment of the court below should be affirmed. I do not mean to go into the question of

the rights of the lay rector to the freehold, for no such right as that appears to be in question in the consideration of the case before us, which involves a claim of right on the part of the incumbent who has duties to perform in the church, and I do not think that I can express the right better than in the words of Sir John Nicholl, in his judgment in *Jarrett v. Steele*, 3 Phil. 167, where he says, "all persons ought to understand that the sacred edifice of the church is under the protection of the ecclesiastical laws as they are administered in this country; that the possession of the church is in the minister and churchwardens, and that no person has a right to enter it when it is not open for divine service, except with their permission and under their authority." I feel that is a perfectly sound interpretation of the law. The words in this plea are not to be torn from their natural meaning, which clearly say that the churchwardens and vicar claim possession of the entire church. It is not necessary to say what are the rights of the lay rector in the church, for my judgment proceeds upon the principle laid down by Sir John Nicholl. It seems to me to be peculiarly necessary that the vicar should have access to the church from any part, and more particularly to the chancel, where at times he has special duties to perform.

WILLIAMS and WILLES, JJ., and CHANNELL, B. concurred. Judgment of the court below affirmed.

#### APPEAL FROM THE COMMON BENCH.

Nov. 30, 1863, and Feb. 4, 1864.

SHEPARD AND ANOTHER v. PAYNE AND ANOTHER.

*Fees payable by churchwardens to registrars of archidiaconal court for visitations.—Presumption of immemorial usage—Variation in amount of fees.*

From 1727 to 1801 visitation fees of the unvarying amount of 7s. 6d. for the Easter visitation, and 4s. 6d. for the Michaelmas visitation, were received by the registrars of an archidiaconal court from the churchwardens of a parish within the archdeaconry. From 1801 to 1857 fees of a varying amount, but always slightly in excess of 7s. 6d. and 4s. 6d., were received. A dispute having arisen in 1857 as to the fees payable to the registrars, and an action having been brought by the registrars to recover fees of 7s. 6d. and 4s. 6d. for the Easter and Michaelmas visitations in 1857 and subsequent years:

*Held*, that the uniform receipt for seventy-one years of the amounts of 7s. 6d. and 4s. 6d. was overwhelming evidence that the excess subsequently claimed was an usurpation on the part of the registrars, but that such modern usurpation did not affect their title to the original fees of 7s. 6d. and 4s. 6d., which had been received for 180 years, and that in favour of vested interests a legal origin of the right to those fees would be presumed unless the contrary were proved.

This was an appeal from a decision of the Court of C. B., affirming the right of the resps. the registrars of the Archdeaconry Court of Colchester to recover certain visitation fees from the apps. the churchwardens of the parish of Little Totham, within the archdeaconry. The special case stated for the opinion of the court, and the judgment of the court, will be found in 6 L. T. Rep. N. S. 716.

*Mellish, Q.C.* (A. Wills with him) for the apps.—The two main propositions of law which the apps. maintain are, first, that there cannot be a payment due by immemorial custom, varying from time to time in amount; secondly, that it is unreasonable that the fees of a court should vary from time to time, at the discretion of an officer of the court, and that if they are changed at all it must by direction

of the court. The Court of C. P. admitted that no fee could be claimed here in respect of a *quantum meruit* for services rendered by the registrars, and that the claim could be supported, if at all, only on the ground of there being an immemorial custom that the disputed fees should be paid. The ancient fee for presentment was only 4d., and a reference to canons 116, 185, 136, which may be used as evidence, shows that 4d. was the fee legally payable. There are three proofs that 4d. is the fee legally payable: first, the entries in the old visitation books that 4d. was paid; secondly, the canons of 1603, especially canon 116; thirdly, Archbishop Whitgift's table of fees. As a conclusion of fact the court must be of opinion that the fees have been raised by no authority but that of the registrar. The fees have varied considerably in successive years, and it cannot be assumed that the bishop and archdeacon, in direct opposition to canon 116, consented to an increase of the fee. No table of fees was ever hung up as required by canon 136. If the increase from 4d. to 7s. 6d. was legal, the increase to 12s. was equally legal. It is said that the canons are binding on the clergy but not on the laity; but it is by no means clear that they are not binding on the officers of the Ecclesiastical Court in a matter relating to their fees:

1 Stephen's Laws of the Clergy, 227;

Matthews v. Burdett, 2 Salk. 673;

Moore v. Moore, Cas. Ch., temp. Lord Hardwick, 158.

It cannot be that a fee should be liable to be raised at the discretion of the registrar, subject only to the limitation that a jury should not think the total amount unreasonable, unless the court are prepared to hold that there could be a custom valid in law that the fee should be so raised. The question must be decided on principle, as there is no authority directly in point. Cases somewhat analogous are to be met with in 2 Inst. 533, *de tallagio concedendo*, and 4 Inst. 274. With respect to the power of a court to fix the amount of fees payable to its officers, the consent of the court will not make the fee binding upon the public, though it will bind its own officers and prevent them from charging a higher fee. The following authorities prove that either a fee must be fixed by custom, or that if fixed by the court it is not binding upon the public until a jury have decided that it is a reasonable fee:

Veale v. Priour, Hardr. 351;

Viner's Abr. tit. "Fees;"

Goslin v. Ellison, 1 Salk. 330;

Burdeux v. Lankester, Ib. 332;

Ballard v. Gerard, Ib. 333;

Johnson v. Lee, 5 Mod. 238;

Spry v. Gallop, 16 M. & W. 716.

Custom, though it may not fix the amount of fee, gives a standard from which it may be calculated. Canon 119 shows that the preparation of presentment papers was not a duty for which the registrar received ancient fees. [MELLOR, J.—By canon 116 no fee is to be paid for voluntary presentments.] In addition to the above objections, there is the minor point, that the fee was demanded by the registrars in cases where they had not performed the work in respect of which their fee was payable.

*Coleridge* (Hannen with him) for the resps.—The argument for the resps. is founded upon the following propositions. 1. That the court of the archdeacon is an ancient recognised court, with ancient recognised officers. 2. That the officers are entitled to certain fees, for which, if withheld, an action lies. 3. That an action lies for fees which are either ancient and customary, or settled by a proper authority as reasonable. 4. That the fees in this case come within each of these descriptions. 5. That the

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canons cited are not applicable to the fees in dispute. These propositions are deduced from

4 Inst. 339;

Com. Dig. tit. "Courts," N. 9;

Ib. "Ecclesiastical Persons," C. 5;

2 Rolle Abr. tit. "Prohibition," pl. 36, p. 285;

*Chiverton v. Trudgeon*, 2 Rolle Rep. 150;

Canon, 123;

*Ballard v. Gerard*, 1 Ld. Raym. 703, and 12 Mod.

608, where the judgment of Lord Holt, C.J. is given at greater length;

Bac. Abr. tit. "Offices," 10.

To validate an ecclesiastical custom, the space of time required is less than that required at common law, and for the purpose of establishing a civil right accruing to a layman according to an ecclesiastical custom, the ecclesiastical time required should be regarded. [BLACKBURN, J.—If the right to this fee depends on an ecclesiastical custom, it would seem that you ought to have sued in the Ecclesiastical Court.] The action will not lie in the Ecclesiastical Courts. The courts of common law have interfered by prohibition where officers have sued for their costs in their own courts. [BLACKBURN, J.—Those cases may be accounted for by saying that fees can only be claimed by common law right, which must be a right derived from time immemorial or custom. Com. Dig. "Prohibition" F. 12, is an authority against you. CHANNELL, B.—Can it be that in a temporal court the officer may bind another person by evidence of a custom existing during forty years only, because such evidence would have bound civil individuals in an ecclesiastical court?] There is, however, in this case evidence of payments having been made from time immemorial, as much evidence as would be considered sufficient to go to a jury in any other case. As to the reasonableness of the fees, see *Thomasina*, part 3; *Disc. circa Benefic.* c. 81, s. 1. [By the Court.—There is sufficient evidence of beneficial service rendered by the registrars, and if the Court of C. P. have decided that the fees are reasonable, this court will not overrule that decision.] The canons cannot affect any right possessed by a layman before they were enacted: (*Middleton v. Croft*, 2 Atk. 650; 1 Str. 1056.) The canons cited respecting the fee of 4d. only apply to voluntary presentments for criminal and other matters: (*Archdeacon Hale's Pr. in Cr. Causes*, 53.) This appears from the original Latin, see canons 26, 53, 76, 90, 116, which last canon is obviously mistranslated in the English version. The fees in Archbishop Whitgift's table apply to fees payable under this canon. Canons 117 and 119 must be construed by the light of the previous canons. The "Booke of Articles" referred to is a book of precedents of declarations. Contemporaneously with Whitgift's table, existed sets of questions sent out by the bishops (collected in *Cardwell's Doct. Annals*), containing the same inquiries as are now made by the books of articles; yet they are not mentioned by Whitgift, which proves that his table was drawn up for a different subject-matter from the present.

*Mellish*, Q. C. in reply.—In former times the non-repair of the church was an ecclesiastical offence, and came within the canons cited, even according to the application given to them by the resps. The English translation is a contemporaneous exposition of the meaning of the Latin version, even if not of equal authority with the latter.

*Cur. adv. vult.*

*Feb. 4.*—BLACKBURN, J.—In the case of *Shepard v. Payne*, which was argued before my Lord Chief Baron, my brothers Bramwell, Channell, Mellor and myself, I will proceed to deliver the judgment of the court, with the exception of my brother Bramwell, on whose behalf I will add a few words. This was an appeal from the decision of the Court of C. B. in

a case in which power was given to draw inferences of fact. The appeal was argued after last Michaelmas Term, before the Lord Chief Baron, my brothers Bramwell, Channell, Mellor, and myself. We are of opinion that the judgment of the court below ought to be affirmed. By the C. L. P. A. 1854, sect. 32, the court of error is required to draw any inferences of fact from the facts stated in the case, which the court where it was originally decided ought to have drawn. The inferences which the court below have drawn are stated in their judgment, delivered by my brother Willea. We agree in them all, but they appear to have thought it unnecessary to say whether the proper inference to be drawn from the facts was, that fees of the fixed amount of 7s. 6d. and 4s. 6d. were immemorial inasmuch as the fees need not be of a fixed and ascertained, but may be of a reasonable amount, and they drew the inference of fact that these amounts were reasonable. Mr. Mellish, in the argument, suggested that this meant that in point of law there might be an ancient fee varying in pecuniary amount from time to time with the changes in the value of money and other circumstances, and subject only to the restriction that it should be reasonable, and he questioned the accuracy of this position. Without expressing, or indeed forming, any opinion upon this question, we prefer to rest our judgment, affirming that of the court below, on this, that in our opinion the facts stated in the case are such that it should be presumed that the fees of 7s. 6d. and 4s. 6d. were immemorial fees attached to the office of registrar, if that presumption is necessary to give them validity. The facts stated in the case show that from 1727 to 1801 visitation fees of the unvarying amounts of 7s. 6d. and 4s. 6d. were uniformly received; from 1801 to 1857, when the present dispute originated, fees of a varying amount, but always slightly in excess of 7s. 6d. and 4s. 6d. were received. The amount in excess of 7s. 6d., and 4s. 6d. is not now claimed, and if it were, the uniform receipt for seventy-one years (from 1727 to 1801) of the amounts of 7s. 6d. and 4s. 6d. would be overwhelming evidence that the excess was an usurpation. But the modern usurpation of an excess does not affect the title to the original fees of 7s. 6d. and 4s. 6d. These have been received from 1801 to 1857 as much as from 1727 to 1801, so that the title to them depends upon an unbroken perception as of right for 130 years. That does not in itself give any title; but in favour of vested interests, and for the quieting of titles, the rule of evidence has been established, that where there has been long continued modern user of a right capable of a legal origin, the existence of that legal origin should be presumed unless the contrary be proved. This presumption is not one *juris et de jure*, which cannot be rebutted, but neither is it one purely of fact, and only to be drawn when the jury really entertain the opinion that in fact the legal origin existed. The true rule seems to be laid down by Lord Wensleydale (then Parke, B.) in *Jenkins v. Harvey*, 1 Cr. M. & R. 877, where he says that the correct mode to direct a jury is to tell them, that from uninterrupted modern usage they should find the immemorial existence of the payment (if that be necessary for its validity) unless some evidence is given to the contrary, or, as he says, in delivering the written judgment of the court on the second trial of the case (2 Cr. M. & R. 407), "From proof that an office existed in 1752 the jury may and ought to presume it to be prescriptive, if that be necessary to make it valid, unless the contrary be proved." The claim in that case was by the corporation of Truro for a metage due of 4d. per chaldron for coals in that port and it was supported. I mention this as showing what is meant by the latter part of the sentence

quoted. I suppose neither the Barons of the Exchequer nor the jurors as antiquarians believed that 4d. a chaldron was actually paid before Richard I. returned from the Holy Land, but the modern user was enough to cast upon the other side the onus of proving that it was an usurpation. We think that in the present case the modern usage for 180 years, to take fees of 7s. 6d. and 4s. 6d., raised a strong presumption that visitatorial fees of that amount were immemorial, and though the other facts stated in the case are such as to raise an inference that the amount had formerly been varying, and lower in amount, we do not think they are sufficient to satisfy the onus cast upon those who seek to upset an enjoyment for so long a time by showing the origin to be an usurpation. We think, therefore, that if it be necessary for the validity of those fees, that fees of that amount should be immemorial, that presumption ought to be made. In every other respect we agree with the reasons given in the judgment of the court below, which we think ought to be affirmed. My brother Bramwell asked me to add this, "I do not presume to differ from this opinion, but being satisfied with the reasons given by my brother Willes in the court below, I think it right to say that, for those reasons, I concur in affirming the judgment."

*Judgment affirmed.*

Attorneys for apps., *Digby and Son.*

Attorneys for resps., *Aldridge and Bromley.*

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

*Saturday, April 23, 1864.*

(Before ERLE, C.J., POLLOCK, C.B., MARTIN, B., BLACKBURN and MELLOR, JJ.)

REG. v. SAMUEL PORTER.

*Lunatic—Ill-treatment of—Neglect by brother having care of—16 & 17 Vict. c. 96, s. 9.*

*A brother who abuses, ill-treats, or wilfully neglects his lunatic brother, of whom he has the care or charge, is liable to punishment under the 16 & 17 Vict. c. 96, s. 9.*

Case reserved for the opinion of this Court by Martin, B.

The prisoner was convicted at the last Cornwall Assizes, upon the following counts of the indictment which are framed upon the latter part of the 9th section of the statute 16 & 17 Vict. c. 96.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and before and at the time of the committing of the offence next hereinafter mentioned, the said Robert Porter was a lunatic within the meaning of the statute in such case made and provided. And that the said Samuel Porter before and at the time of the committing of the offence had the care and charge of the said Robert Porter. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said S. Porter, having the care and charge of the said R. Porter as last aforesaid, unlawfully did wilfully neglect the said R. Porter so being such lunatic as aforesaid, against the form of the statute, &c.

Fourth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and before and at the time of the committing of the offence next hereinafter mentioned, the said R. Porter was a lunatic within the meaning of the statute in such case made and provided, as the said S. Porter well knew. And that the said S. Porter before and at the time of the committing of the said offence had the care and charge of the said R. Porter. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said S. Porter, so having the care and charge of the said R. Porter as last

aforesaid, unlawfully did wilfully neglect the said R. Porter so being such lunatic as aforesaid, as the said S. Porter well knew, against the form of the statute, &c.

Sixth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and before and at the time of the committing of the offence next hereinafter mentioned, the said R. Porter was alleged to be a lunatic within the meaning of the statute in such case made and provided. And that the said S. Porter before and at the time of the committing of the said offence had the care and charge of the said R. Porter. And the jurors aforesaid, upon their oath aforesaid, do further present that the said S. Porter so having the care and charge of the said R. Porter as last aforesaid, unlawfully did wilfully neglect the said R. Porter so being such alleged lunatic as aforesaid, against the form of the statute, &c.

The evidence was, that the lunatic became so upwards of twenty-five years ago. At first the care and charge of him was taken by his father and mother. They have been dead many years, and upon the death of the survivor a sister took charge of him. She went to America upwards of eleven years ago, and since this the prisoner, who is his brother, took upon himself and has had the sole and exclusive care and charge of him, and continued to have it until December last, when the lunatic was removed to the county asylum.

A sum of 6s. or 7s. a-week was received and taken by the prisoner under some family arrangement of the rents of some houses, which apparently were the property of the lunatic, in respect of such care and charge.

The lunatic was kept in a room adjoining the prisoner's house, and was attended to and supplied with food exclusively by the prisoner, or, in his absence, by his wife. He was entirely deprived of reason, and in body was perfectly helpless and unable to move.

At the close of the evidence for the Crown, it was objected by the counsel for the prisoner, that the case was not within the above-mentioned section, inasmuch as the care and charge was by a brother of a brother in the private house of the former, and *Reg. v. Rundle*, 6 Cox C. C. 549, was cited.

I request the opinion of the court as follows:

First, whether, if a brother voluntarily takes upon himself, under such circumstances as above mentioned, the care and charge of a lunatic brother, and keeps him in his private house, and abuses or ill-treats, or wilfully neglects him, it is a misdemeanor within the 9th section of the 16 & 17 Vict. c. 96?

If the answer be in the negative, then

Secondly, whether, assuming that the wilful neglect of the lunatic be an indictable offence at common law, can the prisoner be lawfully convicted of it under the above counts; and if so, then, whether such wilful neglect is an indictable offence at common law?

SAMUEL MARTIN.

*H. T. Cole* for the prisoner.—The conviction cannot be sustained. The prisoner was found guilty of neglect *simpliciter*. The provisions in the Lunacy Acts providing against the abuse and ill-treatment and neglect of lunatics apply only to persons attending on them when in licensed houses or registered asylums, and not to cases like the present. The 8 & 9 Vict. c. 100, s. 56, is expressly limited to such persons. The 16 & 17 Vict. c. 96 was passed to amend that Act, and seems to have had in view only houses licensed for the reception of lunatic patients and registered hospitals or asylums. Sect. 9, on which the counts of the indictment now in question were framed, is as follows:

If any superintendent, officer, nurse, attendant, servant, or



other person employed in any registered hospital or licensed house, or any person having the care or charge of any single patient, or any attendant of any single patient, in any way abuse, ill-treat, or wilfully neglect any patient in such hospital or house, or such single patient; or if any person detaining, or having the care or charge, or concerned or taking part in the custody, care, or treatment of any lunatic, or other person alleged to be a lunatic, in any way abuse, ill-treat, or wilfully neglect such lunatic or alleged lunatic, he shall be guilty of a misdemeanor, and shall be subject to indictment for every such offence, or to forfeit for any such offence, on a summary conviction thereof before two justices, any sum not exceeding 20*l*.

The words "any person having the care or charge of any single patient" seem to refer to a different case from that of a brother or other blood relation taking upon himself the care of a lunatic relative. [MELLOR, J.—The title of the Act is simply for the regulation of the care and treatment of lunatics, without any limitation. POLLOCK, C.B.—The fact of the prisoner being the lunatic's brother has nothing to do with the construction of the statute.] The statute only contemplates the case of a person having the charge of a single patient for gain and emolument under a money contract. [ERLE, C. J.—By the 8 & 9 Vict. c. 100, s. 44, a licence was not required for the reception of a single lunatic into a house, but only where two or more were received. And sect. 90 places persons who receive for profit "any one patient" under certain obligations, from which persons who derive no profit are exempt. But then, if a person takes charge of a lunatic person for no money, why is he exempt from the penalties of the 16 & 17 Vict. c. 96, s. 9, in case he in any way abuses, ill-treats, or wilfully neglects such lunatic?] The patient Robert Porter has never been found lunatic. [BLACKBURN, J.—If the prisoner shut him up and did not allow him to be seen, and treated him as a lunatic, as against him the patient must be regarded as an alleged lunatic.] In *Rex v. Smith*, 2 Car. & P. 449, it was held that one who had an idiot brother as an inmate in his house, and omitted to supply him with proper food, &c., was not indictable at common law for such neglect. And in *Reg. v. Rundle*, 6 Cox C. C. 549, it was held that a husband who ill-treats his lunatic wife was not subject to the penalties of 16 & 17 Vict. c. 96, s. 9.

*M. Smith*, Q. C. and *Stock*, for the prosecution, were not called upon.

POLLOCK, C. B.—This conviction must be affirmed. We are all of opinion that this case is not governed by *Reg. v. Rundle*, which was entirely a different case. The present case falls within the words of the 16 & 17 Vict. c. 96, s. 9, for the prisoner was a person having the care of a lunatic patient and had wilfully neglected him. This case being within the words of the section and not within any of the cases which have created exceptions to it, the conviction ought to be sustained.

ERLE, C. J. had left the court, but had intimated that he was of opinion that the conviction ought to be affirmed.

MARTIN, B.—I am of the same opinion. Mr. Cole has failed to answer the question I put to him, "if the section does not apply to this case, to what does it apply?" He said it does not apply to the case of blood relations. Now, as I read sect. 9, the Legislature has provided for three cases: 1. the case of attendants and others employed in registered hospitals and licensed houses; 2. the case of any skilled person having charge of a single patient; and 3. the case of any one who takes on himself to attend or take charge of any single patient. And if any one in such last class abuses, ill-treats, or wilfully neglects the lunatic, he is liable to the penalties created by the section. The prisoner is

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clearly within the third class. This is a very salutary enactment.

BLACKBURN and MELLOR JJ. concurred.

*Conviction affirmed.*

Saturday, April 23, 1864.

(Before ERLE, C.J., POLLOCK, C.B., MARTIN, B., BLACKBURN and MELLOR, JJ.)

REG. v. GEORGE FULLFORD AND FREDERICK GEO. FULLFORD.

*Misdemeanor—Local Government Act—Indictment for bringing forward a house in a street without consent of local board—Street—24 & 25 Vict. c. 61, s. 28.*

*Whether a house or building forms part of a street within the meaning of the 24 & 25 Vict. c. 61, s. 28 (Local Government Act Amendment Act) is a question of fact for a jury.*

*Seem, that the word "street" in the above section applies only to a row of houses in some degree continuous and proximate, having an apparent continuous line, and not to a set of detached houses at irregular distances and not in a continuous line.*

Case reserved for the opinion of this court by Erle, C.J.

At the Assizes and general gaol delivery holden at Winchester in and for the county of Southampton, in July last, George Fullford and Frederick George Fullford were tried before me on an indictment framed on the 28th section of the 24 & 25 Vict. c. 61.

The indictment charged that they, after the passing of the Local Government Act (1858) Amendment Act 1861, at the parish of Fareham in the said county, and within the district of a certain local board of health there, to wit, the local board of health for the district of Fareham, in the county aforesaid, unlawfully and injuriously did bring forward a certain house there situate and being in the occupation of the said G. Fullford, and then forming part of a certain street there, to wit, West-street, and numbered 17 in the said street, beyond the front wall of the house and building on either side of the said house of the said G. Fullford, to wit, fifteen feet beyond the front wall of the house and building on the west side of the said house of the said G. Fullford, and four feet beyond the front part of the house and building on the east side of the said house of the said G. Fullford, without the previous consent of the said local board of health.

Other counts charged the defts., in like manner, with bringing forward a certain building forming part of West-street, and numbered 17, and with building an addition to a house and to a building forming part of West-street and numbered 17, beyond the front of the house and building on either side thereof, without such consent.

The facts of the case were as follows:—

By an Order in Council, dated 5th Sept. 1849, and published in the *London Gazette* of Sept. 18, 1849, the Public Health Act (sects. 50 and 96 excepted) was ordered to be applied to "the entire area, places and parts of places comprised within the boundaries at present fixed as the boundaries of the parish of Fareham," and such area, places and parts of places were constituted a district for the purposes of the said Act.

The defts. are father and son. The former, a builder, purchased, some years ago, a piece of land situate on the north side of the West-street of the town of Fareham, on which he erected a dwelling-house, in which he has since resided with his family; and what is now called the West-street is a public highway, and forms a portion of a turnpike-road



originally made under the provisions of a local Act, 50 Geo. 3, c. 14, but is now maintained and regulated by a subsequent local Act of 1 Will. 4, c. 61, both of which Acts are declared to be public Acts.

The said house was so erected as to leave an intervening space between it and the public highway of the said street, such intervening space being used as an ornamental garden in front of the said house, and being about sixteen feet deep on the east side, and twelve feet deep on the west side of the said house, and being separated from the highway of the said street by a dwarf wall and iron palisades, outside which is a footway and then a carriage road, which together form the highway of the street aforesaid.

The said house of the deft. G. Fullford, at the time alleged in the indictment, had a house on either side of it; that on the east side being in course of erection, and extending several feet beyond the house of the said G. Fullford, and each of which last-mentioned houses also had an intervening space or garden between it and the highway of the street aforesaid.

It was agreed by the counsel on both sides that the plan produced at the trial on the part of the prosecution, and the model furnished on the part of the defts. might be referred to for the purpose of more particularly delineating the relative position of the said before-mentioned houses and public highway.

In the month of Oct. 1862 the defts. proposed to erect an addition to and in front of the said house to be used as a shop; and on the 31st Oct. 1862 the deft. Fredk. G. Fullford delivered to Thomas Buckham, the surveyor to the Fareham local board of health, a plan of the proposed work, and also an application in writing to the local board of health, in order that he might lay it before the said local board.

The following is a copy of such application :

Meadow-house, Fareham, Oct. 31.  
Gentlemen,—I have this day forwarded to your surveyor Mr. Buckham the plan and specification of a shop which I propose building in the West-street, Fareham. I also beg to inform you that the work was commenced previous to the publication of the notice which you have recently issued, but is now stopped until the decision of the board is made known as to the distance the building is to be erected from the street.  
(Signed) F. G. FULLFORD.

The following is the notice so referred to which had been previously printed and issued by the said Local Board of Health :

#### Notice.

Whereas by the Local Government Act (1858) Amendment Act 1861, sect. 28, it is enacted as follows:

It shall not be lawful, at any time or times hereafter, within the district of our local board of health, to bring forward any house or building, forming part of any street, or any part thereof, beyond the front wall of the house or building on either side thereof, nor to build any addition thereto beyond the front of such house or building, on either side of the same as aforesaid, without the previous consent of such local board.

Now we, the Local Board of Health for the district of Fareham, in the county of Southampton, do hereby give you notice, that any person offending against the above-named provisions of the said Act will be proceeded against as the law directs.

Fareham, 18th Oct. 1862.

By order of the Local Board,  
ALFRED DRIVER, Clerk.

The said plan of the said F. G. Fullford showed that the proposed erection was intended to cover the whole of the intervening space between the house of the said G. Fullford and the said street or highway, except an interval of nine inches immediately against the footway forming part of the said highway, and that it was to extend eight feet beyond the front of the house on the east side thereof nearest to the said highway. But in truth no part of the said erection was built nearer to the said highway than 4ft. 4in.

The said application so made by the said F. G. Fullford was taken into consideration by

the local board of health on the then next following day, and a resolution was come to by the said board, which was communicated to the said defts. by the following letter :

Fareham, 1st Nov. 1862.

Sir,—I am directed by the Fareham Local Board of Health to inform you that the plan of a shop intended to be erected by you in the West-street has been laid before them, and that with regard to the boundary they require you to keep the line of street which will be pointed out to you by the surveyor.—I am, Sir, &c.,  
ALFRED DRIVER, Clerk.

Mr. F. G. Fullford.

On the same day (the 1st Nov.) the said Thomas Buckham, by direction of the said local board, went to the said house of the said G. Fullford, and there saw the two defts. G. Fullford and F. G. Fullford, who were then personally working at the said proposed erection; and the said T. Buckham pointed out on the ground there the exact line within which the said defts. were required by the said local board to keep the said erection; that is to say, the extreme of the front wall (being that of the door-porch) of the house, on the east side of the said proposed erection, and which was many feet beyond the front wall of the house on the west side of the said proposed erection.

The defts. subsequently built the addition to the said house, as shown on the said plan and model, being beyond the line of front so pointed out by the said T. Buckham, and contrary to the aforesaid directions, and against the consent of the said local board of health, and the said shop, which has an internal communication with the said dwelling-house, was opened for business about Christmas 1862, and has since been used and occupied as a grocer's shop, in connection with the said dwelling-house of the said G. Fullford, by the said F. G. Fullford.

Later in the said month of Nov. 1862, notice was given to the defts. by direction of the said local board of health calling upon them to remove so much of the said erection as projected beyond the line prescribed to them by their said surveyor; and the defts. not having done so, on the 27th Jan. following another notice was given to the said defts. by the direction of the said local board that an indictment would be preferred against them at the next Assizes for infringing the provisions of the Local Government Act (1858) Amendment Act 1861, by making the said erection without the consent of the said local board of health, and at the said Spring Assizes for the said county an indictment was accordingly preferred, and a true bill found by the grand jury against the said defts.

The town of Fareham is a market-town, containing, according to the last census, a population of 6000 inhabitants. It lies on the main road between the towns of Portsmouth and Southampton, and is crossed by two turnpike-roads, which constitute the public highways of the four principal streets of the said town, of which West-street is one.

Under the order in council before mentioned a system of drainage and water supply has been introduced into the said town, and the Public Health Act has otherwise been put into full operation therein.

The turnpike-roads before mentioned are repaired by the turnpike trustees; that forming the West-street or highway in question under the before-mentioned Acts of the 50 Geo. 3, c. 14, and 1 Will. 4, c. 61; but the local board of health *de facto* exercise jurisdiction over them so far as requisite for effectuating the general purposes of the Public Health Act, and over all the private property abutting on the said roads as part of the district of the said local board, but the defts. dispute their right so to do.

C. CAR. R.] REG. F. GEORGE FULLFORD AND FREDERICK GEORGE FULLFORD. [C. CAR. R.]

The public sewerage and water pipes are carried under West-street throughout its whole extent, and all the houses in the said street (the defts.' house included) are in connection therewith. The street is also lighted with public gas lamps. The words "West-street" are conspicuously painted on the houses at each end thereof, and the houses in the said street on both sides thereof are numbered. The said street has a raised footway on either side thereof, as shown on the model. The footway on the north side of the said street on which the defts.' house is situate, varies in width from nine to fourteen feet in different parts thereof, and is flagged about one-third of its whole extent, and has a curb-stone for two-thirds of its whole length, but immediately opposite to the defts.' house for some distance on either side, and in some other parts of the street, it has at present neither curb or flag-stone. The said street contains a Market Hall, Trinity Church, two dissenting chapels, an institution hall and charity school. All excepting Trinity Church are nearly a quarter of a mile distant from defts.' premises.

Upon the above facts I directed the jury to find the defts. guilty and they were convicted; and I respited the judgments and admitted the defts. to bail, and reserved for the consideration of this Court the question whether the erection of the said shop and building by the defts. under the circumstances above mentioned comes within the prohibition contained in the 28th section of the statute 24 & 25 Vict. c. 61, upon which the indictment was framed.

WILLIAM ERLE.

The *Solicitor-General* for the defts.—The shop front was built on what was formerly a garden inclosed by a wall, and was about four feet from the footway. The 24 & 25 Vict. c. 61, s. 28, enacts that "it shall not be lawful within the district of any local board to bring forward any house or building forming part of any street, or any part thereof, beyond the front wall of the house or building on either side thereof, nor to build any addition thereto beyond the front of such house or building on either side of the same, as aforesaid, without the previous consent of such local board. First, this was not a street. In the Public Health Act 1848, incorporated with the 24 & 25 Vict. c. 61, a street is defined by sect. 2,—“the word ‘street’ shall apply to and include any highway (not being a turnpike-road), &c.” In this case the road is a turnpike-road, and it was intended to exclude such roads from the jurisdiction of the local boards, and to leave them under the jurisdiction of the turnpike trustees. And that this was intended, is further shown by 21 & 22 Vict. c. 98, s. 41, which empowers local boards to enter into agreements with turnpike trustees as to the repair, &c. of roads and streets within their districts. [ERLE, C. J.—The definition of “street” in the 11 & 12 Vict. c. 63, has relation to sect. 68 of that Act, which vests the property in the streets, &c. in the local boards, and to show that it was not intended to take the property in turnpike-roads out of the turnpike trustees.] In the Towns Improvement Clauses Act (10 & 11 Vict. c. 34), s. 68, the phrase “house or building projecting beyond the regular line of street” is used. This is not a street, because the houses have gardens in front of them, and the houses are not all at an equal distance from the road. What is to regulate the length of the gardens in front of houses so as to form a street? If houses with gardens of 20 feet only are in a street, why not houses with gardens of 100 yards in front of them? Again, the houses on the same side of the way are detached, each standing on its own land. [MELLOR, J.—Some houses like these have ground in front belonging to them, unfenced from the public way, on which the public

can go; others have the ground in front fenced off, and on which the public cannot go. Is the same rule of construction to apply to both? It is clear the clause applies to houses only which do not come close up to the roadway. BLACKBURN, J.—It is difficult to say that Devonshire-house, in Piccadilly, forms part of the street.] This was originally a country road vested in trustees, and now the houses do not adjoin, but are detached at irregular distances. [POLLOCK, C. B.—How could you apply the term “street” to such houses as Lord Wharncliffe’s, in Curzon-street, Mayfair; or Mr. Holford’s, in Park-lane? The projection in front of Sir John Soane’s Museum, Lincoln’s-inn-fields, was maintained, although it was said to be contrary to the provisions of the Metropolitan Building Act.] Independently of the statute, the defts. had a right to build on their own land, as they have done, and the words of the statute should be much more stringent than they are to take away such right.

*Coleridge*, Q.C. for the prosecutors.—I agree that it is only by the cogent words of some statute that a party is to be prevented from dealing with his own property as he pleases. In this case the defts. are prevented from doing so by the 24 & 25 Vict. c. 61, s. 28, which prevents them bringing forward their house or shop beyond the front wall of the house or building on either side thereof. That does not mean the houses or buildings on either side “in a line therewith.” Unless this place is not a street, the defts. have infringed the statute. The real question is, is this a street, or does the defts.’ house form part of a street? [MARTIN, B.—Is this a question of fact or law?] It is a question of law. It is called West-street; but it is conceded the name is not conclusive. It is the ordinary access from the town to the railway-station. This is a highway in a town, and the object of the statute was to compel uniformity of line of buildings in towns. The meaning of the word street, as given in Johnson’s, Webster’s, and Richardson’s dictionaries was quoted.

POLLOCK, C. B.—We are all of opinion that the question whether this was a street or not was a question of fact for the jury, which has not been determined by them, and therefore that this conviction cannot be sustained. I believe that all of us are not agreed as to whether this was a street or not. I and some of my brothers think that it was not. Speaking for myself only, in my opinion, and as far as it is a matter of law on which it is necessary to give a direction to the jury, this set of detached houses, all of which were not in a continuous line, and had not an apparent continuous line, was not a street within the meaning of the Act in question.

ERLE, C. J.—I am of the same opinion. The question is, what is the meaning of the word “street” in sect. 28 of 24 & 25 Vict. c. 61? I think the word “street” was meant to apply only to a row of houses in some degree continuous and proximate to one another, and I ought to have left the question to the jury, telling them that if in their opinion the houses had not that degree of contiguity and proximity that was necessary to constitute a street, they ought to have acquitted the defts.

MARTIN, B.—I am of opinion this was of necessity a question for the jury. In this case I am quite satisfied that this was not a street within the meaning of the Act of Parliament. It was a question of fact for the jury to determine on the best direction that the judge could give to the jury under the circumstances. In this case there is really nothing to guide them to the conclusion that it was a street.

The name is not conclusive, for the old Watling-street in many parts had no houses. The question not having been left to the jury I concur in thinking that the conviction cannot be sustained. I should rather have left the case to the jury, with the intimation that this was not a street.

BLACKBURN, J.—I am of the same opinion. I agree that this was a question of fact, whether, within the meaning of the 24 & 25 Vict. c. 61, s. 28, this house formed part of a street. Whether the houses and buildings on one side of a road are so continuous as to form a continuous road is a question of fact. In the present case I incline to think that they did, but still that was a question for the jury, on which they might have found either way consistently with the evidence.

MELLOR, J.—I am of the same opinion. I agree with my brother Blackburn, that if on the question of whether this was a street having been submitted to the jury they had found either way, I should not have been disposed to disturb the finding. The question really is, whether these houses were so near as to form a continuous row of buildings, and the question was really one for the jury, whether they formed a street or not.

*Conviction quashed.*

(Before POLLOCK, C.B., MARTIN, B., BYLES, BLACKBURN and MELLOR, JJ.)

REG. v. JAMES LEE AND ANOTHER.

*False pretences—Indictment—Particularity—Evidence.*

*The indictment charged that prisoners falsely pretended that two loads of soot which the prisoners then delivered weighed 1 ton 17 cwt., whereas they weighed but 1 ton 13 cwt., by means of which false pretence the prisoners obtained 8s.*

*The evidence was that a contract existed between prosecutor and prisoners for soot, which prosecutor was to buy at the rate of 38s. per ton. Deliveries were made from time to time, and payment was made according to the quantities so pretended to be delivered. The prisoners put broken bricks and slack among the soot in their cart, and went to a public weighing machine, and got the whole weighed and a ticket of such weight given. Afterwards the bricks and slack were removed and the cart with the soot in it taken to the prosecutors and the soot delivered and the tickets presented and payment made by the prosecutor according to the weights specified in the tickets:*

*Held, that the indictment was sufficiently specific in form, and that the prisoners were indictable for obtaining money by false pretences.*

Case reserved for the opinion of this court at the last Nottinghamshire Michaelmas Sessions.

The two prisoners were convicted of obtaining money under false pretences.

The indictment charged in the first count that the prisoners on the 20th Aug. at Oxtou did falsely pretend to one Joseph Burgess Thurman that two loads of soot which the prisoners then delivered to the said J. B. Thurman did together weigh 1 ton and 17 cwt., whereas in fact the said two loads of soot did not weigh together 1 ton and 17 cwt., but only weighed 1 ton 13 cwt., the said prisoners well knowing the said pretence to be false, by means of which false pretence the said prisoners obtained from the said J. B. Thurman 8s. with intent to defraud.

The second count charged, that the prisoners on the 20th Aug. at Oxtou did falsely pretend to one J. B. Thurman that three loads of soot, one of which said loads of soot the prisoners delivered to the said J. B. Thurman on the 17th

Aug., and the remaining two loads of which soot the prisoners delivered to the said J. B. Thurman on the 20th Aug. aforesaid, did together weigh 2 tons 11 cwt. 2 qrs., whereas, in fact, the said three loads of soot did not weigh together 2 tons 11 cwt. 2 qrs., but only weighed 1 ton 9 cwt., the said prisoners well knowing the said pretence to be false, by means of which false pretence the said prisoners obtained from the said J. B. Thurman 2l. 1s. with intent to defraud.

The prosecutor was a farmer. The prisoners were chimney sweepers, of whom the prosecutor had agreed to purchase soot at the rate of 1l. 18s. per ton.

On the 17th Aug. the prisoner Lee delivered to the prosecutor a cart load of soot, and at the same time presented to the prosecutor a ticket of the alleged weight of the soot (14 cwt. 2 qrs.)

The soot was weighed and a ticket obtained at a public weighing machine, seven or eight miles distant from the prosecutor's residence.

Prosecutor paid Lee 1l. 7s. 6d. for that soot, believing there was 14 cwt. 2 qrs., as stated on the ticket.

On the 20th Aug. both prisoners delivered to the prosecutor two loads of soot, and gave to the prosecutor two tickets of the alleged weight of such two loads.

The soot was weighed, and the tickets obtained at the same weighing machine as before; the weight of one load was stated on the ticket to be 17 cwt. 2 qrs., and the weight of the other load was stated on the other ticket to be 1 ton 1 qr., and the prisoner Lee said those were the weights of the two loads.

The prosecutor then paid the prisoners for the two loads of soot according to the weights stated in the two tickets, believing those weights to be correct.

The two loads of soot were then put to the first load of soot bought on the 17th Aug., the prosecutor not then having suspicion of any fraud having been committed, but in a few hours afterwards, in consequence of information received by the prosecutor, the three loads of soot were weighed by him, and the three loads together were found to contain only 1 ton 9 cwt., being 1 ton 2 cwt. 2 qrs. less than the weight represented by the prisoners to be contained in the three loads, and 8 cwt. less than the weight represented to be contained in the two loads last delivered.

The price of 1 ton 9 cwt. would have been only 2l. 17s. The price of the three loads, at the weight pretended by the prisoners, was 4l. 18s., and that sum was actually paid by the prosecutor to the prisoners. The price of the two loads last delivered at the weight pretended by the prisoners was 3l. 10s. 6d., which sum was paid by Mr. Thurman to the prisoners on the 20th Aug.

The three tickets were produced by the prosecution during the trial, and put in evidence.

It was proved on the trial that three loads of what appeared to be soot were weighed by the prisoners at the machine mentioned in the tickets, and that the weights represented on the tickets were the weights of the three loads at the time they were weighed.

It was also proved that, between the time of weighing the last two loads of soot at the machine and the delivery of the soot to the prosecutor, the prisoners had, during the transit, removed from the carts in which what appeared to be soot was conveyed, three bags full of broken bricks and wet coal slack, weighing upwards of 4 cwt., and which was in the carts when the loads were weighed; and that, between the weighing machine and prosec-

C. CAS. R.]

REG. v. LANGMEAD.

[C. CAS. R.]

cutor's premises was a distance of several miles; so that therefore the prisoners had ample opportunity of removing other soot from the cart without being observed.

Upon their arrest the prisoner Lee said, in allusion to the bags of bricks and coal slack, "We were taking those bags to a man's garden at Carrington, and we forgot to leave them;" but no evidence was offered in support of this statement, nor, except as aforesaid, was any explanation given of the deficiency between the soot delivered and the weight mentioned on the tickets.

The prisoner's counsel objected to the indictment that it did not sufficiently set forth the false pretence: that it ought to have set forth the fact that the soot was weighed and tickets were given that it ought to have set forth the contents of the tickets, and then ought to have alleged that the false pretence was the production of the tickets. Prisoner's counsel also objected that it was not an offence under the statute to cheat by false representation of the weight of the soot.

The Court overruled the objections, and held that it was an offence within the statute, that the false pretence was sufficiently set forth in the indictment, and that the tickets were only matters of evidence, and that it was not necessary to set them out in the indictment.

The jury found the prisoners guilty, but the prisoner's counsel requested a case for the court above. The Sessions respited judgment and discharged the prisoners upon their own recognisances.

The questions left for the consideration of the Court for Crown Cases Reserved are—first, is the false representation of the weight of the soot a false pretence within the statute? and if so, secondly, is that pretence sufficiently set forth in the indictment? BELPER, Chairman.

*Yeatman* for the prisoner.—The conviction cannot be sustained. First, the indictment is insufficient for not alleging that the ticket was used as a false pretence. It must be shown what the false pretences are by which the property is obtained: (*Reg. v. Mason*, 2 T. R. 581.) So in *Reg. v. Munro*, 2 Stra. 1127, it was held necessary to specify the false tokens in the indictment by which the property was obtained. The ticket was the inducement to the prosecutor to part with his money. [MELLOR, J.—The ticket is only the means of proof—the false assertion is the same.] Secondly, assuming the indictment good, no offence was proved. This was an ordinary case of buying and selling, in which the seller gave short weight. That is not indictable: (*Reg. v. Eagleton*, 6 Cox C. C. 559.) [MARTIN, B.—Not so. At the time of the delivery of the soot a ticket is presented, which truly specifies what was the weight of the cart at the weighing machine, but then that was made up partly by broken bricks and slack, and the prisoners pretended that it was all soot, and the ticket was used to vouch that false pretence.] (*Reg. v. Reed*, 7 C. & P. 848, was then cited.) [BLACKBURN, J.—That was overruled by *Reg. v. Sherwood*, 7 Cox C. C. 270, from which the present case cannot be distinguished.] In this case the prosecutor got a quantity of soot in respect of his contract, but not all the weight that he was entitled to. This is not a case of false pretences such as was contemplated by the statute.

*Cave*, for the prosecutor, was not called upon to argue.

POLLOCK, C. B.—We are all of the same opinion that the indictment is good, and that the evidence supports the indictment. The objection to the indictment is not well founded. The indictment states the offence in the words of the statute, and it

is not necessary to state more than the general nature of the offence as it is here stated. The case of *Reg. v. Sherwood* is in point. As to mere false representations in buying and selling, and in the course of bargaining, it was not the object of the Legislature to make them the subject of indictment for false pretences. But in this case, though a bargain was made in the first instance, yet by a subsequent device the buyer was imposed on by the seller as to the quantity of soot delivered, and that was the subject of indictment. The conviction will therefore be affirmed.

MARTIN, B.—I am of the same opinion. There can be no doubt in this case on the second count of the indictment, which states precisely what the circumstances were. It is true that the weight of the soot was vouched by a ticket, but that was used only to confirm the prisoner's statement, while in reality it was merely a lie, with the circumstance of a ticket been used as a voucher that that was the weight of the soot, but in fact it was made up with bricks. It was not necessary to mention the ticket in the indictment, for that was merely evidence of the false pretence by which the money was obtained. This is a clear case

The rest of the Court concurring,

Conviction affirmed.

(Before POLLOCK, C. B., MARTIN, B., BYLES, BLACKBURN and MELLOR, JJ.)

REG. v. LANGMEAD.

*Indictment—Larceny and receiving—Recent possession—Evidence.*

*It is a presumption of fact, and not an implication of law from evidence of recent possession of stolen property unaccounted for, whether the offence of stealing, or of feloniously receiving, has been committed.*

*Where an indictment contains counts for larceny and receiving, unless the evidence excludes the probability of one or the other offence having been committed, the case should be left to the jury on both counts.*

Case reserved for the opinion of this court at the General Quarter Sessions of the peace, held at the Castle of Exeter, in and for the county of Devon, on the 23rd Feb. 1864.

James Langmead was indicted and tried for:

1st count. Stealing at Belstone, on the 22nd Dec. 1863, four wether sheep, two ewes, and six sheep, of the goods and chattels of George Glanfield.

2nd count. Feloniously receiving the said sheep, knowing them to have been stolen.

The following is the material part of the evidence taken at the trial:—

George Glanfield, farmer, at Belstone.—Has a right of common on Belstone-common. Had sixty-one sheep on the common in the month of December last. About a fortnight before Christmas-day I saw all my sheep but two on the common. About Thursday or Friday after Christmas-day I went to see my sheep, and found all except thirteen. On the 3rd Feb. I went to Collypriest, Mr. Bond's farm; saw twenty-one sheep there of the Dartmoor breed. I examined them and was certain there were four of mine there. I went again on the following Tuesday. Examined the flock again, and then found six of my sheep, two ewes and four wethers (including the four).

John French, servant.—Living with Mr. Langmead. He kept a car just before Christmas. He has two sons, one about twelve, the other about eight. One morning in Christmas week he told me to get the car. I got the car and went with my master and his two sons as far as Sticklepath. Went through Mr. Reddaway's court to get to the road, and came out in the road about two miles from Okehampton, about one-mile and a-half from Sticklepath. When we came to the turnpike-road we went on to the head of Sticklepath, and then I went back again. We did not go into the village; I went within about a gunshot.

Elizabeth Willis.—I live at Sticklepath. The house I occupy joins the high road. I was out of my bed and saw a flock of

sheep going through the village, driven by two boys. I cannot say who they were. My impression was that they were Mr. Langmead's boys. It was before Christmas, and bright moonlight. It was early in the morning; I cannot tell at all what time.

Cross-examined.—It is a common thing for sheep to be driven through Sticklepath. I cannot say whether it was a month before Christmas.

John Hunt.—In employment of Mr. William Smith, cattle dealer.—On the 23rd Dec. I went to the King William Inn, about a mile from Exeter, at seven o'clock in the morning, in consequence of directions given by my master. I saw that no sheep had passed, and then I went on to the Okehampton-road half-a-mile, and there I met a boy with a flock of sheep—twenty-one. I spoke to the boy, and having spoken to him I drove the sheep back to the inn and went into the public-house. I first saw prisoner outside the public-house; another boy was with him. Both boys had breakfast. One of the boys is here now (points him out in court). That is the boy that drove the sheep. I put the sheep into a lane by the roadside, and then went into the inn. The sheep seemed weary with travelling. I know Sticklepath; that must be seventeen or eighteen miles from Exeter. Prisoner said, before he went into Little John's Cross Inn, he should like to see what keep or food the sheep had. After breakfast I went to a field, into which Mr. Smith directed the sheep to be put. The prisoner went with me. It lies a mile towards Exwick. I told prisoner he was to meet my master at the Swan Inn, at St. Thomas's, in the evening. When I went to the field I turned the sheep in. The prisoner and the two boys went with me.

John Lewis, Innkeeper, King William Inn, at Little John's Cross.—Knows the prisoner; has known him for some time. He came to my house at eight o'clock on the 23rd with his youngest boy in a car. He put the horse in the stable, and ordered breakfast for himself and two boys. "I want breakfast for myself and two boys." After he had arrived there about ten minutes or a quarter of an hour, the second boy came. He said he had sheep coming along the road, and he wished to stop them in the yard till he got keep for them. I refused, because I thought they would trespass on my garden. Prisoner said they were much tired; they would soon lay down. He had his breakfast with his two boys, and then left the house.

William Smith, cattle dealer.—Recollects receiving a letter from the prisoner on the 22nd Dec. I have misread it. Mr. Langmead wrote me he should have some sheep coming on; he would be early at Little John's Cross, at the King William Inn. He said, if I could not be there to deal for them, I was to send some person to show where to put the sheep in my field. I was going somewhere, and could not be there that morning, and sent Hunt. Between six and seven in the evening, on the 23rd, I went to the Swan Inn at St. Thomas's, and there saw prisoner. I believe I said, "Where are the sheep?" to Mr. Langmead. He said, "They are up in your field. What shall you charge me for the keep of them?" I spoke short. I said, "Nothing at all. If you don't sell them you can keep them." I said, "What—have you sold them?" Prisoner said, "No; I have had a very good offer for them." I went with him to my field. I did not count the sheep. Prisoner said there were twenty-one. He said there were two ewes, and I took for granted the remaining sheep were wethers. He said, "You shall be vethem for 33*l*. 10*s*." We returned to the house, and I gave him the money. He told me he had bought a portion of them.

Alfred Bond.—Resides at Collypriest farm, Tiverton. On the 8th Jan. I purchased sheep of Mr. Wm. Smith. Purchased twenty-one. Sent them home to the farm. They were Dartmoor sheep, redded over the backs and sides. In the beginning of February, police constable Harris came. I told him where to go to find the sheep. Some days after, on a Tuesday, Harris, the prosecutor, Reddaway, and Endacott came. They did not take the sheep. They remained in my possession till after I had been to Northawton. Then I gave them to Harris.

The prisoner's counsel at the close of the evidence for the prosecution submitted to the court that there was not sufficient evidence to go to the jury, but the Court decided that there was, and after reading through the evidence by the Chairman, the whole case was left to the jury.

The jury found the prisoner guilty of feloniously receiving the sheep, knowing them to have been stolen.

Whereupon the counsel for the prisoner objected that there was no evidence before the court to support the second count, and that the jury should have been directed that they could not find the prisoner guilty on that count, for (he contended) the evidence proved no more than recent possession by the prisoner after the loss, unaccounted for, and that although a presumption of guilt might legally be inferred from recent possession unaccounted for alone, if the offence of which the jury found the

prisoner guilty had been theft, yet that guilt could not be inferred from recent possession unaccounted for alone, in considering whether the prisoner was guilty of feloniously receiving the sheep, knowing them to have been stolen.

The Court were of opinion that there was sufficient evidence to support the verdict, but at the request of the prisoner's counsel they granted a case on the following question,

Whether upon the whole case the jury should have been directed that they could not lawfully find the prisoner guilty upon the second count.

The prisoner was sentenced to four years' penal servitude.

Execution of the sentence was respited until the judgment of this Court shall have been certified to the clerk of the peace. The prisoner is now in gaol.

B. ANDREWS, Chairman.

Carter for the prisoner.—There was no evidence that ought to have been left to the jury on the count for receiving. Recent possession of stolen property is not evidence of feloniously receiving: if it proves anything it is evidence of stealing. [MELLOR, J.—The evidence of Elizabeth Wills, that she saw the sheep driven by two boys, and that her impression was that they were the prisoner's boys, surely was some evidence (whatever its value may be is another question) for the jury upon the count for receiving.] Recent possession raises the presumption that the prisoner stole them rather than that he received them. The evidence of Elizabeth Wills came to nothing, for she could not say when it was that she saw the sheep driven by two boys, and that it might have been a month before Christmas. It is necessary to infer more conditions in the case of receiving than of stealing—in the latter case you must infer (1) that the things were stolen by some one else; (2) that the prisoner received them; (3) that they are the same things; and (4) a receiving with guilty knowledge. Mere recent possession does not in this case enable you to infer all those things. In 2 Russ. on Crimes, 247, it is said: "Upon an indictment for receiving stolen goods there should be some evidence to show that the goods were in fact stolen by some other person, and recent possession of the stolen property is not alone sufficient to support such an indictment, as such possession is evidence of stealing and not of receiving."

See *v. Denesley*, 6 C. & P. 399;

*Reg v. Odly*, 2 Denn. C. C.

Allison's Principles of the Law of Scotland was also referred to.

POLLOCK, C. B.—We are all satisfied that the chairman could not have withdrawn the case from the jury on the count for feloniously receiving the sheep, or have given them a direction that there was no evidence of felonious receiving by the prisoner. The distinction between the presumption as to felonious receiving and stealing is not a matter of law. No doubt, upon the evidence, no other person than the prisoner appears distinctly to enter into the transaction, and all that appears is that the prisoner was found very recently in possession of the stolen sheep. That *prima facie* is evidence of stealing rather than of receiving, but in no case can it be said to be exclusively such, unless the party is found so recently in possession of stolen property, and under such circumstances as to exclude the probability of receiving: as where a party is stopped coming out of a room with a gold watch which has been taken from the room; but if he has left the room so long as to render it probable that he may have received it from some one else, then it may be evidence either of stealing or of feloniously receiving. In the present case, I think that the

evidence of receiving was more cogent than that of stealing. It is very likely that the prisoner sent the two boys to drive the sheep, and that they had innocently taken them from some one else who had stolen them from the common.

MARTIN, B.—I am of the same opinion. The question is, if the indictment had contained a count for feloniously receiving only, could the chairman have stopped the case from going to the jury? I think clearly not. It is utterly impossible to say that there was not some evidence from which the jury might have inferred that the prisoner's two sons stole the sheep, and that the father received them. No doubt, the jury, believing it to be the more lenient course to find the verdict of feloniously receiving, acted accordingly.

BYLES, J.—I am of the same opinion. There are several grounds on which this verdict may be sustained. The prisoner might have been guilty of receiving the sheep if the two boys had stolen them. That was a possible case on the evidence. Again, he might have sent the two boys as innocent agents to get them from another person who had stolen them. Thirdly, the two boys may be looked upon as guilty agents in receiving, and the prisoner treated as an accessory before the fact, which would render him liable to be tried for a substantive felony. This is like the case of a burglary in which a woman is concerned who is found dealing with the property stolen, in which case it is for the jury to determine in what character she is criminally liable.

BLACKBURN, J.—I am of the same opinion. As a proposition of law there is no presumption that recent possession points more to stealing than receiving. If a party is in possession of stolen property recently after the stealing, it lies on him to give an account of his possession, and if he fails to account for it satisfactorily, he is reasonably presumed to have come by it dishonestly; but it depends on the surrounding circumstances whether he is guilty of receiving or stealing. Whenever the circumstances are such as render it more likely that he did not steal the property, the presumption is that he received it. In the present case I believe that the jury have drawn the right conclusion.

MELLOR, J.—I am of the same opinion. In this case I think that there was evidence on which the jury might have come very fairly to either conclusion of stealing or of receiving.

*Conviction affirmed.*

(Before POLLOCK, C.B., MARTIN, B., BYLES, BLACKBURN and MELLOR, JJ.)

REG. v. MARY SENIOR.

*Perjury—Jurisdiction—Sunday-beer trading—Prohibited hours—11 & 12 Vict. c. 49.*

*To an indictment for perjury on the hearing of an information before justices under the 11 & 12 Vict. c. 49, for keeping open an inn for the sale of beer to persons not being travellers, before half-past twelve o'clock on Sunday afternoon, it was objected by counsel that the justices had no jurisdiction, and that the 11 & 12 Vict. c. 49 was repealed, and for this Whiteley v. Heaton, 27 L. J. 217, M. C., was cited:*

*Held, on the authority of Harris v. Jenks, 3 L. T. Rep. N. S. 408, that the 11 & 12 Vict. c. 49 was not repealed, and therefore that the justices had jurisdiction.*

Case reserved for the opinion of this court by E. F. Price, Esq., Q.C., sitting as Commissioner at the Yorkshire Lent Assizes 1864.

This case was tried before me, sitting as Commissioner for Byles, J., at the last York Assizes.

The prisoner was indicted for wilful and corrupt perjury alleged to have been committed upon the hearing of an information before justices sitting at petty sessions.

The information was laid against one Thomas Sellers under the statute 11 & 12 Vict. c. 49, s. 1, of which the following is a copy:

"Borough of Wakefield, in the West Riding of Yorkshire.

"The information of James McDonnold, of Wakefield, in the West Riding of the county of York, chief constable, taken before the undersigned, one of Her Majesty's justices of the peace in and for the said borough, in the West Riding of the county of York, the 13th Feb. 1864.

"That Thomas Sellers, on Sunday, the 7th Feb. inst., at the borough of Wakefield, in the said Riding, was licensed to keep his house as an inn there, and did open his house there for the sale of beer therein to persons not being travellers, before half-past twelve o'clock in the afternoon, contrary to the statute in that case made and provided.

"JAMES McDONNOLD.

"Taken before me, Samuel Holdsworth."

At the close of the case for the prosecution it was objected by Mr. Campbell Foster, for the prisoner, that there was no jurisdiction in the justices to hear the information under the statute above named; and he further contended that the statute 18 & 19 Vict. c. 118, was the only statute now in force limiting the hours during which public-houses, beer-houses, &c. should be open for the sale of liquor, and that this latter statute had, in effect, repealed the 11 & 12 Vict. c. 49, under which the information was laid, and that it is no offence to sell beer, &c. during any part of the forenoon of Sunday. Mr. Foster relied on the case of *Whiteley v. Heaton*, 27 L. J. 217, M. C.

I overruled the objection and left the case to the jury, who convicted the prisoner, and she was sentenced to three months' imprisonment, but allowed to be on bail until the opinion of the Court for Crown Cases Reserved could be obtained.

I reserved a case for the opinion of the judges as to whether my ruling was right that the 11 & 12 Vict. c. 49 is still in force and that it is an offence to keep open a public-house for the sale of liquor during the hours prohibited by sect. 1 of the latter statute, and therefore that the jurisdiction in the magistrates to hear the information was sufficiently established.

E. F. PRICE.

No counsel were instructed on either side.

MARTIN, B.—The court has been referred to the case of *Harris v. Jenks*, 30 L. J. 183, M. C.; 3 L. T. Rep. N. S. 408, in which it was pointed out that my brother Bramwell, B. could not have intended what he is reported to have said in *Whiteley v. Heaton*, viz., that the 11 & 12 Vict. c. 49, was repealed by the 17 & 18 Vict. c. 79. *Harris v. Jenks* decides that the 11 & 12 Vict. c. 49 is still in force, and therefore the justices had jurisdiction to hear the information in this case, and the conviction is good.

Conviction affirmed.

Saturday, April 30, 1864.

(Before POLLOCK, C. B., BLACKBURN, KEATING and MELLOR, JJ., and PIGOTT, B.)

REG. v. FRETWELL.

*Felony—Shooting into a crowd—Unlawful wounding—24 & 25 Vict. c. 100, s. 18.*

*A person who fires a pistol at a group of persons, not aiming at any one in particular, but intending generally to do grievous bodily harm, and severely wounds one of the group, may be indicted and convicted for feloniously shooting and wounding the person injured with intent to do grievous bodily harm.*

Case reserved for the opinion of this court by Byles, J.

The prisoner was indicted for feloniously shooting at Hirsats Lawton with intent to do grievous bodily harm to Hirsats Lawton, and tried before me at the last York Assizes.

The prisoner had been assaulted and annoyed by several other young men, among whom was the prosecutor. Immediately afterwards these young men were standing together in a group of about fifteen persons. The prisoner drew a pistol from his pocket and fired into the group. The prosecutor received some severe shot wounds in his neck and chin.

The jury found that the prisoner did not aim at the prosecutor, or at any one else in particular, but that he fired into the group, intending generally to do grievous bodily harm, and so unlawfully wounded.

Judgment was postponed, and the prisoner remains in custody, the question being

Whether, on this finding, the prisoner be guilty of the felony charged in the indictment, or of the misdemeanor only? (See *Reg. v. Smith*, 1 Dears. C. C. 559; 7 Cox. C. C. 5 (a), and the cases cited.)

J. B. BYLES.

No counsel appeared on either side.

By the COURT.—The prisoner might very properly be convicted of the felony.

Conviction affirmed.

#### REG. v. HENSHAW AND CLARK.

##### *Indictment—False pretence—Statement of.*

*An indictment for obtaining money by false pretences alleged that prisoners pretended to P., who lived at T.'s and acted as T.'s representative, that C. had come from London to the residence of H., and that P. was to give C. 10s., and that T. was going to allow C. 10s. a-week for the benefit of his health:*

*Held, that the indictment did not state with sufficient certainty a false pretence of an existing fact.*

Case reserved for the opinion of this court by the Recorder of Brighton.

At the General Quarter Sessions of the peace for the borough of Brighton, holden on the 19th March 1864, Lewis Henshaw and John Clark were tried before me upon the following indictment:

Borough of Brighton, to wit.—The jurors for our Lady the Queen, upon their oath present, that Lewis Henshaw and John Clark, on the 14th day of Jan. 1864, unlawfully, knowingly and designedly did falsely pretend to one Henrietta Pond, who then lived at one Madame Temple's, and acted as her representative, that the said J. Clark had come down from London, to the residence of the said L. Henshaw, and that the said H. Pond was to give him 10s., and that the said Madame Temple was going to allow the said J. Clark 10s. a-week for the benefit of his health. By means of which false pretence the said L. Henshaw and J. Clark did then attempt unlawfully to obtain from the said H. Pond the sum of 10s. with intent to defraud. Whereas in truth and in fact the said H. Pond was not to give the said J. Clark the sum of 10s. or any other sum of money, and whereas in truth and in fact the said Madame Temple was not going to allow the said J. Clark the sum of 10s. a-week, or any other sum of money, for the benefit of his health, as they the said L. Henshaw and J. Clark well knew at the time when they did so falsely pretend as aforesaid, against the form of the statute in such case made and provided.

(a) *Reg. v. Smith*.—If A. intending to murder B. shoots at and wounds C., supposing him to be B., he is guilty of wounding C. with intent to murder him, for he intends to kill the person at whom he shoots.

The facts of the case, so far as they are material to the point reserved, were as follows:

On the 15th Jan. last, in the evening, the two prisoners went together to the shop of Madame Temple in Brighton; she has also a shop in London. After Henshaw, in the presence and hearing of Clark, had made a statement to one of Madame Temple's assistants, he requested to see the one of the assistants who kept the accounts. H. Pond being the person by whom the accounts of Madame Temple's Brighton establishment are kept, then came forward.

Her evidence was, that Henshaw, in the presence and hearing of Clark, said: "This young man (meaning Clark) has come down from London; that he (meaning Clark) had been in the Brompton Hospital with a bag leg; that he (meaning Clark) had seen Madame Temple in London; that Madame Temple said that I (H. Pond) was to give him (meaning Clark) 10s. a-week while he was at Brighton for the benefit of his health. I refused to do so, saying that if Madame Temple wished me to do it she would send me a letter the next morning. Once or twice Henshaw said, "You do not intend to give the 10s." Henshaw said to Clark, "Was that what Madame Temple said?" Clark said "Yea." Henshaw then said that he would write to Madame Temple, and the prisoners went away together.

Madame Temple was called, and denied ever having seen, or having any knowledge of either of the prisoners. The counsel for the prisoners objected that the indictment alleged no false pretence of an existing fact, and negatived no false pretence of an existing fact, all the facts alleged and negatived being future.

I held that the false pretence that the said H. Pond was to give him 10s. was a sufficient false pretence of an existing fact to support the indictment, and that the second false pretence, even if not of an existing fact, might therefore be taken into consideration in conjunction with the first false pretence, but reserved the point for the consideration of the Court of Criminal Appeal.

The jury found both prisoners guilty, and they were sentenced by me to four calendar months' imprisonment, with hard labour, and were committed to the House of Correction at Lewes in execution of that sentence.

The question for the opinion of the Court of Criminal Appeal is, whether upon this indictment the said conviction was right.

JOHN LOCKE,

Recorder of Brighton.

*Conolly* for the prosecution. — The indictment shows sufficiently a false statement of an existing fact. [POLLOCK, C. B.—What is the existing fact alleged?] That Madame Temple had said that Pond was to give Clark 10s. a-week whilst he was at Brighton. [POLLOCK, C. B.—That is not so laid; the averment is that Pond was to give him 10s., and that Madame Temple was going to allow him 10s. a week. Now if I say that I am a member of Parliament and am not; that is a false pretence; but if I say I expect to be made a peer, that is no false pretence.] In one sense the act to be done must always be future, for the result of the false pretence, the obtaining of the money, is necessarily so. The averment that Pond was to give Clark 10s. is the statement of an existing fact. [PIGOTT, B.—Does it not require the words "by her authority" to make the statement sufficient? BLACKBURN, J.—The case of *Reg. v. Archer*, Dears. C. C. 449; 6 Cox C. C. 515, is the nearest in your favour. Here the prisoners do pretend that Clark was in some way connected with Madam Temple.] The case of *Reg. v. Fry*, 1 Dears. & B. 449, 7 Cox C. C. 394, was then cited. Here the substance of the thing is



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a pretended conversation with Madame Temple, which never took place.

No counsel appeared for the prisoner.

**POLLOCK, C.B.**—The majority of the Court are of opinion that the indictment does not state with sufficient certainty any false pretence within the rule that requires that an existing fact shall be alleged as the ground of the false pretence. Very likely some speculation may be formed from this indictment as to what the false pretence was, but the majority of the court do not think that it is stated with sufficient certainty.

**BLACKBURN, J.**—I agree with the Lord Chief Baron that the false pretence should be stated with sufficient certainty by which the money was attempted to be obtained. Speaking for myself only, I should say when it is alleged, as here, "that Madam Temple was going to allow John Clarke 10s. a-week," that is to be construed and understood in the sense and meaning that Madam Temple had expressed such an intention at a previous time, and that Pond was to give 10s. on her account, and therefore that it is a sufficient statement of a false pretence of an existing fact. If the count had stated the facts according to the evidence there would have been no doubt that it would then have been a sufficient false pretence. Although I doubt, I concur in the judgment of the court, and do not require the case to be argued before the fifteen judges.

**PIGOTT, B.**—I entertain considerable doubt whether there is a statement in the indictment of a false pretence of an existing fact.

**MELLOR, J.**—Upon the whole, I agree with the Lord Chief Baron, that the false pretence is not, according to the rules of criminal pleading, alleged with sufficient certainty.

**KEATINGE, J.**—I agree that the statement in the indictment is susceptible of the construction put upon it by my brother Blackburn, but I do not think that the indictment states it with convenient certainty.

**POLLOCK, C.B.**—In consequence of what has fallen from my brother Blackburn, I wish to add that, if the averment is susceptible of the meaning he has put upon it, it ought to have been left to the jury to say whether the words made use of by the prisoner did really mean that which would make it a criminal offence, and that the judge ought not to take upon himself to say that they meant that.

*Conviction quashed.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,  
Barristers-at-Law.

Wednesday, April 27.

REG. v. WILKINSON.

*Alehouse licence—9 Geo. 4, c. 61—Class of houses to which licence extends.*

*Under the 9 Geo. 4, c. 61 (an Act to regulate the granting of licences to keepers of inns, alehouses and victualling houses in England), justices have no power to grant a licence to sell exciseable liquors with the condition attached that they are not to be drunk or consumed on the premises, or to any other class of houses than inns, hotels, alehouses and victualling houses wherein the liquors may be drunk or consumed upon the premises.*

Special case stated by the Devonshire Court of Quarter Sessions on appeal by five persons against the refusal of the Licensing Justices of the Paignton division to renew their licences to sell exciseable

liquors to be drunk and consumed on their respective premises at Torquay under the 9 Geo. 4, c. 61.

None of the houses occupied by the apps. were used for the accommodation of man and beast in the usual way in which inns or hotels are used. The apps. supplied wines and spirits in small quantities, varying from a quart bottle to half-a-pint, to persons who came and asked for them, but never allowed them to be consumed on their premises. Indeed all the apps. have been for some years past required by the licensing justices, as a condition for the renewal of their licences, not to allow any wines or spirits to be consumed on their premises.

The justices now declined to renew the licences on the sole ground that the apps., not being hotel or innkeepers, or keepers of victualling houses, were not persons to whom licences could be granted under the 9 Geo. 4, c. 61, adding that the 24 & 25 Vict. c. 21, s. 2 (commonly called the Bottle Act) had defined the limit to which wine merchants such as the apps. were allowed to sell wines and spirits by retail.

The Court of Quarter Sessions confirmed the decision of the licensing justices, subject to the opinion of this court as to the above construction of the 9 Geo. 4, c. 61.

*Bere for the apps.*—The question desired to be ascertained is, whether such licences can be granted under the 9 Geo. 4, c. 61 (an Act to regulate the granting of licences to keepers of inns, alehouses and victualling houses in England). By the interpretation clause, "inn, alehouse, or victualling house, shall be deemed to include all houses in which shall be sold by retail any exciseable liquor to be drunk or consumed on the premises." By the 24 & 25 Vict. c. 21, s. 2, what is called the bottle licence was created, that is, power to sell spirits in any quantity by retail not less than one reputed quart bottle, not to be drunk or consumed on the premises. It was contended that the justices had power, under the 9 Geo. 4, c. 61, to grant the licences applied for by the apps:

*Modlen v. Snowball*, 31 L. J. 44, Ch.

**COCKBURN, C.J.**—The case is too clear for argument. The Act 9 Geo. 4, c. 61, s. 1, expressly says that it shall be lawful for the justices to grant licences for the purposes aforesaid, to such persons as they shall deem proper; that is, to persons keeping, or about to keep, inns, alehouses and victualling houses.

**BLACKBURN, J.**—It comes to this: the Act gives justices a discretionary power to grant licences to inns, alehouses and victualling houses, and it appears that the justices, thinking the number of inns, hotels and alehouses already licensed sufficient, have adopted the practice of granting licences with the condition attached that there is to be no exciseable liquor drunk upon the premises, and the question is, is that correct? The essence of the statute is, that the party licensed shall keep an inn, alehouse, or victualling house, and the power to grant licences is not extended to places where liquors are not to be drunk or consumed on the premises.

**MELLOR, J.**—The justices have a discretion to grant licences under the 9 Geo. 4, c. 61, which they have never exercised in the apps.' favour, as to the general form of licence, but only in the limited way stated in the case, which is clearly contrary to law.

**SHEE, J.**—Except hotels, inns, alehouses and victualling houses, no others are to be licensed under the 9 Geo. 4, c. 61.

*Judgment for the resps.*



REG. V. THE GUARDIANS OF THE POOR OF THE ISLE OF WIGHT.

*Settlement by apprenticeship—Indenture—Incorporated union—Execution by common seal—3 § 4 Will. 4, c. 63, s. 2.*

*By a local Act (16 Geo. 3, c. 58) the directors and acting guardians of the poor, or any five of them, were to bind out pauper apprentices. In pursuance thereof, an indenture of apprenticeship was executed, which purported to be between the guardians of the poor of the one part, and the apprentice's mistress of the other part; and in the operative part it witnessed "that the directors and acting guardians, by virtue of the Act, did put, place and bind the pauper as apprentice." The covenants by the mistress were made with the guardians, and by one of them she bound herself not to assign over the apprentice without the consent of the said directors and acting guardians. In witness thereof the guardians caused the common seal of the union to be put to the indenture; and the indenture was subscribed by two justices:*

*Held, that by the 3 § 4 Will. 4, c. 63, s. 2 (a), the indenture was rendered valid.*

Case for the opinion of this Court from the Middlesex Court of Quarter Sessions (Michaelmas 1862).

The Court of Quarter Sessions, on appeal, confirmed an order of justices, dated July 22, 1862, adjudging the place of the last legal settlement of Samuel Jennings, a lunatic pauper in the Hanwell Asylum, to be in the parish of Newchurch, in the Isle of Wight Incorporation and Union, and ordering the guardians and directors of the poor of the Isle of Wight Incorporation and Union to pay to the parish officers of St. Margaret's, Westminster, the sums of 3*l.* 7*s.* for expenses of examination before justices and conveyance of the lunatic to the asylum, and 26*l.* 10*s.* for maintenance in the asylum, and the further sum of 14*s.* weekly to the treasurer of the asylum from the 29th July 1862.

The material grounds of adjudication were as follows:—

That the lunatic is not legally settled in our said parish, but hath his last legal settlement in the parish of Newchurch, in the Isle of Wight Incorporation and Union, in the county of Southampton. That the said Samuel Jennings is the lawful

son of Thomas Jennings and Sarah his wife. That the said Sarah Jennings, in or about the year 1808, her name being then Sarah Pye, was, by indenture, duly bound apprentice to a Mrs. Thomas, a boarding-house keeper, who then resided in the town of Ryde, in the parish of Newchurch, in the Isle of Wight Incorporation and Union, in the county of Southampton, for a period of three years, to learn the art or employment of a domestic servant, and she fully served her said mistress as such apprentice for a period of two years, and during the whole of that time she resided and slept in the house of her said mistress, and that at the end of her said service of two years the said indentures were cancelled. That the said Sarah Jennings was born in the parish of Whitwell, in the Isle of Wight, in or about the year 1794.

The grounds of appeal were as follows:—

That the said Sarah, the wife of Thomas Jennings, formerly Sarah Pye, was not by indenture duly bound apprentice to Mrs. Thomas, a boarding-house keeper, who then resided in the town of Ryde, for a period of three years.

That the said Sarah Jennings was not born in the parish of Whitwell, in the Isle of Wight.

That the said Samuel Jennings is not legally settled in the said parish of Newchurch, or in any parish in the Isle of Wight.

At the trial of the appeal the reaps. commenced their case by endeavouring to prove the settlement by apprenticeship, and for that purpose put in evidence the indenture hereinafter mentioned and proved the identity of the Sarah Pye therein mentioned with the mother of the pauper lunatic.

The indenture was as follows:—

This indenture, made the 10th day of Oct. A.D. 1808, between the Guardians of the Poor within the Isle of Wight, in the county of Southampton, of the one part, and Eleanor Thomas, of the parish of Newchurch, in the Isle of Wight aforesaid, of the other part: Witnesseth that the directors and acting guardians of the poor within the Isle of Wight aforesaid, by virtue of the Act 16 Geo. 3, entitled "An Act to continue the corporation of the guardians of the poor within the Isle of Wight, and to confirm," &c., and by and with the consent of two of His Majesty's justices of the peace within the said county of Southampton, whose names are hereunto subscribed, acting in and for the division of the Isle of Wight aforesaid, have put, placed and bound, and by these presents do put, place and bind Sarah Pye, a poor girl whose parents are not able to maintain her, of the age of fifteen years or thereabouts, apprentice to the said Eleanor Thomas, with her to dwell and serve from the date hereof until she shall arrive at the age of eighteen years, during all which time the said apprentice her mistress faithfully shall serve in all lawful business, according to her power, skill and ability, and honestly, orderly and obediently in all things demean and behave herself towards her mistress and all hers during the said term. And the said E. Thomas, for herself, her executors, administrators and assigns, doth covenant, promise and agree to and with the said guardians of the poor and their successors that she the said E. Thomas, her executors, administrators and assigns, the said apprentice in the art of a housewife shall teach and instruct, or cause to be taught and instructed, and shall and will, during all the term aforesaid, find, provide and allow unto and for the said apprentice sufficient meat, drink, apparel, lodging, washing, physic in time of sickness, and all other necessaries during the said term, and so provide for the said apprentice that she be not anyways a charge to the said guardians of the poor within the said Isle of Wight, or their successors; but of and from all charges shall and will save and defend the said guardians of the poor harmless and indemnified during the said term. Provided always, that the said last-mentioned covenant on the part of the said E. Thomas, shall continue and administrators, to be done and performed, shall continue and be in force for no longer time than three months next after the death of the said E. Thomas, in case the said E. Thomas shall happen to die during the continuance of the said apprenticeship, according to the Act of 32 Geo. 3, entitled "An Act, &c." And also shall and will, at the end of the said term, provide, allow and deliver unto the said apprentice double apparel of all sorts, good and new. And, further, that she the said E. Thomas shall not nor will at any time during the said term assign or turn over the said apprentice to any person or persons whomsoever without the licence and consent of the said directors and acting guardians or their successors first had and obtained in writing for that purpose. In witness whereof to one part of these Indentures, to remain with the said E. Thomas, the said guardians of the poor have caused their common seal to be set; to the other part thereof, to

(a) 3 & 4 Will. 4, c. 63, s. 2: "And whereas, by divers Acts of Parliament heretofore made and passed, the directors, guardians, acting guardians, or other officers of incorporated hundreds, parishes and other districts, are by the said Acts of Parliament respectively authorised to bind poor children apprentices in the manner by the said Acts of Parliament respectively prescribed and directed; and whereas the said directors, guardians, acting guardians and other officers have bound out poor children apprentices by indentures, to which the said directors, guardians, acting guardians and other officers have been, by their description as directors, guardians, acting guardians, or other officers of such incorporated hundreds, parishes and other districts, respectively made parties of the one part, or to which they have by their said descriptions respectively been binding parties, and which indentures have been executed by the said directors, guardians, acting guardians and other officers, by affixing thereto the seal of the corporation of which they are directors, guardians, acting guardians and officers respectively, and in no other manner by them; and whereas doubts have been entertained as to the effect and validity of indentures so executed, and it is desirable to remove such doubts, be it declared and enacted that, from and after the passing of this Act, in all cases where any indentures for the binding out poor children apprentices have been heretofore or shall be hereafter executed by any directors, guardians, acting guardians, or other officers of any hundreds, parishes, or other districts now incorporated, or hereafter to be incorporated, under and by virtue of any Act of Parliament, by affixing thereto the seal of the corporation of which they are or shall be directors, guardians, acting guardians, or other officers respectively, such execution of the said indentures respectively shall be deemed and taken to be a good, valid and effectual execution of the said indentures respectively by the said directors, guardians, acting guardians, or other officers of such incorporated hundreds, parishes and other districts respectively."

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remain with the said guardians of the poor, the said E. Thomas hath set her hand and seal the day and year above written.

We, whose names are hereunto subscribed, two of His Majesty's justices of the peace for the county of Southampton, acting in and for the division of the Isle of Wight, do hereby consent to the placing out and binding of the above said apprentice according to the true intent and meaning of the above indenture.

J. DELGANO.  
J. BARWIS.

It was objected, on the part of the apps., that the said indenture was invalid in point of law, and for the determination of this question the following facts are material:

By 16 Geo. 3, c. 53, it was enacted, that the corporation created by a certain Act of Parliament therein recited by the name of "The Guardians of the Poor within the Isle of Wight," should for ever in part and in name be one body politic and corporate in law to all intents and purposes, and should have perpetual succession and a common seal, and should be called "The Guardians of the Poor within the Isle of Wight."

The statute then provided, that on and after the last Saturday in June 1776, all and every person and persons possessed of certain qualifications, the nature and amount of which are immaterial, should be and were thereby declared to be members of the said corporation, and guardians of the poor within the said island.

After some further provisions, not material, the statute provided for the annual election of twenty-four guardians, to be called directors of the poor within the Isle of Wight, and thirty-six persons qualified as guardians who were to be acting as guardians for the year.

The attention of the court will be directed to sect. 55 of the Act, being that under which the indenture professed to be made, which is as follows:—

And be it further enacted that it shall and may be lawful to and for the directors and acting guardians, or any five of them, whereof two at least to be directors, to bind any poor children to be apprentices for any term not exceeding their respective ages of twenty-one years, to any persons willing to receive such children, whether such persons be living within or out of the said Isle of Wight; and the said directors and acting guardians shall have authority to order the treasurer out of the moneys in his hands to pay such reasonable sum or sums of money at the time of binding to the intended master or mistress of such child or children as the said directors and acting guardians can agree for with the said master or mistress.

Under these circumstances it was contended on the part of the apps. that the indenture was void as not being made between the proper parties, inasmuch as the power to bind apprentices is by the statute vested, not in the corporation, but in the directors and acting guardians in their individual capacity, and that the indenture being made and executed by the corporation was not the indenture of two directors and three guardians. On the part of the resps. it was contended that the indenture was properly executed under the local Act, and they also contended that the defect, if any, was cured by the statute 3 & 4 Will. 4, c. 63, s. 32.

The Court decided that the indenture was invalid.

The resps. then endeavoured to prove the birth-settlement.

The Court found as a fact that the said Sarah Pye was born in some parish within the Isle of Wight, although in what parish did not appear, but inasmuch as all the parishes within the Isle of Wight contribute to a common fund, out of which alone the expenses of maintaining the poor are paid, and such contribution is irrespective of the expenses incurred on behalf of each parish, the Court confirmed the order, being of opinion that the Isle of Wight was in law a parish or place maintaining its own poor, as defined by the interpretation clause of the 16 & 17 Vict. c. 97, s. 132.

The questions for the opinion of the Court were:—  
1st. Was the indenture above set forth a good and valid indenture in point of law. 2nd. Was the fact

of the pauper's mother being born in some part of the Isle of Wight sufficient to support this order of adjudication.

If the Court should decide either question in the affirmative, the said order of adjudication and the order of sessions are to be confirmed. If both in the negative the said orders are to be quashed.

D. D. Keane, Q. C. (Poland with him) in support of the order of sessions.—First, with regard to the validity of indenture. By sect. 55 of the Act, the directors and acting guardians, or any five of them, are to bind out the apprentices. Now, although the indenture in question purports to be made between the guardians of the one part and Eleanor Thomas (the mistress of the apprentice) of the other part; yet in the operative part the directors and acting guardians are described as the parties actually binding out the pauper apprentice. The acting guardians are included in the general term "guardians of the poor," by whom the indenture purports to have been made. Again, this is a case within the 3 & 4 Will. 4, c. 63, s. 2, and the common seal of the corporation being attached, the indenture is valid:

*Rez v. Haughey*, 4 B. & A. d. 650.

It became unnecessary to argue the second point, as to the birth-settlement in Newchurch, as by the decision a settlement by apprenticeship was deemed to have been acquired.

*Barrow* for the app.—The indenture is invalid.—It was necessary for the parish officers to pursue the terms of their Act strictly in binding out apprentices: (*Reg. v. Derby*, 13 East, 143.) If this had been the deed of the directors and acting guardians, and they had affixed the common seal, it would have been sufficient. But they have not done so. The 3 & 4 Will. 4, c. 63, s. 2, only applies where the right parties are the parties to the deed, but they have executed their power in a wrong way. [COCKBURN, C. J.—In the deed it is expressly said that the directors and acting guardians bind out the apprentices.]

COCKBURN, C. J.—I have no doubt whatever on this point. This is the very case the Act was intended to cure, viz., where the incorporating Act requires that certain parish officers, directors, or guardians shall be parties to the binding out of pauper apprentices, and those parties have considered that they were to act in the name of the incorporation, which course of proceeding was held in *Rez v. Haughey* to be improper in such case. The 3 & 4 Will. 4, c. 63 was passed to cure that defect. That Act seems to have contemplated the possibility of the very case that has now occurred, where the instrument professes to be made between the corporation and the apprentice's mistress; yet the directors and acting guardians in the operative part are made to intervene, and described as the parties who place and bind out the apprentice. They are, in fact, the binding parties.

The rest of the Court concurring,

Order of Sessions confirmed.

Thursday, April 28, 1864.

Ex parte HUTSWORTH.

Church-rate—Objection to its legality—Jurisdiction of justices.

H. was summoned for the nonpayment of a church-rate, and he objected to the jurisdiction of the justices, inasmuch as he disputed the validity of such rate, upon the grounds that the validity of the preceding rate was then in litigation in the Ecclesiastical Court, that the rate was unequal, and that a sum of 200l. had

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been included in it as costs of the churchwardens in the pending suit in the Ecclesiastical Court. The justices having made an order,

*Held, that they had no jurisdiction.*

*J. Brown* showed cause against a rule obtained by *Mereuether* for a writ of *certiorari* to remove into this court an order of justices of Tamworth for the payment of a church-rate. It appeared that in Oct. 1861 a church-rate had been made, for the non-payment of which Mr. Hutsworth had been summoned before the justices of Tamworth, upon which occasion he objected that the rate was invalid on the grounds of its being unequal, and being for illegal items. Upon this, the justices dismissed the complaint, whereupon the churchwardens instituted a suit against Mr. Hutsworth in the Ecclesiastical Court, in which suit the same objections were raised, and which (at this date) is still pending, awaiting the judgment of Dr. Lushington. In July 1863 another church-rate was made, which is the subject of the present rule. Mr. Hutsworth having refused to pay the same, he was summoned before the justices of Tamworth, when he raised the same objections as before, and also alleged that such objections were now under the consideration of the Ecclesiastical Court; and moreover, that the churchwardens had included in the present rate the sum of 200*l.* as and for their expenses of the pending suit in such court. It was answered that the valuation complained of in the former case was now altered, for that a new assessment had been made under the 25 & 26 Vict. c. 103 (Union Assessments Committee Act), and which was the basis of the church-rate; and that, as Mr. Hutsworth had not appealed against it, he must be taken to have acquiesced. The justices thereupon made an order for payment.

It was now contended that, Mr. Hutsworth's objections being made *bonâ fide*, and being reasonable in themselves, the justices had no jurisdiction to make the order.

*Mereuether*, who showed cause in the first instance, contended that the objections raised were untenable; that as regards the including of the item of 200*l.* as expenses of the lawsuit, the churchwardens were bound to have included them, as they could not make a retrospective rate. [BLACKBURN, J.—But it is surely a reasonable objection on the part of a parishioner that he is called upon to pay costs before it is determined whether or not they are to fall upon the parish. It may be that ultimately the costs will fall upon the churchwardens personally.] They must pay as they go; they must have money to pay the legal costs as they are incurred.

COCKBURN, C. J.—This rule must be made absolute. There is no reason to doubt that the objections taken to the validity of the rate were *bonâ fide*, and it was not unreasonable, under the circumstances, that these objections should have been made.

BLACKBURN, MELLOR and SHEE, JJ. concurred.  
*Rule absolute.*

Friday, April 29, 1864.

SUTTON v. THE SPECTACLE MAKERS COMPANY.

Corporation—Retainer of attorney—Contract without common seal.

A municipal corporation is not liable for the costs of an attorney conducting on their behalf an opposition to a Bill in Parliament affecting their privileges, unless the retainer is under the common seal.

Special case.

This action was brought by a solicitor in London to recover a bill of costs from the defts., one of the livery companies of London, constituted by Royal Charter of Charles II., having a common seal, and

being governed by a master, two wardens and eight assistants.

In 1852 the corporation of the city of London promoted a Bill in Parliament for "regulating elections within the city of London and extending the municipal franchise therein." At a meeting of various city companies it was proposed on their behalf to oppose such Bill; and the clerk of the defts.' company was said to have acted on their behalf, and to have assented to a joint opposition to be conducted by the plt. Accordingly the opposition was conducted by the plt., and all the work in respect of which this action was brought concluded in 1852. The defts. had paid what they contended was their proper quota of the expense, and this action was really instituted to try if they were liable for anything more, as plt. contended they were.

*Mellish* (Holl with him) for the plt.—It is conceded that it is not easy to distinguish this case from *Arnold v. Mayor of Poole*, 4 M. & G. 860. In *Haigh v. North Bierley Union*, 1 E. B. & E. 873, a corporation was held liable for the expense of investigating the accounts of the clerk of the union, although the employment of the accountant was not under seal.

*Lush* (Bovill and Raymond with him) was not called upon.

BLACKBURN, J.—Without deciding whether there was or was not a retainer in point of fact, I think our judgment should be for the defts. on the ground that there was no retainer under the common seal of the defts.' corporation. A corporation cannot as a general rule bind itself to a contract except by its common seal. This case is not within any of the exceptions of that rule. The case of *Haigh v. North Bierley Union* goes further than any other on this point, but that is not applicable to the present case.

MELLOR and SHEE, JJ. concurred.

*Judgment for the defts.*

Attorneys for the plt., *Sutton and Osmoney*.  
Attorney for defts., *W. H. Palmer*.

Saturday, April 30, 1864.

REG. v. THE MIDDLE LEVEL COMMISSIONERS.

Bridge—Duty of commissioners to re-erect a bridge under a local Act—Dimensions of.

By a local Act certain commissioners were constituted to protect (inter alia) the banks of the river Ouse, and by another local Act certain commissioners were constituted, under the title of the Middle Level Commissioners, with powers over a large district of land, and who under such powers had built a sluice bridge from bank to bank over the said river Ouse. The tide having broken in and washed away such sluice bridge and 110 feet of the embankment adjoining, a local Act (25 & 26 Vict. c. 188) was passed, enacting that the said Middle Level Commissioners "shall, with all convenient dispatch after the passing of this Act, at their own cost, erect a new bridge, or otherwise provide and make and for ever maintain a good and sufficient continuous road or haling path over and along or near to that part of the west bank of the river Ouse, where recently stood the sluice bridge and roadway made by the said commissioners," &c. The Middle Level Commissioners were ready to build a sluice bridge of the dimensions of the old one, if there were any embankments to which to attach it, but declined to make one to connect itself with the embankment in its present unrestored condition:

*Held, that the words of the statute limit the duty of the commissioners to the making of a bridge of the limits of the former bridge.*

Q. B.]

Ex parte PATER.

[Q. B.]

This was a demurrer to a *mandamus* commanding the Middle Level Commissioners to construct a bridge over the river Ouse.

It appeared that the banks of the river Ouse are under the control and management of a body of commissioners constituted under a local Act of Parliament, and that the Middle Level Commissioners were another body of commissioners likewise constituted under a local Act, with powers over a large district of land, and who, under such powers, had built a sluice bridge from bank to bank over the said river Ouse. The tide having broken in and washed away such sluice bridge and a considerable portion of the bank at each end, a local Act was passed (the 25 & 26 Vict. c. 188), enacting (*inter alia*) that the said Middle Level Commissioners "shall, with all convenient dispatch after the passing of this Act, at their own cost erect a new bridge, or otherwise provide and for ever make and maintain a good and sufficient continuous road or haling path over and along or near to that part of the west bank of the river Ouse where recently stood the sluice bridge and roadway made by the said commissioners, and referred to in the 155th section of the said Middle Level Act." The river Ouse commissioners had not restored the bank to its condition before the breaking in of the tide, such bank being washed away to the extent of 110 feet, nor were such commissioners parties to the present proceedings. The Middle Level Commissioners were ready to construct a bridge of the dimensions of the former bridge, which, however, in consequence of the washing away of the embankment upon which it rested, could not be erected, and they disputed their liability to build any more extensive structure, or to restore the embankment.

*Mellish, Q.C. (Phear with him)* now appeared for the Crown, and contended that the Middle Level Commissioners were bound, under the terms of the local Act, to restore the bridge in an efficient state for use, and that it should be made so as to reach the existing banks, otherwise the provisions of the Act would be wholly nugatory.

*Sir F. Kelly, Q.C. (Metcalfe with him)* argued that the Middle Level Commissioners were bound only to erect such a bridge as before existed, and that the Act imposes no new liability upon them, and that they are ready to make a new bridge as soon as there is an embankment to which it can be attached.

**COCKBURN, C.J.**—It is certainly very much to be deplored that upon a matter so very important the language of the statute should be so ambiguous; but it seems to me that the words limit the duty of the commissioners to the making of a bridge of the limits provided by the former Act. The words are "over and along or near to that part of the west bank of the river Ouse where recently stood the sluice bridge and roadway made by the said commissioners, and referred to in the 155th section of the said Middle Level Act." Now, if the Legislature had intended that the present breach should be spanned, nothing would have been easier than to have enacted it. This perhaps may have been a *casus omisus*, but we cannot supply the omission.

*Judgment for the deft.*

*Monday, May 9, 1864.*

*Ex parte PATER.*

*Contempt—Licence of counsel—Jurisdiction of Quarter Sessions.*

*A Court of Quarter Sessions is competent to punish for contempt. But if it treated as a contempt that which it had no reasonable ground for so treating, this court will interpose.*

*Counsel has a right to, and may with propriety, com-*

*plain of acts having the appearance of partiality done by one of the jurymen; but to do so in violent and abusive language, or in a violent manner, and for the purpose of insulting the juror, and in spite of the prohibition of the court, is a contempt.*

Mr. Pater was a barrister-at-law practising at the Middlesex Quarter Sessions. During his defence of a prisoner he objected to some questions put to a witness by the counsel for the prosecution, on which the foreman of the jury made the observation, "We know what this is for." Afterwards, when he was cross-examining the same witness, the foreman of the jury again interrupted, saying, "You have no right to insinuate that the witness is swearing falsely." Mr. Payne, who was presiding as deputy-assistant judge, did not interrupt or rebuke the jurymen for his interference. In his address to the jury, Mr. Pater used these words: "I thank God that there are twelve jurymen, for if it rested with one, and that one the foreman, there could be no doubt of the result; he ought to be removed from the box and another juror put in his place." The affidavit of Mr. Payne stated that this was spoken in a loud, threatening and insulting tone and manner, and with violent gestures, and that, apprehensive of retaliation by the foreman, Mr. Payne requested him to withdraw the expressions used, but that Mr. Pater refused and repeated them in a loud and offensive tone. At the close of the case, he was again asked to withdraw the expressions used, but, still refusing, the Assistant-Judge was called in and a fine of 20*l.* was inflicted upon Mr. Pater for the alleged contempt.

A rule *nisi* had been granted on a former day to bring up the order to be quashed.

The affidavit of Mr. Payne in answer had been filed.

*Bovill, Q. C. and Welsby* now showed cause, and having read the affidavit of Mr. Payne, he said that the question was of great importance to the independence of the Bar, but still more so to the administration of justice. Happily in the Superior Courts such occurrences never arose. One the earliest and most deeply implanted sentiments in the English mind and character was one of deep respect for the sanctity of courts of justice; and certainly in the Superior Courts such scenes never took place, and it was very seldom that there was any occasion for the interposition of the judges, and whenever such occasions did arise, the least intimation from the bench was sufficient, and was sure to be at once acquiesced in. It was due to Mr. Pater to notice that in his affidavit he denied any intention to offer any contempt to the court; but when called upon at the time to explain or apologise he refused to do so.

**COCKBURN, C. J.**—There could be no doubt that counsel had a right to appeal to the jury not to be unduly influenced by the opinion of any of their number, and if any of them had expressed themselves strongly against his client he had a perfect right to appeal to the rest. It not unfrequently happened that when a judge intimated his opinion to be adverse to one of the parties and the counsel appealed to the jury against that opinion, and reminded them that they were the judges of matters of fact; and so long as this was said in a becoming manner, no judge would take exception to it. But it is otherwise when the mode of making the observation was offensive, and if ambiguous, and admitting of an offensive interpretation, it ought to be explained; and, in this instance, the other observation about removing the foreman from the box might serve to illustrate the spirit in which the words were spoken for which the fine was inflicted.

*Bovill* said that a great deal must, of course,

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[Q. B.]

depend on tone and manner, as to which only those who were present could judge; and it was for the court, who adjudged the contempt, alone to determine whether what was said amounted to contempt. For this he cited *Reg. v. Davison*, 4 B. & A., where the Lord Chief Justice had fined a party defending himself on a charge of libel for observations deemed offensive and amounting to a contempt. It was true that was the case of a Superior Court; but in this respect the Court of Quarter Sessions was in the same position, that it could fine for a contempt of court; and what was a contempt it was for that court itself to determine, subject, no doubt, in some degree, to the supervision of this court to see if there were any grounds for it, but not by way of appeal. It must be taken, he admitted, that Mr. Pater was fined for no other words than these: "I thank God there are twelve jurymen, for if it rested only with the foreman there would be no doubt of the result." But then the meaning of the words it was for the court to decide. Important as were the privileges of the Bar, the administration of justice and the protection of those engaged in it were still more important. Barristers had often been termed by great judges "ministers of justice," and they owed a duty, not merely to their clients, but to the court, and this doctrine had been acted upon in many ways. And if a barrister unfortunately so forgot himself as to use words in a tone and manner which produced on the mind of the presiding judge the impression that a contempt of court had been committed, it was within the province of the court (if a court of record) to fine him for that contempt, after due opportunity afforded him for explanation or apology.

*Denman*, Q. C. (with him *McMahon* and *Kenealey*) in support of the rule.—It was very important to bear in mind that the first occasion of offence had not been given by Mr. Pater—no, nor even the second; for, first, the jury had most improperly interrupted him, and then the judge had altogether omitted to check or control them.

*Mellor*, J. observed that certainly the observations of the jurors were most improper and impertinent.

*Denman* said, so it appeared to him. The jury had no business to interfere with counsel. That was the province of the presiding judge.

*Cockburn*, C. J. remarked that sometimes the observations of jurors were useful, but then they ought to be addressed to the judge.

*Denman*.—Just so; and surely, after the judge had countenanced in this case this most improper interference of a juror, it was most unjustifiable to fine counsel merely for remonstrating against it.

*Cockburn*, C. J.—Much may depend upon tone and manner.

*Denman*.—But no tone or manner can extend or enlarge the import of words beyond the sense and meaning of which they are naturally capable.

*Cockburn*, C. J. said the court were bound to protect the jury.

*Denman*.—Most certainly, but not from what is admitted to be a just remonstrance; for if the interruptions of the jurors were improper, and the judge did not check them, counsel had a right to remonstrate.

*Cockburn*, C. J. said certainly the words themselves were not exceptionable, but the question was, with what meaning they were used.

*Denman* said that must depend upon the words themselves. The arbitrary judges who, in the times of the Stuarts, fined jurors or witnesses, tried to

eke out the alleged offences by such epithets as "loud," "offensive," or "insulting." But they were vague and unmeaning phrases. "Loud!" Why, judges sometimes were so. "Offensive!" Why, most people found remonstrances offensive when they were in fault. "Insulting!" That was to be judged of by the words used. And the words used here had no such meaning, and were not reasonably or fairly capable of it. To allow a barrister to be fined for contempt for words admitted to be in themselves unexceptionable, merely because the judge chose to fancy them uttered with an offensive meaning, would be a most dangerous precedent. Why, our ablest and most illustrious advocates would have been liable to be fined, either in our own times or times gone by, over and over again for similar cause. Had their Lordships forgotten the instance, cited by Lord Campbell, from the celebrated case of *The Dean of St. Asaph*, in which Mr. Erskine was counsel? The jury had returned a verdict, "Guilty of publishing only," upon which Buller, J. said:

You say he is guilty of publishing the pamphlet, and that the meaning of the innuendoes is as stated in the indictment?

*Juror*.—Certainly.

*Erskine*.—Is the word "only" to stand part of the verdict?

*Juror*.—Certainly.

*Erskine*.—Then I insist it shall be recorded.

*Buller*, J.—Then the verdict must be misunderstood. Let me understand the jury.

*Erskine*.—The jury do understand their verdict.

*Buller*, J.—Sir, I will not be interrupted.

*Erskine*.—I stand here as an advocate for a brother citizen, and I desire that the word "only" may be recorded.

*Buller*, J.—Sit down, Sir; remember your duty, or I shall be obliged to proceed in another manner.

*Erskine*.—Your Lordship may proceed in what manner you think fit. I know my duty as well as your Lordship knows yours. I shall not alter my conduct.

Commenting upon this, Lord Campbell proceeds to observe: "The learned judge took no notice of this reply, and, quailing under the rebuke of his pupil, did not repeat the menace of commitment. This noble stand for the independence of the bar would of itself have entitled Erskine to the statue which the profession affectionately erected to his memory in Lincoln's-inn-hall. We are to admire the decency and propriety of his demeanour during the struggle, no less than its spirit, and the felicitous precision with which he noted out the requisite and justifiable portion of defiance. The example has had a salutary effect in illustrating and establishing the relative duties of judge and advocate in England."

*Cockburn*, C. J.—The true answer to that case is, that Buller, J. was in the wrong and Mr. Erskine in the right.

*Denman*.—So here. It was obvious the juror was in the wrong, and Mr. Payne, the judge, was in the wrong for not checking him, and so Mr. Pater was in the right. Nor were there wanting similar instances in our own times, and even among some of those who were now on the bench. The Lord Chief Justice, when at the bar, had not shrunk from warmly remonstrating with a judge for some observation which showed a disposition to prejudice the case; and two or three years ago Mr. Serjeant Shee, now on the bench, took a similar course in a case in which a juror showed a strong feeling against his client, and the learned judge who presided fully approved that course. In the present instance the judge silently sanctioned the improper conduct of the juror, and then, when the counsel remonstrated, fined him for contempt. Such a precedent would be most dangerous, and would afford to arbitrary judges and Courts of Quarter Sessions all over the country a very easy method of silencing a spirited counsel.

*Cockburn*, C. J. delivered judgment, that the rule for a *certiorari* to quash the order should be

discharged, and that consequently the fine should stand. He said that it was beyond a doubt that the Court of Quarter Sessions had inherent in it the power to punish for contempt of court, as being a court of record. Nor was there any question that this court had authority to prevent any excess or usurpation of jurisdiction by the Court of Quarter Sessions. And if the Court of Quarter Sessions treated as a contempt that which it had no reasonable ground for so treating, this court would interpose to prevent it from so acting, and protect the party thus dealt with, and against whom the power to commit or fine for contempt had thus been improperly exercised. Then arose the question whether in this case the jurisdiction had been improperly exercised without any reasonable ground. Now, as regarded that question, this court could not take upon itself the functions of a court of appeal from the decision of the Court of Quarter Sessions. All that they could do was to see that the Court of Quarter Sessions had jurisdiction in the matter complained of. And in the case of *Curus Wilson*, who had been committed for contempt by a colonial court, the Royal Court of Jersey, Lord Denman thus laid down the law: "Here a contempt is supposed to have been committed. It is unfortunate when the court has to act both as party and as judge; but the judge has to decide whether it has been treated with contempt; and we cannot decide that he has come to a wrong conclusion. The court may be insulted by the most innocent words uttered in a contemptuous tone, and so the words here might or might not be contemptuous according to the manner in which they were spoken; and if the words might be contemptuous, there was ample occasion for the decision of the court, with which no other court can meddle. Every court in such a case is to form its own judgment, and must always feel itself most unwilling to interfere in this way. Indeed, the practice has been discontinued for centuries." It is clear that on these principles we must say that there was evidence here on which the court could reasonably come to the conclusion that a contempt had been committed; and that is all we have to determine—we have no appellate jurisdiction in the matter. There can be no doubt that the words themselves were words which counsel might well have uttered in the honest discharge of his duty; and however harsh and unpleasant they might have appeared, that would have been no ground for a committal for contempt. But if used for the purpose of insulting the juror, then they were used, not in the exercise, but the abuse, of the privilege of counsel, and then they would amount to a contempt of court, for which the counsel might properly be punished. And there is evidence that they were so used, for when that sense was imputed to them, he did not disavow it, but repeated the words, and I think it must be taken that he repeated them in the sense thus imputed to them, and which he did not disclaim. Unfortunately, there had been a previous altercation between the counsel and the foreman, and I must say I deeply regret that the foreman was allowed to make the observations he did without any observation from the court. It would certainly have been far better if the judge had told the foreman that anything he had to say he must address to the court, and not get into a personal altercation with counsel. I repeat, that I regret extremely that this course was not pursued. There had, however, been this altercation, and in the course of it the counsel said the foreman ought to be removed from the box—an observation of a very unpleasant character, and which may serve to give a sense and meaning to the other words used, and for which the fine was inflicted. The question is, whether these words were to be understood

merely as an appeal to the other jurors against the prejudice of the foreman, or as conveying an offensive imputation upon the foreman. Mr. Payne at the time suggested that the latter might be the meaning, and Mr. Pater did not explain and disclaim it; and when afterwards called upon to explain or apologise, he refused to do either, but persisted in adhering to what he had said, notwithstanding the construction put upon it. No doubt, when a man has said nothing which can be excepted to, he is not bound to apologise or retract; but when the words he has used are ambiguous, surely he may well explain. Are we, under these circumstances, to say that the court came to a conclusion so utterly wrong and unreasonable as that we can say that they had no jurisdiction to make this order? I think we cannot say so. I deeply regret the unfortunate result. No man can have a higher sense than I have of the importance of the rights and privileges of counsel in the discharge of their arduous and important duties. I quite agree that they have not those privileges for themselves, but for the whole community, and I should be the last man in the world to limit or to restrain them. But, on the other hand, we are bound to protect the jurymen in the discharge of their duties, and if, looking to the whole of the circumstances, we see evidence from which it might fairly be concluded that there was an intention to insult, we cannot interpose to prevent the consequences from a desire to uphold the privileges of the Bar. Deeply, therefore, as I regret the result, I am bound to say that we should not be justified in making this rule absolute to quash the order.

### COURT OF COMMON BENCH.

Reported by W. MATY and LUMLEY SMITH, Esqrs.,  
Barriers-at-Law.

Monday, May 2, 1864.

SHEPPARD AND OTHERS (apps.) v. THE CHURCHWARDENS, &C. OF BRADFORD (resps.)

*Poor-rate—Reformatory—Right to begin.*

*A reformatory established under 17 & 18 Vict. c. 86, is not liable to be rated for the poor-rate.*

*In the Court of C. P., differing from the Courts of Q. B. and Ex., the app. has the right to begin.*

The following special case was stated for the opinion of the court under the 12 & 13 Vict. c. 45, s. 11:—

#### CASE.

The resps., by a rate made for the relief of the poor of the said parish of Bradford, on the 3rd July 1863, have assessed the apps. under the name of the Reformatory Committee at Limpley Stoke, in the sum of 2*l.* 16*s.* 3*d.*, and the apps. have duly given notice of appeal, of which the following are set forth as the grounds of such appeal:

1. That the said premises are not liable to be rated.
2. That we are not liable to be rated in respect of the said premises.
3. That we are not beneficial occupiers of the said premises.
4. That we make no profit of the said premises.
5. That all the funds arising from the said premises are applied to public and charitable uses in common with such premises.
6. That the said premises are a reformatory school for the better training of juvenile offenders under an Act passed in a session of Parliament holden in the 17th and 18th years of Her Majesty, entitled "An Act for the better care and reformation of youthful offenders in Great Britain," and duly certified according to law.

And the said apps. and resps. have agreed that the facts of the case shall be stated for the opinion of the court pursuant to the 11th section of the 12 & 13 Vict. c. 45, and an order of this court has been made accordingly, with the consent of the said parties.

The facts are, that the premises in respect of which the said rate is made are a reformatory school for young female offenders, instituted in pursuance of the 17 & 18 Vict. c. 86, and other statutes in that behalf made and duly certified according to the law as such, and for no other purpose.

The apps. are the managing committee of that institution. They do not reside on the premises, but the matron and other officers of the reformatory do reside there.

The reformatory in question, with a piece of land attached, is rented by the apps. at the annual rent of 74*l.*, but none of them reside there. It is situated in the parish of Bradford in the county of Wilts, and is capable of accommodating fifty girls, although there never has been so large a number of inmates. Offenders from all parts of the kingdom may be and are sent to this reformatory, though it was intended for the counties of Wilts, Somerset and Gloucester, and three beds are always retained for girls from the borough of Bath, but of the forty-three now under detention four only are from these counties, and one from the borough of Bath. On admission, entrance fees are payable, which are paid into the general fund of and applied towards the maintenance of the institution, and these fees for the year 1862 amounted to 22*l.* 12*s.* In many instances also the parents are obliged under statutes 18 & 19 Vict. c. 87, and 20 & 21 Vict. c. 55, to contribute towards the maintenance of their children whilst in the reformatory, which payments are however deducted from the amount allowed by Government. The payments during the year 1862 amounted to 25*l.* 2*s.* 3*d.* The girls are instructed in reading, writing, cyphering and religious knowledge, and are also engaged in various industrial occupations. They make up their own clothes, do the washing and other work of the house, help in cooking, and some of the gardening. Mangling, washing and needlework, not only of the reformatory, but for private families, are done on the premises, and during the year 1863, as appears by the report of the committee, the sum of 28*l.* 5*s.* 9*d.* was credited to the funds of the institution as the value of the washing and needlework done by the girls, nearly the whole of which work was performed during the last four months of the year, since which time extensive alterations have been made in the premises which will enable mangling and washing to be carried on much more extensively. Such work is stated to be done on reasonable terms, and the committee (the apps.) express a hope of ultimately making the reformatory self-supporting, with the aid received from Government.

All the funds derived from work done on the premises are applied towards the maintenance of the institution, or for rewards to the inmates for proficiency and good conduct. The remainder of the income of the reformatory for the year 1862 (such income amounting to 920*l.* 16*s.* 1*d.*) was made up of donations, subscriptions, Government grant, and sundries, the whole of which was applied solely to the maintenance of the reformatory, or placed in banks to meet contingencies of the present year, and which has since been expended on the maintenance of the institution.

The question for the opinion of the court is, Is the reformatory in question liable to be rated for the relief of the poor?

Keane, Q.C. for the resps.—The question is, are these premises liable to be rated for the poor? The

case of *Reg. v. Temple*, 2 E. & B. 160, referred to in the case of *Reg. v. Stapleton*, 9 L. T. Rep. N. S. 322, is closely analogous to the present case. This is not a public institution, and is distinguishable from a gaol:

*Reg. v. Licensed Victuallers' Society*, 1 B. & S. 71; *Anonymous*, 2 Salk. 527.

ERLE, C. J.—In this court the app. begins.

Saunders for the app.—In *Justices of Bedfordshire v. St. Paula, Bedford*, 7 Ex. 650, it was held that the resp. was entitled to begin, as the affirmation was upon him.

WILLES, J.—The practice in this court is otherwise.

BYLES, J. (to Keane, Q.C.)—As you have gone so far you must continue.

Keane, Q.C.—What difference is there between this case and *R. v. Temple*?

ERLE, C. J.—There there was a profit.

Keane, Q.C.—So here there is some profit.

BYLES, J.—To whom does it go?

Keane.—To the support of the reformatory.

BYLES, J.—Are there any children here except those under criminal sentence?

Keane.—No.

BYLES, J.—Then how does this differ from a gaol?

Keane.—There is no compulsion on any one to establish a reformatory, and the person who does so may give it up at any time; he supports it in part and the Government in part; but in a prison there is an imperative duty and necessity to support the prisoners. Gaols are a part of the State system; reformatories are not, but the charity of private individuals in a particular direction, assisted by Government aid.

KEATING, J.—Could the committee release any of the prisoners before their sentence was out?

Keane.—I think not; but if they became insolvent they could say, "You must take the children away." This is not a continuous but a voluntary duty, which they are not compelled to perform longer than they please:

17 & 18 Vict. c. 86;

20 & 21 Vict. c. 55.

ERLE, C. J. referred to the *Dartmoor Prison* case, *Gambier v. Overseers of Lydford*, 3 Ex. & B. 346. Lord Campbell was always of opinion that benevolent persons should not by their benevolence increase the burden of their neighbours.

Keane.—Just so. This is a place that carries on a species of trade, and a profit is made, and the trustees by their servants are the occupiers.

T. W. Saunders for the apps.—The principle is, that if the institution is entirely of a benevolent character, and there is no beneficial occupation, there is no liability to be rated:

*Reg. v. Waldo*, Cald. 858;

*Reg. v. St. George the Martyr, Southwark*, 1 L. J. 129, M. C.

This is a public institution (in fact a prison), and, though a profit may be made, there is no beneficial occupation in any one:

*Reg. v. Wilson*, 12 A. & E. 94;

*Reg. v. Stapleton*, 9 L. T. Rep. N. S. 322;

*Reg. v. Shepherd*, 1 Q. B. 170.

Private individuals cannot send persons to a reformatory, and though persons cannot be compelled to institute reformatories, when instituted they are prisons.

ERLE, C. J.—I have considered the effect of the 17 & 18 Vict. c. 86, and it appears to me that a reformatory is as much occupied for public purposes as a county gaol. I do not think that the distinc-



C. B.]

VESTRY OF ST. GEORGE'S, HANOVER-SQUARE v. SPARROW.

[C. B.]

tion as to the age of the prisoners has any effect as to the liability to be rated. A gaol is excepted from being rated, and, as I read the Act, a reformatory is a gaol for a particular class of offenders; it is used for the same purposes as a gaol, and therefore is not liable to be rated.

WILLES, J. concurred.

BYLES, J.—I am of the same opinion. These persons are occupiers in the strict legal sense of the term, they are entitled to bring trespass; but it has been held under the statute of Elizabeth (43 Eliz. c. 2), that persons in order to be rated must be in the beneficial occupation. Then there is an exception of buildings used for public purposes; thus the Horse Guards, the Admiralty, a place for holding a County Court, places of public worship and county gaols, have been held to be exempt. The persons here confined are confined under a judicial sentence, and there is a public obligation to keep them till their sentence has expired. It may here be observed that this is not a gaol for one county only, but for several. It is not necessary to consider whether this is a charity, as the case of *Reg. v. Stapleton* has distinguished between public and private charities; and some of the cases go further than that one, and on some of them severe observations have been made, and perhaps rightly. This, however, is essentially a charity for public purposes, and on this principle *St. Bartholomew's Hospital* has been held to be exempt: (*Reg. v. St. Bartholomew's Hospital*, 4 Burr. 2435.) The statute 3 & 4 Will. 4, c. 80, now exempts places of worship in all cases; but it had been held before that, where there was no letting of pews, as they were places where all the public might resort for public purposes, they were not liable to be rated. This is a place for carrying out the general purposes of the country for the punishment and reformation of juvenile offenders, and, in my opinion, comes within the category of ordinary gaols, and therefore is not liable to be rated.

KEATING, J.—I am of the same opinion. This is substantially a prison, and it is not necessary to consider its probable duration; while so occupied it is occupied as a prison.

*Judgment for the apps. without costs.*

Friday, April 22, 1864.

VESTRY OF ST. GEORGE'S, HANOVER-SQUARE (apps.)  
v. SPARROW (resp.).

*Metropolitan Local Management, 25 & 26 Vict. c. 102*  
—Erections beyond the general line of buildings.

Where the deft. was summoned under the 75th section of the *Metropolis Local Management Act* for unlawfully erecting a structure without the consent of the Board of Works, it was

Held, that it was for the magistrate to decide whether the structure complained of was an "erection," "building," or "structure," within the meaning of the Act, and also that the certificate of the architect that such erection was beyond the general line of buildings was not final.

This was a summons under the *Metropolitan Local Management Act* (25 & 26 Vict. c. 102), s. 75, charging that the deft. on the 1st July 1863, in the parish of St. George, Hanover-square, Middlesex, within the metropolitan police district, did unlawfully erect a certain erection, to wit, a conservatory, without the consent in writing of the Metropolitan Board of Works, beyond the general line of buildings in a certain street called Half-moon-street, in the parish, county and district, the distance of such line of building not exceeding fifty feet from the highway, contrary to the statute, &c.

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Half-moon-street is about forty feet wide, containing twenty-three houses on the east side, and twenty-four on the west, built at different times, before the 17 Vict., at different heights and levels as suited the respective builders; the deft.'s house No. 1, on the east side, is the corner house next to Piccadilly, that part of the shop front which faces Half-moon-street projects three feet beyond the front wall of the house at the first floor, forming a ledge on the top extending three feet three inches in width from that wall. This shop front existed in its present state before the 17 & 18 Vict. c. 123.

In April 1863 the deft. took out the window with its frame from the room on the first floor of his house looking into Half-moon-street, and substituted for it a case or thing principally composed of glass set in light iron framing about the same height as the old window, and four feet six inches wide, and projecting two feet six inches from the house wall and resting on the above-mentioned shop front, its extreme edge being nine inches nearer the house than the extreme edge of the shop front.

This case or thing of glass and iron is the matter complained of as an "erection" and forms the only window of the said room. The district surveyor of the parish approved of it as being of incombustible materials within the *Metropolitan Building Acts*.

At the hearing before me, the district surveyor stated that this was a "projecting window." The surveyor employed by the parish for thirty years called it a "projection," and not a "projecting window," but said that a bow window would be a "projecting window." The superintendent of the Metropolitan Board of Works styled it a "conservatory" (as in the summons).

The deft. did not obtain the consent of the Metropolitan Board of Works for the above alteration of his house, but got that of the inhabitants of the four houses next his own, lower down from Piccadilly, before putting up the glass and iron in question.

Evidence was given that there was nothing in this thing of glass and iron unsightly or obstructing light or air, or inconsistent with the general character of either side of the street. On the same (east) side of the house No. 5 has a bow window on the first and second floors, projecting from the house wall in like manner, but further into the street. Several balconies project from other houses on the same (east) side, at different levels and distances of projection from the house walls. The last house on the east side has a shop front projecting in the same manner as at No. 1. All these projections are legal, having been erected before the 17 Vict.

Contradictory evidence was given on the point whether the glass and iron in question was in point of fact beyond or within the general line of buildings on the east side of Half-moon-street. The superintending architect of the Metropolitan Board of Works proved his certificate in writing, that "the main front of the buildings forming the row of houses aforesaid" is the "general line of buildings in the said row" as shown in the plan annexed to his certificate and signed by him. He also stated before me that the glass and iron in question called by him a "conservatory" was beyond the general line of building; the word "general" being now substituted for "regular," on which word as occurring in the 18 & 19 Vict. c. 120, s. 143, now repealed, the decision in *Teas v. Freebody* took place, 4 C. P. Rep. 228.

In support of the summons it was argued that the above-mentioned certificate was final and precluded further inquiry by the magistrate. This was denied by the deft., as such a construction would prevent all corrections of even self-evident errors in such certificate or plan. It was also said that not



only was the glass and iron in question within the extreme edge of the shop front, and within the true "general" line of building in the said row of houses forming the east side of Half-moon-street, but that it was also in point of fact within the line laid down in the first plan by the said superintending architect as the "general line of buildings" in that row of houses.

After viewing the *locus in quo*, I called to mind that the summons did not charge this case or thing of glass and iron as a projecting window under sect. 119 of the first Metropolitan Act, 17 & 18 Vict. c. 120, nor as a "projection" under the Metropolitan Building Act (18 & 19 Vict. c. 122), s. 21; nor as a "thing affixed to or projecting from a building, wall or other structure" under the same Act, 18 & 19 Vict. c. 122, schedule, part III., "Dangerous structures;" nor as contrary to any unrepealed section of 57 Geo. 3, c. 29, called "Michael Angelo Taylor's Act," and decided that the thing in question, called by some a "conservatory," by others a "projecting window," and by others a "projection," was not an erection within the intent and meaning of sect. 75 of the Metropolitan Local Management Act, 25 & 26 Vict., upon which the summons proceeded, having regard to the words "building or structure" next preceding it in that section, and to the above-mentioned statutes still in force, and I dismissed the summons accordingly.

I doubted whether "the general line of building" certified by the superintending architect could in point of law be questioned before me. Subject to that doubt I was of opinion that, having regard to the peculiar irregularities of the shop fronts, bow windows, verandahs and balconies projecting as above stated from the house walls on the east side of Half Moon-street, as well as on the west side and legally so projecting, having been there before the 17 Vict., the true general line of buildings might not be along the main walls of the houses in the row. I also thought that in point of fact the extreme edge of the thing of glass and iron in question was not only within the extreme edge of the legally existing shop front, but also within the line certified by the superintending architect as the "general line," but I did not dismiss the summons upon either of these grounds, but on that already stated.

The questions for the opinion of the court are:

1. Whether in point of law the thing of glass and iron in question placed as above described must be held to be an erection within sect. 75 of 25 & 26 Vict. c. 102.
2. If the said glass and iron be such an "erection," whether the line certified and decided by the superintending architect of the Metropolitan Board of Works as the "general line of building" does in point of law preclude all further inquiry, whether it is the true general line in each particular street or row or not.
3. If my decision is reversed the parties seek that the summons shall stand, and this case be remitted to me to make such order as under the guidance of this honourable court shall seem fit.

If my decision is confirmed the deft. seeks that it be confirmed with costs to be taxed by the master.

The decision of the superintending architect was, that the main fronts of the buildings forming the row of houses aforesaid is the general line of buildings in such row. (Signed —.)

Brett, Q.C. (*Stretten* with him), for the apps., contended that, as the 75th section of the Act enacted that the architect of the Metropolitan Board of Works was to determine what was the general line, he was thereby constituted the arbitrator of the whole building, and his decision was final. He referred to *Teas v. Freebody*, 4 C. B., N. S., as to the line being a strictly mathematical line, but a substantially regular line.

Keane, Q.C., for the resp., was stopped by the Court.

ERLE, C.J.—I am of opinion that our judgment should be for the resp. The first question is, whether it is compulsory on the magistrate in point of law to hold the thing in question to be an erection, he being of opinion that it was not. It is impossible to hold as a rule of law that, because there is a certain quantity of materials, the magistrate must hold it to be within the statute. I do not think that it was. It cannot be the bounden duty of any one by law to hold so much glass and materials within the statute. Then he puts the question, "whether, if the glass and iron be such an erection, the line certified and decided by the superintending architect of the Metropolitan Board of Works as the general line of building does, in point of law, preclude all further inquiry whether it is the true general line in each particular street or row or not." I think that such was not the intention of the statute. I cannot believe without very strong words that the decision of the superintending architect is to stand good for every case, past all appeal or inquiry: a whole street, involving millions of money, might be affected by it. It seems very improbable that this should be so. I think that it would protect anybody, if he had permission from the architect, from being proceeded against by the Metropolitan Board of Works. I think that when the parties came to demolish it, it would be time for the magistrate to be called in aid. Then a party may go into the merits and ask for protection, "Am I liable to have these things cast upon me?" The magistrate, if satisfied that it is right, must order a demolition; but I believe that the result of the complaint would be for the magistrate to ascertain whether the statute had been in substance transgressed.

WILLES, J.—I am of the same opinion. I give no opinion as to whether this was an "erection" within the meaning of the Act, as the magistrate has found that it was not. Upon the other ground I agree with the judgment of the Lord Chief Justice. The section is an extremely penal one. It makes it the duty of the magistrate to direct the demolition of the building or erection, the expenses to be borne by the owner or occupier. The 75th section says, that no building, structure, or erection shall, without the consent of the Metropolitan Board of Works, be erected beyond the general line of buildings, such general line to be decided by the superintending architect to the Metropolitan Board of Works for the time being. This section does not show that the architect is to decide whether the erection is within the general line; if it did, the magistrate would only have to decide whether the consent of the Metropolitan Board of Works had been given. What the magistrate has to do is to have clear proof that the "erection" is within the line; and in this case it appears that he did not consider that fact had been proved, and I am of opinion that his opinion was correct.

BYLES and KEATING, JJ. concurred.

#### V. O. KINDERSLEY'S COURT.

Reported by JOSHUA METCALFE and G. T. EDWARDS, Esqrs.  
Barristers-at-Law.

Tuesday, May 3, 1864.

FITZGERALD v. FITZPATRICK.

*Chapel of ease—District chapelry—Poor rents—Marriages, &c.—Fees—Appointment of clerk and sexton—Order in Council—Trust-deed.*

A chapel was erected by subscription, and vested in trustees, the expressed intention in the deed of trust being that the chapel should, when completed, be used

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*as a chapel of ease dependent upon the parish church. By an Order in Council, a portion of the parish was subsequently assigned to the chapel as a district chapel, but there was reserved to the then vicar of the parish the right to receive, during his life, all fees in respect of marriages, baptisms, &c., solemnised or performed in the said chapel. After the vicar's death, his successor laid claim to the exclusive cure of souls within the district chapel, and to receive pew rents, appoint a clerk, sexton, &c., in respect thereof. The plt. admitted at the bar the validity of the Order in Council:*

*Held, that the district chapel was constituted a benefice, and the incumbent a beneficed clergyman, by virtue of the Order in Council and the Acts of Parliament which the order referred to, and that therefore the vicar and churchwardens of the original parish had no right to receive pew rents or appoint officers in respect of the district chapel.*

*Held also, that the trusts of the deed were set aside by the Order in Council.*

This suit was instituted by the vicar and churchwardens of St. Paul's, Bedford, against the incumbent and churchwardens of the chapel or church of the Holy Trinity, at Bedford, and the questions which were raised were, whether an Order in Council declaring that marriages, baptisms, burials, &c. might be solemnised in the said chapel or church of the Holy Trinity, was valid, and also whether the plt. the Rev. William George Fitzgerald, as vicar of the mother church, was entitled to the exclusive cure of souls within the district assigned by the Order in Council to the said chapel or church, and to publish banns of matrimony, and solemnise marriages in the said chapel, and receive fees, pew rents, &c., &c. in respect thereof. There was also a question whether the trust-deed of the chapel was still in force.

The parish of St. Paul's, in the town of Bedford, in the diocese of Ely, is an ancient parish with a vicarage with cure of souls, and in 1840 the Rev. James Donne was the vicar, and John, Baron Carteret, was the patron of the vicarage.

By an indenture dated the 28th Sept. 1840 a piece of land situate in that parish (which piece of land by a previous deed dated in August in the same year had become vested in certain persons, their heirs and assigns), intended for the site of a new chapel, and such intended new chapel, were declared to be held upon certain trusts, which were in effect to permit the chapel to be built and consecrated, and used as a chapel of ease dependent upon the parish church of the parish of St. Paul, Bedford. The trusts of this deed are more particularly referred to in the V. C.'s judgment. The deed was duly enrolled in the Court of Ch. in 1841.

The chapel was built and consecrated in June 1841, by the name of the Chapel of the Holy Trinity, Bedford. The sentence of consecration recited that it had been represented to the bishop that the population of the parish of St. Paul had greatly increased, and that the church had become inadequate for their accommodation, and that it was therefore determined to erect a chapel of ease to the parish church, the necessary funds for that purpose having been provided in part by the Incorporated Society for the Enlargement, Building and Repairing of Churches and Chapels, and the residue by private subscription. The chapel received in the same year an augmentation from Queen Anne's Bounty.

On the 26th Oct. 1860 an Order in Council was made which, in consequence of a representation by the Ecclesiastical Commissioners, assigned to the Church of the Holy Trinity a certain part of the parish of St. Paul, Bedford, to be named the District Chapel of the Holy Trinity, Bedford. It also

provided that banns of marriage, marriages, baptisms, churchings and burials should be solemnised and performed at the church of the Holy Trinity, and that the fees should be paid and belong to the minister of the same church for the time being, excepting that so long as the Rev. James Donne continued vicar of St. Paul's all such fees should be paid to him by the incumbent of the Holy Trinity; and it was ordered that such proposed assignment and arrangement should be carried into effect agreeably to the provisions of 59 Geo. 3, c. 134, 2 & 3 Vict. c. 49, and 19 & 20 Vict. c. 55. The order was duly advertised and registered.

The Rev. James Donne died on the 17th Jan. 1861, whereby there became an avoidance of the vicarage and parish church, and the plt. the Rev. W. G. Fitzgerald, who had become patron thereof, presented himself to the bishop and was duly instituted and inducted to the vicarage. The defts. the Rev. Richard William Fitzpatrick was at that time the perpetual curate of the Chapel of the Holy Trinity, having been licensed thereto on the 11th May 1858.

Mr. Fitzpatrick, after the death of Mr. Donne, published banns of marriage and solemnised marriages, and also received Easter offerings and ecclesiastical dues, and claimed the right to retain them, and to be entitled to appoint a clerk and sexton, though such moneys were received and such appointments were made by the Rev. Mr. Donne with the consent of the churchwardens up to the time of his death. Mr. Fitzpatrick also claimed to be entitled to a proper stipend for his services out of the pew rents. The annual income arising from the permanent endowment of the chapel amounted only to the sum of 80l.

The defts., Messrs. Sheppee and Cotton, were the churchwardens of the Chapel of the Holy Trinity, having been appointed by Mr. Fitzpatrick and the inhabitants of the district under the 6 & 7 Vict. c. 37, and 19 & 20 Vict. c. 104. They refused to allow the plt. to let the pews or sittings in the Chapel of the Holy Trinity, or to collect the rents, or in any way to intermeddle therewith. A notice in writing, dated the 3rd April 1862, was served on behalf of Mr. Fitzgerald, upon the defts., requiring them to abstain from collecting or receiving such pew rents, and to account for and pay over what they had received, and hand over books and papers, which the defts. refused to do.

In 1854 a cemetery had been provided for the parishes of St. Cuthbert, St. John, St. Mary and St. Peter Martin, Bedford. It was situate in the parish of St. Peter, and was provided out of rates levied on the ratepayers of the said several parishes, including the ratepayers of the district of the Holy Trinity. Mr. Fitzpatrick had received and retained, for his own benefit, the surplice and other fees which were paid in respect of the interment of persons removed from the district of the Holy Trinity to this cemetery.

*Stephens, Q.C. and Traill*, for the plt., argued that the Ecclesiastical Commissioners had no power to deal with pew rents except as to a chapel built under 1 & 2 Will. 4, c. 38 (the Church Patronage Act), and that that Act did not apply to the present case, as the population was under 2000, nor did the endowment amount to 1000l. The trust-deed of the chapel remained in force, and was not superseded by 6 & 7 Vict. c. 37, or 19 & 20 Vict. c. 104. They would admit the Order in Council to be valid. They cited

*Tuckniss v. Alexander*, 8 L. T. Rep. N. S. 821;

*Abley v. Dale*, 11 C. B. 878;

58 Geo. 3, c. 45, ss. 62-64, 76-79;

59 Geo. 3, c. 134, ss. 6, 26, 27;

1 & 2 Will. 4, c. 38;

7 & 8 Vict. c. 94.

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*Baily, Q. C. and Surridge*, for the defts., contended that the chapel was no longer a chapel of ease, and that the trusts of the deed were put an end to by the Order in Council and the provisions of the Act of Parliament. Moreover, the collection of pew rents was altogether illegal. They cited

*Wyllie v. Mott*, 1 Hagg. Eccl. Rep. 28;  
*Comyn's Dig. tit. "Eglise," B.;*  
*Gough v. Jones*, 7 L. T. Rep. N. S. 566;  
 1 & 2 Vict. c. 49.

*Wickens*, for the Crown, took no part in the argument, as the Order in Council was admitted to be valid.

*Stephens* in reply.

The VICE-CHANCELLOR.—The questions to be determined by the court have been very much narrowed and brought within a limited space. They are merely these: First, whether the incumbent of St. Paul's has a right to the pew rents from the pews in this chapel; and secondly, whether the incumbent and churchwardens of St. Paul's have the right of nominating the clerk, sexton, or any other officer or officers who have to perform certain functions in the due and solemn performance of divine service? The other question which has been raised by the bill, as to whether the Order in Council dedicating this chapel to the new district is valid, has been abandoned; and I must assume now that the Order in Council, by which this district is created, and by which this chapel was dedicated as a place of worship for that district, is perfectly valid and good. This chapel was built in the following manner. Certain persons in the parish seem to have been desirous of extending church accommodation, which was insufficient for the number of inhabitants; and accordingly by means partly of private subscription and partly, not by a grant from the commissioners, but by a gift from the incorporated society, the chapel was built upon a piece of ground which no doubt had been purchased or given for the purpose. This piece of ground was, by an indenture dated the 28th Sept. 1840, vested in certain trustees upon the trusts which should be declared by a deed of trust of even date. By the deed of trust of even date the trustees were to stand possessed of and interested in the piece of ground upon trust to permit and suffer the chapel which was then in course of being built upon that ground to be erected, and to permit and suffer the same to be used, occupied and enjoyed as a chapel of ease subject to and dependent upon the parish church of the parish of St. Paul, Bedford, for the celebration of divine service, the administration of the Holy Communion, and the performance of the office of burial, but it was provided that no banns of matrimony should be published, or marriages solemnised, or baptisms or churchings had, by any person whatever in the chapel. Then the next clause is also material: "And upon this further trust, to permit and suffer the vicar for the time being of the parish church of St. Paul, Bedford, or his curate or curates for the time being, by his direction, such curate or curates being a licensed curate or curates of the parish of St. Paul, Bedford, and not specially appointed to the chapel, to officiate as the minister or ministers of the chapel, according to the rites and ceremonies of the said united Church of England. And upon this further trust, to permit the vicar and churchwardens for the time being of the said parish to let the pews and seats of the said chapel." Then there were to be certain free seats: "And upon this further trust, to permit the churchwardens for the time being of the said parish to receive the rents of the pews and seats so to be let as aforesaid." Then there is a clause as to vaults and catacombs, which I think is not material to the present question, and it then proceeds thus:

"And it is declared and agreed that it shall be lawful for the vicar and churchwardens for the time being of the said parish from time to time to appoint a clerk, pew openers, and all other officers or servants necessary or proper for the due performance of divine service in the chapel." Then it is further declared and agreed, that the rents and profits so to be received by the churchwardens for the time being of the parish (that is to say the pew rents) should be paid and applied thus—in the first place, in payment and discharge of the costs and expenses attending the celebration of divine service in the chapel, and in necessary repairs and insurance of the chapel, except the vaults or catacombs, and in payment of the salaries of the clerk, pew openers, officers, or servants serving in the chapel, and after payment and discharge thereof, the surplus of such rents and profits should be paid over or accounted for to the vicar for the time being of the said parish half-yearly, and the receipt in writing of the trustees was to be a good discharge. Now, I think it is perfectly clear that the intention of the parties, so far as it was in their power, was to make this chapel a chapel of ease. They expressly declare that the trust is to be to suffer the same to be used, occupied and enjoyed as a chapel of ease, subject to and dependent upon the parish church, and it is to be served, not by any curate or minister specially appointed to serve that church, but by the licensed curate or curates of the parish of St. Paul's; *quatenus in illis*, they designed it to be a chapel of ease, entirely dependent upon the mother church—that is, the Church of St. Paul, Bedford. It has been argued that, if there be a chapel of ease, the freehold of that chapel must necessarily be vested in the incumbent, and not in any trustees or other persons. Here, by the deed of conveyance, the freehold is conveyed to, and by this deed of trust it is contemplated to remain in, the trustees appointed by the parties who were instrumental in causing the church to be erected. It is contended that, if it be a chapel of ease, the freehold must be vested in the incumbent, and that, unless it be so vested in the incumbent, it is not a chapel of ease. Upon that point I do not mean to express any opinion, because, assuming the law to be either way (and I have not had any authority cited on either side to establish the proposition or to rebut it), and supposing it was not properly a chapel of ease of the parish, still the persons who executed this deed, or who were parties to it, intended it to be, so far as it was possible for them to make it so without vesting the freehold in the incumbent, to all intents and purposes a chapel of ease. They at least intended that it should have all the attributes of a chapel of ease, even if, in the eye of the law, it was not actually constituted such. It has further been argued that, if it be a chapel of ease, then all the rules of law which apply to a parish church (that is, with reference to the illegality of letting pews) would necessarily apply to this chapel of ease. Upon that point, again, I do not express any opinion, and I abstain from doing so because cases have not been cited as authorities sufficient for me to draw a conclusion one way or the other. If it were necessary, I would investigate the subject, but it appears to me unnecessary, for the purposes for which I have to decide, to come to any conclusion upon that abstract point. Whether this be, properly speaking, a chapel of ease with reference to the freehold not being vested in the incumbent, or whether, in the case of an actual chapel of ease, there be or be not the same law prevailing with regard to the letting the pews as is applicable to the case of letting pews in a parish church, it appears to me not necessary to determine. But whichever way we may suppose the law to be, we have at all events this fact, that the parties

intended to make this, as far as lay in their power, a chapel of ease entirely dependent upon and served by the curates of the parish church. I assume that during a long course of years, while Dr. Donne was the incumbent of St. Paul's, the pews were let in this chapel, and that Dr. Donne received those pew rents subject only to such deductions as were necessary for the payment of the clerk, sexton, &c., and other expenses necessary for the due performance of divine service, so that, as far as related to any benefits resulting from the chapel, whether they were lawful or unlawful according to the strict laws relating to chapels of ease, the chapel was at all events treated as belonging to the parish church, in the sense that the incumbent received any profits resulting from it, and the incumbent of the parish also served the chapel by means of his own curates. In this state of things comes the Order in Council, which I am to assume to be perfectly valid, effectual and binding. [The V. C. then referred to the Order in Council.] What was the effect of this Order in Council, assuming, as it is admitted I am to assume, it to be a perfectly valid order? In due pursuance of the Acts of Parliament there was constituted a district chapelry, and the chapel in question, which had been a chapel of ease, or had been intended and dealt with as a chapel of ease of the parish of St. Paul, should be the church of the district chapelry of the Holy Trinity. Taking then the two Acts, namely, 59 Geo. 3, c. 184, and 2 & 3 Vict. c. 49 together, the effect of them is that a district chapelry to a church is so constituted that it becomes not only a district chapelry but a benefice, for the Act of Victoria repeals that clause in the Act of 59 Geo. 3 which prohibits it from becoming a benefice, and on the contrary says that it is to become a benefice. Therefore, the incumbent of the Church of the Holy Trinity, Bedford, becomes the incumbent of a benefice, he is a beneficed clergyman; and *primâ facie*, unless there be anything to control in the Act of Parliament, he would be entitled to be in exactly the same position as any other beneficed clergyman; he has not a rectory or a vicarage, but he would be entitled to stand in the same position as any other incumbent. It appears to me that the effect of the order is, to withdraw this chapel from all the trusts, purposes and objects to which, up to the time of the Order in Council, it had been dedicated, and to dedicate it to the new purposes which are prescribed by the Act of Parliament, namely, to become the church of a district chapelry and a benefice. The effect is to withdraw it from all the purposes, including the trusts, of the deed. If indeed there were no power in the Crown to deprive the incumbent of St. Paul, Bedford, or any person, of certain rights and privileges given to them by deed, then that would be a ground for questioning the validity and force of the Order in Council; but it must now be taken to be perfectly good, valid and effectual. Finding, then, that the effect of the Acts of Parliament and the Order in Council taken together, is to constitute a benefice, and the chapel in question the church of that benefice, and the incumbent of that church to be a beneficed clergyman, and a clergyman standing in the position in which any other beneficed clergyman of a similar district chapelry would stand, it appears to me that it follows as a matter of course that, by force of the Acts of Parliament and the Order in Council, all prior purposes to which the chapel was before dedicated have ceased, that is, ceased so far as they are inconsistent with the rights of a beneficed clergyman, and that if there be (upon which I say nothing) any power or any right to impose pew rents upon persons who frequent the church, that right to receive the rents from such pews cannot remain in

the incumbent of St. Paul's, but that, if there be the right to impose them, those pew rents must belong to the incumbent of the new benefice that it thus created. It must be understood that I decide nothing with respect to the question whether the deft. is entitled to receive any pew rents. He may or may not be. It may be that it is quite illegal to impose pew rents in this church under its present constitution, having regard to the purpose to which it is now dedicated; but, supposing it to be so, the question whether the deft. has any right to receive them is not the question which I have to determine; but the question is, whether the plt. has the right to receive them? It appears to me, for the reasons I have mentioned, that the plt. is not entitled to receive the pew rents. Then with regard to the other point which seems almost to stand upon the same footing, or rather a stronger footing, it must follow as a matter of necessity that the right of the minister and churchwardens to appoint the officers, the clerk, the sexton, and the pew openers in a benefice with which they now have nothing to do, would be perfectly monstrous; and the same reason that leads me to the conclusion that the pew rents no longer belong to the incumbent of St. Paul's, leads me also to the conclusion that the right to appoint the officers no longer belongs to him, and I am therefore of opinion that the bill must be dismissed.

*The bill was ordered to be dismissed without costs, by consent, the Attorney-General's costs being provided for.*

Solicitors: *Hilliard, Dale and Stretton; Rivington; Solicitor to the Treasury.*

### V. C. WOOD'S COURT.

Reported by W. H. BENNETT and EDWARD LLOYD, Esqrs.,  
Barristers-at-Law.

April 25 and May 4, 1864.

Re WHITTINGHAM'S TRUSTS.

*Husband and wife—Reversionary legacy—Joint assignment—Desertion—Protection order—21 & 22 Vict. c. 108, s. 8—Right to legacy.*

*A married woman, entitled to a legacy in reversion, joined with her husband in charging it by way of assignment.*

*She was deserted by her husband and obtained a protection order under the 21 & 22 Vict. c. 108, which was expressed to extend only to property acquired by her industry, and that to which she was entitled as executrix or administratrix:*

*Held, that, notwithstanding the form of the order, her reversionary interest is impliedly protected by force of the Act.*

*Order made for carrying the legacy to a separate account in her name, and for payment of the income to her.*

The petitioner, C. Evans, was a married woman, who was deserted by her husband about ten years ago, and was left with a child now about thirteen years old. She was, under the will of Charles Whittingham, entitled in reversion, expectant on her mother's death, to a share of a sum of 1700*l.* Consols, and of the testator's residuary estate.

The fund was now in court and amounted to about 1500*l.*

There was no settlement on or after her marriage, and in 1852 she joined with her husband in assigning her reversion by way of mortgage; the husband soon after became bankrupt and the reversion was sold by his assignees.

The tenant for life of the fund died on the 31st Jan. 1863. On the 27th Aug. in the same year the petitioner obtained a magistrate's protection order, which was to the following effect: "That all money or property

acquired by the lawful industry of the petitioner since the 10th Feb. 1853 (being the day on which it was found that she was deserted by her husband), or which she might thereafter acquire, and all property which she had become possessed of, or to which she might become entitled as executrix, administratrix, or trustee since the same date, should be protected," and such money, &c. should be protected against any claim of her husband, "his creditors, and any person claiming under him;" and that such property should belong to the petitioner as if she were a *feme sole*.

The Act 20 & 21 Vict. c. 35, s. 21, empowers metropolitan magistrates or justices of the peace in petty sessions to make an order in the case of a married woman deserted by her husband, "protecting her earnings and property acquired" since the desertion, upon satisfactory proof that the wife is maintaining herself "by her own industry or property."

By 21 & 22 Vict. c. 108, s. 6, the Judge Ordinary of the Divorce Court may make an order, in similar cases, "to protect any money or property in England" which the wife "may have acquired or may acquire by her own lawful industry, and any property she may have become, or may become possessed of" after the desertion; with a reference to the powers given by the 21st section of the former Act.

Sec. 7 extends the force of all orders for protection to property vested in a wife as executrix or administratrix.

Sec. 8 declares that property of or to which the wife is possessed or entitled for an estate in remainder or reversion at the date of the desertion should be deemed to be included in the protecting order.

*Giffard*, Q. C. and *F. Walford*, now applied in the terms of the prayer of the petition, to have the fund carried to a separate account, and the income paid to the petitioner. They referred to

*Re Rainsdon's Trusts*, 4 Drew. 446.

*W. W. Corper* and *Jessel*, for several parties entitled to charges on the fund, argued that the justices in making the order had expressly limited it, so that it should not include this reversionary interest, and that they had power under the Act so to limit it; this was an interest over which the husband, before the desertion, had an absolute right of disposition, subject to the wife's equity to a settlement; she had joined with him in the assignment, and to that extent waived her right. The Act could not be intended to apply to a case of this sort, for, supposing the trustees of the fund had, after the desertion took place, but before the protection order was made, paid over the fund to assignees for value, the wife might then have obtained the order and compelled the trustees to pay over again.

*A. C. Walford* for the trustees.

*Giffard*, in reply, submitted that the order was wrong in form; the justices had assumed a jurisdiction to limit its operation so as to exclude property, which was expressly included in all such orders by the Act.

The VICE-CHANCELLOR said, that it certainly seemed to him that the order of the justices was wrong in form; but that point was of much importance, and the case must stand over for judgment as to the mode of disposing of the *corpus* of the fund. He should order the income to be paid to the petitioner at once.

*May 4*.—The VICE-CHANCELLOR said, that upon consideration he could come to no other conclusion than that this legacy came within the scope of the protecting order. Upon the form of the order it might no doubt be argued that this reversion was

excluded from its operation; there was however no express exception, and he was not therefore called upon to consider whether an order of such a limited character was good, but it was open to him to hold that the force of sect. 8 was such as to bring within the general terms of a magistrate's order such a reversionary interest as this. There was, in his opinion, an inconvenience in making an order in this form; it formed, in fact, part of the title of the petitioner to this legacy, and was, on the face of it, open to objection. He thought the order on this petition might be in the terms of the prayer, to carry the fund to a separate account, the income to be paid to the petitioner for her life.

Solicitors for the petitioner, *Walford*; for the other parties, *T. Taylor*, Cleobury.

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

*Saturday, April 30, 1864.*

(Before POLLOCK, C.B., KEATING, BLACKBURN AND MELLOR, JJ., AND PIGOTT, B.)

REG. v. PARKER AND SMITH.

*Indictment—Night poaching—Commencement of prosecution—Evidence—Information.*

*On the trial of an indictment for night poaching, under the 9 Geo. 4, c. 69, ss. 4, 9, it is not sufficient to produce the warrant only under which the prisoners were apprehended, to prove that the proceedings were commenced within twelve months of the commission of the offence; but the information in writing should also be produced.*

Case reserved for the opinion of this court by Pigott, B.

The prisoners were indicted for night poaching to the number of three or more, being armed with offensive weapons, under the 9 Geo. 4, c. 69, s. 9.

The indictment was in the following form, viz.:

Gloucestershire.—The jurors for our Lady the Queen, upon their oath present, that Henry Parker and Thomas Smith, and certain other persons to the jurors aforesaid unknown, being to the number of three and more, together, on the 26th Jan. 1864, with force and arms, at the parish of Temple Grinting, in the county of Gloucester, by night (that is to say), about the hour of eleven in the night of the 26th Jan. in the year aforesaid, unlawfully together did enter into, and then and there were in certain land there situate, in the occupation of Isabella Talbot and another, with the intent and for the purpose of then and there by night, as aforesaid, illegally taking and destroying game and rabbits there, the said Henry Parker and Thomas Smith, and the said other persons being then and there by night as aforesaid, and at the time when they were so together, entered and were in the said land as aforesaid, armed with guns and bludgeons, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

The second count did not materially vary.

The evidence showed that the offence was, in fact, committed on the 26th Jan. 1861, and to prove that proceedings were commenced within the time required by the 4th section of the statute, viz., twelve months from the time of the offence, the warrant under which the prisoners were apprehended was put in evidence, dated Feb. 5th, 1861. The following is a copy of the same:

To the constables of the Gloucestershire Constabulary Force and to all other peace officers of the said county of Gloucester. Whereas, information hath this day been laid before the undersigned, one of Her Majesty's justices of the peace in and for the said county of Gloucester, by Richard Fluck, of Temple Grinting, in the said county, gamekeeper, for that Thomas Smith and Henry Parker, of Chipping Campden, labourers, on the 26th Jan. 1861, at Temple Grinting aforesaid, together with divers other persons unknown to the number of three or more, together, about the hour of eleven in the night of the same day, three being then respectively armed with a gun, did then, together, unlawfully enter a certain close of land then in the occupations of the Messrs Isabella and Jane Elizabeth Talbot, there situate, and were then by night as aforesaid, and armed as aforesaid in the

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REG. v. HEYWOOD AND OTHERS.

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said land, for the purpose therein of taking and destroying game contrary to law; and oath being now made before me, substantiating the matter of such information: these are, therefore, to command you in Her Majesty's name forthwith to apprehend the said Thos. Smith and Henry Parker, and bring them before some one or more of Her Majesty's justices of the peace in and for the said county, to answer to the said information, and to be further dealt with according to law. Given under my hand and seal, the 5th Feb. 1861, at Ludley-castle, in the said county. JOHN C. DENT. (L.S.)

It was proved that Mr. John Dent was, when he signed the warrant, a magistrate of the county.

No information was given in evidence, and the respective arrests took place, of Smith on the 27th Nov. 1862, and of Parker on the 14th Jan. 1864.

The counsel for the prisoners objected—

First, that the warrant without the information was no legal evidence that proceedings were commenced within twelve months, as required by the statute; and secondly, that the present indictment was defective for not containing an allegation that such proceedings were in fact taken.

I overruled both objections, but reserved the points for the Court of Criminal Appeal.

The prisoners were convicted and sentenced.

If the Court should be of opinion that the warrant without the information is not sufficient evidence of the commencement of the proceedings, or that the indictment is defective for the cause above stated, in either case a verdict of not guilty is to be entered.

G. PIGOTT.

*Harington* for the prisoners.—It is submitted that this conviction cannot be sustained, on two grounds: first, because the indictment is bad upon the face of it; and secondly, because there was no sufficient evidence of the commencement of the prosecution within twelve months after the commission of the offence. The 9 Geo. 4, c. 69, s. 4, enacts that the prosecution for every offence punishable upon indictment or otherwise than upon summary conviction by virtue of that Act, shall be commenced within twelve calendar months after the commission of such offence. And sect. 9 enacts that any persons to the number of three or more by night unlawfully entering on any land for the purpose of taking game or rabbits, any of such persons being armed with any gun, &c., shall be guilty of a misdemeanor. Now the record of this indictment, when properly drawn up, will show that the proceedings were not commenced within twelve months after the offence, for it will appear thereon that the offence was committed on the 26th Jan. 1861, and that the indictment was not preferred and found until the Lent Assizes 1864. The court will take notice of the dates in the indictment. If A. be indicted of murder or manslaughter, as well the day and place of the stroke or other act done inducing death, as of the death, must be expressed: (2 Hale P. C. 179.)

[MELLOR, J.—It was formerly necessary to show that the offence of murder was complete.] So in this case it is contended that it is necessary to show on the face of the indictment that the proceedings were commenced within a year. In the cases of *Reg. v. Brooks*, 2 Car. & K. 402, 2 Cox. C. C. 436, and *Reg. v. Austin*, 1 C. & K. 621, the question arose upon the facts, and it does not appear what the forms of the indictments were. [BLACKBURN, J.—This question is singularly like the Statute of Limitations, which has never been negatived in stating the cause of action in the declaration.] In *Rez v. Lookup*, 3 Burr. 1901, where an indictment stated the offence to have been committed in the time of the late King, and concluded against the peace of the now King, it was held insufficient on a writ of error. [MELLOR, J.—In the last edition of Archbold's Crim. Plead. this seems to be treated not as a matter of averment in the indictment, but of proof upon the evidence. BLACKBURN, J.—Ever since the 8 & 9 Will. 3, c. 26, it has never been the practice to allege in pro-

secutions for coining the offence to have been committed within three months.] As to the second objection, that there was no proper evidence of the commencement of the prosecution within twelve months. In *Wallace's* case, East P. C. 186, it appears to have been held by the judges that the information and proceeding before the magistrate was the commencement of the proceedings in coining cases. In all the reported cases the prisoners were in custody, and had been apprehended within twelve months of the time of the trial. The mere issuing of a warrant for the apprehension of the prisoners is not a commencement of the prosecution within the meaning of this statute without apprehending them and bringing them before the magistrates:

*Reg. v. Hull*, 2 Foa. & Fin. 16;

*Reg. v. Smith*, 1 L. & C. 181; 5 L. T. Rep. N. S. 761.

The form of the warrant in this case shows that there must have been a previous information in writing, and that information should have been produced to show the commencement of the proceedings. [PIGOTT, B.—You contend that the warrant is merely secondary evidence of the information?] Yes. Paley on Convictions, by Macnamara, is to the same effect. The case of

*Reg. v. Massey*, 32 L. J. 21, M. C.; 7 L. T. Rep. N. S. 391, was then cited.

No counsel was instructed for the prosecution.

POLLOCK, C. B.—We are all of opinion that it was necessary to sustain the prosecution to give the information in evidence, and that therefore this conviction fails.

*Conviction quashed.*

REG. v. HEYWOOD AND OTHERS.

*Pleading—Indictment for three larcenies—24 & 25 Vict. c. 96, s. 5.*

*An indictment against a prisoner for three larcenies from the same prosecutor contained no averment that they were committed within a period of six months:*

*Held, nevertheless, that the indictment was good.*

Case reserved for the opinion of this court by the Recorder of Bolton (Lancashire).

At the Court of Quarter Sessions of the Peace for the borough of Bolton, in the county palatine of Lancaster, holden by me as Recorder of the said borough on the 31st March 1864, James Heywood, John Wood, Isaac Broughton, George Robinson and Edward Kippax were tried before me on the indictment set forth below, and the jury by their verdict found J. Heywood and J. Wood guilty of stealing, and J. Broughton and G. Robinson guilty of feloniously receiving, and Edward Kippax not guilty, after a trial which lasted two days.

Borough of Bolton to wit.—The jurors for our Lady the Queen upon their oath present, that James Heywood on the 1st Sept. 1863, at the borough aforesaid, and within the jurisdiction of this court, was servant to Augustus Warrens and another, and that the said J. Heywood afterwards, and whilst he was such servant to the said A. Warrens and another, to wit, on the day and year aforesaid, 600 pounds weight of cotton wett, 400 pounds weight of cotton twist, and 1000 pounds weight of cotton, of and belonging to the said A. Warrens and another, his said masters, then and there being found, then and there feloniously did steal, take and carry away, against the form of the statute, &c.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood and J. Wood, J. Broughton, G. Robinson and E. Kippax on the day and year aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, 600 pounds weight of cotton wett, 400 pounds weight of cotton twist, and 1000 pounds weight of cotton, of the property of the said A. Warrens and another, then and there being found, feloniously did steal, take and carry away.

Third count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood, J. Wood, J. Broughton, G. Robinson, and E. Kippax, afterwards, to wit, on the same day and year aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, 600lbs. weight of cotton wett, 400lbs. weight of cotton twist, and 1000lbs.

weight of cotton, of the property of the said A. Warrens and another, before then feloniously stolen, taken and carried away, feloniously did receive and have, they, the said J. Heywood, J. Wood, J. Broughton, G. Robinson and E. Kippax, then and there well knowing the said property last aforesaid to have been feloniously stolen, taken and carried away, against the form of the statute, &c.

Fourth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood, J. Wood, J. Broughton, G. Robinson and E. Kippax, on the day and year last aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, was servant to the said A. Warrens and another, and that the said J. Heywood afterwards, and whilst he was such servant to the said A. Warrens and another, to wit, on the day and year last aforesaid, 600lbs. weight of cotton twist, 400lbs. weight of cotton twist, and 1000lbs. weight of cotton, of and belonging to the said A. Warrens and another, his said masters, then and there feloniously did steal, take and carry away, against the form of the statute, &c.

Fifth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood, J. Wood, J. Broughton, G. Robinson and E. Kippax, on the day and year last aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, 600lbs. weight of cotton twist, 400lbs. weight of cotton twist, and 1000lbs. weight of cotton, of the property of the said A. Warrens and another, then and there being found, feloniously did steal, take and carry away.

Sixth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood, J. Wood, J. Broughton, G. Robinson and E. Kippax, afterwards, to wit, on the same day and year last aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, 600lbs. weight of cotton twist, 400lbs. weight of cotton twist, and 1000lbs. weight of cotton, of the property of the said A. Warrens and another, before then feloniously stolen, taken, and carried away feloniously did receive and have, they, the said J. Heywood, J. Wood, J. Broughton, G. Robinson and E. Kippax, then and there well knowing the said property last aforesaid to have been feloniously stolen, taken and carried away, against the form of the statute, &c.

Seventh count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood, J. Wood, J. Broughton, G. Robinson and E. Kippax, on the day and year last aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, was servant to the said A. Warrens and another, and that the said J. Heywood afterwards, and whilst he was such servant to the said A. Warrens and another, to wit, on the day and year last aforesaid, 600lbs. weight of cotton twist, 400lbs. weight of cotton twist, and 1000lbs. weight of cotton, of and belonging to the said A. Warrens and another, his said masters, then and there feloniously did steal, take and carry away, against the form of the statute, &c.

Eighth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood, J. Wood, J. Broughton, G. Robinson and E. Kippax, on the day and year last aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, 600lbs. weight of cotton twist, 400lbs. weight of cotton twist, and 1000lbs. weight of cotton, of the property of the said A. Warrens and another, then and there being found, feloniously did steal, take and carry away.

Ninth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood, J. Wood, J. Broughton, G. Robinson and E. Kippax, afterwards, to wit on the same day and year last aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, 600lbs. weight of cotton twist, 400lbs. weight of cotton twist, and 1000lbs. weight of cotton, of the property of the said A. Warrens and another, before then feloniously stolen, taken, and carried away, feloniously did receive and have, they, the said J. Heywood, J. Wood, J. Broughton, G. Robinson and E. Kippax, then and there well knowing the said property last aforesaid to have been feloniously stolen, taken and carried away, against the form of the statute, &c.

Before the prisoners pleaded, their counsel applied to the court to quash the indictment, on the ground that there was no allegation in the counts charging the second and third larcenies, that they were respectively committed within six months after the commission of the larceny charged in the first count, and after hearing the counsel on both sides, I refused the application.

The counsel for the prosecution then applied to me to amend the indictment by introducing the words, the omission of which had formed the ground of the former objection.

I did not think that it was such an amendment as the statute enabled me to make, but said that, if I was satisfied that I had the power to do so, I should direct such amendment to be made.

The questions for the opinion of the Court of Criminal Appeal are, first, whether I was empowered by the statute to make the amendment directed for, and if the court should be of opinion

that I had that power, then that amendment is to be taken as having been made.

But if the court should be of opinion that I had no power to make that amendment, then the second question for the opinion of the court is, whether the indictment, as it now stands, and on which the prisoners were tried, is sufficient to sustain the verdict so found by the jury, and whether, on that finding, judgment may now be given.

R. B. ARMSTRONG, Recorder of Bolton.

*A. Wills* for the prosecution.—The indictment is good. It is clear upon the authorities that several felonies may be joined in the same indictment, and that it is for the judge to exercise his discretion in calling on the prosecutor to elect for which he will proceed; or to quash some of the counts. And what has been done by the recent Act, 24 & 25 Vict. c. 96, s. 5, which enacts that three larcenies committed against the same person within six months may be included in the same indictment against the same prisoner, is to take away the discretion formerly exercised by the judge in such a case. In 2 Hale P. C. 173, "If there be one offender and several capital offences committed by him, they may be all contained in one indictment, as burglary and larceny. Larcenies committed of several things, though at several times and from several persons, may be joined in one indictment." And Lord Ellenborough ruled, in *Rex v. Jones*, 2 Camp. 132: "In point of law there is no objection to a man being tried on one indictment for several offences of the same sort. It is usual in felonies for the judge in his discretion to call upon the counsel for the prosecution to select one felony and confine themselves to that; but this practice has never been extended to misdemeanors." And Buller, J. said, in *Young v. The King*, 3 T. R. 105: "In misdemeanors, *Rex v. Beaufield*, 2 Burr. 989, shows that it is no objection to an indictment that it contains several charges. The case of felonies admits of a different consideration, but even in such cases it is no objection upon writ of error. On the face of an indictment every count imports to be for a different offence, and is charged as at different times. And it does not appear on the record whether the offences are or are not distinct. But if it appear before the defendant has pleaded or the jury are charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defence or prejudice him in his challenge of the jury, for he might object to a jurymen's trying one of the offences, though he might have no reason to do so in the other. But these are only matters of prudence and discretion. If the judge who tries the prisoner does not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed. But if the case has gone to the length of a verdict it is no objection in arrest of judgment. If it were it would overturn every indictment which contains several counts." In *Rex v. Kershaw*, 1 Lewin C. C. 218, the indictment contained two distinct felonies. [MELLOR, J.—The practice has always been, where several felonies were included in one indictment, to put the prosecutor to elect for which one he will proceed, to prevent the prisoner being embarrassed in his defence. But all reason for such election is now taken away by the recent statute, where three larcenies only are charged. POLLOCK, C. B.—Strictly speaking, the whole presentment of the grand jury from the first to the last indictment, constitutes but one indictment against all the prisoners. The objection to trying a prisoner on several felonies at once is rather an objection in the breast of the judge than a matter of criminal pleading. Formerly it was not the practice to allow counts for larceny and



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receiving in the same indictment, but that was altered by statute.] In *Starkie's Crim. Plead.* 39, it is said, "If several felonies be charged against a prisoner in the same indictment, it is no objection either upon demurrer or in arrest of judgment." See also 2 East P. C. 779.

No counsel appeared for the prisoner.

POLLOCK, C.B.—We are all of opinion that the indictment is good. At any rate it is now too late to allow the objection.

BLACKBURN, J.—At the same time we do not wish to sanction such a departure from the usual mode of criminal pleading.

*Conviction affirmed.*

### BAIL COURT.

Reported by T. H. JAMES, Esq., Barrister-at-Law.

Thursday, May 5, 1864.

(Before CROMPTON and SHEE, JJ.)

REG. v. THE GUARDIANS OF THE NEWPORT UNION.

*Notice of appeal against order of maintenance—Criminal Lunatic—4 & 5 Will. 4, c. 76.*

*Notice of appeal against an order for the maintenance of a criminal lunatic may be signed by the clerk to the board of guardians, the appa.; and it is not too late if it be received fourteen days before the following sessions, although more than twenty-one days have elapsed since the order was made.*

This was a rule calling upon the justices of Warwickshire to show cause why a *mandamus* should not issue to them, ordering them to hear an appeal against an order of settlement and maintenance of one Brass, a criminal lunatic. The order was made upon the defts. on the 3rd Dec. 1863, and the notice of appeal posted on the 24th Dec. directed to the clerk of the peace (made resp. by statute), but not received by him until the 26th.

Motion was made to respite the appeal at the following Epiphany sessions, which was opposed upon the ground that the notice of appeal was invalid, as being too late. This objection the justices held good, and refused to respite the appeal.

*Adams showed cause.*—Sect. 2 of the 3 & 4 Vict. c. 64 (the Criminal Lunatic Act), enacts that the justice shall inquire into the settlement of a criminal lunatic, and make orders on the parish for maintenance, &c., or on the guardians of the union; if the parish, &c. is under the management of a board of guardians established by the Poor Law Commissioners. The first point is, that the notice of appeal was improperly signed by the clerk to the guardians. It is submitted that he cannot give such notice. It need not be signed by the guardians themselves, but may be signed by an attorney acting in their behalf: (12 & 13 Vict. c. 45, s. 1.) [CROMPTON, J.—If the clerk to the board of guardians signs, surely the presumption is that he signs on their behalf.]

*Manley Smith.*—This objection was not taken at sessions, or his authority could have been easily proved. [MELLOR, J.—The presumption of authority is even greater in the case of the clerk to the guardians than in that of an attorney. The second point is, that notice of appeal was not given in due time. Sect. 5 of 3 & 4 Vict. c. 64, enacts that the overseers or guardians may appeal against the order of the justices. [MELLOR, J.—The Act requires a "reasonable notice" to be given.] The Poor-law Amendment Act, 4 & 5 Will. 4, c. 76, s. 79, enacts,

No poor person shall be removed under any order of removal from any parish or workhouse, by reason of his being chargeable to, or relieved therein, until twenty-one days after a notice in writing of his being so chargeable or relieved,

shall have been sent by post or otherwise, by the overseers or guardians of the parish obtaining such order, to the overseers of the parish to whom such parish shall be directed: provided that, if notice of appeal against such order of removal shall be received by the overseers or guardians of the parish from which such person is directed in such order to be removed within the said period of twenty-one days, it shall not be lawful to remove such poor person until after the time for prosecuting such appeal shall have expired, or, in case such appeal shall be duly prosecuted, until after the final determination of such appeal.

In this case twenty-one days had elapsed before notice of appeal was even sent, and twenty-three days before it was received. [MELLOR, J.—The question of "reasonable notice" was not discussed at sessions; how then can we refuse a *mandamus* in order that the question may be discussed?] 12 & 13 Vict. c. 45, s. 2 enacts that none of the provisions contained in it relating to notices of appeal shall be construed to affect or alter the law as to notice of appeal against a summary conviction, or against an order of removal, or against an order under any statute relating to pauper lunatics. But it is submitted that this case is not within the statute, for it is not an order of removal, nor is it under a statute relating to pauper lunatics. [CROMPTON, J.—Is he not a pauper lunatic, as well as a criminal lunatic?] By 16 & 17 Vict. c. 97, s. 133, no provisions of this Act apply to the 3 & 4 Vict. c. 56:

*Reg. v. The Justices of Glamorganshire*, 13 Q. B. 561.

*Manley Smith* was not called on.

CROMPTON, J.—I am of opinion that this case is governed by that of *Reg. v. The Justices of Glamorganshire*, and that we must hold that the notice was in time. As to the second point, the clerk to the guardian is, in point of fact, an attorney, and signs as clerk. That, in my judgment, is sufficient. The rule will therefore be made absolute.

MELLOR, J.—I am of the same opinion. No authority has been cited which shows that the clerk to the guardians must sign as attorney.

*Rule absolute.*

REG. v. BRICKHALL.

*Conviction—Assault upon a constable—Common assault—Municipal Corporation Act—24 & 25 Vict. c. 100.*

*The deft. was summoned, under the Municipal Corporation Act, for assaulting a constable in the execution of his duty. The magistrates dismissed the summons, but convicted him, under the 24 & 25 Vict. c. 100, for a common assault:*

*Held, that the conviction was bad, as being under a different statute from that under which the summons was issued.*

The deft. was summoned before the justices for the borough of Shaftesbury, Dorset, under the Municipal Corporation Act, for assaulting a police-constable in the execution of his duty. The justices dismissed the summons, but fined him for a common assault, and, in default of payment, he was imprisoned.

T. W. Saunders having obtained a rule *nisi* for a *certiorari* to quash the conviction, upon the ground that the justices had no jurisdiction, upon a charge of assaulting a constable in the execution of his duty, to convict of a common assault, now supported it. The Municipal Corporation Act does not entitle justices to fine for an assault not charged in the summons:

*Martin v. Bridges*, Ell. & Ell. 778; 28 L. J. 179, M.C.; *Soden v. Craig*, 7 L. T. Rep. N. S. 824.

[CROMPTON, J.—If the deft. had been summoned for a common assault, he could not have been fined for one of an aggravated nature. But is the converse true?] Yes; and it is very remarkable that a



heavier punishment is attached to what is nominally a more trivial offence. For a common assault justices may imprison for six months, while for assaulting a police-constable they can but fine the deft. 5*l*. They must have acted under the Municipal Corporation Act, or they could not have convicted summarily—they must have committed for trial. The deft. came prepared to meet one charge, viz. that of assaulting a constable in the execution of his duty. He may have thought it sufficient to prove that the prosecutor was not a constable, and for various reasons, have refrained from bringing witnesses to prove that he was justified in committing a common assault. [MELLOR, J.—If he had pleaded guilty to the charge, his punishment would have been in reality less than it is.] Precisely so. [MELLOR, J.—The difficulty is, that the justices had jurisdiction to convict summarily of a common assault, but they should have dismissed the first summons and convicted the deft. upon another].

*H. T. Cole* showed cause. Under the 24 & 25 Vict. c. 100, the punishment for an assault is six months' imprisonment, and under the Municipal Corporation Act, a fine of 5*l*. A certificate, barring any further proceedings, may be given under either statute alike. Sect. 42 of the 24 & 25 Vict. c. 100, enacts: that for an unlawful assault by any person committed upon any other person, the justices may impose a fine not exceeding 5*l*. "Any other person" may include a constable, and the words, "officer in discharge of his duty," are mere aggravation. [MELLOR, J.—If the justices had said nothing, the conviction would be good. I do not see how you can distinguish *Martin v. Bridges* from this.] Sect. 72 of Municipal Corporation Act takes away *certiorari*. It is submitted that a case ought to have been granted.

*Wilkinson v. Dutton*, 32 L. J. M. C. 152; 8 L. T. Rep. N. S. 276.

MELLOR, J.—The real objection is, that the summons is under one statute and the conviction under another.

CROMPTON, J.—Where there is a written charge it must be adhered to. The conviction in this case was without the jurisdiction of the justices. They dismissed the summons, as far as the aggravated assault was concerned, and convicted of a common assault. I think that the case of *Martin v. Bridges* is exactly in point. The justices have power to convict of a common assault under the 24 & 25 Vict., c. 100, and the *certiorari* would be taken away were the conviction under the Municipal Corporation Act. As it is, the rule must be made absolute.

MELLOR, J.—I am of the same opinion. There are two statutes affecting the offence of assaulting a constable while engaged in the execution of his duty. The one is the Municipal Corporation Act; but under this Act, justices have no power to deal with other offences; the other is the general statute, which imposes a term of two months' imprisonment or fine of 5*l*; but there can be no summary conviction under that statute. It is perfectly clear that the justices have summoned under one statute and convicted under another. This they cannot do, therefore the rule must be made absolute for a *certiorari*, which is not taken away because they have exceeded their jurisdiction.

*Rule absolute.*

Friday, May 6, 1864.

*Ex parte* THE OVERSEERS OF PUDDING NORTON.

Overseer—"Householder"—*Certiorari*—Sessions.

*A.*, being the tenant of a cottage as part of his service, was appointed an overseer of a parish.

On motion for a *certiorari* to quash the order of appointment:

*Held*, that it was a case for an appeal to the sessions, not for a *certiorari*.

*Quere*, is the appointment good?

Mellish, Q.C. moved for a rule calling upon the Justices of Norfolk to show cause why a *certiorari* should not issue to remove an order appointing two overseers of the parish of Pudding-Norton, upon the ground that one of the overseers was not a substantial householder. He cited *Reg. v. Cousins*, 9 L. T. Rep. N. S. 686. his was not an extra-parochial place. The overseer, whose appointment was objected to, paid no rent, but inhabited a cottage as part of his service. [CROMPTON, J.—Why could you not appeal to sessions? I never heard of a case where an order was quashed, because an overseer was not a householder.] The reason of this application to quash the order is, that the guardians have made a rate, and although there are no poor, yet, as the parish is included in a union, the inhabitants are liable to the union charges:

4 Burn's Justices, 83, 29th edit.

CROMPTON, J.—A man may be a "householder," although he is a tenant only, and this, as part of his service; if a burglary were committed, the property would be rightly laid in him. But this is an application that ought to be made to sessions. I rather think that the appointment is good.

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,  
Barristers-at-Law.

April 27 and May 4, 1864.

REG. v. INGHAM.

*Coroner's inquest*—*Inquisition*—*Statement of cause and manner of death*—*View of the body by the jurors.*

*In an inquisition of murder or manslaughter it is not necessary to set forth the manner in which, or the means by which, the death of the deceased was caused.*

*Although it is necessary that all the coroner's jury should view the body at the first sitting of the inquest, it is not necessary that they should all view it together and in the presence of the coroner.*

Temple, Q.C. on a former day obtained a rule to quash an inquisition of one of the coroners of Yorkshire, of manslaughter against Mr. John Arthur Ingham, for the killing of one Sarah Greenwood.

The rule was obtained upon the grounds, first, that the inquisition did not set out the mode and cause of death; and secondly, that one of the jurors, when he viewed the body, did so in the absence of the coroner and the rest of the jury.

Cleasby, Q.C. (Welsby with him) showed cause, and contended, first, that inquisitions are upon the same footing as indictments, and need not therefore set out the mode and manner of death; and that as the juror in fact viewed the body, it was not essential that he should have done so in the company of the coroner and the other persons.

Temple, Q.C. (Maule with him) contended that the injunction was bad on both grounds. The following cases and statutes were cited:

2 Inst. 887;

*Reg. v. Ferrand*, 3 B. & Ald. 260;

Sewell on Coroners, 161;

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*Ex parte SHARPE.*

[Q. B.]

Co. on Lit. s. 194, p. 126;  
 Hawk, P. C. c. 25, p. 287;  
 4 Inst. c. 29, p. 271;  
 Ell. Bla. & Ell. 139;  
 11 Hen. 4; 2 & 3 Ed. 6, c. 24, s. 2;  
 1 & 2 Ph. & M. c. 13, s. 5;  
 6 & 7 Vict. c. 83;  
 14 & 15 Vict. c. 100;  
 19 & 20 Vict. c. 16;  
 24 & 25 Vict. c. 100, ss. 6, 30.

The arguments sufficiently appear in the following judgments:—

COCKBURN, C. J.—I am of opinion that this rule should be discharged. The question is whether the 6th section of the 24 & 25 Vict. c. 100, which provides that in any indictment for murder it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, applies to coroners' inquisitions? and I am of opinion that it does. I take it to be clear, upon a review of the older authorities, that the term "indictment" was understood by them and by the Legislature to comprehend "inquisition." The earliest statute is that of the 11 Hen. 4, the effect of which is considered by all the judges in *Whithpole's case* in Cro. Car., and it was held that the word "indictment" used in the statute included an "inquisition." So in 2 & 3 Edw. 6, c. 24, we find that the word "indictment" is applied to that which is found either by the jurors of the coroner or of the county. So also in the 1 & 2 Ph. & M. c. 13, the term "inquisition" is applied to the case of a finding by any jury. So far, the statutes show that the Legislature uses the term "indictment" whether as applicable to a grand jury or a coroner's jury. Lord Coke, too, uses it in the same sense. I think, therefore, that it is sufficiently shown, both by the Legislature and the great authority of Lord Coke, that an inquisition is included in the term "indictment." When we look at the later legislation, we find a great desire manifested to get rid of technicalities. In the 14 & 15 Vict. c. 100, with reference to this very subject of doing away with technical objections, we find the provisions as to indictments applying equally to inquisitions. By the 4th section, it is enacted that, in any indictment for murder or manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused; and by sect. 30 it is enacted that the word "indictment" shall be understood to include "information," "inquisition" and "presentment," as well as indictment. And thus the law remained until the recent statute of the 24 & 25 Vict. c. 100, the 6th section of which enacts that, in any indictment for murder or manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused; but unfortunately the former statute being repealed, the latter statute omitted to include the word "inquisition," and it was argued that the Legislature intended to restore the distinction between indictments and inquisitions. But I cannot think that there is anything in that objection. The operation of the 14 & 15 Vict. had not been found to have been inconvenient, and there was no reason therefore why technical matters should have been restored. I cannot see the force of Mr. Temple's objection that the Legislature should have gone back to the former technicalities. I cannot imagine that it was the intention of the Legislature to have restored them, and so throw difficulties in the way of the administration of justice. I cannot suppose that, after ten years, it should have been thought necessary by the Legislature to interfere to restore the law to what it was before the 14 & 15 Vict. without any reason whatever being assigned for so doing. With regard to the second point, that one of the jurors viewed

the body after the other jurors had seen it, that is cured by sect. 2 of the 6 & 7 Vict. c. 83, which enacts that no inquisition found upon or by any coroner's inquest shall be quashed "because the coroner and the jury did not all view the body at the same instant, provided they all viewed the body at the first sitting of the inquest." So that, although it is necessary that all the jurors should view the body, it is not necessary that they should all view it at the same time. It is certainly not necessary for the proper administration of justice that all should view at the same time. I think the language of the statute quite large enough to comprehend this case, and therefore that this objection fails also.

BLACKBURN, J. delivered a similar opinion.

SHEE, J. concurred.

*Rule discharged.*

Attorney for the deft., *Crocker.*

Attorney for the prosecution, *Edwards.*

Thursday, May 5, 1864.

*Ex parte SHARPE.*

*Husband and wife—Protecting order of wife's earnings—Rescinding—20 & 21 Vict. c. 85, s. 21.*

*Justices and police magistrates have no power under the Divorce Act 1857 to discharge an order protecting a wife's earnings and property acquired after desertion by her husband, not made by themselves.*

Rule nisi, calling on Mr. Arnold, one of the metropolitan police magistrates, to hear and determine the application of John Sharpe, to discharge an order made in favour of Mary Elizabeth Sharpe, his wife, under 20 & 21 Vict. c. 85, s. 21 (Divorce Act 1857), by Mr. Paynter, a magistrate of the Westminster Police-court, since deceased, for protecting her earnings and property acquired since her husband's desertion of her.

The order was made in 1858, and Mr. Paynter died in April 1863. The application to discharge the order was made by the husband to Mr. Arnold, in Sept. 1863, who refused to rescind the order, on the ground that he had no jurisdiction, the power to do so being confined, as he thought, by the statute to the magistrate making the order.

An application was then made to the Divorce Court, in Feb. 1864, to discharge the order, and the Judge Ordinary held that he had no jurisdiction in the matter, but thought that the police magistrate had. Thereupon the application was renewed before Mr. Arnold, who again held that he had no jurisdiction over a protection order made by another magistrate. In consequence thereof the present rule was obtained.

*Prentice showed cause.*—Under the words of the stat. 20 & 21 Vict. c. 96, s. 21, "it shall be lawful for the husband and any creditor, or other person claiming under him, to apply to the court or to the magistrate or justices by whom such order was made, for the discharge thereof." Mr. Arnold has no jurisdiction to interfere with the order made by Mr. Paynter. The words "magistrates" and "justices" are personal, and the clause gives to courts a general jurisdiction over the orders made by such courts, and to magistrates and justices jurisdiction only over their own orders.

*Pearce* in support of the rule.—By the stats. 10 Geo. 4, c. 44, s. 4, and 2 & 3 Vict. c. 47, s. 75, the police magistrates of the metropolis form one body acting for the metropolitan district, and it is submitted that the powers given to them may be exercised by any one of their body, and the order might be discharged by Mr. Arnold, should he after hearing the facts think that it ought to be so.

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GELL v. THE MAYOR, &amp;C. OF BIRMINGHAM—REG. v. TIVNAN AND OTHERS.

[Q. B.]

COCKBURN, C. J.—This rule must be discharged. The Act is clear, that a party seeking to discharge a protection order must go to the magistrate by whom it was made. A distinction is drawn between the court and magistrates; the words “by whom such order was made” apply to those which immediately precede them, viz., to the magistrate or justices; and the word “whom” is not properly applicable to a court. But for hearing that the learned Judge Ordinary held that he had no jurisdiction, I should have thought otherwise; but we have not to decide that. It may be that this is *casus omissus*.

BLACKBURN and SHEE, JJ. concurred.

Rule discharged.

## GELL v. THE MAYOR, &amp;C. OF BIRMINGHAM.

*Burial board—Fees of parish clerks and sextons—*  
15 & 16 Vict. c. 85—16 & 17 Vict. c. 134.

*Under the 15 & 16 Vict. c. 85, and the 16 & 17 Vict. c. 134 (the Burial Acts), parish clerks and sextons are entitled to perform, when necessary, the same functions and duties, and receive fees therefore in respect of the burials of parishioners and inhabitants of the parishes of which they are clerks and sextons, in the new burial-grounds provided by burial boards under those Acts, and the burial boards cannot deprive them of such fees by appointing other persons to do their duties.*

This action was brought to try the right of the parish clerks and sextons of Birmingham to recover certain fees.

The plt. (parish clerk and sexton of St. Philip's parish) claimed to recover compensation from the defts., the Town Council acting as the Burial Board of the borough of Birmingham, under the 17 & 18 Vict. c. 87, s. 2, and 15 & 16 Vict. c. 85, s. 24, for their having prevented him from performing duties and functions which he claims to perform, and from receiving fees in respect of certain interments in the consecrated portion of the burial-ground of the defts., opened by them in 1863 for the borough. The ground is common to the several parishes, and no specific portion is assigned to any of the parishes. Burials have taken place therein of deceased inhabitants of St. Philip's parish.

Previous to the opening of the ground the plt. and his predecessors were accustomed to perform certain duties in and about interments, and to receive fees therefore. (These were all set out in the case.)

The 15 & 16 Vict. c. 85, s. 32, enacts that

Every incumbent or minister of the parish or each of the parishes (as the case may be), for which the burial-ground is provided, shall by himself and his curate or such duly qualified persons as such incumbent or minister may authorise, perform the duties and have all the same rights and authorities for the performance of religious service in the burial, in such burial-ground or in the consecrated portion thereof, of the remains of parishioners or inhabitants of the parish of which he is such incumbent or minister, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received. And the clerk and sexton of such parish, or of each of such parishes, shall (when necessary) perform and exercise the same duties and functions in respect of the burial of the remains of parishioners or inhabitants of the parishes of which he is clerk or sexton in such burial-ground or the consecrated portion thereof, and shall be entitled to receive the same fees on such burials as he has previously performed and exercised and received as if such burial-ground were the burial-ground of the respective parish of such incumbent or minister, clerk and sexton respectively. And the parishioners and inhabitants of such parish, or of each of such parishes, shall have the same rights of sepulchre in such burial-ground as they respectively would have had in the burial-ground or burial-grounds in and for their respective parishes, subject nevertheless to the provisions herein contained.

The defts. employed persons to perform the functions of clerk and sexton in their new burial-ground, although the plt. had, previous to the opening of the burial-ground, given them notice that

he claimed to perform those functions and receive the fees in respect of the burials of parishioners and inhabitants of St. Philip's.

The defts. determined that the plt.'s services were not necessary, the staff necessarily employed by them being sufficient.

*Phipson, Q.C. (A. Wills with him) for the plt.*—It is submitted that the plt. is entitled to the accustomed fees as clerk and sexton of St. Philip's for the burial of parishioners and inhabitants of that parish in the new burial-ground. The 15 & 16 Vict. c. 85, which applied only to the metropolis, is extended, by the 16 & 17 Vict. c. 134, to the parts beyond by sect. 7; and sect. 32 of the former Act is made to apply to the present case. Sect. 32 is absolute as regards incumbents and ministers, but the clause relating to clerks and sextons contains the qualification that they are to perform their duties “when necessary;” and the burial board contend that if they choose to employ persons to dig the graves, toll the bell, &c., the services of the parish sextons and clerks are not necessary. That, however, is not the meaning of the section, but it means that whenever the services ordinarily performed by clerk and sexton are necessary, those services shall be performed by the clerks and sextons of the respective parishes. It is now penal to bury in the old burial-grounds, and no compensation is given to clerks and sextons. The former Act, by sects. 22, 34, 37, contemplates that fees will be payable to clerks and sextons. So also do the stats. 17 & 18 Vict. c. 87, 20 & 21 Vict. c. 81, s. 17. The words “when necessary” in sect. 32 meet the cases in which the friends of the deceased dispense with some of the usual services at funerals, such as tolling the bell.

*O'Malley, Q.C. (Field Q.C. with him) for the defts.*—The intention of the Legislature was to vest the whole of the management of interments in the burial boards, and many of the duties could not be performed by any but their servants with any regard to convenience or decency. Digging graves is sometimes a very critical operation, having regard to the nature of the soil, the adjacent graves and the foundations, &c., of vaults, which it would be unwise to allow unskilled persons to do. The duties of clerk and sexton are the same in one funeral as another, and are inconsistent with the new duties created by the new burial-grounds.

COCKBURN, C. J.—The words “when necessary,” apply equally to the clerk and sexton, and it is a strong proposition to say that they empower burial boards to deprive them of all their fees.

CROMPTON, J.—Suppose the case of two parishes, could the burial board, by appointing the sexton of one parish to do the duties of both, deprive the other sexton of his fees? It is very difficult to say that the fees of the clerks and sextons are taken away by these words.

SHEE, J.—It may be they have their fees whether the services are necessary or not.

Judgment for the plt.

May 24 and 25, 1864.

REG. v. TIVNAN AND OTHERS.

Extradition Acts—6 &amp; 7 Vict. c. 76—Piracy.

*Under the 6 & 7 Vict. c. 76 (an Act for giving effect to a treaty between England and the United States, for the apprehension of certain offenders), there is no power to commit accused persons to goal for the purpose of being delivered up to the United States authorities, unless the United States have exclusive jurisdiction to try and punish the accused.*

*It is not necessary that there should be any warrant*

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issued or depositions taken in the United States, in order to found a requisition by the United States authorities for the delivery up of any accused person within the Act 6 & 7 Vict. c. 76.

It is not necessary for the magistrate who commits an accused person to gaol in pursuance of the Act, to state in his warrant that the evidence on which it issued was given upon oath.

The word "piracy" does not mean piracy *jure gentium*, but a crime made such by the municipal law of one alone of the parties to the treaty, and over which each has exclusive jurisdiction.

In last term a writ of *habeas corpus* was issued by this court, directing the gaoler of the borough gaol of Liverpool, in whose custody the defts. then were, to bring them into this court, together with a return of the cause of their detention by him. They were accordingly now brought into court, and the gaoler returned that he had them in custody by virtue of several warrants which he set out.

It appeared that a merchant ship of the United States of America was at Matamoras, bound with a cargo for New York, and that whilst there six passengers came on board, three of whom were the prisoners. Whilst on board they seized the ship as and on behalf of the Confederate Government, under which they claimed to be authorised. Having disposed of the ship and cargo, the three prisoners were found at Liverpool, and upon a requisition from the American Ambassador in this country, the Secretary of State for the Home Department issued his warrant for their apprehension under the provisions of the 6 & 7 Vict. c. 76, s. 1, which warrant was as follows:

To Her Majesty's Justices of the Peace and other magistrates and officers of the peace in and for the borough of Liverpool, &c. Whereas on the 15th day of February 1864, in pursuance of a treaty between Her Majesty and the United States of America made on the 9th day of August 1852, and ratified on the 10th day of October in the same year, and of an Act of Parliament passed in the session holden in the 6th & 7th years of Her Majesty's reign, entitled "An Act for giving effect to a treaty between Her Majesty and the United States of America for the apprehension of certain offenders," a requisition was made by Charles Francis Adams, Esq., the United States' Minister at this court, to deliver up to justice certain persons called or known by the name of James Clements Wilson, Daniel O'Brien and Kelly, charged with the crime of piracy on board the schooner *Joseph Gerrity* of New York within the jurisdiction of the United States of America.

I therefore, the Right Hon. Sir George Grey, Bart., one of Her Majesty's principal Secretaries of State, do hereby in pursuance of the power and authority given to me as such Secretary of State by the said Act require you and all of you within your several jurisdictions to govern yourselves accordingly, and to aid and assist in apprehending the said James Clements Wilson, Daniel O'Brien and Kelly and committing them to gaol for the purpose of being dealt with according to the provisions of the said treaty, and deliver up to justice pursuant to the said Act if found to be within the same.

In witness whereof I have hereunto set my hand and seal this 20th day of February 1864. G. GREY. [L.S.]

By the 6 & 7 Vict. c. 76 (entitled "An Act for giving effect to a treaty between Her Majesty and the United States of America, for the apprehension of certain offenders") it is, by sect. 1, recited,

That whereas by the 10th article of a treaty between Her Majesty and the United States of America, it was agreed that Her Majesty and the United States should, upon mutual requisitions by them or their ministers, officers, or authorities respectively made, deliver up to justice all persons who, being charged with the crime of murder or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper committed within the jurisdiction of either of the high contracting parties, should seek an asylum, or should be found within the territories of the other, provided that this should only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged should be found would justify his apprehension and commitment for trial if the crime or offence had been there committed, &c.; and it is then enacted, "that in case requisition shall at any time be made by the authority of the said United States in pursuance of and according to the said treaty for the delivery of any person charged with the crime of murder or assault with intent to commit murder, or with the crime of piracy, or arson, or robbery, or forgery, or the utterance of forged paper

committed within the jurisdiction of the United States of America who shall be found within the territories of Her Majesty, it shall be lawful for one of Her Majesty's principal Secretaries of State . . . by warrant under his hand and seal to signify that such requisition has been so made, and to require all justices of the peace and other magistrates and officers of justice, within their several jurisdictions, to govern themselves accordingly, and to aid in apprehending the person so accused, and committing such person to gaol for the purpose of being delivered up to justice according to the provisions of the said treaty, &c.

The prisoners had been apprehended upon the foregoing warrant, and evidence had upon several occasions been taken upon the charge before Mr. Raffles, the stipendiary magistrate for Liverpool. Upon these occasions it had been objected on their behalf that the case was not within the statute. They had been from time to time remanded, and when the writ of *habeas corpus* issued they were still under remand. It was admitted that the sole object of the present charge was, that they might be given up to the United States Government under the provisions of the statute.

Edward James, Q.C., Littler and T. H. James now moved that the defts. should be discharged out of custody, and they contended that the offence of piracy *jure gentium*, which all nations have a power to punish, as being an offence against all mankind, is not the piracy meant by the statute, which is intended to be confined alone to municipal piracy, that is piracy which is such alone by the particular laws of the complaining country; that the piracy referred to in the warrant of the Secretary of State, and set forth in the depositions, is piracy *jure gentium*, and could be dealt with by the courts of this country, and that the treaty and statute only contemplated such piracy as this country could not take notice of, and which the American Government alone could punish. They cited

Kent's Commentaries, 8th edit. pp. 36, 95;

*Re Kane*, 14 Howard, pp. 108, 137 (American);

Wheaton, 286, 242, 260.

They also objected that the warrant of the Secretary of State was bad, inasmuch as it did not appear that it was founded upon any warrant or depositions issued or taken by the United States Government.

May 25.—*Lush, Milward and Lushington* showed cause against the discharge of the prisoners. The word "jurisdiction" in the 6 & 7 Vict. c. 76, s. 1, has two senses: (1) in its primary sense it denotes authority and power; (2) in its derivative sense it denotes the territory within which authority and power are exercised. The words "committed within the jurisdiction of either of the contracting parties" mean committed within places or territories over which the law of either country prevails. And the treaty is for the delivery of all persons charged with the crimes specified. The compact is to give up all offenders, although both powers have jurisdiction to try them, and it was the intention that the one power immediately affected by the crime should have the power to punish. There is no implied exception of cases within the jurisdiction of either: (*Dwarris on Stats.* 654.) Although we may have jurisdiction to try, we have no power to bring over witnesses from the United States. The word "piracy" in the statute indicates that offence which both countries know to be piracy, or it may apply to all the cases which both countries call piracy. The jurisdiction applies to territory, not to authority to punish:

Wheaton, 208;

Lee's Law of Prize, 1753;

MacLachlan on Shipping, 465;

*Reg v. Lopez*, 1 Dears. C. C. 525;

*Nash's case*, 4 B. & Ald. 296.

E. James, Q. C., in reply, cited

Wheaton, 253.

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COCKBURN, C. J.—The main and principal question for our determination is, what construction is to be put upon the 6 & 7 Vict. c. 76, which gives effect to the treaty between Her Majesty and the United States of America for the apprehension of certain offenders. Besides that, two or three minor points have been made with reference to the regularity of the proceedings by virtue of which the prisoners on whose behalf this application is made have been taken into custody and remanded from time to time. It has been objected that, prior to the issuing of the warrant by the Secretary of State, there should have been depositions taken and a warrant issued in the United States, and that that should have been the foundation of the requisition to the Government of this country to issue a warrant for the prisoners' apprehension. I think that point is untenable. The second section of the Act does not require the issuing of any warrant or the taking of depositions in the United States. The whole effect of the proviso is, that before a Secretary of State issues a warrant for the apprehension of any person under the Act, there must be evidence before him which would justify the apprehension and committal of such person in the United States, and the second section only provides that such evidence may be made up of copies of the depositions upon which the original warrant (if any had been granted) was issued in the United States. Another objection made was, that the magistrate's warrant was imperfect in not stating that the evidence on which it proceeded was taken upon oath to support the charge for which it was issued. Mr. Lush met that objection successfully by pointing out a form given in a subsequent statute which had been followed in the present instance. Then we come to the great question in the case, what is the true construction of the statute? Now the words are undoubtedly large enough in their primary and ordinary sense to comprehend this case. Provision is made for the delivery up to the authorities of the United States of persons who have been guilty of piracy "committed within the jurisdiction of the United States of America." Passing for a moment from the question whether there was evidence of the crime of piracy committed there, there can be no doubt that, if in this case it is an offence at all, it is piracy *jure gentium*; and the statute provides for cases of piracy "committed within the jurisdiction of the United States of America." Nor can there be any doubt that, if it was piracy, it was committed on board an American ship, and so in that sense within the jurisdiction of the United States. Then comes the question whether that is sufficient within the meaning of the statute. The main argument for the prisoners is, that the statute is to be read as applicable only to a case where the act of piracy which has been committed is within the exclusive jurisdiction of the United States. If the term piracy in the statute is to be read as piracy *jure gentium*, then it appears the case for the prisoners is at once disposed of. If the contracting parties intended that such piracy should be deemed within the treaty, then, inasmuch as piracy is an offence not against any particular statute, but against the whole civilised world and punished by all civilised nations, then the offence here would not be one committed within the exclusive jurisdiction of the United States; so that if the word piracy is used in the statute in the largest sense, the case for the prisoners falls to the ground. Now what is there to show that the term piracy is used in a limited sense? If it is to be restricted to piracy by the municipal law as a matter for the exclusive jurisdiction of the particular country where the offence is committed, then no doubt the statute may be construed in the way contended for the prisoners, as being restricted to certain offences committed within the exclusive

jurisdiction of the country claiming the extradition of the accused. If such had been the intention, it strikes me we should have had piracy by the municipal law in some way distinguished from piracy as understood in the more general acceptance of the term, but the language is the widest and most comprehensive. Why, then, is it to be implied in a limited sense? It is said, and with truth, that the mischief the Extradition Treaty was intended to prevent was that of persons committing crimes within the territory of one State and within its jurisdiction, escaping out of that jurisdiction with impunity, and that for such purpose only was this statute passed. That this was the primary object I entertain no doubt, but that it was the only one I entertain great doubt, because it is impossible not to see that the mischief is not limited to such cases. It may be that an offence may be cognisable in two countries, as in the case of a murder committed by one British subject upon another in the United States, in which case the accused may be tried in this country by the municipal law, yet it would be highly inconvenient that he should be tried here, because criminals, as I observed during the argument, may escape not only by going beyond the territory and reach of the law of the country in which the crimes have been committed, but also by failure of evidence and the difficulty of adducing sufficient evidence except in the country, where the crimes have been committed. Therefore, if the language of the statute is large enough to comprehend both these kinds of mischief, it is highly inexpedient to restrict it to one only. It has been urged, indeed, with great force, that it is inconsistent with the dignity of this country to surrender the jurisdiction of its own tribunals in a case of concurrent jurisdiction, and allow persons who could be tried here to be carried away to be tried elsewhere. But it seems to me, that the moment you say you will give up offenders with a view to promote the large interests of justice throughout the whole civilised world, as a matter in which all nations have a common interest, you must then look to see what is the extent and scope of the mischief you thus desire to counteract and to prevent; and I cannot see that there is any abandonment of national dignity or honour in saying that, though there may be concurrent jurisdiction in respect of offences which have been committed by our own subjects in foreign countries, yet if the foreign States against whose laws the crimes have been committed require that the criminals should be surrendered to justice, and justice can be better done in the country in which the offence is committed, then I cannot see that there is any violation of national dignity or character in doing that which is expedient and desirable to promote the interests of justice. And, looking to the ground of convenience, I think that, if the treaty and the Act were not capable of the construction I put upon them, the feeling of the country would probably be to amend them. And, as the words are strong enough to include the case of piracy *jure gentium*, and I see no reason for a more limited construction, I think that, if there was a *prima facie* case of such piracy before the magistrate, the case comes within the Act. It is impossible, in my opinion, to limit the word "jurisdiction" by the insertion of the word "exclusive," and on that point I am inclined to adopt the view taken by Mr. Lush, that the true meaning of the word is the area over which, whether it be land or sea, the laws of the particular State prevail; and, inasmuch as it is conceded that the ship of a certain territory is, constructively, part of its territory, or, at all events, a place where its laws prevail, this ship was within the jurisdiction of the United States. I feel, therefore, bound (though I regret to differ

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from my learned brethren), in adherence to the view which I take of the statute, to hold that this case comes within it, and therefore that the prisoners are not entitled to be discharged. As to the other question, whether, supposing piracy *jure gentium* to be within the Act, there was sufficient *prima facie* evidence of it, I agree in everything Mr. James said as to acts done with the intention of acting on the behalf of one of the belligerent parties; and I concur in thinking that persons so acting, though not subjects of a belligerent State, and though they may be violating the laws of their own country, and may even be subject to be dealt with by the state against whom they thus act with a rigour which happily is unknown among civilised nations in modern warfare, yet if the acts were not done with a piratical intent, but with an honest intention to assist one of the belligerents, such persons cannot be treated as pirates. But then it is not because they assume the character of belligerents that they can thereby protect themselves from the consequences of acts really piratical. Now, here it is true that the prisoners at the time said they were acting on behalf of the Confederates, and that was equivalent to hoisting the Confederate flag. But then pirates sometimes hoist the flag of a nation in order to conceal their real character. No doubt, *prima facie* the act of seizing a vessel, saying at the same time that it is seized for the Confederates, may raise a presumption of such an intention; but then all the circumstances must be looked at to see if the act was really done piratically, which would be for the jury, and I cannot say that the magistrate was not justified in committing the prisoners for trial. It is, however, unnecessary to say more upon this point, as, upon the main question, my learned brethren (for whose opinions I have the utmost deference, and who, I have no doubt, are right) are of opinion in favour of the prisoners, and therefore they will be discharged.

CROMPTON, J.—I desire to speak with great deference, as I did not hear the argument when the rule for the *habeas* was argued. This is a motion on a *habeas corpus* to discharge the prisoners on the ground that the custody is illegal. I agree with Cockburn, C.J., that it is not necessary that there should be any foreign proceedings before proceeding in this country under the statute. All I think we have to consider is, whether there was any evidence on which the magistrate could reasonably, in the exercise of his discretion, commit these prisoners to gaol for the purpose of being delivered up to the United States' authorities. It is not a convenient practice for this court to interpose before the magistrate has decided, but in the present case he has asked our assistance. In determining this case, we must see if there would be anything illegal in the magistrate's committing these prisoners to gaol under the Act. We are not the proper parties to judge of the evidence, but we have the power of saying that there is no evidence before him on which he ought legally to come to the conclusion to commit them to gaol. I cannot say that the magistrate, in his discretion, ought not to commit them, on the ground that the act done was something like a belligerent act; for, looking at the surreptitious way in which the prisoners went on board and took the vessel, there was evidence before the magistrate that this was piracy. Upon this point I quite concur with my Lord, because it is not for us to weigh the effect of the evidence, which is for the magistrate, and all we can consider is, whether there is enough to justify a committal; and I agree with my Lord that we cannot say that there is not. But upon the other and the main question I have come, after a careful consideration of the case, to a different conclusion. The preamble of a statute is a good

key to its meaning, and here the preamble of the statute points clearly to offences committed within the jurisdiction of either of the contracting States—that is, within the jurisdiction of one of them, and not of the other. It goes on to speak of persons who, having committed certain crimes within the jurisdiction of one of the two States (that is, as I read it, of one of them and not of the other), shall “seek an asylum” and be found in the territory of the other. Now, an “asylum” surely means a place where the criminal is safe from prosecution or pursuit, not a place where he may be tried and convicted. The enactments of the statute apply to cases in which persons having committed murder or piracy or robbery within the jurisdiction of the United States, afterwards seek an asylum or are found in British territory; and it appears to me that they mean only cases of crimes committed within the peculiar jurisdiction of the United States. And that phrase, of course, could not be applied where the crime is equally within the jurisdiction of every nation in the world, as is piracy *jure gentium*. It would not be a proper use of words to say that such a crime was committed within the jurisdiction of the United States. The words, “within the jurisdiction of either of the contracting States,” mean within the jurisdiction of either of them respectively or relatively to each other—i. e., or of one of them and not of the other. But here the crime was within the jurisdiction, not only of both of them, but of every nation in the world. Then the persons charged are to be “delivered up to justice”—that is, to the justice of the country where justice can be done, implying that they are in a country where it cannot be done. Otherwise, when the men were actually committed for trial in this country, they might be claimed, to be tried abroad, which surely would be a strange construction of the Act. Indeed, according to that construction, one does not see why they might not be claimed back again by this country. For this is clearly, if anything, a case of piracy *jure gentium*, and triable in either country. The fact that the men, being in the ship, seized it, makes no difference; it is equally piracy unless it was an act of belligerency; but, if such, more so on that account than if the men had been in another ship. No doubt, in either case, it would be within the jurisdiction of the United States, but that would be a jurisdiction shared equally with the whole world. Is that a case within the meaning of the Act? Surely it would be a strange construction of its terms, and it must mean peculiar and exclusive jurisdiction. The case here was near American waters, but would be the same in principle if it had occurred in the Chinese seas. Whether the Act would apply in all cases, even of piracy by American subjects in distant seas, it is not necessary to determine. It is not to be lost sight of that the statute, in my view of it, carries out what was deemed by some writers to be the obligation of international law before it passed—viz., to deliver up criminals who could not be tried here. My view of the Act is also confirmed by some high American authorities who have been referred to. The learned Judge here referred to the following extracts from a speech of the Hon. J. Marshall, delivered in the House of Representatives of the United States, in *Nash's* case, 5 Wheaton's Reports, appendix:—“The well-considered opinion of the American Government is, that the jurisdiction of a nation at sea is personal, reaching its ‘own citizens only,’ and that this is the appropriate part of each nation on that element.” “A pirate, under the law of nations, is an enemy of the human race. Being the enemy of all, he is liable to be punished by all. Any act which denotes this universal hostility is an act of piracy. Not only an actual robbery, therefore, but cruising on the high seas without commission, and with intent to rob, is

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piracy. This is an offence against all and every nation, and is therefore alike punishable by all. But an offence which in its nature affects only a particular nation is only punishable by that nation. A statute may make any offence piracy, committed within the jurisdiction of the nation passing the statute, and such offence will be punishable by that nation. But piracy under the law of nations, which alone is punishable by all nations, can only consist in an act which is an offence against all. No particular nation can increase or diminish the list of offences thus punishable." So the able judgment of Mr. Justice Nelson in the case of *Re Kain*, 14 Howard's American Reports, 137: "The two nations agree that upon mutual requisition by them, or their officers or authorities respectively made, i. e., on a requisition made by either one Government, or by its ministers or officers properly authorised, upon the other, the Government upon whom the demand is thus made shall deliver up to justice all persons charged with the crimes as provided in the treaty, who shall have sought an asylum within her territories. In other words, on a demand made by the authority of Great Britain upon this Government, it shall deliver up the fugitive; and so in respect to a demand by the authorities of this Government upon her. This is the exact stipulation entered into when plainly interpreted. It is a compact between the two nations in respect to a matter of national concern—the punishment of criminal offenders against their laws—and where the guilty party could be tried and punished only within the jurisdiction whose laws have been violated." Taney, C. J. and the other judges referred to this judgment as containing an exposition of the law on which they based their own judgments, and the result is, that in their opinion the statute only applies in cases where the fugitives could only be tried in the territory to which it was proposed to deliver them up. It is difficult to see that two great maritime nations would have given up their jurisdiction to try pirates whenever they were caught. Take the case of a pirate taking an American, an English and a French vessel, on the same day, in some of those distant seas where pirates abound. Why should not the courts of either of the three countries in which the pirates might be found do justice upon them? It is said that we must trust to the discretion of the other State that it will not demand extradition in cases where it is unreasonable to do so. But that is very dangerous doctrine, to which I cannot subscribe; and I think it is far more wise to construe the Act in such a way, if we can, as to exclude cases in which the demand would be unreasonable. At first sight it certainly occurred to me that the word "piracy," in its primary sense, was against my reading of the statute; but that was answered by Mr. James in his able argument, for he stated that there were some species of piracy by the municipal law of America not piracy by our law. It was said by Mr. Lushington that the jurisdiction would depend upon whether the ship was the ship of one nation or of another, but that can hardly be so. It is an offence against all nations. The pirates are not English pirates or American pirates, but pirates against all nations. The principal argument in support of the committal was founded upon the fact that the ship was American, and it was argued that therefore the case was, in some peculiar way, within American jurisdiction. But I doubt that. The piracy—if piracy—was not altered in character because committed in the ship itself which was seized. Suppose the prisoners had been in a ship of their own, and sunk the other, without ever going into it? It would be the same offence, and equally, in both cases, it would be within the common jurisdiction of the courts of all

nations. And it does not appear to me, therefore, that it could be said to be within the jurisdiction of the United States more than of any other country. Nor can I see that in this statute the two States have given up their jurisdiction to try pirates whenever they can take them. I think, upon the whole, that the case is not within the statute, which I read as being limited to piracy committed within the peculiar jurisdiction of the United States. If, therefore, this was a belligerent act, the prisoners are entitled to our judgment; but if not—and I think it was not, but a charge of piracy *contra jus gentium*—in my view, the case is not within the statute. The prisoners are therefore entitled to be discharged.

BLACKBURN, J.—I agree with my brother Crompton in thinking that the prisoners ought to be discharged. They have been committed to gaol on a warrant under the Extradition Act, and the question is, what is the state of things required to authorise their being committed to gaol for the purpose of being delivered up to the United States authorities? There would be no right so to commit but for the 6 & 7 Vict. c. 76. That Act was passed for carrying out a treaty between this country and the United States, for the apprehension of certain offenders, and the Act recites part of the treaty, and the words of the statute are to be construed as if it had been a contract between two subjects. Looking at the words alone, I think it would apply to crimes committed within the jurisdiction of one of the contracting countries only, and not to crimes within the jurisdiction of both. I think this is clear, whether we look to the terms of the Act, or to its obvious object. The main argument in favour of the opposite view is founded upon the force of the word "piracy," which, it is urged, in its primary sense, means piracy *jure gentium*, and so must apply to cases within the jurisdiction of both countries, and no doubt it would include such piracy if it stood alone; but then there are the words "committed within the jurisdiction of the United States," which run through the Act and are its governing words. The question is not one of territorial jurisdiction, but of piracy, which is quite different. There are a great many offences called piracy which are not piracy by the law of nations. Offences of piracy in which there is a common jurisdiction do not seem to me to satisfy the words of the statute. In Kent's Commentaries, 186, I find it written: "It is of no importance, for the purpose of giving jurisdiction, on whom or where the piratical offence has been committed. A pirate who is one by the law of nations may be tried and punished in any country where he may be found, for he is reputed to be out of the protection of all laws and privileges. The statute of any Government may declare an offence committed on board its own vessels to be piracy, and such an offence may be punishable exclusively by the nation which passes the statute. But piracy, under the law of nations, is an offence against all nations, and punishable by all." Such is the law as laid down by that great American authority, and it is also perfectly good English law, and both countries must be supposed to have entered into the treaty with a full knowledge of it. Why, then, should piracy by the law of nations be deemed within the jurisdiction peculiarly of one of the two States? It would be so if it were piracy only by its own municipal law. The American citizen, who has done an act declared to be piracy by American statutes, would be within American jurisdiction, and the English subject who has done an act which was declared piracy by an English statute would be within English jurisdiction; and such piracy, no doubt, would be within the treaty, and America would give up an English subject who



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had committed piracy by English law, and England would give up American subjects who had committed piracy by American law. But the man who has committed piracy *jure gentium* is equally within the jurisdiction of either country, and peculiarly in the jurisdiction of neither, and so is not within the meaning or the mischief of the statute. I therefore think that in a case of municipal piracy the accused ought to be delivered up under the Act, but the case of piracy *jure gentium* is not within the words or mischief of the Act, as I think. It is true there may be cases in which it may be more convenient that the prisoners should be tried in one country than in another, but this is a question not of convenience, but of jurisdiction. No power is given to us by any other Act to send accused persons to another country for trial where a trial can be more conveniently had. The question then comes round to this, whether this was piracy *jure gentium* or not? It strikes me that there was such an amount of evidence of its being piracy *jure gentium* as, if the case had been before a jury, the judge would not have been justified in withdrawing it from them. I do not wish to prejudge the case, and all I say is, that there is, upon the depositions, a case of that sort. As to the evidence, its effect would be for the jury, and though the Confederate States are not recognised as independent, they are recognised as a belligerent power, and there can be no doubt that parties really acting on their behalf would be justified. But the case is either one of piracy by the law of nations—in which case the men cannot be given up, because they can be tried here—or it is a case of an act of warfare, in which case they cannot be tried at all; and as they are now detained for the purpose of their being delivered up to the American Government, they are entitled to be discharged.

SHEE, J.—I have had the advantage in this case of hearing two arguments, one on the motion for the rule, and another on the motion for the discharge of the prisoners, and I have referred to and considered the cases which have been cited. The crime with which the prisoners are charged as described in the return, and as appears on the depositions, is piracy, a crime of pre-eminent enormity, and which, by the law of nations, is punishable wherever the offender may be found. It is not, in my opinion, the crime for which, under the name of piracy, extradition is stipulated, in the treaty of the 9th Aug. 1842; the provisions of that treaty were not needed for, nor are they, as it appears to me, applicable to, its repression. The treaty provides that persons charged with having committed the crimes of murder, piracy (not piracy on the high seas), arson, robbery, or forgery, within the jurisdiction of the United States, and seeking an asylum in or found in the territories of our Sovereign, shall, on the requisition of the United States, be delivered up to justice. The object of the 10th article of the treaty, as appears from its provisions and from the title and enacting clauses of the 6 & 7 Vict. c. 76, which gave effect to it, was to legalise the apprehension within the territories of the Queen of persons charged with the commission of the crimes mentioned in the treaty within the jurisdiction of the United States for the purpose of their surrender to that jurisdiction. The persons whose apprehension and extradition are contracted for by the treaty and authorised by the Act of Parliament are persons "fugitive" from the justice of the United States, and "seeking an asylum" that is (but for the treaty and the Act of Parliament), safe in the asylum of the territories of our Queen, because not liable to be arraigned before her tribunals. The words "surrender," "deliver up to justice," mean deliver from an asylum or place of safety up to

justice, that is to the ministers of justice of the United States, by whose courts only, on the persons charged with the crimes imputed, justice can be done. Read with reference to the declared object of the treaty and the Act of Parliament, and by the light which the words "fugitive," "seeking an asylum," "surrender," "deliver up to justice," afford, the words "within the jurisdiction" must, as I think, mean within the exclusive jurisdiction of the United States, and cannot be held to extend to crimes not within any jurisdiction exclusively—but justiciable wherever the person charged with having committed them may be found. It is injurious to suppose that a State should, in a public treaty, admit the possibility of its unwillingness or inability to do justice by binding itself to surrender to the justice of another State persons charged with the commission of crimes which it would be the duty of both to punish, and over which both would have jurisdiction. Had this been intended, provision would surely have been made for the case of justice by acquittal or conviction having been done by one State before cognisance of the crime taken by the other—for pleas of *autrefois convict*, or *autrefois acquit*—familiar in this case to the jurisprudence of both States, and for proof by the record of conviction or acquittal—that the crime for which the offender had been in jeopardy was the crime for which extradition was claimed. But the treaty and the Act of Parliament contain no such provisions, though stipulations for the extradition of criminals had been long in force between the two Governments, and the meaning of the words "within the jurisdiction" had been the subject of serious discussion between them. Upon the words, therefore, of the treaty and the Act of Parliament alone I should have been prepared to hold that the words "within the jurisdiction" mean within the exclusive jurisdiction of the State requiring the extradition. We have been invited, however, to consider—and I think we must consider—the state of the law as respects piratical offences before the date of the treaty, in order the more satisfactorily to determine to what extent the provisions of the treaty would take effect if the word "exclusive" were added to the words "within the jurisdiction," that is, first, within the exclusive jurisdiction of the United States as respects the place where the offence was committed; secondly, within the exclusive jurisdiction of the United States as respects the person by whom the offence was committed. It will be seen, I think, on reference to the legislation of the United States before and at the time the treaty was signed, that consistently with that legislation, the words "within the jurisdiction" in both of these meanings may have, as respects offences of a piratical character, a very extensive range, without the crime of piracy on the high seas. The Constitution of the United States gave power to the Congress to define among other crimes the crime of piracy. It was inherent in the sovereignty of the United States, as respects the subjects of the United States, to designate as piracy, and punish as piracy, crimes committed within its jurisdiction which were not thus piracy on the high seas, not piracy by the law of nations. The Act of Congress of the 30th April 1790 provides "that if any person shall commit upon the high seas, or in any river, haven, basin, or bay out of the jurisdiction of any particular State, murder or robbery, or any other offence which, if committed within the body of a country would by the laws of the United States be punishable with death, or if any captain or mariner of any ship or other vessel shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship voluntarily to any pirate; or if any seaman shall lay violent hands on his commander,



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thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship, every such offender shall be deemed, taken and adjudged to be a pirate and a felon, and being thereof convicted shall suffer death. And that if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof upon the high seas, under colour of any commission from any foreign prince or State, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged and taken to be a pirate, felon, and robber, and on being thereof convicted shall suffer death." These provisions, most of which are with little more than verbal alteration taken from our own statute-book, include, as respect citizens of the United States, and persons owing temporary allegiance to them in return for the protection of themselves, not only piracy by the law of nations, but, as respect citizens, offences also which are piracy because the municipal lawgivers have chosen so to call them. By an Act of Congress of March 3, 1819, c. 75, s. 5, it was enacted that, if any person on the high seas should commit the crime of piracy as defined by the law of nations, he should on conviction thereof suffer death. By an Act of Congress of the 5th May 1820 it was enacted, that any person who should upon the high seas or in any open roadstead (which has been held in the Supreme Court of the United States to be upon the high seas), or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate, and being convicted thereof shall suffer death. And, if any person engaged in a piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, shall land from such ship or vessel, and on shore shall commit such robbery, such person shall be adjudged a pirate, and on conviction thereof shall suffer death." It thus appears that the Legislature of the United States, in framing municipal laws for the repression of offences of a piratical character, has always kept in view and made special mention of "piracy on the high seas," grouping with it, however, a large class of offences which bear a strong family resemblance to it, within the territorial jurisdiction, but which are not piracy by the law of nations—viz., "robbery in any river, haven, basin, or bay out of the jurisdiction of any particular State of the United States, upon any vessel or upon the lading or ship's company of any vessel in any open roadstead, haven, basin, or bay, or in any river where the sea ebbs and flows." On land, if the robbery be committed by persons engaged in a piratical cruise or enterprise, or being of the ship's crew or ship's company of any piratical ship or vessel, who shall land from such ship or vessel, and on shore commit such robbery, many of the crimes thus defined, though included in a list at the head of which is "piracy on the high seas," and classed with it as equal in guilt and deserving of equal punishment, differ from it in the essential particular that they are not committed on the high seas, but within the territorial jurisdiction of the United States; and being committed within the territorial or personal jurisdiction of the United States, they are thus offences, not against our laws (though we have laws to the same effect), but against the laws of the United States. Regard being had to this legislation, which must have been in full view of the American minister who negotiated this treaty, it is a remarkable feature of the treaty, tending strongly to show that "within the jurisdiction" means within the exclusive juris-

dition, territorial or personal, of the United States, that, though "piracy" committed within the jurisdiction of the United States and—as if to avoid all cavil as to its meaning—"robbery" are mentioned,—piracy on the high seas—piracy by the law of nations—has been omitted. For these reasons I am of opinion that the true reading of the words "within the jurisdiction" is within the exclusive jurisdiction of the State requiring extradition.

COCKBURN, C. J.—I wish to add, that one of the grounds of the conclusion to which I came was, that if we are to construe the statute as applying only to cases of exclusive jurisdiction, this consequence would follow—that whenever an English subject has committed in America a crime for which he could be tried there, although he could also be tried here, he could not be given up. I do not think the Legislature could have contemplated a result so mischievous. However, as the majority of the court are of an opposite opinion the prisoners must be discharged.

Friday, May 27, 1864.

BAYLEY v. ALDRED.

*False imprisonment—Notice of action—Committing a nuisance.*

*The owner of property is not justified in giving a person into custody found (popularly speaking) committing a nuisance against his premises, nor is he entitled to notice of action for having done so, unless he is fairly justified in believing that the person had the intention to soil or deface them, within the 2 & 3 Vict. c. 47, s. 54, or the intention to commit damage or injury or spoil to them within the 24 & 25 Vict. c. 97, s. 52.*

Action for false imprisonment.

Plea.—Not guilty by statutes 2 & 3 Vict. c. 47, ss. 54, 79; 2 & 3 Vict. c. 71, s. 53; and 24 & 25 Vict. c. 97, ss. 52, 61, 71.

At the trial before Cockburn, C. J. it appeared that the deft. was the owner of a house in Oxford-street, which had a street-door down an adjoining gateway; that the plt. and a friend one night turned down the gateway for a convenient purpose; that the deft. came up and an altercation took place, and that the deft. thereupon gave the plt. into custody for committing a nuisance against the street-door.

The jury found that the deft. acted in the *bona fide* belief that he was entitled to give the plt. into custody; but they also found that the plt. had not committed a nuisance against the street-door. The verdict was entered for the plt. with 40s. damages.

M. Chambers moved to enter the verdict for the deft. on the ground of want of notice of action.—It is submitted, that the deft. was, on the finding of the jury, entitled to notice of action under the 2 & 3 Vict. c. 47, sect. 54 of that Act. The 2 & 3 Vict. c. 47, s. 54, enacts, that every person shall be liable to a penalty, not more than 40s., who within the limits of the metropolitan police district shall in any thoroughfare or public place commit any of the following offences (among others):

10. Every person who, without the consent of the owner or occupier shall affix any posting-bill or other paper against or upon any building, wall, fence, or pale, or write upon, soil, deface, or mark any such building, wall, fence, or pale, with chalk or paint, or in any other way whatsoever, or wilfully break, destroy, or damage any part of any such building, wall, fence, or pale, or any fixture, or appendage thereunto, or any tree, shrub, or seat in any public walk, park, or garden. . . . And it shall be lawful for any constable belonging to the metropolitan police force to take into custody without warrant any person who shall commit any such offence within view of any such constable.

Sect. 79 incorporates the 10 Geo. 4, c. 44, which by sects. 41 requires a month's notice of action. The

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24 & 25 Vict. c. 97, also applies, and sect. 52 thereof enacts,

That whosoever shall wilfully or maliciously commit any damage or injury or spoil to or upon any real or personal property whatsoever, either of a public or a private nature, for which no punishment is hereinbefore provided, shall on conviction thereof, &c.

And sect. 61 enacts that any person found committing any offence against the Act may be immediately apprehended without a warrant by any peace officer or the owner of the property injured, &c. And sect. 71 requires a month's notice of action to be given. *Read v. Coker*, 13 C. B. 850, was cited. [The Court referred to *Roberts v. Orchard*, 33 L. J. 65, C. P., where it was decided by the Ex. Ch. that the true test is, whether the deft. honestly believed in the existence of such a state of facts as would, if it had existed, have afforded a justification for the arrest under the statute, and that he must believe that the plt. had been found committing the offence.]

COCKBURN, C. J.—I am of opinion that there should be no rule. This case does not fall within either statute. It is not within 2 & 3 Vict. c. 47, s. 54, because it is necessary that there should be the intention to soil and deface the building, wall, or fence with chalk or paint or in some way analogous thereto. So, again, with regard to the 24 & 25 Vict. c. 97, s. 52, there must be the intention to commit damage, injury, or spoil to the property. It is not because accidentally some injury may arise from the act done that it falls within these sections. The party giving another into custody must have not merely a belief that he is justified by the existing state of facts, but there must be a state of facts which would have justified him in giving another into custody. Here there was not a state of facts which justified the deft. in giving the plt. into custody. The deft. could not fairly believe that the plt. had the intention to damage or spoil his property.

The rest of the COURT concurring,

*Rule refused.*

*Saturday, May 28, 1864.*

REG. v. THE OVERSEERS OF SOUTH WEALD.

*Burial board—Chapelry—Election of member of board. When districts are formed into a chapelry by an Order in Council, such order need not be enrolled.*

*By the 18 & 19 Vict. c. 128, s. 4, a vacancy in a burial board is to be filled up by the vestry within one month, or in default it may be filled up by the burial board:*

*Held, that a vacancy filled up after the lapse of one month was well filled up, the burial board not having taken advantage of the delay.*

A *mandamus* having issued to the overseers of South Weald commanding them to pay over to the Burial Board of Great Warley the sum of 53*l.* 15*s.*, a return was made whereupon issue was joined, and upon coming on for trial at the Chelmsford Assizes, it was arranged that the facts should be turned into a special case. This accordingly now came on for argument.

It appeared that in the year 1855 an Order in Council was issued directing that a portion of each of the parishes of Great Warley, Shenfield and South Weald should be consolidated into one chapelry, under the provisions of the 59 Geo. 3, c. 134. Subsequently a burial board was constituted for the said chapelry, and money being required by the board, they made their certificate for the payment by the overseers of South Weald of the above-mentioned sum, such certificate requiring the signature of three members of the board, and being so signed by a Mr. Francis as one of such three members.

The overseers of South Weald objected to make

the payment on the grounds, first, that the chapelry was not duly constituted, inasmuch as the order was not enrolled as provided for by sect. 6 of the 59 Geo. 3, c. 134; secondly, that the certificate of the burial board was not valid, inasmuch as Mr. Francis, one of the three members who signed it, had not been duly elected.

By the 59 Geo. 3, c. 134, s. 6, the order is directed to be enrolled; but by the 8 & 9 Vict. c. 70, s. 9, which recites the former statute and explains the course to be pursued upon the junction of chapelries, nothing is said with reference to enrolment.

By the 18 & 19 Vict. c. 128, s. 4, provision is made for filling up vacancies in burial boards, and it enacts that

Every vacancy in any burial board shall be filled up by the vestry appointing the same within one month after such vacancy shall have happened, and immediately on the occurrence thereof such vacancy shall be notified by the burial board to the churchwardens or other persons to whom it belongs to convene meetings of the vestry; and in case any such vestry shall neglect to fill up any such vacancy, the vacancy may be filled up by the burial board at any meeting thereof, &c.

It appeared that, a vacancy having occurred, the vestry omitted to fill it up within the month, but that afterwards, the burial board having themselves neglected to fill it up, the vestry elected Mr. Francis, who accordingly took his seat and acted at the board, being in fact one of the three members by whom the certificate was signed.

*Petersdorff* now appeared for the Crown, and contended, first, that whether or not the provision in the 59 Geo. 3, c. 134, as to enrolling, was compulsory or only directory, the subsequent statute of the 8 & 9 Vict. c. 70, which in sect. 9 says nothing about enrolling, must be taken as laying down the legislative directions upon the subject. Secondly, that although the burial board, upon default by the vestry within a month of an election of a member, may themselves elect, yet their power to elect is not gone, but may be lawfully exercised if the burial board omit to do so. There was a further objection taken—that the Burial Board Acts do not apply to chapelries of this sort. This objection, however, was abandoned.

*Gray, Q.C. (Woollett and Philbrick with him)* argued that the certificate was illegal upon both grounds—first, that the 59 Geo. 3, c. 134, as to enrolling, is compulsory, and is not repealed; secondly, that the vestry, having allowed the month to elapse, their power to elect was wholly gone. [COCKBURN, C.J.—They do not require the assistance of the 59 Geo. 3, c. 134, for they have the Order in Council under the 8 & 9 Vict. c. 70. 'There may have been very good reason for an enrolment under the old Act, but with reference to an Order in Council under the Act of Victoria, which sets out the boundaries, there can be no necessity for its enrolment.] The word "may," in sect. 4 of the 18 & 19 Vict. c. 128, imposes a duty upon the burial board to fill up the vacancy upon the default of the vestry to do so, and there cannot be a right in two parties at the same time to fill it up.

COCKBURN, C.J.—We disposed of the first objection in the course of the argument. As to the second point, I think Mr. Francis was properly a member of the burial board. The effect of the legislation is, that the vestry are under an obligation and duty to fill up the vacancy within the space of a month, and by way of securing the discharge of that duty, it is enacted that if the vacancy is not then filled up by such vestry, the burial board may themselves appoint. It has been argued that it was imperative upon the vestry to appoint within the month, and that after that period the power could not be exercised. But I think that is not the effect of the enactment, and that that even after the

lapse of the month it is still the duty of the vestry to appoint. It may be said that it could not be intended that both bodies should make an appointment at one and the same time; but if such a case were to arise, there might be good reason for giving a preference to the appointment of the burial board as against the vestry. But we are not called upon to say anything upon that point, for the burial board in this case did not make any appointment.

MELLOR and SHEE, JJ. concurred.

*Judgment for the Crown.*

#### REG. v. THE INHABITANTS OF GREAT SALKELD.

*Irremovability—Removability from one parish to another parish in the same union.*

*The 24 & 25 Vict. c. 55, s. 1, which enacts that the residence of a person in any part of a union shall have the same effect, in reference to the provisions of the 9 & 10 Vict. c. 66, s. 1, as a residence in any parish, has reference only to the pauper's status with reference to a parish out of such union, and does not affect his status with reference to parishes within the same union. Where, therefore, A. and B. were two parishes in the union of C., and the pauper, whose parish of settlement was at A., had resided there all his life with the exception of a few months (less than three years) next before the obtaining of the order of removal, during which he resided in the parish of B.:*

*Held (Crompton, J. dissentiente), that he was removable to his parish of settlement (A.), and that the order was good.*

This was an appeal against an order of justices for the removal of John Mallinson and Hannah his wife and their five children from the township of Plumpton Wall to the parish of Great Salkeld, both in the Penrith Poor Law Union, in the county of Cumberland. The appeal was tried at the last Michaelmas Quarter Sessions for the county of Cumberland, when the order was affirmed subject to the following case:—

The pauper John Mallinson, who is now forty-two years of age, never resided in any parish or township in the Penrith Union, other than the parish of Great Salkeld and township of Plumpton Wall, above mentioned, and he was resident in Great Salkeld continuously from the year of his birth until he removed to Plumpton Wall, on the 1st July 1862. He became legally settled in Great Salkeld in 1842 by apprenticeship, and also gained a second settlement in Great Salkeld, in 1857, by renting a tenement therein. While so residing in Great Salkeld with his wife and family, he in the month of Dec. 1860 became chargeable thereto, and applied for relief to the relieving officer of the Penrith Union, and was relieved by him at the charge and expense of Great Salkeld. From the 14th Dec. 1860 to the 6th July 1861, with the exception of a fortnight, during the period from the said 14th Dec. 1860 to the 6th July 1861, he and his family resided in Great Salkeld. On the 1st July 1862 (up to which time the pauper and his family had resided in Great Salkeld, as stated before) the pauper took a cottage in Plumpton Wall, and removed there with his wife and family. On the 30th Sept. 1862 the pauper, whilst residing in Plumpton Wall, again became chargeable, and applied to the relieving officer of the Penrith Union (in which both Great Salkeld and Plumpton Wall are situate, and of which they form a part) for relief; the officers brought the case before the board of guardians of the Penrith Union, who ordered the pauper to be relieved from the common fund of the union till the 2nd June 1863, when the board of guardians, on the complaint of the parish officers of the parish of Penrith, in the same

union, stopped the relief from the common fund. The pauper continuing chargeable to Plumpton Wall after the stoppage of the common fund relief, the parish officers of that township obtained the present order of removal.

If the court shall be of opinion that the residence in the parish of settlement should not be included in the calculation of the three years' residence in a union required to establish the *status* of irremovability under the 24 & 25 Vict. c. 55, s. 1, then the said order to be confirmed. But if the court shall be of a contrary opinion, then the said order shall be quashed.

By the 9 & 10 Vict. c. 66, s. 1, it is enacted that no person shall be removed from any parish in which such person shall have resided for five years next before the application for the warrant. And by the 24 & 25 Vict. c. 55, s. 1, it is enacted:

That after the 25th March next, the period of three years shall be substituted for that of five years specified in the first section of the statute 9 & 10 Vict. c. 66, and the residence of a person in any part of a union shall have the same effect in reference to the provisions of the said section as a residence in any parish.

Mellish, Q. C. appeared in support of the order of sessions, and argued that the order of removal was good, for that the 1st section of the 24 & 25 Vict. c. 55 was not intended to affect the relationship of each other of parishes in the same union, but to apply only to the power of removal from the union to parishes out of the union.

Maule, contra, for the apps., contended that the Legislature intended no such limitation as that contended for by the resps., that its object was to place the union upon the same footing as the parish was before the Act, and that therefore, under the circumstances, no removal could take place from one parish to another in the same union.

COCKBURN, C. J.—I am of opinion that the order of Quarter Sessions should be confirmed. The effect of the recent statute, the 24 & 25 Vict. c. 55, was, I think, merely this, that so far as regards the ambit of the pauper's residence, when he is sought to be removed to a place out of the union, it is sufficient that he has resided in any part of that union, to give him the *status* of irremovability. Formerly he could be removed if he had not resided for a certain number of years in the same parish; but it is enough now if he has resided in any of the parishes of the same union for a certain period. It is true that formerly there was nothing known of a removal from one union to another, it was a removal from one parish to another parish only, whether such parishes were included in a union or not. But the effect of the recent enactment is to give the *status* of irremovability if the pauper has resided in the same locality, though in several parishes of the same union. I can see very good reason for that alteration, for as the cost of the irremovable paupers was paid out of the common fund, it did no injustice to the parishes within it. But as between the parishes within the same union, there might be great injustice and hardship if a pauper could, by removing into a neighbouring parish of the union, acquire the *status* of irremovability, and as against another parish count as part of the three years his residence in the parish of settlement. Such a result, I think, could scarcely have been intended by the Legislature.

CROMPTON, J.—I have certainly great difficulty in coming to any other conclusion than that the Legislature in the recent Act did intend to make the union exactly like a parish as far as regards the question of removability, and I find no words which enable me to adopt the construction which my Lord and my brother Shee adopt. I certainly think that the recent statute means not merely that the

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word "union" shall be substituted for that of "parish," as regards removability to places beyond the union, but means that whenever the pauper has resided three years in the same union he shall not be removable at all. Henceforth, I think a pauper may use the union as he formerly used a parish, and may go from any one part of it to any other without his removability being affected. I believe the Legislature thought that that would be for the benefit of the working classes, without perhaps considering all the consequences of such an enactment.

SHEE, J. said he entirely agreed with the Lord Chief Justice.

*Order confirmed.*

Wednesday, June 1, 1864.

CHURCHWARDENS, &C. OF POTTON v. BROWN.

*Lighting rate—Nullity—Wrong heading.*

*The Watching and Lighting Act (3 & 4 Will. 4, c. 90), so far as related to lighting, was adopted by part of a parish only, and a rate was made under the Act which in its heading purported to be a rate on the whole of the parish; but the names only of persons liable to be rated were inserted in the rate:*

*Held, that the rate purported to be a rate for the whole of the parish, and as there was no power to make such a rate, it was a nullity; and that a fresh rate could be made for the same purpose the first was intended for, without quashing the first.*

Case stated by justices under 20 & 21 Vict. c. 43, on a refusal to make an order on a complaint for refusing to pay a lighting rate, dated 23rd Nov. 1863.

It appeared that the Watching and Lighting Act (3 & 4 Will. 4, c. 90), so far as the same related to lighting, had been adopted for part only of the parish of Potton (Beds.), and that a rate, intended to raise the necessary funds, was made on the 3rd Feb. 1863, intitled "An assessment for the lighting of the parish of Potton, in the county of Bedford, and for other purposes chargeable thereon, according to law, made the 3rd Feb. 1863, after the rate of 1s. in the pound."

The overseers collected the greater part of it, but as some persons named in it refused to pay, the overseers in office, on the 27th May then next, made a complaint against several of them for refusing to pay it, and they having been summoned and attending accordingly, the complaint came on to be heard before the justices of Biggleswade Petty Sessions, and was dismissed on the ground that the rate was bad, because by the heading it purported to be a rate for lighting the entire parish of Potton, instead of for lighting such part only of the said parish as had adopted the Act.

On the 23rd Nov. 1863, the then churchwardens and overseers of the same parish, without getting the first rate quashed, and assuming it to be a nullity, made another rate intended to raise money for the same purposes as the first rate had been made for, and the last rate was intitled "An assessment for lighting such part of the parish of Potton as is mentioned in the schedule hereunder written, under the provisions of the Act 3 & 4 Will. 4, c. 90, intitled 'An Act to repeal an Act of the 4th year of the reign of His late Majesty King George the Fourth, for the lighting and watching of parishes in England and Wales, and to make other provisions in lieu thereof, viz. all that part of the said parish of Potton,' &c. describing particularly the part of the parish by which the Act had been adopted.

In collecting the rate the overseers gave credit to those who had paid the first rate for the sums so paid, and demanded the rates of those who had not

paid the first, which being refused by some of them, on the 9th Dec. 1863 a complaint was made on the part of the churchwardens and overseers against them, the present resps., for refusing to pay it, and when it came on to be heard the resps. objected that the rate of the 23rd Nov. 1863 was bad and invalid, because the rate dated the 3rd Feb. 1863 having been made for the same purpose and for the same time was still in existence, and not quashed or otherwise got rid of, to which the apps. replied that the first so-called rate was an absolute nullity by reason of the defect in the heading abovementioned.

The justices thought that the rate of Feb. 3 could not be treated as a nullity, and was in existence, not being quashed, and therefore that the November rate was bad.

*Douglas Brown* for the resps.—The November rate is bad, as the previous one of February was still in existence, and was made for the same purposes. In *Reg. v. Fordham*, 11 A. & E. 73, it was held that a rate is bad, which is made for a period for which a rate has already been made, and not quashed. [BLACKBURN, J.—In that case the question arose on appeal against the rate, not on a proceeding to enforce it by order of justices in petty sessions.—COCKBURN, C.J.—There was no authority at all to make a lighting rate for the whole of the parish of Potton. If this is a rate, as it purports to be, for the whole parish, it was *ultra vires* and a nullity.] All the persons mentioned in the rate were liable to pay, but the heading merely was wrong. [BLACKBURN, J.—The rate sets out an Act which gives authority merely to rate part of the parish. What authority is there for rating the whole? The rate is not a good rate under sect. 73.] Sect. 32 was referred to, and also the case of

*Reg. v. Eastern Counties Railway*, 5 E. & B. 974.

*Sills*, contra, was not called upon.

By the Court.—The first rate was a nullity, and the second one was good, and the justices ought to enforce the payment of it.

*Judgment for the apps.*

## COURT OF COMMON BENCH.

Reported by W. MAYN and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

Tuesday, May 31, 1864.

LEADER v. YELL.

*Beershop licence—Certificate of good character.*

*By the 2nd and 8th sections of 4 & 5 Will. 4, c. 85, it is enacted that no person shall have a licence to keep a beershop without a certificate from six rated householders that he is a "person of good character;" and also that any person using such a certificate, knowing it to be false, is liable, on conviction, to certain penalties:*

*Held, that a man living in concubinage with a woman by whom he had children, and also the fact of his being occasionally drunk, was not sufficient to convict him of uttering a certificate of six rated persons, knowing it to be false.*

This was an information preferred by David Yell, of Newton in the Isle of Ely and county of Cambridge, labourer, against Robert Leader, of the same place, blacksmith, for that the said Robert Leader, on Friday, the 9th Oct. 1863, at the parish of Long Sutton, in the said parts of Holland, county of Lincoln, for the purpose of obtaining for himself a licence to retail beer or cider, unlawfully did make use to one Samuel Cooke, of Holbeach, in the said county, an officer of the Inland Revenue, a certain certificate required under the provisions of the statute in that behalf made and provided to wit, a

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certificate in the words and figures following, that is to say :

We, the undersigned, being inhabitants of the parish of Newton, in the county of Cambridge, and respectively rated to the poor at not less than 6*l*. per annum, and none of us maltsters, common brewers, or persons licensed to sell spirituous liquors, or being licensed to sell beer or cider by retail, do hereby certify that Robert Leader, dwelling in Newton in the said parish, is a person of good character.

Dated this 27th Aug. 1863.

(Here follow the six signatures.)

I do hereby certify that the above-named applicant is the real resident holder and occupier of the said house, and that the true rent or annual value at which such house, with the premises occupied thereby, is rated in one rating to the poor-rates, &c. And I further certify that all the above-mentioned persons whose names are subscribed to this certificate are inhabitants of the parish of Newton, rated to 6*l*. to the relief of the poor of the said parish.

Dated Aug. 28, 1863.

(Signed)

SAMUEL SHIPPEY,  
Overseer of the parish of Newton.

The said Robert Leader then and there well knowing one or more of the matters certified therein, to wit, that the said Robert Leader was a person of good character, and that the said Robert Leader, as the applicant named in the application attached to the said certificate, was the real resident holder and occupier of the said house, and the true rent or annual value of which such house, with the premises occupied therewith, is rated in one rating to the poor-rates according to the last sum or rating made and allowed in such parish for the relief of the poor, is the sum of 12*l*., to be false, contrary to the form of the statute in such case made and provided.

HENRY MESSON.

And after hearing the parties, and the evidence adduced by them, we, the undersigned, being two of Her Majesty's justices of the peace in and for the parts of Holland in the county of Lincoln, did thereupon dismiss that part of the charge against the said Robert Leader relating to his unlawful use of the certificate of the rating or assessment of his house and premises, but did convict him under the 6th section of the statute 3 & 4 Vict. c. 61, of the charge of having unlawfully made use of the said certificate, so far as he was thereby certified to be a person of good character, he, the said Robert Leader, then and there well knowing such statement to be false. And the said Robert Leader alleging that he is dissatisfied with the said determination as being erroneous in point of law, did, within three days thereafter, apply to us, the said justices, to state and sign a case setting forth the facts and the grounds of such determination for the opinion of Her Majesty's Court of C.P., in pursuance of the statute in such case made and provided.

Case.—The deft. having appeared upon the summons before us, the undersigned, to answer to the said information, it was thereupon proved on the part of the said informant, that the said deft. did make use of the said above-mentioned certificate by presenting the same in person, on or about the 9th Oct. last, to Samuel Cooke, the officer of excise then sitting and acting officially in our aforesaid petty sessional division; that the deft. had been previously to the said 9th Oct. cautioned by Samuel Shippey, the overseer of the said parish of Newton, that he (Shippey) had received a letter from Mr. John Barwise, the supervisor of excise for the same district, stating that he (Mr. Barwise) had received an intimation that the certificate was untrue and incorrect, and was objected to; that notwithstanding such caution he (the deft.) did apply for and obtain a licence for selling beer by retail on his aforesaid premises; that the said deft. has been ever since the year 1854, and still is, living in open concubinage with a widow woman named Cox, and has three illegitimate children by her, all now living in the house with them, and that from 1854 or 1859 he was also frequently drunk; that the deft. has been several times warned by two successive curates of the parish of Newton of the immorality and guilt of his course of life, and desired by those gentlemen to reform himself and

marry the woman; that one of those gentlemen, on being applied to by the deft., refused to receive the children in question at the deft.'s hands into the church or otherwise to baptize them, in consequence of the deft.'s living with and refusing to marry Cox. And it was further stated on oath by the two parties who had lastly so signed the said certificate of good character, that they signed the same without in fact reading the certificate or otherwise knowing its contents, and that if they had read it they should certainly both (knowing the deft.'s course of life in the matter aforesaid) have refused to sign the same, and it was thereupon objected by deft.'s attorney that the mere proof of immorality in a man did not constitute him not to be a person of good character, but that it was necessary to prove him to have been guilty and convicted of some criminal offence to deprive him of that quality.

Whereupon we, the said undersigned, did adjudge and determine that the said deft. was not a person of good character, and did convict him of the offence of having unlawfully used the aforesaid certificate of his being such a person, he well knowing the same to be false, and did further adjudge and determine that he should forfeit and pay for such offence the mitigated penalty or sum of forty shillings, besides costs, and should moreover forfeit the licence so obtained as aforesaid.

If the court shall be of opinion that our determination on the above point was correct, then the conviction shall be confirmed. But if the court shall be of a contrary opinion, then the said conviction shall be quashed. (Signed),

Denman, Q.C. appeared for the app.

O'Malley, Q.C. and Naylor for the resp.

ERLE, C.J.—I am of opinion that the conviction is wrong. The app. had been convicted of using a certificate that he was a person of good character, knowing it to be false. The question for us to consider is, whether evidence that the app. was living in concubinage with a person by whom he had three illegitimate children compelled the magistrates to find that he knew that certificate to be false. It is quite clear that the magistrates have a very wide discretion in these cases, and I do not wish to interfere with them in the exercise of this discretion; but I can find nothing else in the case except that the app. had cohabited with a woman without the ceremony of marriage. There was nothing imputing the open violation of decency, and the very fact of its being stated that he had been known to be drunk on different occasions, between 1854 and 1859 shows me that there had been an inquiry of a very strict nature into his character, and it proves that there has been nothing like a want of sobriety on his part since that time. He had cohabited with this woman, and his neighbours have certified that he was of good character. Did he know that he was giving a false certificate when he uttered that certificate of their opinion of him, rendering him liable to this penalty? I do not think that his so using such a certificate made it incumbent on the magistrates to convict him. The words "person of good character" were intended to prevent the danger of these houses becoming the resort of dishonest and immoral people, who might there plan and concoct their schemes, and so conduct themselves as to set at defiance the feelings of the public. No doubt persons who so acted would be held to be persons of bad character; but cohabiting with a woman and having children born by her, does not necessarily impute to him that he knew he was of bad character. It was possible that when this cohabitation began the woman might have believed her husband to be dead, and that afterwards it might have turned out that he was alive. It by no means

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follows that his neighbours should refuse to certify because they knew of his living with this woman. The cohabiting with a woman, and having children born to her, does not necessarily impute to him that he knew he was of bad character. The only evidence I can see of this matter being notorious was, that the curate of the parish had remonstrated with him for not marrying and he had refused to do so. I am of opinion, therefore, for these reasons, that the conviction was wrong.

WILLIAMS, J.—I am of the same opinion, but I have some doubt whether the magistrates really intended to leave this narrow point for us to decide. It is quite possible that there might have been some other evidence upon which they might have convicted the app., but which has not been laid before us.

BYLES, J.—I am of the same opinion. I think the word "character" in the Act means character in the sense of repute, and I do not think that the consciousness of the app. having lived in concubinage with a woman is any evidence that he did not believe that what his neighbours had certified was true; and the fact of his six neighbours having signed the certificate is strong evidence of his being a person of good repute.

*Judgment for the app.*

*Friday, April 29, 1864.*

BAYLEY (app.) v. WILKINSON (resp.)

*Local board of health* — 11 § 12 Vict. c. 63, s. 69; 21 § 22 Vict. c. 98.

*By sect. 69 of 11 § 12 Vict. c. 63 it is enacted that in case any present or future street, or any part thereof, (not being a highway) be not sewered, levelled, flagged and channelled to the satisfaction of the local board of health, such board may by notice in writing to the respective owners or occupiers of the premises fronting or abutting upon such parts require them to level, sewer, pave, flag, or channel the same within a time to be specified in such notice; and if the said notice be not complied with, the local board may, if they think fit, execute the work, the expenses to be borne by the owners in default, according to the frontage of their respective premises, in such proportion as shall be settled by the surveyor, and in case of dispute as shall be settled by arbitration, &c.*

*On the 8th April the local board gave notice to the resp. requiring him to sewer, level, pave, &c., and to which notice the following was appended:—"Particulars of the necessary works may be obtained from the borough surveyor, No. 3, Town-hall." On the 16th May the resp. served a notice on the board, stating that he disputed his amount of the proportion of the expenses, and on the 10th June he did the same, requesting them to concur in the appointment of an arbitrator; but upon the 14th Oct. he gave notice that he abandoned the notices, and that he did not dispute the proportion of the expenses, but disputed his legal liability to pay the same.*

*On the 18th Oct. the board gave the resp. notice that they had appointed an arbitrator, who, on the 29th Nov., in the absence of the resp., he having refused to attend, sat and eventually made his award, reciting the resp.'s notice of the 10th June, and awarding that the proportion due to the local board by the resp. was 92l. 7s. 6d., and that he should pay his own costs:*

*Held, that the notice of the 8th April was good; that the appointment of the arbitrator was invalid, and that his award was void; and also that all the arbitrator has to do under the 69th section is, to decide upon the proper apportionment amongst the houses of all the expenses incurred, and that he has no power to decide what the amount of the expenses should be.*

At a petty sessions of the peace holden at Wolverhampton on the 17th and adjourned to the 24th June 1863, the resp. Joseph Wilkinson was summoned before me for refusing to pay his proportion of certain expenses incurred by the Local Board of Health for the borough of Wolverhampton for certain works executed by them, together with certain costs. The summons, so far as it is material to set out the same, is as follows:

That certain expenses have been incurred by the local board of health of the said borough and corporate district in sewerage, levelling, paving, flagging and channelling, metalting and making good certain streets, called respectively Bromney-street, Ledgley-street and Duncan-street. In the said borough and corporate district, to or upon which said streets respectively certain premises belonging to you (the resp.) front, adjoin, or abut, and that the proportion of expenses you are liable to pay, according to the frontage of your premises in the said streets respectively having been settled by the surveyor of the said local board at the sum of 97l. 19s. 5d., and having been disputed by you was settled by arbitration by the award of Rupert Kettle, Esq., made pursuant to the statutes in that behalf, and dated the 31st day of Dec. 1862, at the sum of 23l. 7s. 6d., and which sum being such proportion of the expenses as aforesaid, together with the sum of 23l. 3s. 10d., being the amount of the costs of the proceedings incurred by the said board in that behalf, you have neglected to pay, contrary to the statute in such case made and provided.

The summons was dismissed, and the following case was stated for the opinion of the court:—

The Local Board of Health of Wolverhampton (who will be henceforth in this case called the Board) in the month of April 1861 served the owners and occupiers of property in several streets in the district called the Blakenhall estate or district with notices under the Public Health Act 1848, and the Local Government Act 1858, to sewer, level, pave, flag, channel, metal and make good those streets to the satisfaction of the board. The said resp. J. Wilkinson was the owner of property in three of those streets called Bromney-street, Ledgley-street and Duncan-street, and he was served with three notices which, with the exception of the names of the several streets in which the property was situate, were in the following words:

#### BOROUGH OF WOLVERHAMPTON.

The Public Health Act 1848, and the Local Government Act 1858.

The Town Council, acting as the Local Board of Health within and for the borough and corporate district of Wolverhampton, do hereby give you notice that the street called Duncan-street, situate within such corporate district, and not being a highway, is not sewered, levelled, paved, flagged and channelled, metalled and made good to the satisfaction of such local board of health. And the said local board of health do hereby give you further notice, and require you within one month from the service hereof, to sewer, level, pave, flag and channel, metal and make good the said street to their satisfaction; and in case you do not comply with the above notice the said local board will execute the works above referred to and charge and recover the expenses thereof as directed by the Public Health Act 1848 and the Local Government Act 1858.

E. J. HARRIS.

April 8, 1861. Clerk to the said Local Board of Health. To the respective owners or occupiers of the premises fronting, adjoining, or abutting, upon the said street.

At the foot thereof the following notice was printed in red ink:

Particulars of the necessary works may be obtained from the borough surveyor's office, 3, Town-hall.

Certain plans and specifications were accordingly lodged at the surveyor's office, and were seen there by the resp. and several of the other owners of property in the said streets. The resp. and other owners of property in the said streets did not execute the works by the said notices required, and the same were subsequently executed by the said board, and the proportion of the resp. of the amount of the expenses incurred by them in so doing was settled by the surveyor of the said board at the sum of 97l. 19s. 5d., and notice of the amount of such proportion was given to the resp. on the 11th March 1862, and payment thereof then demanded from him.

On the 10th May 1862 the resp. and other owners

of property presented a memorial to the Mayor which is as follows :

Wolverhampton, 10th May 1862.

To the Worshipful the Mayor of Wolverhampton.

Sir,—We, the undersigned, being owners of property in the Blakenhall estate wish respectively to bring to the notice of the Town Council, through your worship, the enormous charges levied upon us for paving, flagging, &c., certain streets on the said estate, particulars of which have been laid before the streets committee by a deputation that waited upon them. Not having heard anything respecting the reduction of the same we now make this application.

On the 16th May 1862 a notice to the board, signed by the resp. and other owners of property in the said Blakenhall district, was served upon the clerk to the board, which is as follows :

Wolverhampton, May 15, 1862.

To the Local Board of the Borough Corporate District of Wolverhampton.

We, the undersigned, beg respectively to give you notice that we severally dispute the amounts of the proportion settled by your surveyor to be due from us in respect of works executed by you under the Public Health Act 1848, or the Local Government Act 1858, and for the repayment of which we are liable, on the ground that the cost of the said works is excessive and unfair; and we beg leave to call your attention to the memorial presented through the mayor to the town council on Monday last relating to this overcharge, and hope you will reduce the price and make it fair and reasonable. And as the contractor has constructed the streets with improper material, we consider you may fairly call upon him to reduce the amount of contract.

On the 10th June 1862 another notice, signed by the resp. and other owners of property in the said district, was served on the clerk of the board, of which the following is a copy :

Wolverhampton, 10th June 1862.

To the Local Board of the Borough Corporate District of Wolverhampton.

We, the undersigned, beg respectively to give you notice that we severally dispute the amount of the proportion settled by your surveyor to be due from us in respect of works executed by you under the Public Health Act 1848, or the Local Government Act 1858, and for the repayment of which we are liable, on the ground that the cost of the said works is excessive and unfair; and we respectfully request you to concur with us in the appointment of a single arbitrator, pursuant to the said Acts.

On the 14th June the town clerk wrote the following letter to the resp. :

I would suggest you referring me to your attorney with whom I shall be happy to communicate. I think he will advise you that you have taken an erroneous view of the question to be submitted to arbitration, which is not as to the amount of the contract price being excessive, but confined to the proper apportionment of the amount expended or incurred between the respective owners of property; and if you will inspect the apportionment and plans in the borough surveyor's office you will probably be satisfied as to the accuracy of the apportionment.

E. J. HAYES,

To Mr. Jeremiah Mason and others.

Town Clerk.

On the 28th June 1862 the clerk to the board wrote and sent the following letter in reply :

Town Clerk's office, Wolverhampton, 28th June 1862.

Gentlemen,—In reply to Mr. J. Mason's letter of the 16th inst., I beg to inform you that several of the persons whose names are attached to your notice of the 10th inst. have paid the amount of their respective apportionments, and others have informed the rates collector that they will pay and are desirous of having their names withdrawn from the notice. Under these circumstances I shall be glad to see Mr. Wilkinson or any other person on your behalf, but you must distinctly understand that the council do not recognise the power of an arbitrator to do more than ascertain whether the expenses have been properly apportioned, pursuant to the Public Health Act and the Local Government Act. It is quite clear that the arbitrator has no power to go into the question of the amount expended, his power being confined to settling the proportion payable by the respective owners in case of dispute, &c.

E. J. HAYES,

Mr. J. Mason and others.

Town Clerk.

On or about the 5th Aug. 1862 the resp. and others were summoned before the magistrates by the board under the 129th section of the Public Health Act 1848, to recover the several amounts apportioned upon them by the surveyor of the board; and on 7th Aug. the said summonses came on for hearing, and were adjourned by arrangement between the parties to the 21st of that month, on which day they came on for hearing, when the attorney for the resp. and other owners, before the

merits were gone into, objected to the sufficiency of the said notice to do the works, dated 8th April 1861, on the authority of *Parkinson v. The Mayor of Blackburn*, 83 L. T. Rep. 119; and the magistrates adjourned their decision on this objection to a day which was ultimately extended to the 9th Oct. 1862.

In the meantime the board being so advised, offered the resp. and others to withdraw the summonses and pay the costs; and on the 8th Oct. they served the resp. and others with a notice of arbitration.

On the 9th Oct., when the summonses again came on for hearing, the clerk to the board again offered to withdraw the summonses and to pay the costs, stating to the magistrates, as a reason for taking such course, that the board was then advised that the notice of the 10th June 1862, given by the resp. and others, had made arbitration the only proper mode of proceeding against the resp. and others. The magistrates refused to allow the summonses to be withdrawn, and on the 11th Oct. dismissed them all with costs, on the preliminary objection taken to the notice of the 8th April 1861.

On the 14th Oct. the attorney for the resp. and the other parties sent by post to the clerk to the board a letter (which was duly received by him on the following day), to the effect that the notice of the 10th June was abandoned, and that he did not dispute the proportions of expenses as settled by the surveyor, but disputed his legal liability to pay the same.

On the 18th Oct. the board gave the resp. notice that, in pursuance of his notice of the 10th June, and in consequence of his having failed to appoint an arbitrator, they thereby appointed R. K. arbitrator, and that the matter to be referred was that mentioned in his aforesaid notice as to his proportion as settled by their surveyor.

On the 29th Nov. the resp. was duly served with notice to attend the arbitration on the 6th Dec., on which day the arbitrator sat, when the resp. protested against his proceeding on the arbitration, upon the grounds, first, that there was no dispute between him and the board which an arbitrator had power to decide; secondly, that he did not dispute the proportion of expenses as settled by the surveyor; thirdly, that he disputed his liability on the ground of the excessive and unreasonable cost of the works executed, and on the ground that the local board did not, previous to the execution of the works, give him the notice required by 11 & 12 Vict. c. 63, s. 69, and because the board had proceeded against him to recover his proportion in a summary way before magistrates, who had adjudicated on and dismissed the same with costs. The resp. refused to go into the arbitration, and went away. The arbitrator proceeded with the reference *ex parte*, and, on the 31st Dec., published his award, which, after reciting the resp.'s notice of the 10th June, awarded that "the proportion due and payable by the said J. Wilkinson (the resp.) to the said local board for works executed by the said local board, under 11 & 12 Vict. c. 63, and 21 & 22 Vict. c. 96, was 92l. 7s. 6d., and that the resp. should pay his own costs."

The amount apportioned by the surveyor against the resp. was 97l. 19s. 3d.; but the arbitrator reduced the amount to 92l. 7s. 6d. The appointment of the arbitrator was made a rule of court in Hilary Term 1863, and the costs of the board, consequent upon the reference and of making the appointment a rule of court, were taxed at 29l. 8s. 10d.

On the 21st April 1863 the board obtained a rule of this court, calling upon the resp. to show cause why he should not pay the board the sum awarded and the costs, which rule was discharged.

I find, as facts on the evidence before me, that up to the 31st July 1862 the resp. disputed his liability



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to pay the amount of the proportion settled by the surveyor, on the ground that the costs were excessive and unfair; that on the 10th June 1862, the resp. gave notice to the board that he required the matters to be settled by arbitration; that on the 5th Aug. 1862 the resp. took the objection before the magistrates to the validity of the notice to execute the works, dated the 8th April 1861, which was decided in his favour on the 11th Oct. 1862; that on the 8th Oct. the resp. was served by the board with notice of arbitration; that on the 14th Oct. the resp. gave notice to the board that he abandoned his notice of arbitration of the 10th June 1862, and also gave notice to the board that he did not dispute the proportions of expenses incurred, but did dispute his legal liability to pay the same or any part thereof. I find, also, that up to the hearing before the arbitrator, and by his protest, delivered to the arbitrator, he disputed his liability to pay the amount on the ground of the excessive and unreasonable cost of the works. I was also of opinion that the notice of the 8th April 1861 was good; but I dismissed the summons in consequence of the doubts I had, whether under the facts and circumstances stated in this case, and looking at the judgment of the Court of C. P., the award was good.

The following questions were submitted to the court: Whether the notice of the 8th April 1861 was a good notice? whether the award was valid; and whether, looking at sect. 123, 11 & 12 Vict. c. 63, I had any jurisdiction to inquire into its validity.

(Signed),

Hayes, Serjt. (*McMahon* with him) appeared for the apps., and cited

*Parkinson v. The Mayor of Blackburn*, 38 L. J. 119;  
*The Mayor of Salford v. Ackers*, 16 M. & W. 85.

ERLE, C. J.—In this case I am of opinion that our judgment ought to be for the resps. This was a proceeding under the Public Health Act of the 11 & 12 Vict. c. 63, s. 69, and by that section a power is given to the local board to give notice as regards streets requiring to be paved, and so forth, to the owners and occupiers of the adjoining premises, and if the owners and occupiers after such notice do not execute the works mentioned therein, the expenses incurred by the board in doing the works shall be paid by the owners in such proportion as shall be settled by the surveyor, or, in case of dispute, as shall be settled by arbitration. Now, the first question in the case is, whether the notice to pave was a valid notice; and I take the notice to be in effect a notice calling on the parties to pave. I take that as an example of one of the things required by sect. 69; but the notice does not specify either what breadth is to be paved, or what level is to be kept, or other particulars which would be absolutely essential before the work could be done. In the case of *Parkinson v. The Mayor of Blackburn* a notice which required the party to pave, and omitted any of the requisites which would enable the party to pave according to the requirements, was held to be void, and the present notice has been thought to be void according to the doctrine laid down in that case. But I think there is a material distinction. In the *Blackburn* case it was required that the party should pave, and there were no means pointed out by which the party could learn what was the work he was required to do. In the present case at the foot of the notice the parties are referred to the office of the surveyor, and it appears by the case that at the office of the surveyor plans and information were to be seen, and that the parties called on to do the work did go to the office and see those plans. I do not mean to say that I affirm distinctly that this notice, with the reference to where the plans were to be seen according to that reference, made it a

good notice; but I am perfectly clear that it is not shown to be bad. It may have been that the plans and sections were perfectly sufficient. The parties appear to have gone and seen them. There is nothing said in the case about the information not being sufficient. This would therefore be a notice of reference to a place where further information might be got if the parties wanted to have that information. There is nothing to show me it was not the most ample that could be required, that it was not a specification of the work to be done, with plans and sections, and all that was material to enable the parties to do it; so far I agree with the judgment of the justice before whom this proceeding was. The proceeding before the justice was to enforce payment of the sum given by the award, and the justice has been of opinion that the award was not valid, and I think that the opinion of the justice is right. I come to the conclusion that the statute only authorises an arbitration in respect of the apportionment, but that the local board are to settle the amount of expenses actually incurred, and that then the surveyor is to apportion to the persons who are liable the portion that each of them is to bear; and if those persons are dissatisfied with the surveyor's decision, they have a right to demand that an arbitrator should be appointed, and for him to say what is the portion. The words of the section which I have read appear to me clearly to bear the meaning, that they shall pay in such proportions as shall be settled by the surveyor, or in case of dispute, as shall be settled by arbitration, having regard to all the circumstances of the case. Then, as to the dispute about the apportionment, I take the term "apportionment" of a sum amongst a number of persons liable to make up a total to have one recognised meaning throughout the kingdom, as in the Tithe Commutation Act, where the total to be paid by the parish is one sum, and there is an apportionment thereof amongst the persons liable for each portion, and a right given to dispute the apportionment and an appeal in respect of it. That seems to be the old meaning of the word, and the words in this section are to be so considered. I have also looked at the 21 & 22 Vict., which gives a provision for proceeding before the justices where the sum is under 20*l*. There the justice is at liberty to call before him a district surveyor, not the surveyor of the corporation, and to examine what are the works that have been done, and the claims in respect of those works. At the first reading, that appears to be a power to go and examine whether the expenses alleged to have been incurred by the board have been properly incurred. I have looked further to the statute, and I think it only goes to this, it only allows such reference as was clearly within the 11 & 12 Vict. c. 62, which is an arbitration of the matters in the statute, and the mode of proceeding under the 21 & 22 Vict. is the same as by the prior statute, and though it may be rare that a local board should have power to incur expenses, and that the persons on whom those expenses should be laid should not have the means to investigate whether the board has confined itself within its proper duty, yet, in respect of many cases where self-government is given to certain persons, the parties who are elected by the district to have that self-government are entrusted with powers in respect of which they cannot be called directly to answer to the body that appointed them. They are elected for a time, and if they misbehave, the remedy is afforded to the electors to elect persons in whom the body can have more confidence for the future. It is not an absolutely irresponsible power, because the outlay made by the local board is to be examined by auditors; they are final in allowing and disallowing, but they have no juria-



diction to go into the question whether the outlay was reasonable, only whether the outlay has been actually made, and, on the best opinion they can form, the outlay actually made is settled finally by the board, and the matter for the surveyor, if there is no dispute to settle, is the apportionment amongst the occupiers of houses who are liable. If there is a dispute, the arbitration is confined to the apportionment amongst the houses; the arbitrator is not at liberty to go into an examination whether the expenses were reasonable or ought to have been incurred, or whether the board had employed a contractor to do the work upon an estimate. Then, if that was so, this award is bad for two reasons: one, that the arbitrator has gone into the question whether the expenses were properly incurred and has taken off a portion of the expenses which the board charged, and so far as that went, it would be in favour of the persons who are called on to pay. Secondly, the party has given a notice that he intended to appeal, and the notice might be to dispute the amount of the apportionment; he really likewise wishes to have a trial whether the expenses had been reasonably incurred or not. He gives a notice that he required an arbitrator, and said that he disputed the amount apportioned to him, because the total of the outlay had been, in his judgment, excessive. The legal adviser of the board informed him that he had mistaken the power of appeal; that power was only given in respect of his portion, not in respect of the sum total of which a portion had been cast upon him. Such having been the notice of appeal, the board then treated the notice of appeal as a nullity, as, in my judgment, they had a perfect right to do, and summoned him to pay the amount which had been put upon him by the surveyor. The summons was dismissed by the magistrate, on the ground that the notice to treat was bad. Then, the moment the parties obtain a judgment in their favour, they withdraw their notice requiring an arbitrator to be appointed. I think they had a right to withdraw their notice requiring an arbitrator in respect of the apportionment. They say: "We are of opinion the arbitration only relates to apportionment; we give you notice that we withdraw the claim, and do not want an arbitration in respect of the apportionment. We will try to get redress, if possible, in respect of the sum total, which we say is an excessive charge on your part." There can be no arbitration in respect of the unreasonableness of the sum total of the charge. Their withdrawal of the former notice was a valid withdrawal. The local board have said, "The arbitration may relate to the sum total if you withdraw your complaint as to the apportionment, but if you keep your complaint as to the sum total, we have a right to treat it as a dispute still existing, and go to arbitration." In my opinion the board have no right to say, "There is a dispute as to the reasonableness of the sum total, we insist, whether you will or will not, upon going to arbitration." I think the appointment by one side is void, and that the award made by the arbitrator so appointed is in my opinion void. That was the opinion entertained by the magistrate. I therefore think the judgment of the magistrate ought to be affirmed.

WILLES, J.—With respect to the question, whether the original notice is valid, I concur with my Lord, assuming that the proper construction to be put on the words "expenses incurred" in the 69th section is that which my Lord has put on them. I agree in all the rest of my Lord's judgment, because those words mean, in my mind, expenses incurred to be fixed by the board of health, or by their surveyor, and the subsequent proceedings before the arbitrator relate to an apportionment of the amount only upon the persons who are liable. It is quite clear

there was no ground for the appointment of an arbitrator by the board of health on the 18th Oct., and unless that appointment was a valid one all the subsequent proceedings were void. Upon the 10th June the notice was given by the resp. that he required an arbitration, which notice was revoked upon the 14th Oct., when the resp. notified that all dispute as to the apportionment was at an end, and he only disputed his legal liability, including in those terms, as has been properly admitted on his behalf, the amount of the total of the expenses claimed to be apportioned. But if that amount was to be considered as fixed for the purpose of arbitration under the 69th section, it is clear that the notice of the 14th Oct. put an end to any dispute, and withdrew any request to refer to arbitration. Then the only question is whether the "expenses incurred" means the expenses claimed to have been incurred by the local board; or, in other words, whether the arbitrator has a right, not merely to determine the proportion which the owner is to pay, having regard to the frontage of his house, and any local circumstances affecting the expenses incurred, or to the portion of the street opposite his house, or whether he has a power to enter into the question how the whole amount charged on all the occupiers ought to be apportioned; whether he is entitled to tax the amount or to moderate it? Upon that question I have entertained some doubt, because the expenses incurred would, according to the ordinary rule of construction, mean the expenses reasonably incurred. As a rule, where a discretion is given to a public body appointed by an Act of Parliament, that is a discretion, not to be exercised according to their own private caprice, but according to the rules of law and reason. Therefore, if sect. 69 had stood alone, I should have thought that it ought to be read, "The expenses reasonably incurred by them." But I do not dissent from the opinion of the court, because I think, having reference to other sections of the Act, to which I proceed to refer, a very great light is thrown on the construction of the 69th section in this particular context. The words "expenses incurred" may not unreasonably, having regard to the duties imposed on the board of health, and having regard especially to the provisions of the 85th section, be held to mean expenses which they in the course of their duty have incurred, or thought it right to contract to pay to another. It will be found that expenses of this description are referred to in very many parts of the Act; that the expression "expenses to be incurred," except in one instance, is invariably used where the board have powers to execute works upon the default of some person who by the Act is bound to execute them or to pay the price of them. In such cases it will be found the expression invariably used is "expenses incurred." Where expenses are to be incurred by the board for doing works which they themselves are to perform, it will be found that the expressions "necessary," and so on, are used with reference to such expenses. The language of the Act varies in speaking of expenses which the board are to undergo on the part of the public, and which they are to undergo on default of the person who ought to do the work which they undertake. I think a consideration of those sections may not be out of place. The first to which I refer is the 49th, which deals with the case of a house being without a drain, and in that case a notice being given and not complied with, the board, if they think fit, are to do the work, and the "expenses incurred" by them in so doing are to be recoverable. There you have the expression of the 69th section. The same is the case in sect. 51, in dealing with the case of a house wanting a proper supply of water. The same is the case in sect. 54 with reference to drains. And now

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we come to a section dealing with other cases, sect. 57, which enacts that the board is to provide public closets, conveniences, and so on, and to defray not "the expenses incurred by them," but "the necessary expenses" out of the district rates to be levied under the Act. Therefore, in dealing with the expenses to be incurred by the public, we have a change of language. Then, passing on, you come to the 69th section, and now another change of expression is to be found, and the 71st is a section which enables the board to require gas and water pipes to be moved at the expense of the board; they are to give notice, and the expenses attendant upon or connected with any such alteration shall be paid by the local board out of the district rates. Where they are to pay some person to do work which they require, language is used which clearly means the amount of the expenses, differs from the language throughout used as to the "expenses incurred" by the board in the former case of default. The expression "expenses incurred" is again used in the 72nd and 76th sections. I pass over some sections as to expenses which are of a special character, and the next section at which I arrive is the 90th, and there they deal with private improvement rates; and where private improvements are being made, and the occupier of a house becomes liable to a special rate, then the expression is used "had incurred or become liable to," following the sections relating to default, probably not differing in substance, though differing in language. Then the only other section to which I need refer is the 85th, and that is a very special provision for preventing an abuse of the powers of the board, preventing them from giving a preference to their friends, or from entering into contracts with reference to any private favour or object which requires publicity to be given to their proceedings, and which requires that they shall not incur any expenses considerable in amount without a process such as to insure publicity and to expose their proceedings to public opinion. For these reasons, though I own I entertained and do entertain a doubt upon a decision which has the inevitable effect of vesting considerable discretion in the board of health, I do not dissent from the judgment of the court.

BYLES, J.—I am also of opinion that our judgment should be for the respas. With respect to the notice, the main objection to it is this, that the plans and specifications at large are not sent to every owner. Now that would be most unreasonable, because I see in the interpretation clause of this Act of Parliament that the word "street" applies to any roads, bridges not being public highways, lanes, footways, squares, courts, alleys, passages, whether a thoroughfare or not. It would seem, therefore, independently of the late enactment, which does not apply to this case, to be most reasonable that a general reference should be given to plans and specifications to be seen at some public office accessible to the parties interested at all reasonable hours. I think the recent enactment is very strong in favour of this notice, for it makes obligatory that which was before most reasonable and proper, and what was done in this case. The notice therefore founding the proceedings seems to me to be good. With respect to the main question, whether the jurisdiction of the arbitrator applied to anything beyond the proportions, with the great deference and respect which I always feel for any opinion of my brother Willes, I do not participate in his doubts. It will be observed that all the things which the occupiers are to do are things which they might reasonably be expected to do. An observation might be made on the word "sewerage," but on reference to the 45th section of

the Act of Parliament, I find that the board of health may, if they please, make all the district sewers themselves, and they may, if they think fit, leave to the occupiers any small sewers or drains which it may be reasonable for them to make. Then the statute says, "If you do not do the work to the satisfaction of the board of health, you will receive a notice requiring you to do so within a limited time." It is their duty, therefore, to do it within a limited time. They need not fear any partiality or any unreasonableness on the part of the board of health, because they can anticipate and prevent the board having anything whatever to do with it. If they do not do it, in order that it may not remain undone, the Act goes on and says the board may, if they think fit, execute the works mentioned or referred to therein. No limit is placed to their power in raising the sum of money and in expending the sum of money. I agree that they are to incur a reasonable sum, but who is to judge of the reasonableness? If it be said that they ought not to be the judges of the reasonableness, who else is to be? Is the arbitrator? And if it be the arbitrator and the surveyor, do the public get any security as to the reasonableness of the sum if, instead of the body at large judging of it, a servant appointed by them, to wit, the surveyor, is to judge of it? It seems to me they do not. That being so, they are to say what is to be done, and to lay out the money. I cannot help saying that I felt very forcibly the observation of Mr. Gray. Suppose they lay out 300*l.*, and it is 200*l.* more than they ought to do, how is that 200*l.* to be got back again? On whom is the loss to fall? The reasonable construction seems to me to be that, inasmuch as the ratepayers have chosen to throw this burden upon them, they must exercise it as well as they can, and that they are not responsible if they act honestly in what they do. The consequence of that is, that we should read those words according to their natural sense, that the expenses shall be paid by the owners in default, according to the frontage of their respective premises, in such proportions as may be settled by the surveyor, or in cases of dispute by the arbitrator, having regard to all the circumstances of the case. It is not therefore a mere arithmetical computation, as was asserted by my brother Hayes, but it is a duty intrusted, and very properly intrusted, to the person, the surveyor, or arbitrator, who seems to stand in the place of the surveyor, and that being so, the arbitrator had, as it seems to me, no jurisdiction whatever except to inquire into the proportions. That being so, he was acting without jurisdiction. More than that, the defect of the jurisdiction appears on the face of the award, because it appears on the face of the award that what was submitted to him was the excess of the gross sum, and he makes his award for a less sum. He has taken that into consideration. It seems to me not only that the award was made without jurisdiction, but that the absence of jurisdiction appears on the face of it when it is made. In addition to that, before the award was made, it was revoked in terms—doubly revoked. The parties say, "We will not proceed with the arbitration further; we object to the proportions, which was the only thing the arbitrator could entertain." On these grounds it therefore seems to me that the respas. are entitled to our judgment. I regret it very much, because I cannot help thinking this is a sum which they ought to pay, and I trust they will be disappointed if they suppose that the time for payment in this, or in some other way, has elapsed.

KEATING, J.—In this case I am also of opinion that the magistrate was right on both the points which he decided. I think that the notice which

has been alluded to was good for the reasons which have been already given, to which I do not think it necessary further to advert, agreeing as I do with them all. I also think he was right that the award was bad, because I think that, reading this 69th section in the manner which has been adopted by the majority of the court, namely, that if the notice be not complied with, the local board may, if they shall think fit, execute the works mentioned or referred to therein, and the expenses incurred by them in so doing shall be paid by the owners. It seems, in my opinion, that means the expenses actually incurred, not the expenses which, in the opinion of an arbitrator to be appointed, might reasonably have been incurred; and it seems to me that this must be so when you consider what the object of the Legislature was. The object of the Legislature was that those works should be done. First of all it gives the option to the owners of the property to do the work; on their refusal the board may do it; and if the board were to do it at the peril of having their expenditure reviewed by an arbitrator, it would follow practically that it never would be done, because the board of health never would expend sums in the performance of works of this description, upon which we know from experience so much contradictory evidence might be given before an arbitrator, if that was to be at the peril of their expenses actually incurred being disallowed by an arbitrator. Therefore I think there is nothing strained in the construction that they should be made the judges of the proper expenditure. They are elected by the ratepayers, as has been already suggested by my lord, and they can be changed by the ratepayers if they do not properly discharge their duty; and the Legislature, in those enactments, does not assume that they will do otherwise than rightly discharge their duty. Therefore, inasmuch as the reasonableness of the expenditure, the propriety of the expenditure, is a question that must be decided by somebody, it seems to me more in accordance with the whole frame of the Act that that discretion should be exercised by the board of health, the representative body, than that it should be controlled by an arbitrator to be chosen in cases of this description. That being so, it then follows that the only matter of dispute over which the arbitrator would have jurisdiction would be to settle the proportions. That does not necessarily exclude his inquiry as to the amount actually expended upon the works in question, and therefore he would, no doubt, have to make that inquiry, but it seems to me that his jurisdiction is limited to that inquiry. It appears from the facts of the case, and, as my brother Byles has observed, upon the face of the award, that he has exceeded his jurisdiction, therefore, that the magistrate was right in holding that the award was bad. I therefore think the magistrate was right upon both the points which he has decided, and that the resps. are entitled to our judgment.

*Judgment for the resps.*

Thursday, June 9, 1864.

COLES (app.) v. DICKINSON (resp.)

*Factory Act—7 & 8 Vict. c. 15, s. 73—Information for employing young persons under eighteen years of age without registering name—Exception.*

*The resps. were owners of a mill at Manchester and another in Herts; the mill at the former place was worked by machinery, and was used for sorting, cleaning and breaking up of cotton waste rags and other materials, and reducing them to what was known in the trade as "half stuff" which was then sent to the mill in Hertfordshire and converted into paper:*

*Held, that the two mills were parts of one factory, and used solely for the purpose of making paper, and therefore that the mill at Manchester was within the exception mentioned in sect. 73 of the Factory Act, and that the resp. was not liable to be informed against for employing a person under the age of eighteen years without having registered his name.*

This was an appeal against the decision of the stipendiary magistrate of the city of Manchester on an information laid by the app., who is a sub-inspector of factories, against the resps., an old-established firm carrying on a very extensive business as wholesale stationers and papermakers in London, and who have paper works or mills in different parts of Hertfordshire, and also carry on one branch of their business at a mill belonging to them in Elm-street, in the city of Manchester.

The object of the information was to render Messrs. John Dickinson and Co. liable for non-compliance with the provisions of the Factory Act (7 & 8 Vict. c. 15), as amended by the 13 & 14 Vict. c. 54, intitled "An Act to amend the Acts relating to labour in factories;" and by the Act made in the 16 & 17 Vict. c. 104, intitled "An Act further to regulate the employment of children in factories," on the ground that their mill at Elm-street was a factory within the 7 & 8 Vict. c. 15, s. 73, being used for the preparing of cotton, and that it was not within the exception contained in that section, not being a factory, or part of a factory, used solely for the manufacture of paper.

Messrs. John Dickinson and Co. contended that they were not so liable, but that their Elm-street mill was within the exception, being solely used in cleaning and preparing waste and rags to be by them made into paper at their other mills in Hertfordshire, and that the Elm-street mill was, in fact, merely a branch of the Hertfordshire works.

The stipendiary magistrate, after having referred to the case of *Hoyle and Sons v. Oran*, 12 C. B., N. S., 124, which was quoted by the resps., dismissed the case.

On the application of the app., the stipendiary magistrate granted the special case now to be argued, of which the following is a copy:—

#### CASE.

Messrs. John Dickinson and Co., of Nash-mills, in the parish of Abbots Langley, in the county of Herts, who carry on the business of papermakers there and elsewhere, appeared before me, Cuthbert Edward Ellison, Esq., the stipendiary magistrate duly appointed and acting in and for the city of Manchester, on the 30th Oct. 1863, pursuant to a summons obtained against them by Robert William Coles, Esq., sub-inspector of factories, upon an information and complaint which, omitting formal parts, charged them for that on the 14th Oct. 1863, they did employ a young person, to wit, Frederick Beardsall, in a certain factory, occupied by them in the said city, without having registered his name and the date of the first day of his employment as by law required.

Upon the hearing of this information the following facts were proved:—Frederick Beardsall, the boy mentioned in the summons, was under sixteen years of age, and was employed by the resps. on the 14th Oct. 1863, at their mill in Elm-street, Manchester, and he worked there as a waste carrier, or, in other words, was employed in carrying cotton waste and rags to or from a willowing or cleaning machine previous to and after being cleaned, and his name and the date of the first day of his employment were not registered.

The resps. use steam power in their mill in Manchester for the purpose of moving machinery.

Since the mill in Elm-street, Manchester, has been established, all the material cleaned and pre-

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pared has been forwarded to the resps'. Hertfordshire works and there made into paper. On no occasion has any material prepared in Manchester been sold by the resps. at that place or elsewhere, or used by them for any purpose except for that of papermaking.

In all paper works the material used for manufacture of paper is subjected to a process before being made into paper by which it is reduced into half stuff or semi-pulp, and many papermakers have establishments for the purpose of reducing their materials to this state situated at considerable distances from the mills where the manufacture is completed.

The only work done in the Elm-street mill is the sorting, cleaning and breaking up of cotton waste, rags and other material, and reducing the same into a state known to the trade as half stuff. The cotton waste so cleaned and prepared consists of the sweepings and refuse which accumulate in the course of spinning cotton, and the old materials which have been used for wiping and cleaning machinery.

For the purpose of cleaning and preparing the cotton waste and other materials the resps. employ the under-mentioned processes:

1. *Dusting*.—This process consists in the cotton waste being placed in a revolving sieve-like machine moved by steampower, which shakes the dust out of it.

2. *Picking*.—After having been dusted the cotton waste or other material is carefully picked over by hand, and all foreign substances removed from it.

3. *Willowing*.—After having been picked the cotton waste is put into a machine called a willow, within which is a revolving cylinder studded with rows of blunt iron teeth coming into contact with the cotton waste, which open the fibres and clean it.

4. *Boiling*.—After having been willowed the cotton waste is boiled with lime and alkali, for the purpose of removing the grease.

5. *Washing and grinding*.—These processes are performed with the same machine which is known as a "rag engine." This engine consists of a cistern with a middle partition, on one side of which revolves a roll fitted with steel blades that can be brought more or less in contact with the other blades fixed below, and thus shorten the staple of the cotton waste or other material, or grind it.

6. *Second washing, willowing, dusting and packing*.—Washing the cotton waste only without grinding is frequently done by the same engine. After the first boiling and washing the cotton waste is boiled a second time still further washed and ground, pressed dry with a hydraulic press, then willowed, then dusted, then willowed again, and afterwards dried and packed. These are the only processes performed by the resps. in their mill at Manchester. All of the above processes used by the resps. in cleaning and preparing their cotton waste, rags and materials, are also generally used by waste cleaners carrying on business in Manchester and elsewhere. The premises of such waste cleaners are considered to come within the Factory Acts, and are under inspection accordingly. The cotton waste and materials thus cleaned are fit for the manufacture of paper, and the same are also fit for the manufacture of wadding, or for being mixed with other cotton spun over again, and manufactured into cotton goods.

It was argued that the mill of the resps. was a factory within the 7 & 8 Vict. c. 15, s. 73, and being used for the preparing of cotton it was not within the exception, not being a factory or part of a factory used solely for the manufacture of paper.

For the resps. it was contended that this mill was within the exception, being solely used in cleaning and preparing waste and rags to be by the resps. made

into paper at their mill at Hemel Hempstead, and that the mill was in fact merely a branch of the Hertfordshire works, and the case of *Holl and Sons v. Oram*, 31 L. J., N. S., 213, was referred to.

Upon these facts, and upon the authority of the case of *Hoyle and Sons v. Oram*, I determined that the mill of the resps. was within the exception above mentioned, and dismissed the summons accordingly.

The question for the court is, whether that decision was or was not correct in point of law.

If correct, the decision will stand; if not correct, the resps. will be convicted in a penalty of 20s. and costs.

C. E. ELLISON.

Feb. 26, 1864.

The facts are contained in the above case, and need not be here repeated, except that although each of the processes employed by the resps. may be used by waste cleaners, in no instance we believe are they all used together.

The *Solicitor-General* (T. Jones with him) appeared for the app., and contended that the mill in Manchester was a factory within the meaning of the Factory Act (7 & 8 Vict. c. 15), s. 73, inasmuch as steam power was used therein to work the machinery employed in preparing cotton for the purpose of its being afterwards manufactured into paper; and that the mill was not employed solely for the manufacture of paper, and therefore did not come within the exception contained in the above section.

*Mellish, Q. C.* (*Holker* with him), who contended that the mill was used solely for the manufacture of paper and therefore came within the exception, was stopped.

*ERLE, C. J.*—In this case the magistrate decided that the mill in Manchester and the mill in Hertfordshire were two parts of one factory, and used solely for the manufacture of paper. I am of opinion that his decision was right. It appears that the mill in Manchester was used for the purpose of turning cotton waste into "half stuff," which was then sent to the mill in Hertfordshire to be converted into paper, and that such process is a step in the manufacture of paper. The case of *Hoyle v. Oram* decides that the distance between the two mills is entirely immaterial. We have nothing to do with the reasons which actuated the Legislature in deciding that these penal provisions shall not apply to factories used solely for the manufacture of paper. This mill being used solely for the manufacture of paper comes within the exception and the person in question being employed in its manufacture, I think the magistrate was right in deciding as he did.

WILLIAMS, WILLES and BYLES concurred.

Decision affirmed.

Attorney for app., *Solicitor to the Treasury*.Attorney for resps., *N. C. Milne*.

Saturday, June 11, 1864.

BURGESS v. PEACOCK (Clerk to the Local Board of Health for the District of Barnsley).

*Public Health Act 1848—Local Government Act 1858*  
—Power of local board of health to make bye-laws affecting buildings existing at date of constitution of district.

*A local board of health has no power under sect. 34 of the Local Government Act 1858 to make a bye-law relating to buildings erected before the date of the constitution of the district, and to the closing of such buildings when unfit for human habitation and to the prohibition of their use for such habitation.*

The declaration stated that the plt. sued the deflt. as clerk to the local board of health for the district of the township of Barnsley, in the West Riding of the county of York—

For that the said local board on or about the 18th Aug. 1863 broke and entered the dwelling-house of the plt. situate at Pogmoor in the district of the said township of Barnsley in the county aforesaid, and unlawfully procured and caused to be affixed in and upon a conspicuous part of the said dwelling-house a certain printed placard stating that the said dwelling-house was unfit for human habitation, and kept and continued the said placard affixed thereto for a long time, whereby the plt. was compelled to quit the said dwelling-house, and was put to great expense and inconvenience.

And also for that the said local board on or about the 29th Aug. 1863 broke and entered the said dwelling-house of the plt. and ejected him therefrom, and prevented and hindered him from continuing to occupy the same, and the plt. has been and still is prevented from continuing to occupy the said dwelling-house by the said unlawful and illegal acts and proceedings of the said local board, and the said house has since in consequence of the proceedings of the said local board remained untenanted and uninhabited.

The deflt. pleaded not guilty, by statute 11 & 12 Vict. c. 63, s. 139 (public); 21 & 22 Vict. c. 98, s. 4 (public); 16 Vict. c. 24, ss. 1 and 2 (public).

Notice of action had been served on the deflt. on the 29th Dec. 1863, a month before the issuing of the writ.

At the trial before Blackburn, J., at the last assizes at York, it appeared that there was no dispute between the parties as to the facts, the only dispute being as to the power of the local board of health to make a bye-law affecting buildings erected before the constitution of the township of Barnsley into a district. The plt.'s house was erected before the year 1853, in which year a local board of health was established for the district of the township of Barnsley under the provisions of 11 & 12 Vict. c. 63 (the Public Health Act 1848). By an Act of Parliament (16 Vict. c. 24) entitled "The Public Health Supplemental Act 1853," a provisional order set out in the schedule and made by the General Board of Health for the application of the Public Health Act 1848 to the district of Barnsley, was confirmed and made of like force as if expressly enacted in that Act.

By sect. 34 of the Local Government Act 1858 (21 & 22 Vict. c. 98), declared by sect. 4 to form part of and be construed with the Public Health Act 1848, it was enacted that the 53rd and 72nd sections of the Public Health Act 1848 should be repealed, and in lieu thereof it should be enacted as follows:

Every local board may make bye-laws with respect to the following matters (that is to say):—1. With respect to the level, width and construction of new streets and the provisions for the sewerage thereof. 2. With respect to the structure of walls of new buildings for securing stability and prevention of fire. 3. With respect to the sufficiency of space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings. 4. With respect to the drainage of buildings to water-closets, privies, ash-pits and cesspools in connection with buildings, and to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation. And they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done, in contravention of such bye-laws: Provided always that no such bye-law shall affect any building erected before the date of the constitution of the district. But for the purposes of this Act the re-erecting of any building pulled down to or below the ground floor, or of any frame building of which only the framework shall be left down to the ground-floor, or of the conversion into a dwelling-house of any building not originally constructed for human habitation, or the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only, shall be considered the erection of a new building.

The local board for the district of Barnsley thereupon made bye-laws, in the manner prescribed by the Public Health Act 1848, and the Local Government Act 1848, which bye-laws were approved by the Home Secretary on the 31st March 1860.

Bye-law 27 was as follows:

In any case where it is certified to the local board of health by the officer of health of the district, if any, by the surveyor, by the inspector of nuisances, or by any two medical practitioners, that any building or part of a building is unfit for human habitation, the local board of health may, by their order, affixed conspicuously on the building or part of the building, declare that the same is not fit for human habitation, and shall not, after a date to be therein specified, be inhabited, and any person who after the date mentioned in such order, lets or occupies, or continues to let or occupy, or knowingly suffers to be occupied such building or part of a building, shall be liable for every such offence to a penalty not exceeding 20s. for every day during which the same is so let or occupied. Provided always, that if at any time after such order made the local board of health shall be satisfied that such house has become or rendered fit for human habitation, they may revoke their said order, and the same shall thenceforward cease to operate.

On the 23rd June 1863, at a meeting of the local board, a resolution was passed ordering the officer of health to inspect the plt.'s house and report to the board whether it was fit for human habitation. The officer of health having made his inspection accordingly, reported that it was not fit for human habitation.

On the 21st July 1863 the local board passed a resolution that the board should give the proper order declaring the house unfit for human habitation, and at a meeting of the board, held on the 18th Aug. 1863, the following notice was signed and sealed by the board:

**Barnsley Local Board of Health.**

Whereas our officer of health has certified to us in writing that the dwelling-house situate at Pogmoor, within the district of the township of Barnsley, in the county of York, belonging to George Wike, and in the occupation of Samuel Burgess, is unfit for human habitation. Now we, the said local board of health for the said district do by this order, affixed conspicuously on the said dwelling-house, declare that the same is not fit for human habitation, and that the same shall not be inhabited after the 29th day of Aug. instant.

And we do hereby give notice that any person who, after the said 29th day of Aug. instant, lets or occupies, or continues to let or occupy, or knowingly suffers to be occupied the said dwelling-house, will be liable to a penalty not exceeding 20s. for every day during which the same dwelling-house shall be so let or occupied.

This notice, duly signed and sealed, was affixed on the outer and only door of the plt.'s dwelling-house on the same day; and on the 29th Aug. the plt. left the house and it remained unoccupied down to the commencement of the action.

These facts being admitted at the trial, the plt. denied the power of the local board to make any bye-laws entitling them to declare unfit for human habitation a building erected before the date of the constitution of the district. Assuming, however, that the bye-law was authorised by the Act of Parliament, it was admitted by the plt. that all the proceedings of the board had been regular, with the exception that the plt. contended that notice and an opportunity of being heard ought to have been given to him before the order was made by the board. Blackburn, J. directed a nonsuit, giving the plt. leave to move to enter a verdict for him for five guineas. A rule *nisi* having been obtained accordingly,

*Manisty, Q.C. and Kemplay showed cause.*—The proviso that "no such bye-law shall affect any building erected before the date of the constitution of the district," applies only to bye-laws containing the stringent powers of removing and pulling down houses which are given to the local board by the part of sect. 34, which immediately precedes the proviso. Although the Legislature gives power to pull down new buildings, they decline to give the same power with respect to old buildings. Nothing can be more reasonable than this bye-law, and the beneficial effect of the Act will be in a great measure prevented if the power of the local board is thus restricted:

*Shiel v. The Mayor, Aldermen and Burgesses of Sunderland, 6 H. & N. 796.*

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[C. CAS. R.]

*Overend, Q.C., Field, Q.C. and Maule* supported the rule.—Sect. 34 of this Act is enacted in lieu of two repealed sections, which are both prospective, and this gives a clue to the intention of the Legislature in this enactment, that it was intended to be prospective also, and not to affect existing buildings. It cannot be that the proviso was intended as a limitation to the powers given by the words immediately preceding it, as contended by the *defts.*, because those powers obviously apply only to new buildings, and therefore the proviso would be unnecessary.

*ERLE, C.J.*—I am of opinion that the bye-law 27 constituted no defence for the *deft.*, and therefore that our judgment ought to be for the *plt.* The *plt.*'s house was erected before the date of the constitution of the district, and the bye-law, under which the *defts.* acted, provides for the closing of buildings which are unfit for human habitation. The local board of health have power, under sect. 34 of the Local Government Act 1858, to make bye-laws respecting the closing of houses unfit for human habitation; but the wide words of that part of the section which give them that power are controlled by a proviso; and giving effect to the plain words of the section and the proviso, it seems to me that the local board had no power to make a bye-law empowering them to close an old building. I am much pressed by a scruple lest, in giving this interpretation to the words of the statute, I should be obstructing the sanitary operation of the statute, for the power claimed by the local board would, if executed with fairness, produce a good effect, and the local board having to act on a wide district, full of old buildings, I am very anxious not to limit their authority. But I find powers given in different parts of the Act, and several already exist at common law, to prevent any persons from being a nuisance to any other persons in their neighbourhood; and, on the other hand, the Legislature might be disposed to be extremely cautious in taking away legal rights vested in legal owners of property. Where, however, an owner chooses to lay out his capital in places affected by bye-laws of a local board of health it is reasonable that he should be subject to the powers contained in them. I am confirmed in this view on looking to the repealed enactments for which this section is substituted, and am clearly of opinion that the proviso at the end of the section was intended to limit the authority of the local board in making bye laws, and that they had no power to make a bye-law applying to an old house.

*WILLIAMS, J.*—I am of the same opinion. The ordinary grammatical construction of the section and proviso is confirmed by the context. If the *defts.*' contention were right and the proviso applied only to bye-laws containing the specified provisions made for their observance, classes of the matters with respect to which bye-laws are authorised to be made would be left perfectly unfettered and include buildings erected either before or after the constitution of the district. This would be a harsh power to confer upon the local board, having regard to the rights of parties who erected buildings before the consideration of what is healthy and what is not healthy received the attention which it now does. In the second place, if the *defts.*' interpretation were the correct one, the proviso would be useless, not to say senseless, for the authorised provisions for the observance of the bye-laws necessarily apply to matters arising after the constitution of the district. Lastly, the *defts.*' interpretation would make the clause at the end of the section beginning with the words "But for the purposes of this Act," useless if not senseless. According to the *plt.*'s construction, the bye-laws are not to apply to existing

buildings, and then this clause narrows the immunity of existing buildings by enacting that buildings pulled down and rebuilt, or buildings converted into human habitations, shall be considered as new buildings. But if the *defts.*' construction were the correct one, and the local board already possessed an absolute power of making bye-laws respecting both old and new buildings, these words, which enlarge what was absolute before, are useless.

*WILLES and BYLES, JJ.* concurred.

*Rule absolute.*

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, June 4, 1864.

(Before COCKBURN, C. J., WILLIAMS, J., MARTIN, B., CROMPTON, J. and BRAMWELL, B.)

REG. v. BULMER.

*False pretences—Evidence—Larceny—24 & 25 Vict. c. 96, s. 88.*

*An indictment for false pretences alleged that the prisoner pretended he was the servant of Mr. Hardman, and was sent to buy a horse for him, whereby the prisoner unlawfully obtained a horse from the prosecutor. The evidence was, that the prisoner represented himself as the servant of Mr. Hardman, but the prosecutor's son, confounding the name with that of Harding, a person whom he knew, said in the prisoner's presence to his father, "I am going to sell the horse to Mr. Harding," whereupon the prisoner adapted his story to meet that belief of the prosecutor and his son, and so obtained the horse:*

*Held, that a conviction could not be sustained, as the pretence by which the horse was obtained was, that the prisoner was the servant of Mr. Harding, and that was not averred in the indictment.*

*To prevent a prisoner indicted for false pretences from being acquitted on the ground that the offence is that of felony (24 & 25 Vict. c. 96, s. 88) the false pretences laid must be proved, for under the statute he is to be found guilty of the misdemeanour.*

Case reserved for the opinion of this Court by the Recorder of Newcastle-on-Tyne.

The prisoner was tried before me at the last General Quarter Sessions for the town and county of Newcastle-upon-Tyne, on a charge of obtaining a horse by false pretences.

The indictment ran as follows:—

Newcastle-upon-Tyne (to wit).—The jurors for our Lady the Queen upon their oath present that George Bulmer, on the 30th March 1864, unlawfully, knowingly and designedly did falsely pretend to one James Henderson the younger, that he the said G. Bulmer was the servant of one William Hardman, of Stickleby, in the county of Northumberland (the said W. Hardman then and long before being well known to the said J. Henderson the younger), and that the said G. Bulmer was then sent by the said W. Hardman to buy a horse for the said W. Hardman, by means of which said false pretences the said G. Bulmer did then unlawfully obtain from the said J. Henderson the younger, a certain horse, with intent thereby then to defraud; whereas in truth and in fact the said G. Bulmer was not then the servant of the said W. Hardman; and whereas in truth and in fact the said G. Bulmer was not then or at any other time sent by the said W. Hardman to buy a horse for the said W. Hardman; to the great damage and deception of the said J. Henderson the younger, to the evil example of all others in the like case offending, against the form of the statute, &c.

The following are the principal facts that were proved in evidence:—

James Henderson, of Denton Burn, had a mare for sale at the horse fair in Newcastle, on Wednesday, March 30. The prisoner went up to him and asked if the mare was for sale. "Yes." "What price?" "12/." "Where do you come from?" "Denton

Burn." "The same place," said the prisoner, "that my governor is from." "Who is he?" "Mr. Hardman; he lives at Stickley Farm." "What does your master want her for?" "To drive in a waggonette and ride occasionally."

Henderson knew no person of the name of Hardman, of Stickley Farm, but he had known very well a gentleman named Harding, who had lived some time previously at Benwell Lodge, about ten miles from Stickley.

Henderson and the prisoner then went into the Sun Inn, where Henderson's father joined them. Henderson said to his father, "I am going to sell a horse to Mr. Harding of Benwell Lodge," upon which his father remarked to the prisoner, "He does not live there now." "No," said the prisoner; "he lives now at Stickley Farm." "How long is it since he went there?" The prisoner turned about, gave a bow of his head and no answer.

After some bargaining, during which the prisoner expressed his great wish that his master should see the mare, Henderson agreed to take 1*l*. for the loss of the fair, and it was arranged that the prisoner should take the mare home to his master, and meet Henderson next day at the Sun Inn to pay the agreed price, *videlicet*, 12*l*. The prisoner, according to Henderson, then said, "You must give me a note of the price for my master to see." To this Henderson agreed, and he wrote out and signed the following memorandum, which the prisoner dictated:

George Bulmer bought of James Henderson a brown horse for the sum of 12*l*., to be paid at the Sun Inn at eleven o'clock on March 31.

JAMES HENDERSON, Butcher.

Denton Burn.

The prisoner then paid Henderson 1*l*., and the mare was handed over to him.

Henderson was pressed upon cross-examination as to whether this 1*l*. was not paid on account of the purchase-money; but he positively swore that the 1*l*. was paid as the consideration for his giving up the chance of a better price at the fair. In answer to further questions he said, that if the prisoner had met him at the Sun Inn and paid the money next day it would have been all right; but he added that he never would have parted with the mare at all, or accepted the 1*l*., or signed the memorandum or agreed to meet at the inn, but in the belief that the prisoner was the servant of Mr. Harding, late of Benwell Lodge, and was purchasing the mare for his master.

Mr. Hardman, of Stickley Farm, was called and proved that the prisoner was not his servant, or in any way authorised by him to buy the mare, and that the prisoner lived a mile and a half from his farm.

It was proved that there was no other Hardman or Harding at Stickley, and that Mr. Hardman, of Benwell Lodge did not reside at or near Stickley Farm.

A few hours later on the same evening, March 30, the prisoner sold the mare in the fair for 6*l*., having first asked 9*l*. for her. She was resold for 8*l*. 12*s*. 6*d*. the same night, and next day was offered to Henderson himself by a third owner for 16*l*.

The prisoner never appeared at the Sun Inn; and on Friday, April 1, was taken into custody.

On the warrant being read, which charged him with obtaining a horse by false pretences from J. Henderson, he said, "Is that all?" and afterwards added that he bought the horse, producing the document above mentioned as a voucher for his statement.

At the close of the case for the prosecution, Mr. Blackwell, the counsel for the prisoner, submitted to me:

First, that, looking to the memorandum signed by the prisoner, to the payment of the 1*l*., and to the admission of the prosecutor that it would have been

all right if the prisoner had met him at the inn and paid the money, the evidence showed that the prosecutor had sold the mare to the prisoner, and having taken the risk of parting with her on the understanding that the price should be paid next day, there was no case to go to the jury. He referred to *Reg. v. Dale*, 7 C. & P. 352.

Secondly, that the evidence did not support the false pretences laid in the indictment, inasmuch as the prosecutor admitted he parted with the mare in the belief that the prisoner was the servant of Mr. Harding of Benwell Lodge, whereas the pretence proved was, that he was the servant of Mr. Hardman, of Stickley Farm, and the innuendo as to the said W. Hardman being very well known to the prosecutor was, in fact, disproved.

I overruled both objections, holding, as to the first, that it was a question for the jury whether the prosecutor would have parted with the mare at all, or agreed to have met at the Sun Inn, if he had not believed that the prisoner was a servant acting for his master in the transaction; and, as to the second objection, holding that, if the jury thought the pretence as to W. Hardman, of Stickley, being the prisoner's master was false, and that it led the prosecutor to part with his mare even under a misapprehension as to the identity of the master referred to, they might convict the prisoner under the present indictment.

I then called the attention of the prisoner's counsel to the Criminal Law Consolidation Act, 24 & 25 Vict. c. 96, s. 88, "Provided that if upon the trial of any person indicted for such misdemeanor it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor."

Upon this it was submitted that there was not sufficient evidence, had this been an indictment for larceny, to justify a conviction for felony; and, secondly, that though the Act provided that the prisoner "should not be acquitted," the jury would not be justified in returning a general verdict of guilty under this indictment, if they thought the false pretences were not proved as laid.

I held that they might, and that the Act was intended to apply to such a case as the present, and that it was for the jury to say whether the prisoner acted *bona fide*, or whether he had from the first fraudulently designed to deprive the owner of his mare and appropriate her to his own use, for that if the whole proceeding on his part was a trick and contrivance to deprive the owner of his property and possession of the mare, that would be enough to support a conviction for larceny: (*Reg. v. Shepherd*, 9 C. & P. 121.) The learned counsel then addressed the jury on behalf of the prisoner.

In summing up I directed the jury according to the above ruling. The jury after some deliberation found a verdict of guilty, and in answer to a question from me they said they found the prisoner guilty of obtaining the mare by the false pretences laid, and further that, taking my ruling as to the law, they thought the facts amounted to a larceny by the prisoner.

Bail not having been tendered, I sentenced the prisoner to six months' imprisonment with hard labour, which he is now undergoing.

Being requested in the course of the argument to reserve a case for the Court of Criminal Appeal, I consented to do so; and the question for the Court I respectfully submit is, whether the prisoner has been properly convicted.

W. DIGBY SETMOUR, Recorder.

No counsel was instructed for the prisoner.

*Gainsford Bruce* for the prosecution.—First, on the facts in this case and the finding of the jury, that



this was a larceny, the conviction may be sustained under the 24 & 25 Vict. c. 96, s. 88. [CROMPTON, J.—The enactment does not say that if any larceny is proved he is not to be acquitted of the misdemeanor; but, that if you prove the misdemeanor as it is laid in the indictment, the prisoner is not to be acquitted because the case amounts to a larceny.] Secondly, as to the false pretences, it is submitted that, although the prisoner subsequently altered his story to meet the prosecutor's misconception that he was dealing with Mr. Harding's servant, nevertheless he also made the false representation that he was Mr. Hardman's servant, and the jury must be taken to have found that that led the prosecutor to part with the horse; and if so, the conviction may be supported. [COCKBURN, C. J.—There was plenty of false pretences, if rightly charged in the indictment. The false pretence which operated on the prosecutor's mind, and led him to part with his property, must be properly laid and proved. It is plain that the prosecutor confounded the name of Harding with that of Hardman, used by the prisoner, who, seeing that, adapted his story to meet that, and it was the representation that he was Mr. Harding's servant which led the prosecutor to part with his horse. But, unfortunately, the indictment makes the pretence that he was Mr. Hardman's servant the inducing cause of the prosecutor's parting with the horse. BRAMWELL, B.—On this indictment, if the averments were true, the seller would have a right to look to Mr. Hardman as liable for the price, whereas he intended to sell the horse to Mr. Harding, and to hold him liable.] Supposing the indictment not proved, the prisoner may be convicted of larceny. [MARTIN, B.—No. My brother Crompton has given the true reading of the section. CROMPTON, J.—The prisoner is to be convicted of the misdemeanor, not of larceny.]

WILLIAMS, J.—I feel great difficulty in concurring with the judgment of the court.

— Conviction quashed.

#### REG. v. COLLINS AND OTHERS.

##### *Attempt to commit larceny.*

*In order to convict of an attempt to commit larceny, it must appear that there was property in the place where the attempt is made that could be stolen.*

*Therefore, where a person put his hand into the pocket of another with intent to steal, he cannot be convicted of an attempt to steal, unless it appear that there was property in the pocket which might be stolen.*

*It should be left to the jury to say whether there was any property in the pocket.*

Case reserved for the opinion of this Court by the Deputy-Assistant Judge at the Middlesex Sessions.

The prisoners were tried before me at the Middlesex Sessions on an indictment which stated that they unlawfully did attempt to commit a certain felony; that is to say, that they did then put and place one of the hands of each of them into the gown pocket of a certain woman, whose name is to the jurors unknown, with intent the property of the said woman in the said gown pocket then being from the person of the said woman to steal, &c.

The evidence showed clearly that one of the prisoners put his hand into the gown pocket of a lady, and that the others were all concerned in the transaction. The witness who proved the case said on cross-examination that he asked the lady if she had lost anything, and she said "No."

For the defence it was contended that to put a hand into an empty pocket was not an attempt to commit a felony, and that as it was not proved affirmatively that there was any property in the pocket at the time, it must be taken that there was

not, and as larceny was the stealing of some chattel, if there was not any chattel to be stolen, putting the hand in the pocket could not be considered as a step towards the completion of the offence.

I declined to stop the case upon this objection, but as such cases are of frequent occurrence I thought it right that the point should be determined by the authority of the Court of Criminal Appeal.

The jury found all the prisoners guilty, and the question upon which the opinion of your Lordships is respectfully requested is, whether under the circumstances the verdict is sustainable in point of law.

The prisoners are in custody awaiting sentence.

JOSEPH PAYNE, Deputy-Assistant Judge.

*Poland for the prisoners.*—The conviction is bad. It is not an indictable offence to put your hand into an empty pocket with intent to steal, but an offence punishable only under the Vagrant Act. It is not alleged in the indictment that there was any property in the pocket. This is very like the case of *Reg. v. M'Pherson*, 1 Dears. & B. 197, where it was held that a man who was charged with breaking and entering a dwelling-house and stealing certain specified goods could not be convicted unless the specified goods were in the house, notwithstanding other goods were there. [COCKBURN, C. J.—That case proceeds on the ground that you must prove the property as laid.] In the course of the argument Bramwell, B. put this very case, and said: "The argument that a man putting his hand into an empty pocket might be convicted of attempting to steal appeared to me at first plausible; but supposing a man, believing a block of wood to be a man who was his deadly enemy, struck it a blow intending to murder, could he be convicted of attempting to murder the man he took it to be?" So in *Rex v. Scudder*, 3 C. & P. 605, it was held that there could not be a conviction for administering a drug to a woman to procure abortion, if it appear that the woman was not with child at all. That case was before the Consolidation Act, 24 & 25 Vict. c. 100, s. 58. [BRAMWELL, B.—You may put this case. Suppose a man takes away an umbrella from a stand with intent to steal it, believing it not to be his own, but it turns out to be his own, could he be convicted of attempting to steal?] It is submitted that he could not.

*Metcalfe for the prosecution.*—The fallacy in the argument on the other side consists in assuming that it is necessary to prove anything more than an attempt to steal. The intent to steal it is conceded is not sufficient, but any act done to carry out the intent, as putting the hand into the pocket, will do. [CROMPTON, J.—Suppose a man were to go down a lane armed with a pistol, with the intention to rob a particular person, whom he expected would pass that way, and the person does not happen to come, would that be an attempt to rob the person?]

COCKBURN, C. J.—We are all of opinion that this conviction cannot be sustained, and in so holding it is necessary to observe that the judgment proceeds on the assumption that the question, whether there was anything in the pocket of the woman which might have been the subject of larceny, does not appear to have been left to the jury. The case was reserved for the opinion of this court on the question, whether, supposing a person to put his hand into the pocket of another for the purpose of larceny, there being at the time nothing in the pocket, that is an attempt to commit larceny. We are far from saying that, if the question, whether there was anything in the pocket of the woman had been left to the jury, there was not evidence on which they might have found that there was, and in which case the conviction would have been affirmed.



But, assuming that there was nothing in the pocket of the woman, the charge of attempting to commit larceny cannot be sustained. This case, we think, is governed by that of *Reg. v. M'Pherson*, and that an attempt to commit a felony can only be made out when, if no interruption had taken place, the attempt could have been carried out successfully, and the felony completed of the attempt to commit which the party is charged. In this case, if there was nothing in the pocket of the prosecutrix in our opinion the attempt to commit larceny cannot be established. It may be illustrated by the case of a person going into a room, the door of which he finds open, for the purpose of stealing whatever property he may find there, but finding nothing in the room, in that case no larceny could be committed, and therefore no attempt to commit larceny could be committed. In the absence, therefore, of any finding of the jury in this case, either directly or inferentially by their verdict, that there was any property in the pocket of the prosecutrix, we think that this conviction must be quashed.

Conviction quashed.

#### REG. v. JOHN GLOVER.

*Embezzlement—Relation of master and servant—County Court bailiff.*

*A County Court bailiff was indicted for embezzling moneys of the prosecutor, the high bailiff. The moneys embezzled were received on levies under County Court processes:*

*Held, that the charge could not be sustained, as the relation of master and servant did not exist between the bailiff and high bailiff, nor was the bailiff bound to pay over the moneys to him.*

Case reserved for the opinion of this Court at the Oxfordshire General Quarter Sessions.

The indictment contained three counts:

The first count charged that, on the 3rd Sept. 1863, the prisoner being then employed as servant to the prosecutor, did, by virtue of such his employment, then and whilst he was so employed, receive and take into his possession certain money, to the amount of 12s. 3d., for and in the name and on account of the prosecutor his master, and did then fraudulently embezzle the said money; and that the prisoner did feloniously steal, take and carry away the said money, the property of the prosecutor, from him his master as aforesaid, against the form of the statute, &c.

The second count charged that the prisoner afterwards, and within six calendar months, &c., to wit, on the 1st Oct. 1863, being the servant to the prosecutor, embezzled 1*l.* 1*s.* 2*d.* (as in the first count).

And the third count charged a similar embezzlement of 3*l.* 6*s.* 9*d.* on the 11th Oct. 1863.

The prisoner pleaded to the indictment generally, not guilty. On the trial the jury found him guilty; but the justices, before whom the case was tried, reserved for the consideration of the Court of Criminal Appeal the following question of law, which arose on the trial, and judgment was postponed and the prisoner discharged on recognisance of bail to appear and receive judgment.

Question: Whether the prisoner was the servant of the prosecutor within the provisions of the statute 24 & 25 Vict. c. 96, ss. 68 and 71?

The evidence was as follows:—That the prosecutor being high bailiff of the Witney County Court, appointed the prisoner (by the allowance of the judge of the court, and under the provisions of the statute 9 & 10 Vict. c. 95, s. 31), to be one of the bailiffs to assist the high bailiff.

That the prisoner in his official capacity received the three sums mentioned in the indictment, being the amounts of three levies received by virtue of

processes issued out of the court, and that he neglected to pay over the amounts to the registrar of the court, but embezzled them, and that consequently the prosecutor was held responsible to the County Court.

By virtue of the above Act, s. 31, the high bailiff may at his pleasure dismiss a bailiff; and the prosecutor had in this case (subsequently to the appropriation of the three sums of money) dismissed the prisoner; and every bailiff so appointed may also be suspended or dismissed by the judge. And by sect. 33, the high bailiff is entitled to receive all fees and sums of money allowed by the Act in the name of fees payable to the bailiff, out of which the high bailiff is to provide for the execution of the duties for which such fees are allowed, and for the payment of the assistant bailiffs according to a scale, and the high bailiff is to be responsible for all the acts and defaults of himself and of the bailiffs appointed to assist him, in like manner as the sheriff of any county in England is responsible for the acts and defaults of himself and his officers.

Rule 31 of the Statutory Rules of Practice of the court is as follows:

Every bailiff levying or receiving any money by virtue of any process issuing out of the court of which he is bailiff shall, within twenty-four hours from the receipt thereof, pay over the same to the registrar of such court, and shall file such process and retain the same in his custody.

Although the prosecutor was answerable for the acts of the prisoner, and for all moneys not paid into court by him, yet, as the sums in question ought, under the above rule, to have been paid to the registrar of the court, the question arose whether the prisoner was in law the servant of the prosecutor as laid in the indictment.

The statute 9 & 10 Vict. c. 95, s. 116, provides:

That if any bailiff of the court shall be charged with not duly paying or accounting for any money levied by him, under the authority of this Act, it shall be lawful for the judges to inquire into such matter in a summary way, and for that purpose to summon and enforce the attendance of all necessary parties, in the like manner as attendance of witnesses in any case may be enforced, and to make such order thereupon for the repayment of any money so levied as aforesaid, and for the payment of such damages and costs, as he shall think just, and also if he shall think fit to impose such fine upon the bailiff, not exceeding 10*l.* for each offence, as he shall deem adequate, and in default of payment of any money so ordered to be paid, payment of the same may be enforced by such ways and means as are herein provided for enforcing a judgment recovered in the said court.

HUGH HAMERSLEY, Chairman.

No counsel appeared for the prisoner.

*Sleigh for the prosecution.*—The conviction is good. The relation of master and servant existed in this case. The high bailiff appoints the bailiff, and has power to dismiss him: (9 & 10 Vict. c. 95, s. 31.) The power given to the judge of the County Court by sect. 116 of the 9 & 10 Vict. c. 95, to inquire into the bailiff's conduct and fine him has reference to defaults arising out of mere negligence and carelessness and not to a case of felony. A servant is a person who is employed by another, and bound to obey the orders of another. [Cockburn, C.J.—The bailiff is bound to obey the orders of the court. CROMPTON, J.—If the high bailiff were to tell the bailiff not to pay over moneys levied by him to the court, and he were to obey, the bailiff might be punished by the court for not paying them over.] It is submitted that the bailiff is the servant of the high bailiff, although he is also required by the County Court rules to pay over moneys levied or received under process to the registrar.

COCKBURN, C.J.—Even if it were made out, which I think it is not, that the bailiff is the servant of the high bailiff, he was not bound to pay over these moneys to his master. But as he was not the servant of the high bailiff, and this was not the money

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of the high bailiff, the conviction must be quashed. He was anything but the servant of the high bailiff, and by the statutory rule of practice he was bound to pay the moneys to the registrar.

CROMPTON, J.—Even in the case of a bound bailiff to the sheriff, the bailiff is not answerable criminally. I never heard of a prosecution against a bound bailiff in a case like this. The bailiff is the officer of the court, and he was not bound to pay these moneys to the high bailiff.

The rest of the Court concurring,

*Conviction quashed.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,  
Barristers-at-Law.

Saturday, June 4, 1864.

LATHAM AND OTHERS v. THE QUEEN (in error).

*Indictment—Error—Two counts and judgment on one only—Quarter sessions—Jurisdiction—Conspiracy.*

*The plts. in error were indicted at the quarter sessions upon an indictment containing two counts, one for obtaining money by false pretences, and the other for a conspiracy, by divers false pretences, to defraud the prosecutor of his money. They were found guilty upon the second count only, and upon a writ of error the record, though it set out the finding and judgment upon such second count, was wholly silent as to any finding or judgment upon the first count:*

*Held, that the finding and judgment upon such second count was good.*

*By the 5 & 6 Vict. c. 38, s. 1, the quarter sessions are prohibited from trying any persons for conspiracies, except conspiracies to commit any offence which the sessions have jurisdiction to try when committed by one person:*

*Held, that a count charging the defts. with conspiring, by divers false pretences, against the form of the statute in such case made and provided, the said A. B. of his money to defraud, sufficiently showed a conspiracy within the jurisdiction of the quarter sessions.*

*This was a writ of error upon a conviction of the defts. upon an indictment.*

It appeared that the defts. were indicted at the Lancashire Quarter Sessions holden at Salford, and the indictment contained two counts: first, a count for obtaining money by false pretences; secondly, a count for a conspiracy to obtain such money, the material part of such second count being as follows:

*That the said Benjamin Latham, &c., being evil disposed persons, and contriving and intending to defraud the said Richard Bealby of his money, unlawfully, knowingly and designedly did amongst themselves combine, conspire, confederate and agree together, by divers false pretences, against the form of the statute in that case made and provided, the said Richard Bealby of his money to defraud, against the form of the statute in that case made and provided.*

At the trial the jury found the defts. guilty upon the second count only, and they were accordingly sentenced.

The record, as made up and returned into this court, contained the proper averment as to the conviction of the defts. upon such second count, but was quite silent as to the result of the first count, containing no averment of acquittal upon such count.

By the 5 & 6 Vict. c. 38 (the Quarter Sessions Jurisdiction Act), s. 1, it is enacted that

Neither the justices of the peace acting in and for any county, riding, division, or liberty, nor the recorder of any borough shall, at any sessions of the peace, or at any adjournment thereof, try any person for (inter alia) unlawful combinations and conspiracies, except conspiracies or combina-

tions to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person.

Cottingham now appeared for the defts. (plts. in error), and contended, first, that the record was bad, inasmuch as the defts., being convicted alone upon the second count, it takes no notice of their acquittal upon the first count, for that being convicted only upon the second count, they were entitled to have an entry of acquittal upon such first count, and that by such omission, if again indicted for the offence contained in such first count, they would be unable to plead either *autrefois acquit* or *autrefois convict*:

*R. v. Hayes*, 2 Ld. Raym. 1518;

*O'Connell v. The Queen* (in error), 11 Cl. & Fin. 295-6 (Parke, B.)

Secondly, that as the quarter sessions have only a limited jurisdiction in cases of conspiracy, it should appear upon the record that the conspiracy was one which they had a right to try, and that in the present case it did not so appear, for that the conspiracy set out in the record of the indictment might be to do some act not indictable at quarter sessions, such as to defraud as a bankrupt, and that therefore the nature of the fraud ought to have been set out, that the court might see that there was jurisdiction: (*Reg. v. Jones*, 1 Dear.) Thirdly, that it was not averred on the record that the defts. were present when judgment was pronounced, actual presence being requisite, though the case was one of misdemeanor, corporal punishment being awarded:

1 Chit. Crim. Law, 696, 720.

Campbell Foster, contra (who was directed to confine his arguments to the first objection only), argued that, there being a good count upon which judgment was passed, it was immaterial that there were other counts which were passed over in silence, for that separate counts in an indictment stand upon the footing of separate indictments, and it is no objection that no judgment is given upon one, if a right judgment is given upon others, and that at any future time the omission can be supplied if necessary:

*Peak v. Oldham*, Cowp.;

*O'Connell v. The Queen*, Tindall's judgment, 255;

*Holloway v. The Queen*, 2 Den. 295;

*Gregory v. The Queen*, 15 Jurist.

Cottingham in reply.

BLACKBURN, J. (a)—I think that in this case the Crown is entitled to judgment. There were in this indictment two counts, and the jury ought regularly to have pronounced a verdict on both. No doubt, in fact, the verdict was one of guilty on the second count and of not guilty upon the first count; and it is by a misprision of the clerk who drew up the record that the first count is untouched. If in due time an application to amend had been made, it would have been set right, and even now, if any inconvenience should arise to the prisoners with reference to future proceedings, it may be amended. At present I cannot speculate upon that. Then comes the question as to the effect of the omission upon the finding of the jury. As to that, where there is an issue which the jury have to try, and they imperfectly dispose of it, the court will award a *venire de novo*. We need not, however, inquire into that, for here there has been no imperfect finding. But when there are two counts in an indictment, they are to all intents and purposes two separate indictments, and the finding upon them would be as though they were separate indictments. An imperfect finding upon a count might be a ground for a *venire de novo*; but if there is

(a) Cockburn, C. J. and Crompton, J. were sitting in the Court for Crown Cases Reserved.

a good finding upon a good count, why may a deft. not be convicted upon that? There is nothing that I can see in principle against it. It is said that the question is concluded by authority, and one case is cited from Lord Raymond. [His Lordship here referred to the case, and continued:] But I think that case has no bearing upon the present one. An indictment has no analogy to a civil claim where the claim is entire, whereas in a criminal case each count is in effect a separate indictment. In *O'Connell v. The Queen*, Lord Wensleydale, then Mr. Baron Parke, shows that this was his view in his judgment at page 296. I certainly cannot see why the judgment upon one count should not be supported merely because there is no judgment upon another. The second question is, as to whether or not the second count (for the conspiracy) sets out an offence within the jurisdiction of the court of quarter sessions? It is a count for a conspiracy. [His Lordship here read the count.] The object of the conspiracy is stated to be to defraud the prosecutor of his money, and the objection is, that inasmuch as the quarter sessions have only a limited jurisdiction in cases of conspiracy, the count should set out the facts of the fraud so as to show whether the offence came within its jurisdiction. The count alleges that the defts. conspired, by divers false pretences, to defraud Richard Bealey of his money, against the form of the statute. Now, in conspiracies, it is not required that the object of the conspiracy should be set out so precisely as though the indictment were for the substantive offence; all that is required is to show that there was a conspiracy to defraud, and before finding the bill the grand jury must be satisfied that the conspiracy was to defraud the prosecutor of his money by false pretences. There were other technical objections taken, such as not setting out the false pretences, and then there being no allegation that the defts. were present when judgment was passed; but there is really nothing in them, and the case of *Sydes v. The Queen*, 11 Q. B. 245, is in point. There must therefore be judgment for the Crown.

SHEE, J.—I am of the same opinion. It appears there were two counts in the indictment, and that judgment is entered only upon one of them. Now the two counts are in principle the same as two indictments, and the record shows that the defts. were tried and convicted upon one count. It is said that the record is bad, because it does not appear that any judgment was given upon the first count. It certainly does appear that no sentence was passed upon it, and although it does not say that the defts. were acquitted, it is rather an imperfect statement than a statement that prejudices, and if hereafter there is any difficulty it may easily be set right. Upon the second point the objection was, that inasmuch as it does not appear upon the face of the second count that the offence which the defts. conspired to commit was one over which the quarter sessions had jurisdiction it was bad, for that the sessions could only try a conspiracy to do an act which would have been triable at sessions. Now it is not necessary that the offence in a charge of conspiracy should be set forth with the same particularity as would be required in stating the substantive offence. Here the gist of the offence is the conspiracy, and I think the count is sufficient.

*Judgment for the Crown.*

Thursday, June 9, 1864.

REG. v. THE COMMISSIONERS OF METROPOLITAN POLICE.

*Hackney and Stage Carriage Act—Omnibus conductors' licences—Suspension for misconduct.*

*The Commissioners of Metropolitan Police have power under the 6 & 7 Vict. c. 86 to suspend the issuing of renewals of licences to omnibus drivers and conductors for a period, for misconduct during the preceding year.*

This was an application for a *mandamus* to the Commissioners of the Metropolitan Police to grant a licence to a conductor of an omnibus under the 6 & 7 Vict. c. 86 (an Act for regulating hackney and stage carriages in and near London).

The applicant had been a licensed omnibus conductor for eight years, and his licence expired on the 1st June last. He had made the usual application for the renewal of his licence, and produced to the Commissioners of Police the certificate of good behaviour required by sect. 8 of the statute to be produced to the registrar (the Commissioners of Police being substituted for the registrar by a later statute). The applicant was informed at the office of the commissioners that his licence was suspended for a month and would not be granted until July 1. The ground of suspension was that the applicant had been summoned three times, and fined on each occasion.

The following are the sections of the Act referred to in the argument:

Sect. 8:

That it shall be lawful for the registrar (of metropolitan public carriages) to grant a licence to act as driver of hackney carriages, or as driver or as conductor of metropolitan stage carriages, or as waterman (as the case may be) to any person who shall produce such a certificate as shall satisfy the registrar of his good behaviour and fitness for such situation respectively. Provided always that no person shall be licensed as such driver as aforesaid who is under sixteen years of age, and in every such licence shall be specified the number of such licence and the proper name and surname and place of abode, and age, and a description of the person to whom such licence shall be granted, and in the case of a waterman of the standing or place at which he shall be thereby authorised to act as waterman and the nature of his duties, and every such licence shall bear date on the day on which the same shall be granted in the month of May in any year, then to continue in force until and upon the first day of June in the year next following that in which the same shall be granted, except in either case the same shall be sooner revoked, and except the time (if any) during which any such licence shall be suspended; and on every licence of a driver or conductor the registrar shall cause proper columns to be prepared in which every proprietor employing the driver or conductor named in such licence shall enter his own name and address and the days on which such driver or conductor shall enter and shall quit his service respectively, and in case any of the particulars entered or indorsed upon any licence in pursuance of this Act shall be erased or defaced every such licence shall be wholly void and of none effect; and the said registrar shall at the time of granting any licence, deliver to the driver, conductor, or waterman, to whom the same shall be granted, an abstract of the laws in force relating to such driver, conductor, or waterman, and of the penalties to which he is liable for any misconduct, and also a metal ticket upon which there shall be marked or engraved his office or employment, and a number corresponding with the number shall be inserted in such licence.

Sect. 14:

That before any such licence shall be granted a regulation for the same, in such form as the registrar shall from time to time appoint for that purpose, and accompanied with such certificate as hereinbefore is required, shall be made and signed by the person by whom such licence shall be required; and in every such regulation all particulars as the registrar shall require shall be truly set forth, and every person applying for, or attempting to procure any such licence, who shall make or cause to be made any false representation in regard to any of the said particulars, or who shall endeavour to obtain a licence by any forged recommendations, or who shall not truly answer all questions which shall be demanded of him in relation to such application for a licence; and also every person to whom reference shall be made who shall, in regard to such application, wilfully and knowingly make any misrepresentation, shall forfeit for every such offence the sum of five pounds, and it shall be lawful for the registrar to

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proceed for recovering of such penalty before any magistrate, at any time within one calendar month after the commission of the offence, or during the currency of the licence so improperly obtained.

Sect. 25 :

That it shall be lawful for any justice of the peace before whom any driver, conductor, or waterman shall be convicted of any offence, whether under this Act, or any other Act, if such justice in his discretion shall think fit, to revoke the licence of such driver, conductor, or waterman, and also any other licence which he shall hold under the provisions of this Act, or to suspend the same for such time as the justice shall think proper, and for that purpose to require the proprietor, driver, conductor, or waterman in whose possession such licence, and the ticket thereunto belonging, shall then be to deliver up the same; and every proprietor, driver, conductor, or waterman, who being so required shall refuse or neglect to deliver up such licence, and any such ticket or either of them shall forfeit so often as he shall be so required, and refuse or neglect as aforesaid, the sum of £4., and the justice shall forthwith send such licence and ticket to the registrar, who shall cancel such licence if it has been revoked by the justice, or if it has been suspended, shall, at the end of the time for which it shall have been suspended, redeliver such licence with the ticket to the person to whom it was granted.

*E. James, Q. C.*, in support of the application.—Sect. 8 is imperative on the commissioners to grant a licence on the production of the certificate of good behaviour. If the commissioners are satisfied with the certificate they are bound to grant the licence. No further questions have been asked under sect. 14, and what the commissioners have done is in effect to inflict a punishment upon the applicant, which they have no power to do. The justices, under sect. 25, are the proper parties to do that. [MELLOR, J.—That section relates to misconduct arising after the granting of the licence and during its currency.] The consequence of suspending licences in this way is that this class of persons are thrown out of employ and subjected to a fresh punishment not specified by the statute.

COCKBURN, C. J.—I think this court ought not to interfere. The jurisdiction exercised by the Commissioners of Police is essential to the proper conduct of these men. It is quite clear that the commissioners are not bound to be satisfied with the mere production of a certificate of good behaviour, but they are entitled to see that the behaviour has been proper. That appears to be so from the provisions of sect. 14. Therefore when it was disclosed that the applicant had been three times fined, it was competent to the commissioners to say that they would not grant him a licence, notwithstanding sect. 8. If then they could refuse the licence altogether, it was perfectly competent for them to say to the applicant that what he had done during the last year was a sufficient reason why they should not at once grant him a licence, and that, as a salutary check, they would withhold it until July 1, and that if he returned for it at that period, they would give it to him.

The rest of the Court concurring,

*Application refused.*

Wednesday, June 8, 1864.

REG. on the prosecution of THOMAS TAYLOR v. THE DARLINGTON LOCAL BOARD OF HEALTH.

11 & 12 Vict. c. 63, ss. 45, 144, 145 (*Board of Health Act*)—21 & 22 Vict. c. 98, ss. 68, 70, 73, 74 (*Local Government Act*)—*Mandamus*—*Local boards*—“*Injurious affecting*”—*Watercourse*—*Right to compensation*.

By 11 & 12 Vict. c. 63, s. 45, local boards are empowered to construct sewers, and by sect. 144 compensation is awarded to persons injured by the exercise of their powers.

By the 21 & 22 Vict. c. 98 (which incorporates the

*former Act*), s. 73, local boards are prohibited from injuriously affecting any river or stream, &c., or the supply, quality, or fall of water contained in any river, stream, &c., in cases where any company or individuals would, if the Act had not passed, been entitled by law to prevent or be relieved against the injuriously affecting such river without the previous written consent of the parties.

The prosecutor is the owner of a water-mill on the river S., and as a riparian proprietor is entitled to the flow of the water of the river S. to his mill. The defts. are the Local Board of Health of D., and some years since under the Board of Health Acts caused a sewer to be constructed near the river S. The result of the construction of this sewer was to divert and diminish the supply of water to the mill.

On mandamus to compel compensation for injuries done in the exercise of the powers of the board :

Held, that the acts complained of constituted an injuriously affecting of the river S., which the prosecutor would have been entitled by law to prevent or be relieved against. That they might still have been the ground of an action at law. That they therefore did not form the subject of compensation, and that the mandamus was wrong.

This was a case stated for the opinion of the court by an arbitrator.

It appeared that by lease dated the 2nd March 1858 George Stonehouse, being seised in fee of Blackwell-mill, demised the same for ten years to the prosecutor, who occupied the mill until some time in the month of March 1861, and carried on the business of a miller.

The mill is situated on the right bank of the stream called the Skerne, and at a short distance below the town of Darlington, through which the Skerne flows.

For a long period before the operations of the defts., the occupiers for the time being of Blackwell-mill, as the representatives of ordinary riparian proprietors without any prescription, enjoyed the benefit of the waters of the Skerne for the working of the mill, and the prosecutor was entitled, as such representative, to the use of the waters of the Skerne for working the mill, subject to the rights of other riparian proprietors, and the exercise by the defts. of their statutory powers.

The defts. were constituted a local board of health according to the Public Health Act 1848, by a provisional order of the general board, dated the 1st Aug. 1850, and confirmed by the Public Health Act 1850.

In the year 1859, the defts. constructed a drain or sewer from a point above Darlington along the right bank of the Skerne for some distance, then for some distance beneath the bed of the stream and terminating in a cesspool close to the left bank of the Skerne, with trap-doors admitting the waters of the Skerne into the sewer for the flushing thereof; this is hereafter called the first sewer. The termination of the first sewer and the discharge or return to the Skerne of the water so admitted being higher up the Skerne than Blackwell-mill, no perceptible diminution of the water flowing to the mill was occasioned while the first sewer terminated at that place.

In the years 1858 and 1859 the defts. constructed a new drain or sewer in continuation of the first sewer from the place where it so terminated as aforesaid along the left bank of the Skerne, to a new cesspool considerably lower down the stream than the old cesspool, and below the place where the waters of the Skerne enter the dam of the said mill, and beyond the district of the board of health. This new drain is hereinafter called the second sewer. The water passing through the second sewer passes to the Skerne at a place so far down the stream as to be lost to the mill.

On the 18th June 1859, after the first and second sewers were connected by the direction of the person whose business it was to flush the sewers for the board of health, a hole was made into the first sewer for the purpose of letting the water of the Skerne into that sewer to flush it, and this hole continued open until some time on the 20th June, when upon the complaint of the prosecutor it was filled up by the direction of the surveyor of the board of health. During the time the hole continued open a large portion of the Skerne passed through the hole into the first sewer, and thence into the second sewer, and was wholly lost to the prosecutor, and the working of his mill was thereby stopped. This is the first head of the prosecutor's claim.

During the construction of the second sewer a certain quantity of the water of the Skerne oozed into the second sewer by reason of that sewer being near to and below the bed of the stream, and certain underground springs also oozed into the second sewer, which would, but for the making of that sewer, have percolated into the Skerne; and such quantity of the water of the Skerne was lost to the prosecutor. But since the completion of the second sewer, no portion of the Skerne or of the said springs finds its way into the second sewer either by percolation or otherwise. This is the second head of the prosecutor's claim.

Since the construction of the second sewer, any water which passes into the first sewer through the trap-doors is lost to the mill; but the trap-doors are usually kept closed, and no water passes into the sewer through the trap-doors, except when they are opened for the purpose of flushing the sewers, which is only done occasionally, and when there is fresh water in the Skerne. This is the third head of the prosecutor's claim.

Before the said sewers were constructed, the surface drainage water from the town of Darlington, which had never found any natural definite channel, together with the house drainage water, was conducted by artificial drains into the Skerne. These drains were altered by the defts. and made to carry their water into the first sewer. Since the completion of the second sewer this water is carried by it below the prosecutor's mill, and is thus wholly lost to the mill. This is the fourth head of the prosecutor's claim.

The street and houses of the town of Darlington are supplied with water from the river Tees by means of waterworks and not from the Skerne.

The questions for the opinion of the Court are:—

1. Whether the prosecutor is entitled to compensation, as in the *mandamus* suggested, in respect of all or any of his four heads of claim.

2. Whether, if the court should be of opinion that the prosecutor is entitled to compensation upon one or more of the said heads, and upon such heads or head he should not be able to prove any substantial damage, he would be entitled to nominal damages.

Judgment to be entered for the Crown or defts. as the case may be.

*T. Jones* (with him *J. Henderson*) for the prosecutor.—The injuries caused to the prosecutor's rights by the operations of the local board were the results of acts performed by them in the exercise of their statutory powers, and are the proper subject of compensation. The right and obligation of local boards in reference to third parties are settled by the 11 & 12 Vict. c. 63, and 21 & 22 Vict. c. 98. By the 43rd, 44th and 45th sections of the earlier statute vast powers are given them to make sewers and deal with the property of others for that purpose. But by the 144th section a compensation is awarded to those who may have suffered damage from the employment of those powers. By the 145th section, however, they are prohibited from injuring and

interfering with certain public works therein specified, and also with watercourses and streams in which the owners of mills, &c., are interested, without a written consent. Now, if this section was still in force, it might be conceded that the remedy by *mandamus* for compensation could not be sustained. But it has been repealed by the 68th section of the 21 & 22 Vict. c. 98, and various modifications have been substituted. By that section the absolute prohibition is confined to public works alone; and by the 73rd section the local board are forbidden to "injuriously affect any river, stream, &c., in cases where any company or individuals, would, but for the Act, have been entitled by law to prevent or be relieved from, such injurious effects." The most natural meaning of this language would seem to be, that the board may be permitted to interfere with the rights of persons situated like the prosecutor except in cases where the acts done are such that a court of equity would intervene and stop them by injunction. The question therefore arises, in what cases would the court grant such an injunction? The rule is clearly stated in *Drewry on Injunctions*, p. 249, and in the judgment of Lord Brougham in *The Earl of Ripon v. Hobart*, 3 Myl. & K. 179, where he says: "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief without waiting for the result of a trial, and will according to the circumstances direct an issue or allow an action, and, if need be, expedite the proceedings, the injunction meantime being continued. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which according to circumstances may become so, the court will refuse to interfere until the matter has been tried at law." The acts performed here do not come within that rule; they must then be held to fall within the earlier sections of the 11 & 12 Vict. c. 63, and may consequently be made the subject of compensation.

*W. A. Rew* (with whom was *Davison*) for the local board.—The prosecutor has shown no ground here for compensation. It is questionable whether any injuries have resulted from the acts complained of; but, at any rate, if they have, they constitute an "injurious affecting" within the 73rd section, and are prohibited. They are, therefore, the subject of action. The argument that the words "prevent, or be relieved from," must be confined to cases where an injunction would be granted, is fallacious. It would be sufficient if the parties injured would be entitled to apply for injunction. It is an injurious affecting if there has been damage, however small. He referred to

*The New River Company v. Johnson*, 2 El. & El. 435.

*T. Jones* replied.

*BLACKBURN, J.*—I am of opinion that our judgment should be for the defts. on the questions asked by the arbitrator. The Local Board of Darlington have constructed a sewer under the provisions of the Public Health Act 1848, and in doing so have more or less affected the waters of a stream that flowed to the prosecutor's mill. The mill was not an ancient one, but he was a riparian proprietor, and had a right that the water should come down to his mill. He has been more or less injured by the operations of the board, and the only question is, whether they are injuries for which he would be entitled to compensation. If they are, then the *mandamus* to the defts. is right. But if they are not, if they are such for which an action at law may still be brought, and it is not necessary to inquire what the action should be, then the defts. are entitled to succeed. The general principle of law is well established, that when anything has been done actionable at common law, but authorised

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by Act of Parliament, then, though there is *damnum* to the party affected, yet there is no longer *injuria*; and no action will lie. To remedy this injustice the Legislature, when it has given powers to interfere with the rights of third persons, has also awarded compensation for the injuries inflicted by the exercise of those powers. But when the wrong done is not authorised, an action may still be maintained. Now, by the enactments under consideration, several matters actionable at law are sanctioned, and the action for them is taken away; while there are others which still remain unauthorised. The 21 & 22 Vict. c. 98, s. 68, repeals the 144th section of the 11 & 12 Vict. and substitutes matter relating entirely to works of a public nature. It is then followed by the 73rd section, which provides that nothing in the Act shall be construed to authorise any local board to injuriously affect any river or stream, &c., or the supply, quality, or fall of water contained in any river, stream, &c., in cases where any company or individuals would, if the Act had not passed, have been entitled by law to prevent or be relieved against the injuriously affecting such river, stream, supply, quality, or fall of water, unless they shall have first obtained their written consent. Now the obvious meaning of this is, that they shall not have authority to injuriously affect without the consent of the parties, if such parties would have been entitled to relief. The consent is a condition precedent, and, unless obtained, the board would be clothed with no authority under the Act; and an action would therefore lie if an injury has been sustained. Is the prosecutor in this situation? I think he is. He is the owner of a mill, and has a right to the flow of water to it as of old; and if any unauthorised person interferes with, diverts, or takes it away, he is entitled to maintain an action at common law, and also to seek for an injunction from the performance of acts which are an infringement of his legal rights. Equity, indeed, might not interfere in every case where there has been an injury to a legal right, but still the matter is not to be stopped when it may be compensated for in damages. A court of equity may exercise its discretion in interfering; but still the question would be whether or not the act done was authorised by the Legislature, and whether an action would lie even if a court of equity would not interfere. I think that this view is confirmed by the 74th section, which allows that any difference of opinion between the parties as to whether the supply of water has been injuriously affected shall be referred to arbitrators, who are to proceed and decide in the manner pointed out in the 70th section, and by that section it is provided that if the arbitrator shall think that no injury will be caused, the board may proceed with the works; if they think that an injury will be caused which can be compensated for by money, then they may award such compensation; but if they think that the injury could not be so compensated, then the board shall be prohibited from proceeding to do any matter or thing in respect of which such opinion is given. I think therefore that, if they injuriously affect any watercourse, that would be illegal, and the act would be a ground of action, but not for compensation. The acts complained of by the prosecutor in the present case are ranged under four heads. Now it seems to me doubtful whether all or any of these acts constitute a ground of complaint at all, but assuming that they do, then they must be considered as acts which injuriously affect the prosecutor's rights; they are therefore not the subject of compensation, but should form the basis of an action for damages.

SHERR, J.—I am of the same opinion. By the 45th section of the Public Health Act of 1848, local

boards are authorised to construct sewers under certain conditions mentioned in the 145th section. They are permitted to do so provided they do not use, injure, or interfere with certain works therein excepted. It appears from the enactments of the subsequent Act that the restrictions were considered too large, and that it was deemed desirable to confine the prohibition to public works under the management of commissioners acting by virtue of an Act of Parliament. Accordingly, by the 68th section of the 21 & 22 Vict. c. 98, the 145th section of the former Act is repealed, and various provisions substituted as to interference with public works and other works under the management of persons appointed by an Act of the Legislature. Then this is followed by the 73rd section. This section does not apply to all the matters contained in the 145th section, but to only a portion of them. It provides that the boards shall not be authorised to injuriously affect any reservoir, river, stream, &c., or the supply, quality, or fall of water contained therein, in cases where a company or individuals would be entitled by law to prevent or to be relieved against such injurious affecting, without previously obtaining their consent. Now, I understand these words to mean, that they shall not only not use or interfere with, but shall not "injuriously affect," which expression is considerably larger, in every case where the party concerned would be entitled by law, that is, by going to law, to prevent them from interfering with their property in any way which would affect it, as in the present instance, by diverting the supply of water. Therefore, if the person aggrieved is entitled to prevent or to be relieved by a court of equity, the board would not be authorised to do the act; and the injury would be a ground for action and not for compensation. I think that the acts done here were an injuriously affecting, and that therefore the *mandamus* was wrong.

BLACKBURN, J. stated that Mellor, J., who had been obliged to leave after the termination of Mr. Jones's reply, had requested him to say that he concurred with the rest of the court.

*Judgment for the debts.*

Attorney for the debts., H. Dunn, Darlington.

REG. on the prosecution of THOMAS STALEY AND ANOTHER (apps.) v. THE OVERSEERS OF THE POOR OF THE TOWNSHIP OF CASTLETON, IN THE PARISH OF ROCHDALE, LANCASHIRE.

Poor-rate—6 & 7 Will. 4, c. 96, s. 1—"Net annual value"—"Reasonably expected to let from year to year"—Meaning of—Cotton-mill.

The 6 & 7 Will. 4, c. 96, s. 1, enacts that "no poor-rate shall be allowed which shall not be made upon an estimate of the net annual value of the hereditaments, that is to say, of the rent at which the same might reasonably be expected to let from year to year," &c.:

Held, that the rent referred to in that section must be considered to be the rent which a tenant would be expected to give from year to year for premises in their existing condition, and, according to their actual capacity to be used beneficially, and not the rent which a person would pay if the property were let for a reasonable term of years, and with a prospect of their future increased value during the term.

Before the commencement of the American civil war, a cotton-mill furnished with the necessary machinery, situate at C. in L., had yielded large returns and been assessed at an annual value of 260l. Sub-

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sequent to the war the business declined to such a degree that the owners determined to cease to work the mill. They accordingly dismissed all their workmen, with the exception of the fireman. This latter person they have since only employed to attend to the machinery and keep it in fit order to be used on the return of more favourable times. It was admitted that, should the war cease, the mill would recover its former value. It was further admitted that the rateable value of the mill to be used as a warehouse for storing machinery was 141l. 10s.:

*Held*, that the mill was rateable; but the amount at which it was to be assessed was the latter sum, viz., its value as a warehouse for machinery.

This was a case stated for the opinion of the court with the consent of the parties. A rate was duly made on the 30th April 1863, for the relief of the poor of the township of Castleton, in Rochdale, and duly allowed.

In the said rate the apps were assessed as follows:

Name of occupier.	Description of property.	Name and situation.
Staley & Wilkinson	Mill.	Dichin Green.
Gross estimated value, 210l. Rate at 2s. 2½.		

The mill mentioned in the assessment was at the time of making the rate a cotton-mill and premises connected therewith, situated at Dichin Green. At the time of making the rate the apps. were the owners, and so far as hereinafter stated the occupiers of the mill. The mill was furnished with a steam-engine about forty nominal horse power with a suitable steam-boiler for generating steam to work the engine and warm the mill. The mill was filled to its full capacity with all the machinery necessary for the purposes of a cotton-mill. Shafting connected with the steam-engine ran throughout the mill for the purpose of turning the machinery; steam pipes from the boiler were carried through all the rooms of the mill for the purpose of warming them.

Before and up to the time of the mill being stopped the machinery in the mill was used for spinning cotton. Such machinery was in some instances fixed to the floors in order to its steadier working, while in other instances it was merely placed on the floors of the mill. According to the custom of the trade this spinning machinery was in the nature of tenant's machinery or fixtures.

Shortly after the commencement of the present civil war in America, the business of the apps. fell off very much, and the apps. were compelled to reduce the hours of labour, and at length in Jan. 1862, in consequence of the continuing badness of trade, the apps. determined to work up all the cotton they had, and to close the mill and discontinue business therein until a great improvement in the trade should take place.

Accordingly in Jan. 1862 they finished the working of the cotton, and then discharged all their workpeople, except the fireman whom, and whom alone, they have since employed on the premises at a considerable reduction in his wages, for the purpose only of keeping the steam in the mill, and turning the engine and machinery for the purposes and in the manner hereinafter mentioned; and since that time they have not had any goods whatever in the mill, nor have they ever worked the same except to keep the mill and machinery in repair and ready for use upon the revival of the trade. Ever since Jan. 1862 the rooms of the mill have been kept constantly warmed by means of steam passed from the boiler through the steam pipes. Steam has been constantly kept up in the boiler, which has been from time to time cleaned for the purpose of keeping the same in proper condition. The steam-engine has been worked at least one

hour every day except Sundays; the shafting throughout the mill has been turned daily by the steam engine; every part of the machinery has remained in its proper place and has been cleaned from time to time as required. Those parts of the machinery known as the carding engines, twenty-four in number, have occasionally been turned by means of the steam-engine; and in short, since Jan. 1862 all parts of the mill and machinery have been constantly kept in perfectly fit condition to be used on the revival of the trade. For the purpose of so keeping the same in order, and for this purpose only, the apps. have been compelled to continue the services of their fireman. But all this has been done to keep the machinery in order, as the same would otherwise have been much depreciated and would in time have become worthless as working machinery. The gross and rateable value, and the amount of rate of the mill, &c., as appears in the said assessment, is made up of three items and in manner following:

	Estimated gross value.	Rateable value.	Rate.
Steam at 2l. per horse power.....	£ 80	64l. 0	£ 16
Building of mill.....	176	141 10	14 3
Office.....	5	4 10	0 9
	£261	£210 0	£21 0

The assessment, in fact, is made upon the engines and mill as if the same were in full work and operation as a cotton-mill.

The office is a detached building standing separate from the mill and having a distinct entrance, and the apps. admit their liability to be rated for it. It is admitted that, prior and up to the commencement of the present war, the average rateable value of the mill, as mentioned in the said assessment, was 210l., composed of the three distinct items mentioned, and that such rateable value will be at least as great when the trade revives.

The questions for the opinion of the court are:

1. Whether, under the circumstances stated in the case, the apps. were rateable at all to the said rate for anything but the office, and if so, for what?
2. If the apps. were rateable for the said mill and engine, or either of them, were they rateable as if the same were in full work, or were they rateable on the said mill as if it were a mere warehouse for storing machinery, or were they rateable on the mill and engine to the extent of the rent which might have been reasonably obtained if the same had been let to a tenant from year to year?

The rateable value of the building of the mill used as a warehouse for storing machinery is, for the purpose of this case, agreed to be 141l. 10s.

*Joseph Kay* appeared to argue on behalf of the resps., but the Court called on

*Holl* for the apps.—The mill cannot be made the subject of a rate. Real property can only be rated at the net annual value incident to its occupation, and by the 6 & 7 Will. 4, c. 96, s. 1, the net annual value of hereditaments is declared to be “the rent at which the same may reasonably be expected to let from year to year, free of usual tenant's rates and tithe commutation charge, if any, and deducting therefrom the probable average annual costs of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent.” Here the facts found show that the mill has become useless as a mill, and that it is maintained at a loss to the owners. It therefore not only does not at present produce any profit to the occupiers, but would not, if offered for lease, be likely to obtain a tenant. There is consequently no value that can be assessed. Nor is the question affected by the fact that the mill is provided with machinery:

*Rez v. The Southampton Docks Company*, 14 Q. B. 587;



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*Reg. v. The Birmingham Gas Light Company*, 6 Ad. & El. 634; and

*Reg. v. Haslam*, 17 Q. B. 220.

establish undoubtedly the principle that buildings to which machinery is attached are liable to be rated in respect of such machinery; but those decisions were based on the ground that the premises had acquired an increased value from the possession of the machinery, and that such increased value was the true criterion by which the assessment was to be regulated. But in the present case the machinery gives no additional value to the mill; it can only be regarded as furniture placed there for safe keeping, and it has never been decided that furniture was liable to be rated. It will indeed be contended that there is a probability that the mill will hereafter become valuable, and that such prospective value cannot be excluded from consideration. But the judgment of Lord Ellenborough in *Rex v. Bedworth*, 8 East, 389, shows that such a proposition cannot be sustained, and that it is only the annual value during the period for which the rate is made that can be computed.

*Joseph Kay* for the resp.s.—The amount at which the overseers have assessed the mill is correct. The Parochial Assessment Act, in addition to the enactment referred to, has a proviso to the effect that “nothing therein contained shall be construed to alter or affect the principles or different liabilities (if any) according to which different kinds of hereditaments are now by law rateable.” According to these principles, the test should be, not what the property may let for for one year, but what would be its value for a reasonable term of years. This is shown by the case of *Rex v. Merfield*, 10 East, 219, where it was held that saleable underwoods, although only cut down once in twenty-one years, must be rated not at the time merely when they were cut down and produced actual value, but every year, according to the annual average value. Here the mill may soon again become valuable. A tenant, therefore, although he would probably not give anything for the mill for the current year, would pay a fair rent for a reasonable term of years; and it is at this rent that the assessment should be made.

BLACKBURN, J.—The question involved in this case, although undoubtedly one of general importance to a large number of persons, nevertheless does not present any great difficulty. It appears that the mill, the subject of the rate, was formerly, while trade was in a flourishing condition, of considerable annual value to be worked as a cotton-mill. It was fixed therefore at a high annual rent, and the occupier rated accordingly. Times have since changed, and trade has declined to such an extent that it has become a loss to carry it on; it is no longer worked as a cotton-mill, and money is actually being expended to maintain the machinery in a fit state for the resumption of operations on the return of more favourable times. On what principle then is the mill to be rated? The Parochial Assessment Act lays down the rule that property shall be rated “at the rent at which the same might reasonably be expected to let from year to year after deducting the probable average annual costs of repairs and other expenses,” with a proviso upon which reliance has been placed by Mr. Kay. Now, with reference to this proviso, I may remark in passing, in the words of Lord Denman, in *Rex v. Capel*, 12 Ad. & Ell. 411, that “it is very inartificial and loose to a degree which renders the discovery of a definite meaning to all its parts extremely difficult.” But at any rate I do not consider that it can govern the present case, as there is nothing here which affects relative liabilities. Applying, then, the principle that the value is to be reckoned

at the rate at which the premises might reasonably be expected to let from year to year, how is this mill to be rated? Now it is manifest that the mill, under existing circumstances, could only be worked at a loss, and that therefore a tenant would give nothing for it to work it as a mill. In this sense, therefore, the mill would not be rateable at all, as there would be nothing to rate. Mr. Kay, however, says that, as it is probable that cotton-mills will soon recover their old value, and yield their former high returns, a tenant would still give a large rent, if he could obtain the mill for a term of years, and thus render it profitable; and that the rent he would thus give should form the amount upon which the rate should be levied. But this would be to alter the language of the Act, and to substitute the words “let for a reasonable term of years” for the existing expression “let from year to year.” I do not think, therefore, that this construction can be sustained. If it were admitted, then the effect would be that a person who took a lease of minerals for a term of years would be liable to be rated while he was only driving his shafts. The Legislature never contemplated such a result, but only designed that the rate should be levied upon the rent which would be given for the property *rebus sic stantibus*. In fixing the price at which property is to be sold, future possible profits may indeed fairly be considered; but they cannot form an element in the estimation of the value from year to year. It is not the subsequent, but the present, annual value which is contemplated by the Act. And this is the interpretation which the Court of Ex. have given to the expression in the recent case of *The Attorney-General v. The Earl of Sefton*, 2 Hurl. & C. 362: “Future increased value might form a very proper element in estimating the price at which the property might be sold, but cannot be regarded in assessing the amount of rating.” But while I cannot adopt the principle suggested by Mr. Kay, I equally differ from Mr. Holl in the opinion that the property is not rateable at all. The probable rent is to be computed according to the subject-matter, and the real value of the premises to be assessed. If things are so affixed as to become part of the building, then we must regard them as if they were permanently built into it. But if they are not so affixed, still their presence would affect the yearly value, and a tenant who hired the premises would certainly take their capacity for use into account. Their present state for beneficial use, and all their capacities, must be embraced in the calculation. It must also be considered how they would be let to a tenant who possessed the means of working them profitably. There are many persons to whom a certain kind of premises would be worthless, while there are others to whom they would be exceedingly valuable. Take the case, for instance, of a railway. To an ordinary individual it would yield nothing; but by a company with their carriages, engines, stock and other appliances, it is worked beneficially. So here we have a mill with machinery which would be valuable to one with a capacity to use it. It is obvious, therefore, that it is property for which rent would be given by a millowner. But, if it be regarded further as a mere warehouse, in which machinery might be fitly and safely stored, it is still property for which a rental might and would be paid. And as the sum which would be paid for such a purpose has been agreed upon, I think that is the amount at which the mill should be rated.

SHER, J. concurred.

*Judgment for the resp.s.; but the rateable value to be reduced to 141l. 10s.*



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HAYWARD v. OVERSEERS, &amp;C. OF BRINKWORTH, WILTS—COE v. WISE.

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THOMAS HAYWARD (app.) v. THE OVERSEERS OF THE POOR OF THE PARISH OF BRINKWORTH, WILTS (resps.)

Poor-rate—6 & 7 Will. 4, c. 96, s. 1; and 25 & 26 Vict. c. 103, s. 15.—Net annual value of hereditament—Actual rent paid.

*In assessing premises to the relief of the poor under the 6 & 7 Will. 4, c. 96, s. 1; and 25 & 26 Vict. c. 103, s. 15, the overseers should proceed on the estimate, not of the rent actually paid for the premises by the occupier, but of the rent at which they might reasonably be expected to let from year to year.*

*Three farms, situate in the parish of B., were let at a certain sum annually. They might, however, reasonably have been expected to let, and might have let, at a larger sum. The overseers assessed their occupiers to the relief of the poor at the rent actually paid by them:*

*Held, that they were wrong; that they should have adopted the larger sum, viz., the rent at which the farms might have been reasonably expected to let, as the estimate of the net annual value; and that the rate must be amended.*

This was a case stated for the opinion of the court under the provisions of stat. 12 & 13 Vict. c. 35, s. 11.

It was an appeal against a poor-rate. The rate so appealed against was made by the resps., in accordance with the valuation lists made and signed by the resps., and approved by the assessment committee of the union of Malmesbury, Wilts, within which the parish of Brinkworth is situated, pursuant to the stat. 25 & 26 Vict. c. 103. The rate was made in the form shown in the schedule annexed to the last-mentioned statute, and the several sums inserted in the column in the said rate headed "Gross estimated rental," as representing the gross estimated rental of the several properties rated, represented the rentals at which the several properties were actually let to the occupiers, and such rentals had been ascertained and paid by reference to the returns of the rentals of the said several properties made under schedule A of the Income-Tax Assessment Act, and were identical in amount with the rentals of the said several properties contained in the said column, and the app. and G. Adey, J. Spencer and R. Matthews were respectively assessed in the said rate in respect of farms hereinafter mentioned, at a rateable value estimated on the basis of the actual rentals paid by them respectively to their respective landlords, and ascertained in manner aforesaid. The farm occupied by the app., and in respect of which the rate appealed against was made, contains 146a. 1r. 7p., and by the rate appealed against the app. was rated in respect of his said farm, on a gross estimated rental of 300l. per annum, which was the rent paid by him to his landlord, and was a rack rent.

The farm of the said John Adey, and in respect of which he was rated in the rate appealed against, immediately adjoins that of the app., and contains 244a. 3r. 7p., and is of the same quality and of at least the same yearly value per acre as that of the app. In the rate appealed against the said John Adey is rated in respect of his said farm at a gross estimated rental of 400l. a-year, which is the rent paid by him to his landlord. The said farm of the said John Adey at the time of the making of the valuation list and the said rate would readily have let and reasonably might be expected to let from year to year at a rent of more than 400l. a-year; and on a comparison of the annual values of the said respective farms of the said John Adey and the app., estimated with reference to the rents at which the same might reasonably be expected to let

from year to year, the said John Adey is in the said rate rated at 9s. less than the app. In like manner the said J. Spencer and R. Matthews are rated in the said rate in respect of their farms at a rateable value estimated on the basis of the rentals paid by them to their landlords, although at the time of the making of the valuation lists and the rate the farms would readily have and might have been expected to let from year to year at more than the said rentals respectively; and on a comparison of the annual values of the farms of J. Spencer and R. Matthews and the apps. respectively, estimated with reference to the rents at which the same might reasonably have been expected to let from year to year, J. Spencer and R. Matthews are in the said rate rated at 15s. and 11s. per acre less than the app.

Upon these facts it was contended by the app. before the justices that the rate was unfair and unequal, inasmuch as it was based upon the rents actually paid by the said J. Adey, J. Spencer, and R. Matthews; and that such rents did not represent the annual value of their respective farms as defined by the 1st section of the 6 & 7 Will. 4, c. 96, and the 15th section of the 25 & 26 Vict. c. 103, and that the said rate ought to be amended by increasing the amounts at which the said J. Adey, J. Spencer and R. Matthews were rated in the rate, in proportion to each of the annual values of their respective farms; but the justices overruled these objections and decided that the said J. Adey, J. Spencer and R. Matthews were properly rated on the basis of the rentals actually paid by them to their respective landlords, and on this ground made the order confirming the said rate.

The question for the opinion of the Court is,

Whether, under the circumstances, the justices were right in making the said order, or whether the said order ought to be quashed and the rate amended as contended by the app.

Kingdon (with whom was Greville Howard) appeared for the apps.

Herbert Saunders appeared to argue for the resps.; but in answer to a question from the Court, admitted that he could not hope successfully to sustain the principle on which the rate had been calculated.

BLACKBURN, J.—I think that the case is perfectly clear, and that the rate must be amended. The Legislature has stated that the estimate according to which the rate shall be calculated shall be, not the actual rental paid, but the rent at which the premises might have been reasonably expected to let from year to year. The rent actually paid is no doubt *prima facie* the estimate, but it is not conclusive. Here the premises might have been let at a larger sum than that demanded by the landlords; and the rate, therefore, should have been calculated on that amount.

SHEE, J. concurred.

*Judgment for the app. that the rate be amended.*

Apps.' attorneys, Price, Bolton and Filder.  
Resps.' attorneys, Bower and Son.

Tuesday, May 24, 1864.

COE v. WISE.

Public commissioners—Works by—Damages from—Liability.

*Persons entrusted with the performance of a public duty, discharging it gratuitously, and themselves taking no personal part in its performance, and having no funds at their disposal out of which compensation for injury arising from the negligent acts of persons*

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employed by them can be made, are exempt from the liability in respect of such negligence.

The defendant was clerk to a body of commissioners constituted under certain Acts of Parliament for improving the drainage and navigation of the middle level of the Fens. Such commissioners did not, and could not, personally execute and maintain the works, and it was necessary that they should appoint others to do so. The works gave way, and the property of the plt. was thereby injured, and upon the trial the jury found that the plt. had sustained damage by the absence of due care and skill on the part of the commissioners in respect of the maintaining of a certain sluice erected by such commissioners. The funds which the commissioners were empowered to raise are by the statute to be applied to "executing and completing the several works of drainage and the several other works, matters and things required by the Acts to be made, done or executed by the drainage commissioners and for the general purposes of carrying the Acts into execution;" and there were no powers for the appropriation of funds for the payment of damages:

*Held (Blackburn, J. dissentiente), that the action could not be supported.*

In this case an action had been brought by the plt. against the deft., who was clerk to the commissioners for carrying into execution the 7 & 8 Vict. c. 106 (local) being "An Act for improving the Drainage and Navigation of the Middle Level of the Fens," for injury done to his land by the inundation thereof by the tidal waters of the sea, occasioned by the failure of certain works made and erected by the said commissioners under the above-mentioned statute.

At the trial before Erle, C. J. the jury, in answer to certain questions put to them by the learned judge, returned certain answers, whereupon he directed a verdict to be entered for the plt., reserving leave to the deft. to move to enter it for the deft.

Sir F. Kelly, Q.C. having accordingly moved and obtained a rule nisi,

Keane, Q.C., D. Brown and Phear showed cause.

Sir F. Kelly, Q.C., O'Malley, Q.C., Newton and Metcalfe in support.

(The judgments of the learned Judges are so copious and comprehensive that it is unnecessary to give the arguments of counsel.)

*Cur. ado. vult.*

MELLOR, J.—The deft. in this case was the clerk to the commissioners for carrying into execution the Act 7 & 8 Vict. c. 106, being "An Act for improving the Drainage and Navigation of the Middle Level of the Fens." The plt. was the proprietor of lands which were submerged and damaged by an inundation of the tidal waters of the sea, occasioned by the failure of certain works made and erected by the commissioners under the provisions of the Act above mentioned. The cause was tried before Lord Chief Justice Erle, at Norwich. The jury, in answer to questions put to them by the learned judge, found that the plt. had sustained damage, in the first place, by the absence of due care and skill on the part of the commissioners in respect of the maintaining of a certain sluice erected by such commissioners; in the second place, by the absence of such due care and skill in not providing remedies against mischief after the sluice was destroyed; and in the third place, by reason that the puddle wall was not made. And the question is whether or not, upon these findings of the jury in connection with the evidence given in the case and the summing up of the judge, the commis-

sioners are liable for the negligence and improper conduct of the contractors' agents and servants employed by them to make and maintain the works which they were authorised and required to construct "and maintain" under the provisions of the above-mentioned Act, there being no finding by the jury that the commissioners had negligently or improperly employed unskilful or incompetent contractors or agents in the making or maintaining of such works, or had any notice or knowledge that the bank referred to in the 137th section of the Act had been constructed without a puddle claywall, in or near the centre thereof, as required by that section. Upon the best consideration which I have been able to give to this case I am of opinion that the commissioners being trustees for public purposes, and acting without reward, and deriving no tolls or profits from the works so made and executed, not possessing any means of raising funds except for the specific objects of the Act, are not liable in this action. I do not deny that trustees or commissioners acting for public purposes without reward and without income may render themselves liable in their representative character (*Sutton v. Clarke*, 6 Taunt. 84; *Boulton v. Crowther*, 2 B. & C. 709 to 711; *Hall v. Smith*, 2 Bing. 158) by acts or damages negligently committed or made under their direct order, or with their direct sanction, in cases in which they have the power of reimbursing themselves out of rates or otherwise; but I doubt whether all the cases in which it has been decided that trustees or commissioners may so become liable in the absence of any such power of reimbursement can be reconciled with the authority by which I consider myself bound. Each case must depend upon the particular provisions of the statute under which commissioners or trustees are empowered to act; but it never could, as it appears to me, have been contemplated by the Legislature that a body of commissioners gratuitously acting in the execution of a public trust could be liable in an action for the negligence or want of skill of contractors and agents whom, in the very nature of things, they were obliged to employ, and whom they employed honestly believing them to be competent and skilful, without at the same time making provision for enabling them to raise funds to answer claims arising from the employment of such agents or servants. The duty imposed upon the commissioners in this case was not only to make, but also to maintain the works; and if it was an absolute duty incumbent upon them under all circumstances, they have failed in the performance of it, but such failure was not owing to any negligence or unskilfulness on their part, but was simply due to the negligence and unskilfulness of the contractors and agents whom they employed, believing them to be competent and skilful. The words of the section which impose the duty must have a reasonable interpretation in connection with the scope and subject of the Act and the constitution of the body of commissioners who were authorised to carry its provisions into effect. It would not have been sufficient that the commissioners could make or maintain the works in question otherwise than by the employment of contractors and agents, and the real obligation resting upon them, as it appears to me, was *bonâ fide* to employ such contractors and agents as they believed to be skilful and competent. Had it been intended to impose upon them the duty of maintaining the works in any other sense, I should have expected to have found in the Act some provision for levying rates to meet the possible consequences of failure. I can find no such provision, and I am drawn to the conclusion that the duty imposed upon the commissioners by the Legislature was not an absolute duty to maintain the works under all contingencies, but merely to take reasonable measures

and to exercise due care and skill in appointing proper agents and contractors for that purpose. There are cases, such as the *Hitchin Bridge Company v. The Local Board of Southampton*, 8 E. & B. 800, in which the commissioners have been held liable in their representative character for actual negligence admitted on the record, without it also appearing that they had funds out of which they could reimburse themselves in respect of damages and costs. But, in the case of *Ruck v. Williams*, 27 L. J. 329, Ex., which followed, and professed to be in a great measure governed by it, it appears to have been assumed by some of the judges that in each case the commissioners had the means of reimbursing themselves out of rates; and it is to be observed, that in the *Hitchin Bridge Company v. The Local Board of Southampton*, Lord Campbell and Wightman, J. rely upon sect. 139 of the Act, which empowered the board to render amends, as implying that an action might be maintained against the board for a wrong. The cases upon this subject are not all easily reconciled, but those which establish the liability of trustees or commissioners acting gratuitously in the execution of a public trust may be classed as follows:—First, cases of individual liability, where trustees or commissioners had exceeded or abused their power; secondly, cases in which the duty or obligation imposed upon such trustees or commissioners has been violated by reason of directions or orders given by them for the doing of the very acts from which damage to others has resulted; thirdly, cases of commissioners, trustees, or corporations, authorised to construct or maintain works for trading or the like profitable purposes, such as dock trustees, corporations acting as proprietors of gas or waterworks and the like, in which cases, although they may act without reward, yet the subject of their incorporation or constitution is to make and maintain works yielding profitable returns either by tolls and dues, or payment for services rendered, and in their very nature were substitutions on a large scale for individual enterprise. There is really no sound distinction between such bodies and ordinary trading corporations, such as railway and canal companies, banking companies and market companies. It is true that, in cases like *Gibbs v. The Liverpool Docks*, 27 L. J. 321, Ex., and *Penhallow v. The Mersey Docks*, 3 H. & N. 184, and 30 L. J. 329, Ex. Ch., the trustees, although receiving tolls and dues for the use of their works, were themselves unsalaried, and the surplus of the profits earned from time to time was paid over to public objects; still they were constituted and incorporated for the very purpose of earning profits by the use which was to be made of their works. To the extent of their earnings from the works so made and maintained, it would have been justly impolitic to exempt them from a liability to which all individual owners of similar works are subject. They kept open their dock to the trading public for reward when it was in a dangerous condition, and inasmuch as they had the means of knowledge that it was so, and took no measures to obviate the danger, the maxim *respondent superior* was properly applicable to such a case. *Penhallow v. The Mersey Docks* does not govern the present case, which falls within the reasoning of *Hall v. Smith*, 2 Bing. 156; *Duncan v. Findlater*, 6 Cl. & F. 894; and *Holliday v. St. Leonard's, Shoreditch*, 4 L. T. Rep. N. S. 406, and other similar authorities. The commissioners are authorised, for public works, to erect and maintain great works in drainage and navigation. They derive no other profits from the execution and maintenance of the works than a share in the beneficial results anticipated therefrom, and funds for their construction and maintenance are raised by rates imposed upon the districts supposed to be benefited thereby; but no business is authorised to

be carried on for profit, nor are any tolls authorised to be taken for any use of the works. The object is public, although the direct benefit is local. It is not in any respect analogous to lading or carrying or affording dock accommodation for profit. The commissioners have no property except such as is strictly incident to the machinery for making and maintaining the works and raising the necessary rates, and they have no power to levy a rate for any other purpose. In trading and carrying corporations, it is reasonable that the funds to be earned should be applicable to all consequences of their business; but here the only funds authorised to be raised are strictly limited to the construction and maintenance of the works. This appears to me to amount to a strong intention that it was never contemplated by the Legislature that the commissioners were to be liable under circumstances like the present. Most of the cases on this subject are reviewed by the Court of C. P. in *Holliday v. St. Leonard's, Shoreditch*, 4 L. T. Rep. N. S. 406, in which Byles, J., who tried the case of *Whitehouse v. Fellowes*, 4 L. T. Rep. N. S. 177, so much pressed in the argument before us, explains that in that case, "the defendants were personally cognisant of and parties to the works which caused the injury," and so distinguished it from the case under consideration. It is not necessary for me to examine the authorities in detail; but it will be found that all those which establish the liability of trustees, commissioners, or persons clothed with the gratuitous execution of a public trust are included in one or other of the classes above referred to. As was said by Lord Cottenham in *Duncan v. Findlater*, "cases may possibly be supposed in which the funds raised by a statute would be liable for acts done strictly in pursuance of the directions of the statute; but none in which such funds would be liable for acts done without the authority of the statute. It was, however, strenuously contended on the part of the plt. that although a judgment in his favour might be fruitless owing to the absence of any funds out of which it could be satisfied, or the means of raising any, that he was nevertheless entitled to our judgment, and he argued that various provisions of the statute 7 & 8 Vict. c. 106, proved that it was contemplated that actions might be brought against the commissioners for acts, &c. done by them and expressly excepted them from personal liability, except in cases of wilful neglect or default, and in all other actions or suits directed that execution on any judgment or decree should be executed against the goods and chattels of the commissioners belonging to them by virtue of their office. There may be cases in which, although there are no existing funds or means of raising any to satisfy judgments, it is no answer to say an action is brought on a debt or contract expressly authorised to be entered into, or for an act within the scope of the authority of the commissioners to do, and to which they might lawfully apply their funds if they had any (*Pallister v. The Mayor of Gravesend*, 9 C. B. 774, and *Rendell v. King*, 17 C. B. 479); but I do not consider them as analogous with the present. With a view to see how the argument urged on the part of the plt. applies to the present case, it may be well to consider the effect of the provisions referred to which provide for the indemnity of the commissioners out of the moneys to be raised by virtue of the said Acts. By sect. 19 it is enacted that nothing in any deed or contract by the said Act authorised to be made by the said commissioners for the purposes of the said Act should charge or affect the persons of the commissioners or their own lands, &c., with or for the performance of anything contained in any such instrument, but that all damages, &c. in any action in consequence of such instrument or which such commissioners should otherwise be put to by

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virtue of the said Act should be discharged out of the moneys to arise by virtue of the said Act, &c., unless such suit or damage, &c. should have arisen in consequence of the wilful neglect or default on the part of the commissioners incurring the same. Then by sect. 20 it is enacted, that in all actions, &c. in respect of any matter or thing relating to the execution of the act by or against the said commissioners, it should be sufficient to state the names of two of the said commissioners or their clerk as plt. or deft.; and then by sect. 21 it provides that executions are to be executed on the goods and chattels of the commissioners by virtue of their office; and sect. 22 indemnifies the commissioners or clerk in whose name suits may be brought or defended out of the moneys in the hands of the treasurer against all costs and suits, and enacts that no such commissioner or clerk shall be personally liable for payment thereof, unless the action should have arisen in consequence of his own wilful neglect or default. It appears to me that these clauses are strong to show the nature of the liability which the commissioners may be called upon to bear in acting in the execution of this Act. They must necessarily enter into deeds, and instruments, make contracts and employ agents. The statute, therefore, provides that all liability to arise in consequence of such instruments, or which any commissioner shall otherwise be put to, shall be discharged out of the moneys to arise by virtue of the said Acts, unless the same be the consequence of "wilful default or neglect." These are the only provisions which regulate the indemnity of the commissioners, and it cannot be supposed that the Legislature could have contemplated any other liability than that arising out of the execution of the deeds and instruments, and the employment of contractors and agents, for the execution of the work, and raising the necessary funds, or a liability arising out of the wilful neglect and default of the commissioners. The former liability was imposed on the funds to be raised under the Act. The latter was to be borne by the individual commissioners. There is no third course apparently contemplated by the Act, and I think that its provisions tend to show that the remedy of the plt. must be against the commissioners personally, inasmuch as they have been guilty of no wilful default or neglect, nor, under the circumstances, can it be against them, in their corporate capacity, because they have no funds which they can apply nor the means of raising any to answer for damages arising to the plt., or any of the grounds of nonfeasance or neglect imputed to the deft. In my opinion, therefore, the rule should be made absolute.

BLACKBURN, J.—In this case I have come to a conclusion different from that of my Lord and my brother Mellor, and I think that the rule to set aside the verdict for the plt. ought to be discharged. The action is against the clerk of the drainage commissioners for carrying into execution the statute 7 & 8 Vict. c. 105, for improving the drainage and navigation of the middle level of the Fens, as representing the drainage commissioners. The declaration, after referring to the 137th and 138th sections of the Act, which authorise the drainage commissioners to make a certain cut, and by which, amongst other things, it is enacted that the drainage commissioners shall "make and maintain a good and substantial sluice of brick and stone, at or near the opening of the cut, to exclude the tidal waters," alleges that the cut and sluice were made, and then sets forth, by way of breach, that the drainage commissioners "so carelessly, negligently, unskillfully and wrongfully conducted themselves in and about, *inter alia*, making and maintaining the said sluice good and substantial," that in consequence the tidal

waters burst in and flooded the plt.'s land. The material plea was, not guilty. On the trial before the Lord Chief Justice of the C. P., it was proved that the sluice did give way, and the tidal waters broke in, flooding the plt.'s land and occasioning much damage. There was much evidence given as to the cause of this accident. The Chief Justice left several questions to the jury. Their finding, so far as bears on the present point, was, that the damage to the plt. was not caused by the absence of due care and skill on the part of the defts. in respect of making the sluice, but they also found that it was caused by the want of due care and skill on the part of the defts. in maintaining the sluice. It is on this latter finding that I think the plt. entitled to retain his verdict; and I therefore omit noticing any other part of the verdict. The drainage commissioners, from the nature of their body, could not do anything in the nature of maintaining the sluice, except through the instrumentality of their officers, and the surveyors, engineers and other agents acting for them; and it was argued on behalf of the plt., that, therefore, the finding of the jury must be understood as meaning that the defts. had negligently chosen incompetent persons to whom they had entrusted the superintendence and maintenance of the works; but, on looking at the evidence and summing up, I think that the finding cannot be so understood. I think it must be understood as a finding that the sluice might, by due skill and care, have been maintained, and that due skill and care were not applied to maintain it. It was negligence on the part of those whose duty it was to cause due skill and care to be applied for that purpose, and if, as the plt. contends, that duty is cast on the drainage commissioners, it was negligence in them. The question whether that duty is imposed on the drainage commissioners depends on the true construction of the 7 & 8 Vict. c. 106; and into that question I will inquire afterwards. On the other hand, the defts.' counsel contended that, even if the duty was cast on the drainage commissioners for public purposes, as such (it was said) they were not liable for any acts and defaults of those employed by them, and so, it was argued, they could not be liable for a failure to maintain the sluice, a failure which could not have arisen except from a default of their engineers and surveyors, and other persons in their employment who ought to have seen the defects in the sluice, and prompted the commissioners to take the proper steps to remedy them. I do not, however, agree that such is the law with regard to public commissioners. There are, no doubt, several cases which were cited during the argument, in which it has been said that public bodies are not responsible for the acts of those they employ; but all those cases were of the kind in which the liability of the employer depends upon the standing towards those who actually do wrong in the relation of master and servant. They are all cases in which the act authorised by the public body was in itself lawful, but those who were employed to do that act were, in the course of the employment, guilty of negligence, from which the plt. suffered. These decisions, or at least the greater part of them, might be supported on the ground that the relation of master and servant did not exist between the body sued and the person guilty of negligence, for the master is liable for his servants, because he selects them, and has control over them, and in many cases a public body has not this selection, and a control over the officers whom it is obliged to employ. But this explanation does not apply to *Holliday v. St. Leonard's, Shoreditch*, 4 L. T. Rep. N. S. 406, in which the Chief Justice of the Court of C. P. gives as the *ratio decidendi* that "persons entrusted with the performance of a public duty discharging it gratuitously are exempted from

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liability for the negligent acts of those employed by them," which seems to me to express in other words that there is an exception from the general rule that masters are responsible for the negligent acts of their servants when the master falls within the class somewhat indefinitely styled trustees for public purposes. I should therefore, if the drainage commissioners were sought to be charged for the collateral negligence of their servants, act upon that decision, leaving it to the plt., if so advised, to call on a court of error to examine the foundation of this doctrine, and to inquire how far it is founded on principle or liability established by authority. But the doctrine in question has, as it seems to me, no bearing on the present case, as the drainage commissioners are not sought to be charged for the collateral negligence of their servants, but for the nonperformance of a duty which was, it is alleged, imposed by Act of Parliament on the drainage commissioners themselves. In *Duncan v. Findlater*, 6 C. & F. 894, which was much relied on by the defts., the point raised by the bill of exceptions, on which alone the H. of L. decided, was, whether the jury were properly directed "that road trustees on a public road are liable for any injury which might happen to passengers in consequence of the negligence or improper conduct of labourers or surveyors, or other persons employed by the trustees or by the officers of the trustees, when engaged in any operation performed under the authority of the trustees." It would appear to have been at least doubtful whether the persons by whose negligence the injury was occasioned were not the servants of a contractor, and it certainly does not at all appear that they were the servants of the trustees; so that no doubt the exception was well founded. Cottenham, L.C., however, in giving judgment in the H. of L., intimates an opinion that a body by Act of Parliament created and endowed with funds for a particular purpose can never as such be liable to pay damages, inasmuch, as either the act was justified by the statute under which the body acted, or was a wrong for which the trustees who ordered it might be responsible as individuals, but for which the trustees as such could not be liable, on the grounds that such liability would have the effect of diverting the trust-funds from the statutable object. This, however, was not the decision of the H. of L. It was merely an opinion of the L.C., but though delivered in a Scotch case, not an English one, is entitled to great respect and weight, but which is not binding on us as a decision. And there have subsequently been several express and positive decisions in our own courts opposed to the opinion thus intimated by Lord Cottenham, which, as it seems to me, establish that such a body may in their corporate capacity be guilty of a wrong for which judgment will go against them. Amongst these are the *Hitchin Bridge Company v. The Local Board of Southampton*, 8 E. & B. 801; *Ruck v. Williams*, 8 H. & N.; *Whitehouse v. Fellowes*, 4 L. T. Rep. N. S. 177; and *Brownlow v. The Metropolitan Board of Works*, 6 L. T. Rep. N. S. 187, which last case has been recently affirmed in the Ex. Ch. In all these cases the plt. obtained judgment for damages against public companies or quasi-corporate bodies for acts done by them in excess of their powers. The respective bodies corporate did not do the acts personally in one sense, for a body corporate never can literally do anything itself, but the wrongful acts complained of were the personal acts of the corporations, in the sense that the corporations directed those acts to be done, and were not merely fixed with the unauthorised and unintended negligence of their servants. In the present case the charge against the defts. is not one of malfeasance, but one of neglect of a duty imposed on them. In this

respect it very closely resembles *Penhallow v. The Mersey Docks*, 3 H. & N. 184. There the defts. were a public body who kept open a dock. It had been held by the Ex. Ch., in the previous case of *Gibbs v. The Trustees of the Liverpool Docks*, 3 H. & N. 164, that the law cast upon them the same duty, that it would have cast upon any other body keeping open a dock or canal, namely, "to take reasonable care so long as they kept it open for the public use of all who might choose to navigate it, that they might navigate it without danger to their lives or property." The issue at the trial was, not guilty; whether the Mersey board had neglected this duty. The Chief Baron directed the jury that if the defts., by their servants, had the means of knowing the state of the dock, and they were negligently ignorant of it, the defts. were liable. This ruling was held right in the Court of Ex. Ch. The H. of L. may yet reverse that decision; but, whilst it stands, it seems to me to reduce the inquiry in the present case to that one question, whether the statute 7 & 8 Vict. c. 106, has imposed on the drainage commissioners a duty to take due care that the sluice was maintained, and unqualifiedly is a duty which the law cast upon the Mersey board to take due care that their docks were reasonably safe. Now sect. 138 is in the following terms: "That the said drainage commissioners shall make and maintain a good and substantial sluice of brick and stone at or near the entrance of the said cut into the river Ouse, with two or three openings and water ways, and which shall not be less than 50 feet, and with doors to each of the said openings of sufficient height to exclude the tidal waters." Nothing has been pointed out on the argument, and I have not myself discovered anything, to qualify this enactment, which certainly seems to me to cast upon the drainage commissioners the duty to maintain this sluice. The common law gives a right of action against those neglecting a duty cast upon them to those who in consequence sustain damage. I entirely assent to the position, that if the Legislature have shown an intention to prohibit this right of action in the present case, that will effectually prevent it, and I agree that such an intention need not be shown in the express words if it can be collected from the whole Act. But I think that the onus lies on the defts. to show that it was intended to prevent the right of action, and not on the plt. to show that it was intended to give it. Now, the commissioners are a large and fluctuating body, whom it would be very difficult to sue at common law as a body, and it would be very harsh and impolitic (for the reasons given in *Hull v. Smith*, 2 Bing. 156) to make the individual commissioners responsible out of their private funds for the default of the body; but the Legislature, being aware of this, have (as is now almost universally the case in actions of this sort) provided, by sect. 30, that the commissioners may be sued by their clerks in respect of anything relating to the execution of the Acts; and, by sect. 22, that execution on any judgment thus obtained against them shall be executed against the goods and chattels belonging to such drainage commissioners by virtue of their office. It certainly seems to me that if it were necessary to show affirmatively an intention on the part of the Legislature that judgment might be obtained and execution issued against the commissioners as a body, those sections would go far to show it. It is very true that an execution under the 21st section which would be a sufficient remedy for any judgment for a small sum will prove perfectly inadequate to meet such a very large liability as is involved in the present claim, and that the effect of a judgment against the drainage commissioners will probably be to make them insolvent. That, however, does not show that the Legislature intended to

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take away the right to obtain judgment, and is not a ground on which we can, as I think, refuse to give the plt. the judgment he is entitled to. He will, no doubt, wish to raise the question whether he cannot compel the drainage commissioners to make a rate for the purpose of liquidating his claim. I do not mean to express any opinion, now, prejudging the question at all. I think it premature to do so, and that we should, as in the *Hitchin Bridge Company v. The Southampton Local Board*, 8 E. & B. 80, give judgment for the plt. without deciding that question at all; but even if it were decided against the plt. it would not, in my opinion, afford any ground for depriving him of the right to obtain what he can by an execution under sect. 21, and of the benefit he may derive from his improved position before a committee in case there be any further litigation on the subject. For these reasons I think that the rule should be discharged.

COCKBURN, C. J.—This is an action brought against the defts. as commissioners of the drainage of the middle level of the Fens for injury sustained by the plt. by reason of the defts. not properly constructing and maintaining a sluice, which as such commissioners they were bound under the Act of the 7 & 8 Vict. c. 106, to make and maintain at a point where the waters of the middle level, after being conveyed by the cut across the marsh and district are discharged into the river Ouse; as also for omitting to make a puddle clay wall along the line of the embankment as required by the Act of Parliament. By the finding of the jury the defts. were absolved from all charge of omission or negligence in respect of the original construction of the sluice; but the jury found that there had been a want of due care and skill on the part of the defts. in respect of maintaining the sluice and in respect of providing remedies against mischief after the sluice was destroyed. The jury also found, as the fact was, that there had been an omission to construct the puddle clay wall; but as the disaster which gave rise to the present action arose not so much from the absence of the puddle clay wall, as from the giving way of the sluice, this finding became of minor importance. As regards each of these heads of default, however, the question for our decision on the leave reserved at the trial is, whether the case ought not to have been withdrawn from the jury on the ground that, on the admitted facts with reference to the circumstances in which the defts. as commissioners of the drainage are placed, they were in point of law exempt from liability. The effect of the decisions in the cases of *Hall v. Smith*, 2 Bing. 156; *Duncan v. Findlater*, in the H. of L., 6 Cl. & F. 894; and *Holliday v. St. Leonard's, Shoreditch*, 11 C. B. 192, is to establish the position that persons intrusted with the performance of a public duty discharging it gratuitously and themselves taking no personal part in its performance, and having no funds at their disposal out of which compensation for injury arising from the negligent acts of the persons employed by them can be made are exempted from the liability in respect of such negligence. The question in the present case is whether the defts. as commissioners of the drainage of the middle level are so circumstanced as to be entitled to immunity within the rule referred to. The cases cited are binding upon us, and if the present case falls within them the defts. will be entitled to our judgment. The defts. are commissioners appointed and acting under the Acts of the 50 Geo. 3, c. 125, and 7 & 8 Vict. c. 106, for improving the drainage and navigation of the middle level of the Fens. Their powers and functions in respect of the drainage are entirely distinct from those which are incidental to their office as commissioners of the navigation; and it is as commissioners

of the drainage that they are sought to be made liable in the present action. The drainage commissioners appointed under these Acts took no part personally in the original construction of the works, nor have they ever done so as regards the maintenance of the works, or management of the drainage. They are not persons specially named or selected for the purpose. Every landowner in the district is, as such, a commissioner; nor is there any option on the part of persons duly qualified to decline the office. It is, of course, impossible that such a body of persons can themselves personally execute the duties cast upon them by the Acts of Parliament; all that they can do is to appoint competent persons by whom those duties may be performed. Accordingly, it was left to the jury whether there had been want of due care on the part of the defts. in selecting the persons employed by them; and whether there had been want of due care and skill on the part of the persons so employed. Reading the verdict by the light of the evidence, we must take it that it was upon the latter hypothesis that the verdict against the defts. proceeded. This case therefore stands clear of the decisions in *Whitehouse v. Fellows*, 4 L. T. Rep. N. S. 177; *Southampton and Hitchin Floating Bridge Company v. Southampton Local Board of Health*, 28 L. J. 41, Q. B.; and *Luck v. Williams*, 3 H. & N. 308, in which the negligence imputed to the defts. was of a personal character. In none of these cases was the negligence for which the defts. were sought to be made liable that of their servants only; in all of them the fact was, or was assumed to be, that the defts. had themselves personally interfered in the work, and they have been themselves guilty of the negligence complained of. The defts. are therefore so far within the rule as laid down by Erle, C.J., in *Holliday v. St. Leonard's, Shoreditch*, as to the immunity of persons exercising public duties, that they are appointed by the Act of Parliament for the discharge of duties which they cannot themselves personally execute, and in the performance of which they are therefore compelled to employ others. It is however contended, on the part of the plt., that the defts. are not commissioners appointed for a public purpose, so as to come within the rule entitling such persons to exemption from liability. In support of this proposition it is urged that the drainage of the district in question is matter of local rather than of general or public concern; its sole purpose being to drain and improve the lands within that district alone. That case is therefore said to come within the principle of the decisions in *Reg. v. Badcock*, 6 Q. B. 787, and *The Birkenhead Dock Trustees v. The Overseers of Birkenhead*, 2 E. & B. 148, in which it was held, that property vested in trustees for the benefit of a local district is rateable to the relief of the poor in the parish in which it is locally situate, as not being specially appropriated to public purposes to be exempt from rateability. It does not, however, appear to me that these cases which are decided with reference to rateability alone are at all conclusive upon the present point. All property from which a benefit or profit arises ought, under done is within the statute it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute itself has provided it, and this is clear on the legal presumption that the act creating the damage, being within the statute, must be a lawful act. On the other hand, if the thing done is within the statute, either from the party doing it having exceeded the powers conferred on him by the statute, or from the manner in which he has thought fit to perform the work, why should the public fund be liable to make good his private error or misconduct? Cases may possibly be supposed in which the funds raised by a statute would be liable for acts done strictly in pursuance of the

directions of the statute, but none in which such funds would be liable for acts done without the authority of the statute." It is true that in the present case there are no prohibitory words such as occur in the section of the General Turnpike Acts, and which were therefore present in *Duncan v. Findlater*; but it appears to me that where a statute directs the fund to be raised, and expressly directs its application to specific purposes, this has, by implication, the effect of prohibiting the application of the fund to any other purpose. Now, these commissioners are directed to execute and maintain the works specified by the Acts, and they are empowered to levy taxes prescribed by the Acts on lands within the district. The purposes to which the funds thence arising are to be applied are set forth in the 30th and 38th sections of the 50 Geo. 3, and the 237th section of the 7 & 8 Vict. c. 106. In the two former the fund is specifically appropriated to the purposes therein referred to. The language of sect. 237 of the 7 & 8 Vict. is somewhat more general. It directs that after defraying the expenses of the Acts, the funds shall be applied to "executing and completing the several works of drainage, and the several other works, matters and things required by the Acts to be made, done, or executed by the drainage commissioners, and for the general purposes of carrying the Acts into execution." It is on the concluding words of this section alone that it can be contended that damages recovered in an action for default or negligence, could be paid out of the fund to be raised by the commissioners. But I am of opinion that such a charge cannot properly be considered as one of the general purposes of carrying the Acts into execution. It cannot be that the Legislature contemplated that the commissioners, or those employed by them, would be guilty of a breach of duty or negligence in the discharge of their duty. And this view is confirmed by the circumstance, that by the 217th section of the 7 & 8 Vict. c. 106, provision is made for compensation "where any person or body, at any time after the said drainage commissioners, or any person employed or authorised by them, shall have begun to carry this Act into execution, shall happen to sustain any damage or injury in his lands, tenements, or hereditaments, goods or chattels, by or in consequence of any act of the said commissioners for drainage, or their agents, workmen, or servants for which no recompence or satisfaction is hereby otherwise provided." A positive appropriation of the funds to be raised by the commissioners being thus made by the Act, this appropriation, as I have before said, has by implication the effect of negating the authority of the commissioners to apply the funds in payment of damages. Besides this, the Act contains in sect. 239, a provision for the reduction of the tax which the commissioners are empowered to levy to half or one-third of the amount so soon as the works should be executed and the debts discharged. Such a provision was held in *Rex v. Liverpool*, 7 B. C. 61, to be a ground for holding that the dock rates and duties authorised to be taken by Act of the statute 43 Eliz. c. 2, to contribute to the relief of the poor. To this liability an exception has, however, been established in the case of property devoted to public purposes. But the propriety of this exception has, in recent times, been questioned, on the ground that every such exception necessarily throws an additional burden on other property in the parish; and the tendency of modern decisions has been to confine the exemption within the narrowest possible limits, and to restrict it to those cases in which the purpose to which the property is appropriated is public in the largest sense of the term; that is, where it is held for the benefit of the entire public as distinguished from any portion of the

public, however extensive. This rule does not appear to me to be applicable to the case of trustees or commissioners acting for an extensive district in a matter of general, and not individual concern. The drainage of an extensive district without which a vast tract of arable land would be reduced to the condition of marsh and fen, and would thus be drawn from the producing power of the country, is, I think, sufficiently a matter of public and general concern to entitle those who are entrusted with the construction and management of the works necessary for such a purpose to the character of public commissioners, and to the immunity to which it is now settled that trustees or commissioners for public purposes are entitled. In like manner it was contended for the plt. that one of the conditions of the immunity of persons employed for a public purpose being, according to the rule laid down by Erle, C.J., in *Holliday v. St. Leonard's, Shoreditch*, that the service should be gratuitous, this condition was not satisfied in the present case, inasmuch as the commissioners, although receiving no salary or other direct remuneration for their services, yet as owners of land within the district receive a benefit from the employment of their land by the drainage. But a remote and indirect benefit of this kind incidentally arising from the works, and not received by the commissioners as a remuneration for their services, is not, as it seems to me, sufficient to take the case out of the rule as to the immunity above referred to. In my judgment, however, the main criterion in these cases is, whether there is any fund at the disposal of public trustees or commissioners available for the payment of damages in respect of injury occasioned by negligence. Not indeed that I feel the force of the reasoning of Best, C.J. in *Hall v. Smith*, but no one would undertake a public duty without remuneration if liable for the negligence of servants, inasmuch as it is not pretended that public trustees or commissioners can be made to answer in damages out of their own private funds. The ground on which my judgment proceeds is, that it being admitted that public trustees or commissioners cannot be made liable in their individual character, the fact that the Legislature has appropriated the funds in their hands to specific objects, so as to exclude their application to the payment of damages, leads fairly to the inference that the trustees or commissioners cannot be held liable in their aggregate or quasi-corporate character. In *Holliday v. St. Leonard's, Shoreditch*, Byles, J. says: "Here the defts. are public officers acting gratuitously and compulsorily, and having no funds out of which the damage could be paid; and the cases show that under such circumstances, being guiltless of personal negligence, they are not liable." The absence of any such funds was strongly insisted on by Lord Cottenham in his judgment in *Duncan v. Findlater*. He there says: "It is impossible to suppose that the framers of this statute contemplated that any part of this fund would be appropriated for the purpose of affording compensation for any act of the persons who might be employed under the authority of the trustees. If the thing Parliament were not even rateable to the relief of the poor. Lord Tenterden, in giving judgment, says, 'The statute under which the dock rates in question are levied does not indeed contain an express direction that the rates shall be applied to the purposes specified and no other; but it directs that certain burdens shall be discharged, and that then the rates shall be lowered, and therefore any application of these rates to other purposes not specified would be a direct violation of the statute. We were pressed on the argument with the authority of the decision in the case of *Scott v. The Mayor of Manchester*, 2 Ex. 204. But the present case is obviously distinguishable, inasmuch as there the



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trustees were in the receipt of profits beyond the amount necessary for the primary and immediate purpose of the statutory powers and applicable to the benefit of the town of Manchester. The defts. were thus in the nature of a trading corporation. In the present case the taxation is imposed expressly for the execution of the works, without any provision directing the application of the surplus (if any) to any ulterior purpose, or to the benefit of any one. It has, indeed, been suggested that, whether there be funds applicable to the payment of damages and costs recovered in an action or not, the plt. who has sustained an injury is still entitled to bring his action and to proceed to judgment and execution, although it may be known all along that such a proceeding must necessarily be barren of any profitable result. It appears to me that such a position is untenable. It would be to bring the law into contempt to suffer an action to be maintained where, if the plt. succeeds, the judgment cannot possibly be satisfied either by taking the person or property of the deft., or by any other means. A result so absurd in itself is a strong ground for applying the principle of that immunity to such a case. But besides this, if such an action were allowed to be maintained, property which *ex hypothesi* cannot be applied in compensation of the injury complained of, might be taken in execution on the judgment. If that judgment were obtained against the commissioners, funds in their hands, or property necessary for the execution of their powers, might be taken in execution under it; and this, although the Act of Parliament under which the public trustees or commissioners were appointed might have expressly prohibited the application of the funds to any other purposes than the purposes of the Act. Besides which the defts. in such an action would necessarily be put to expense in defending it, and would either be compelled to pay those expenses out of their own pockets, to which it is admitted they ought not to be liable, or would pay them out of the public funds, which on the hypothesis ought not to be applied to such a purpose. The cases of *Gibbs v. Trustees of the Liverpool Dock*, 3 H. & N. 164, and *Penhallow v. The Mersey Docks*, 7 H. & N. 329, may appear to militate against this view, inasmuch as in these cases the defts. were held liable for negligence, although the rates and tolls are payable by them, being appropriated by the Acts, and there was held no fund available to satisfy the judgment. It may be observed that the point as to the absence of funds to satisfy the judgment does not appear to have been taken by counsel or to have been adverted to by the court. But assuming that this difficulty would not have altered the decision in the cases referred to, the present case may be distinguished from them on the ground that the class of actions on which it appears the plt. in those cases succeeded was the personal negligence of the defts., the trustees being held liable not upon the ground of any default or negligence in the execution of their duty under the Act, but for the wrongful act of keeping the dock open, and inviting vessels to enter it when it was in an unfit and dangerous condition. The distinction between those cases and the present is, that which I have already pointed out as distinguishing this case from *Whitehouse v. Fellowes*, namely, that the defts. are here sought to be made liable, not for their own default, but for that of persons in their employ. It is true that by the declaration the defts. are charged with breach of duty in not constructing and maintaining the works, but the form in which the declaration is framed cannot alter the substance of the thing, or enlarge the liability of the defts. As we have seen, the commissioners cannot discharge their duty personally; they are obliged to employ contractors, engineers

and other servants for the purpose, and the question left to the jury, although in form general as to whether there had been due care and skill in maintaining the sluice, or in providing remedies where the sluice was destroyed, which at first sight might appear to have had reference to the defts. themselves, came under the direction and observations of the learned judge in effect to be whether there had been due care and skill on the part of the defts.' servants. The case appears to me therefore in all respects to fall within the principle of the decisions in *Duncan v. Findlater* and *Holliday v. St. Leonard's, Shoreditch*, by the authority of which we are bound, and I am consequently of opinion that the defts. are not liable, and that this rule should be made absolute. (a)

Rule absolute.

Attorney for the plt., T. M. Wilkin, Lynn.

Attorney for the deft., F. J. Wise, March.

Wednesday, June 1, 1864.

KNOWLSEN, DRON AND OXFORD v. THE QUEEN.

Pleading—Vexatious Indictments Act—Averment of conditions of—Recognisance—Conspiracy.

*In indictments for offences within the provisions of the Vexatious Indictments Act, it is not necessary that it should appear upon the record that the conditions imposed by that Act, or any of them, have been complied with.*

*A., B. and C., charged with a conspiracy to defraud members of a friendly society, were bound over before a magistrate to appear at the next session of the Central Criminal Court to plead to such indictment as might be preferred against them in respect of the said charge. At the next session a true bill was found against them upon the said charge, but was postponed until the following session. At the following session a second indictment was found, charging A., B., C., and D., a fourth person not charged before the magistrate, with the same conspiracy:*

*Held, that as A., B. and C. had been once bound over by a magistrate, and the subject-matter of both indictments was the same as that mentioned in the recognisance, the defts. might be tried and convicted thereon.*

Writ of error on the conviction of John Knowlson, John Dron and Thomas Oxford, on an indictment preferred and found by the grand jury at the October Sessions 1863 of the Central Criminal Court. A fourth person, Charles Alfred Coombs, was charged in the said indictment. The charge was a conspiracy to defraud divers members of a friendly society called the Perseverance Life Assurance and Sick Fund Friendly Society. The three prisoners were each sentenced to eighteen calendar months' imprisonment with hard labour.

Upon the face of the assignment of error the following facts appeared:—

On the 19th Aug. 1863, at the Southwark police court, Knowlson and two sureties were bound by recognisance whereby, after a recital as follows: "Whereas the said J. Knowlson (with others) was this day charged before me the said magistrate for that they did unlawfully conspire, confederate and agree together to cheat and defraud, against the peace," &c., he was bound over to appear at the next ensuing session of the Central Criminal Court, and surrender and plead to such indictment as might be found against him by the grand jury for or in respect of the charge aforesaid, and take his trial upon the

(a) This case was partly argued also before the late Mr Justice Wightman.



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same, and not depart the said court without leave, then the said recognisance to be void.

Oxford and Dron were bound over in similar recognisances on the 22nd Aug. 1863.

On the 19th Aug. 1863, before the same police magistrate, the prosecutors and witnesses entered into recognisances whereby, after reciting that the three *plts.* in error were that day charged before the said magistrate with a conspiracy to cheat and defraud, against the peace, &c., they were bound over to appear at the next ensuing session of the Central Criminal Court, and there prefer or cause to be preferred a bill of indictment against the three *plts.* in error for the offence aforesaid, and duly prosecute the said indictment and give evidence thereon.

At the September session of the Central Criminal Court, which was the next ensuing session after the 22nd Aug., an indictment for conspiracy to defraud several members of the above friendly society was preferred and found against the three *plts.* in error alone by the grand jury.

On the application of the counsel for the prosecution, the trial thereof was postponed until the ensuing October session on the ground of the absence of a material witness, and the said recognisances entered into by the *plts.* in error were accordingly *duly respited* until the said October sessions.

On the 24th Oct. the Solicitor-General gave his consent as set out below to a fresh indictment being preferred against the three *plts.* in error and Charles Alfred Coombs. Accordingly on the 26th Oct. the indictment was found on which the *plts.* in error were tried and convicted.

That indictment was in the ordinary form, and did not state on the face of it that it had been preferred by leave of a judge or the assent of the law officer of the Crown. The *plts.* in error, on being called upon to plead to the indictment, refused to do so, and the Court directed a plea of not guilty to be entered for them on their behalf.

The prisoners were not tried upon the first indictment found at the September session, which remains on the files of the Central Criminal Court undisposed of.

#### Assignment of error:

That at the time of the presenting and finding of the indictment, neither the prosecutor nor any other person prosecuting the indictment were or was bound by recognisance, to prosecute or give evidence, but that certain recognisances entered into by the prosecutors had been discharged and fulfilled, so far as they might be discharged and fulfilled, by the presenting and finding of an indictment at the September Sessions 1863 of the Central Criminal Court, when the three *plts.* were charged with a conspiracy jointly one with another, and not with the said Coombs, which said indictment has never been quashed, and is now pending; and the *plts.* further said that they were not committed or detained in custody, or bound over by recognisances to appear to answer the indictment found at the October sessions, nor was the last-mentioned indictment preferred or found with the consent or by the direction of a judge of a Superior Court, or by the direction of the Attorney or Solicitor-General, nor were the provisions of the statute 22 & 23 Vict. c. 17, in any way complied with.

And the *plts.* further assigned that, contrary to the said statute, they were not, nor were any of them, bound by recognisance to appear to answer to the indictment preferred in October, but that they were bound by recognisance before a police magistrate to appear to the September indictment, in which Coombs was not charged, which offence was another and different offence to that which the *plts.* were bound over to appear to answer.

And the *plts.* further assigned that, on the 24th Oct. 1863, Her Majesty's Solicitor-General signed a written direction to the effect following, to wit:

Central Criminal Court, October Sessions 1863.

RES. v. JOHN KNOWLSEN, THOMAS OXFORD, JOHN DRON AND CHARLES ALFRED COOMBS.

I direct an indictment to be preferred against the above-

named Charles Alfred Coombs, at the Central Criminal Court, for a conspiracy to defraud.

(Signed)

R. P. COLLIER, Solicitor-General

Dated 24th Oct. 1863.

And that thereupon the indictment on which the *plts.* were found guilty was presented and found, and that there is no sufficient allowance and authorisation of the said indictment by consent in writing.

The *plts.* further assigned error in this, that it did not appear upon the record and proceedings that the said indictment was authorised and allowed, as is provided by the said statute, by the consent in writing of a judge of the Superior Courts at Westminster, or of Her Majesty's Attorney-General or Solicitor-General, so as to be lawfully presented and found by the said jury.

Joinder in error.

*Giffard* (*Besley* and *Kydd* with him) for the *plts.* in error.—The conviction cannot be sustained. The 22 & 23 Vict. c. 17 renders it necessary that certain conditions precedent should be complied with before an indictment for conspiracy should be presented to or found by a grand jury. Those conditions ought to be entered on the record, and it must appear that they have been fulfilled. In this case it should appear that the *plts.* in error were bound over by recognisance to answer the indictment on which they were convicted, or that the indictment was preferred by the direction or leave of a judge or law officer of the Crown. [BLACKBURN, J.—How is it with respect to criminal informations? The 4 & 5 Will. & M. c. 18 was passed to prevent malicious informations in the Court of Q. B., and sect. 2 says, that the clerk of the Crown shall not, without express order of the court given in open court, exhibit, receive, or file any information, yet the record never shows on the face of it that such order has been made. The rule in criminal pleading is, that where there is general jurisdiction and a qualification subsequently put on it, it is not necessary to notice the qualification on the record.] Under that Act the Court of Q. B., whose information it is, gives the leave. In a *qui tam* action to recover a penalty for acting as a commissioner under the Public Health Act (11 & 12 Vict. c. 63), s. 153, it was held necessary to aver in the declaration the consent of the Attorney-General to the proceedings: (*Hollis v. Marshall*, 27 L. J. 235, Ex.) [BLACKBURN, J.—There the statute which imposed the penalty also imposed the condition upon which proceedings for the recovery of it might be taken.] The 22 & 23 Vict. c. 17, says that the grand jury shall not find any indictment in the specified misdemeanors, unless the conditions have been complied with. In pleading, where place or any particulars as to the character or person are essential, they must be averred. So in bankruptcy it was essential to set out all the ingredients which went to make out the bankruptcy. Each element of the offence must be stated on the record:

*Reg. v. Fearnley*, 1 Leach, 426;

*Macdonald's case*, Foster's C. L. 59.

The 22 & 23 Vict. c. 17, takes away the whole jurisdiction of the grand jury, unless the conditions have been complied with. [CROMPTON, J.—Your argument must go the length that in every indictment for obtaining money or other property by false pretences you must aver a committal by a magistrate, or leave of a judge or law officer of the Crown.] If the record does not show that, it is doubtful whether the liberty of the subject has been legally taken away or not. Secondly, as to the error in fact. The indictment preferred and found at the October sessions against four persons was another and different one to that found at the September sessions. [COCKBURN, C. J.—The recognisances bind them to answer the charge, not any particular

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indictment.] If so, the three were not bound over to answer a charge along with Coombs. The authority given by the Act was exhausted by the preferring and finding of the first indictment at the September sessions. [BLACKBURN, J.—What are we to understand by the statement of the recognisances being *duly respited* to the next sessions? That appears to me to be the material point.] The recognisances apply to different persons. They cannot be construed to mean that the prosecutor may prefer a charge of conspiracy against four persons.

The *Solicitor-General* for the Crown.—The recognisances were properly respited: (*Lord Drummond's* case.) The words of the recognisance are to prosecute or give evidence against the person accused of such offence. Respiting means, that the time for estreating the recognisances shall be enlarged. It is immaterial as regards the recognisances whether the charge is against three or four persons. It is not necessary that all the persons charged with the conspiracy shall be convicted. The indictment on which the plts. in error were found guilty meets the charge mentioned in the recognisances. Then, as to the averment on the record of the conditions of the statute having been complied with, this is similar to the case of criminal informations, in which it is not necessary to aver that leave of the court has been obtained pursuant to the 4 & 5 Will. & M. c. 18, s. 2. The rule is laid down in *Paley on Conv.* 195 (edit. 4). Again, this is not matter for a writ of error; the application should be to quash the indictment, or for a *certiorari*, on the ground that the conditions of the statute have not been complied with:

*Reg. v. Mansell*, 8 E. & B. 54.

*Giffard* in reply.—In *Reg. v. Heane*, 9 L. T. Rep. N. S. 719; 33 L. J. 154, M. C., the Court said that they would not quash the indictment, but leave the party to his writ of error.

COCKBURN, C. J.—I am of opinion that our judgment should be for the Crown. As regards the first question, whether the condition required by the 22 & 23 Vict., as a condition preliminary to the presenting to and finding of the indictment by the grand jury must appear on the face of the record, it appears to me that it is not necessary. It is true that, in general, whatever is necessary to give jurisdiction must appear on the face of the record, but that rule is subject to the qualification pointed out by my brother Blackburn during the argument. Here it is not a condition attached to the jurisdiction of the grand jury over the offence. The moment the condition is complied with, the grand jury are seized of the matter, and the offence need only be stated on the indictment in the usual form. Nothing could be more inconvenient than that matters of this description should be stated on the record, for it would follow that they might be put in issue, and then it would be necessary in every case within the Act to try the question whether the accused had been committed or bound over to answer the subject of the indictment. That could not have been the intention of the Legislature. No doubt there ought to be in some way enough evidence to satisfy the grand jury that the condition of the statute has been complied with, but when that is done, the grand jury exercise the same jurisdiction as they exercised before the Act. Where the parties and the prosecutor have been bound over to prefer the indictment the accused must be aware of the fact, or, if he has any doubt, the fact may, on inquiry, be readily ascertained. Supposing a prosecution to have been improperly instituted, and a deception practised on the officers of the court as to the preliminary condition having been complied with,

there can be no doubt that redress can be had in some way; whether by application to the judge before the trial to quash the indictment, or whether when it comes to the party's knowledge at a later period by some other proceeding, it is not necessary now to decide. It is enough to say that redress can be obtained in some way. I think, therefore, that, with reference to the first question, the argument of the defts. fails. As to the other point of error in fact, it was urged in the first place that the prosecution upon which defts. were convicted was not the same prosecution as that to which the recognisances entered into relate, because the prosecutor was bound over to prosecute on a charge of conspiracy against three persons, whereas the indictment, on which the prisoners were tried and convicted, was a charge of conspiracy against four persons. In substance both indictments were for the same offence, and the subject-matter of the conspiracy was the same, and the only variation was that there was an additional conspirator charged. But inasmuch as two or more out of a larger number of persons charged with a conspiracy may be convicted, the fact that an additional person was added on the indictment on which the prisoners were found guilty makes no difference. Then it was further said that the recognisances of the accused to appear and answer the charge were no longer in existence. In the first place it is questionable whether the recognisances were not still in existence, for although fresh ones were not entered into at the September sessions, yet the accused had never appeared according to the exigency of the recognisances, which for the benefit of all parties, instead of being estreated at the September sessions, were enlarged or respited until the next sessions. I doubt whether that is not keeping the recognisances alive for the purpose of the second indictment. Whether that is so or not, I think that, the accused having been bound over to appear and take their trial on a charge of conspiracy, the condition of the statute was complied with so long as the indictment was preferred for the same offence as they were bound over to meet. The words of the statute are large enough to meet that construction of it, and the purpose and object of the Act being to protect persons against vexatious indictments, as soon as the parties have gone before a magistrate who has bound them over, that object has been gained. If that has been done by the magistrate, or an order of a judge has been obtained to present the indictment to the grand jury, the statute has been satisfied. I therefore think our judgment should be for the Crown.

CROMPTON, J.—I am of the same opinion. I do not think it necessary to hold that it is indispensable that in all cases within the Act there should be on the record an averment that the indictment has been preferred by the assent of a judge or the law officers of the Crown. There is a general jurisdiction in the grand jury to find a bill of indictment; and this enactment is a direction in effect to the grand jury not to act in the particular cases specified until the things required by the Act have been done. This Act is to prevent vexatious indictments for certain misdemeanors. It is different to an Act which creates a penalty not to be incurred except under certain circumstances, in which case it must be shown on the record that those circumstances have happened. The cases referred to upon the statute of 4 & 5 Will. & M. are very much in point. After the Revolution of 1688 the proceeding by way of a criminal information was very much abused, and that statute was passed to prevent the vexatious abuse of that process, and it enacted that the coroner and attorney of the Crown should not file.

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any criminal information in certain cases without the express direction of the court given in open court. The Crown officer is placed very much in the same position as the grand jury, but it has never been deemed necessary to state on the face of a criminal information that the statute has been complied with. In the present case the accused has the means of inquiry, and practically there is no real difficulty in the case. The officer of the court has every commitment sent to him, and he knows whether there has been a committal or not in each case. Through his office the indictment must pass on its way to the grand jury, and it is very much like a direction to him to take care that an indictment shall not be presented to the grand jury until the condition of the statute is complied with. The practice in modern times under the statute 4 & 5 Will. & M. in the case of criminal informations is not to aver compliance with the conditions of that statute, on the record, and I cannot think that in this case the matter ought to appear on the record. It is not necessary to consider what the exact remedy may be when the statute has not been complied with. It is said that a writ of error will lie. Supposing that to be so, yet I am of opinion that there is no ground of error assigned in this case. The parties were both before the magistrate, and the accused knows whether the magistrate committed him or not for trial. It is also clear that the prosecutor was bound to give evidence against the party accused of this offence. The offence of which the prisoners have been found guilty is the same offence. Then as regards the indictment being found at the subsequent sessions, it is the same offence, though the case stood over until the next sessions for which the prisoners were bound over. If the recognisances had been discharged at the September sessions, it would have been different. It is no answer to say that the accused did not appear at the September sessions. The only difficulty that struck me was, whether the two indictments were the same prosecution, and I think that they were practically the same. Therefore, both grounds fail.

BLACKBURN, J.—I am of the same opinion. The Vexatious Indictments Act puts as a condition, that before any bill of indictment for any of the offences specified shall be presented to or found by the grand jury, certain things shall be done. It does not alter the nature of the offences or the general jurisdiction of the grand jury. If the things required constituted any part of the offence, then they would be a matter of trial before the petty jury; but that is not so—they are only a condition put on the general jurisdiction of the grand jury to find a bill of indictment in the cases specified. It is precisely the same as the case of vexatious criminal informations. It has never been the practice to aver in a criminal information that leave has been obtained to prefer it, but the mode of pleading remains the same as at common law before the 4 & 5 Will. & M. passed. I therefore think the first objection made a bad one. If a bill of indictment were improperly preferred and found, it may be that the more convenient course, when the fact was discovered, would be to apply to the court before the trial to quash it, and I think the court would have jurisdiction to quash it or any part of the indictment as to which the statute was not complied with. Or it may be a question whether the case falls within the statute or not, as in *Reg. v. Heane*, where it was doubted whether the case was one of perjury or not, in which case it might be, that one court might entertain the view that it was not within the Vexatious Indictments Act, and another might hold that it was, and in such case, perhaps, the deft. might plead to the jurisdiction. I am also inclined to think that error

in fact would lie, but I do not desire to express an opinion on that without further consideration. It is not necessary to decide what is the proper course to pursue, for here the condition of the statute has been complied with. As to the recognisances: the prisoners were bound to appear at the next sessions to an indictment for this conspiracy to defraud this benefit society. The condition and the spirit of the Act have been fulfilled, which was to prevent vexatious indictments being preferred, and that object was fulfilled as soon as the accused were bound over by the magistrate to answer the charge. It may be that a fresh charge would not be right, but the fact of four persons being included in the indictment, whereas three persons only were implicated before the magistrate, does not vary the offence. I am of opinion, therefore, that judgment must be for the Crown.

SHER, J.—I am of the same opinion. The Legislature must be taken to know the mode in which indictments are usually preferred, and that they pass through the hands of the officers of the court to the grand jury. I think that the statute is nothing more than a direction to those officers to take care that no bill shall be presented to the grand jury unless the requisitions of the statute have been complied with. I think the Legislature might have had in view the 4 & 5 Will. & M., for the Act of 22 & 23 Vict. contemplates the same evils. I think that if it came to the knowledge of the court that a bill of indictment had been found without the requisites having been complied with, it might be treated as a nullity and as if it had not been found, and that the court might quash it. As to the recognisance, the question in my opinion is, not whether the indictment is the same, but whether the offence is the same. Here the offence is the same and the facts are the same, and the only difference is that a fourth person is charged in the second indictment. And I think that the accused have been bound by recognisances within the meaning of the statute to appear to answer this indictment. I therefore concur in the judgment of the court.

*Judgment for the Crown.*

Tuesday, June 7, 1864.

GARDINER v. COLYER.

*Lease—Construction—Reservation of right of sporting.*

*In an indenture of lease the lessor granted to the lessee the right of sporting over the land demised, and certain other lands "in common with the lessor, his heirs and assigns, and any friend of his or them."*

*Held, that the privilege might be granted to several friends to sport at the same time.*

Action for breach of a covenant for quiet enjoyment of a lease.

The declaration stated a demise of land to one W. Dray,

Together with the right, in common with the deft., his heirs and assigns, and any friend of his or them, of shooting on, in and over the premises and hereditaments thereby demised, and also in and over the several closes, pieces and parcels of land comprising the farm called Hampton Court Farm, then in the occupation of John Allen, under a lease granted to him by the deft., and contemporaneously with the now recited indenture.

Averments:

That Dray assigned the lease to the plt, and that afterwards and during the term, J. Allen, G. Davis, A. Halse and W. Brown, claiming through and under the deft. the right jointly so to do, and having the authority of the deft. so to do (such persons not being the heirs or assigns, nor any one of them being the heir or assign of the deft.) jointly entered the said premises and hereditaments by the said recited indentures

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demised to the said W. Dray, and also into and upon the several closes, pieces, or parcels of land, comprising Hampton Court Farm, in the pursuit of game.

Demurrer to the declaration.

*Manisty* Q. C. in support of the demurrer.—By the 1 & 2 Will. 4, c. 32, s. 11, where the lessor or landlord has reserved to himself the right of killing the game upon any land, he may authorise any other person or persons who shall have an annual game certificate to enter upon such land for the purpose of pursuing and killing game. The lease does not abridge the right this statute gave to the deft. as a lessor who had reserved the right of sporting. But, independently of the statute, under this reservation or grant the deft. was at liberty to authorise several persons to sport at the same time:

*Wickham v. Barker*, 7 M. & W. 63;

*Doe v. Lock*, 2 A. & E. 705.

*R. A. Fisher* contra.—The declaration disclosed a breach of the deft.'s covenant for quiet enjoyment, independently of the right of shooting or sporting claimed or asserted by him. It is consistent with the breach assigned, that the deft. entered the lands, not in virtue of any right or claim of shooting reserved by the demise, but as a trespasser. The deft. should have set forth his right in a plea specially. Assuming that the point is raised by the pleadings, the right to enter the lands demised to shoot or sport was restricted and reserved to one friend in company with the deft. at one and the same time or simultaneously with the plt.; "any friend" is to be read as "a" or "any one" friend of the deft.'s, not a plurality or promiscuous number of his friends. Although in the 8 & 9 Vict. c. 16, s. 36, enabling a creditor to take proceedings by *sci. fa.* against "any of the shareholders" it has been decided to mean any number, that was by reason of their previous liability. But here the privilege granted is purely personal and limited to the deft. and "a" friend—a kind of *electus personæ*. Lord Denman, in *Doe dem. Douglas v. Scott*, 2 Ad. & E. 705, 745, says: "The privilege of hawking, hunting, fishing and fowling is not either a reservation or an exception in point of law, it is only a privilege or right granted to the lessor." Consequently, the privilege here is to be strictly and literally construed. The right of sporting set forth in the grant in *Wickham v. Barker*, 7 W. & M. 63, was more extensive in terms, by reason of the words "or otherwise." If a plurality of friends were permitted to exercise the right, the plt. might be deprived of his right of sporting altogether by the destruction of all the game upon the premises by the deft. and his friends.

COCKBURN, C. J.—I am of opinion that our judgment must be for the deft. The declaration does not negative that the persons who went sporting on the premises with the consent of the landlord were his friends, and we must therefore take it that they were so. The question then arises, whether the deft., by virtue of the right reserved in the lease, is entitled to send more friends than one at a time on the land. On the true construction of the lease I am of opinion that he was. The demise is of a farm to the plt., with the right to sport over it, and also over other lands of the deft. in common with the deft., his heirs and assigns, and any friend of his or them. This means that he may grant permission, not indeed to any one, but to friends of his to whom he might have granted it if he had not demised to the plt. It would have been easy, if it had been intended to limit the right to a single friend at a time, to do so by words plainly expressing that meaning. The words used would be commonly understood to mean a plurality of friends. All doubt is removed

by the fact that the right of sporting granted and also reserved in this lease has reference, not only to the premises demised to the plt., but to other lands over which the plt. would have no right except for this grant. I think the lessee did not intend to do anything more than to grant to the tenant a right of sporting in common with him, not to divest himself of any part of his right to sport himself, and to take any friends with him.

CROMPTON, BLACKBURN and SHEE, JJ. concurred.

*Judgment for the deft.*

Attorney for the plt., W. May.

June 8 and 11, 1864.

THE LONDON AND NORTH-WESTERN RAILWAY COMPANY (apps.) v. THE SURVEYORS OF HIGHWAYS OF THE TOWNSHIP OF SKERTON (resps.)

*Highway—Repair of—8 Vict. c. 20, ss. 46-65—Approaches to a railway bridge—Road lowered—Liability of railway company to repair.*

The 8 Vict. c. 20, s. 46 (*Railways Clauses Consolidation Act*) provides, that when the line of a railway crosses a road or highway, either the road shall be carried over the railway, or the railway shall be carried over the road, by means of a bridge of the height and width and with the ascent or descent by that or the special Act provided; and that the immediate approaches and all the necessary works connected therewith shall be maintained at the expense of the company.

A railway company, in constructing a bridge over a highway, lowered the highway in order to bring it to a proper level below the bridge:

*Held*, that the road thus lowered did not constitute an immediate approach or necessary work within the meaning of the above section, and that the company were therefore not bound to keep it in repair.

This was a case stated under the 20 & 21 Vict. c. 43. The apps. are the lessees of the Lancaster and Carlisle Railway, and for the purpose of this case may be considered as the Lancaster and Carlisle Railway Company.

On the 12th Dec. the apps. were summoned, under the provisions of the Railways Clauses Consolidation Act (8 Vict. c. 20, s. 65), before the justices of Lonsdale, in the county of Lancaster, for the non-repair of the immediate approaches on each side of the bridge constructed by the apps. for the purpose of carrying their railway over a certain public highway in the township of Skerton, leading from Lancaster to Morecombe, the said approaches being a work executed in the construction of the said railway. Prior to the construction of the railway, the highway was repairable and repaired by the resps. A plan which accompanied the case showed the railway and the approaches in question, and how the bed of the original highway was altered and lowered by excavation nine feet deep, in some parts, by the apps., at the time of the construction of the railway bridge, for the purpose of enabling the public to pass under it. It was not shown in evidence that the company had made good the damage done by them to the surface of the road, or to the road, at the time of their interference with it. The surveyors the resps. have never since repaired the *locus in quo*, neither have the apps. The railway was formed about the year 1850. The company admitted the non-repair of the highway and of the approaches to the bridge, but contested their liability to keep them in repair after their works had been finished. The justices made an order for the company to repair the said approaches, subject to the following case.

The original Lancaster and Carlisle Railway was authorised by an Act of Parliament (7 Vict. c. 37), entitled "An Act for making a railway from the Lancaster and Preston Junction at Lancaster to or near to the city of Carlisle."

This Act received the Royal assent the 6th June 1844. The bridge in question was built under the provisions of the Deviation Act (8 & 9 Vict. c. 83), hereinafter referred to. By sect. 270 it is enacted, with respect to the crossing of roads,

That, except as therein provided, if the line of railway cross any turnpike road or public carriage way, then either such turnpike road or public carriage way shall be carried over the railway, or the railway shall be carried over such road by means of a bridge of the height and width and with the ascent or descent by the Act in that behalf provided, and such bridge or other necessary work connected therewith shall be executed at the expense of the company.

The Railways Clauses Consolidation Act (8 Vict. c. 20) received the Royal assent on the 8th May 1845. By sect. 1 it is enacted,

That the Act shall apply to every railway which shall by any Act which shall thereafter be passed be authorised to be constructed, and the Act shall be incorporated with such Act, and all the clauses and provisions of the Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to undertakings authorised thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act, and be construed together therewith as forming one Act.

By sect. 46, with respect to the crossing of roads, or other interference therewith, it is enacted,

That if the line of the railway cross any turnpike road or public highway, then, except where otherwise provided by the special Act, either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge of the height and width and with the ascent or descent by that or the special Act provided; and such bridge, with the immediate approaches and all other necessary work connected therewith, shall be executed, and at all times thereafter maintained, at the expense of the company.

By sect. 58 it is enacted,

If in the course of making the railway the company shall use or interfere with any road, they shall, from time to time, make good all damage done by them to such road.

In the same session of Parliament the Lancaster and Carlisle Company obtained an Act (8 & 9 Vict. c. 83), to enable them to alter the line of such railway, and to make a branch therefrom, and for other purposes relating thereto. To this Act the Royal assent was given on the 21st July 1845. The bridge in question and a considerable length of railway on each side of it were constructed; and the highway in question was lowered and interfered with under the provisions of the last-mentioned Act.

By sect. 1 of this Act it is enacted,

That all the powers to take lands, and all other the powers, authorities, provisions, directions, penalties, forfeitures, payments, exemptions, remedies, regulations, clauses, matters and things contained in the said recited Act, except such of them or such parts thereof respectively as are repugnant to this Act, or as are by this Act expressly repealed or altered, or otherwise provided for, shall extend and be construed to extend to this Act; and shall operate and be in force in respect to the objects and purposes thereof as fully and effectually, to all intents and purposes, as if the same powers, authorities, provisions, directions, penalties, forfeitures, payments, exemptions, remedies, regulations, clauses, matters and things were repeated and re-enacted in this Act.

There is no express provision in this Act for incorporating the Railways Clauses Act. There is no further provision in this Act as to making or maintaining roads or other works.

In 1859 the Lancaster and Carlisle Railway Company obtained another Act (22 & 23 Vict. c. 124), intituled "An Act for authorising the Lancaster and Carlisle Railway Company to make new works and to make arrangement with other companies, and to raise further funds, and for other purposes."

By sect. 2 it is enacted,

That the Lands Clauses Consolidation Act 1845, and the Railways Clauses Consolidation Act 1845, save so far as any

of the clauses and provisions thereof respectively are excepted or varied by this Act, are to be incorporated with this Act.

The question for the opinion of the court is whether the apps. are bound to keep in repair the public highway in question under their line and the immediate approaches thereto. If so, the order of the justices is to stand; if not, it is to be quashed.

*Bovill*, Q.C. for the resps.—The justices were right in holding that the obligation to repair was imposed on the resps. The bridge and approaches were constructed at a period subsequent to the passing of the Railways Clauses Consolidation Act. By the 1st section of that statute it is enacted that its provisions shall be applicable to the construction of future railways; and by the 46th section, after showing how bridges over highways with their ascents and descents are to be formed, it is provided that the immediate approaches and all other necessary works connected therewith shall be maintained at the expense of the company. Here the alteration and excavations of the road were necessary to the construction of the bridge in question. The duty therefore of keeping them in a proper state was thrown on the company. And this has been decided in the cases of

*The North Staffordshire Railway Company v. Dale*, 7 L. J., N. S., 147, M. C.;

*Leech v. The North Staffordshire Railway Company*, 1 L. T. Rep. N. S. 332; 29 L. J., N. S., 150, M. C.

*A. S. Hill* for the apps.—In determining the extent of the obligations imposed on the company, this special Act as well as the Railways Clauses Act must be considered. Now by the 2nd section of the former Act their duty is limited to the construction of the work necessary in the formation of bridges. They are bound to make, but not to keep in repair, such works. But further conceding that the question must be governed by the public Act, it is manifest, from the language employed, that it was the intention that its provisions as to keeping approaches in repair should apply to approaches to roads carried over railway bridges, and not to those passing under them. The company, therefore, in the present instance, are not bound to repair.

*Bovill* replied.

*Manley Smith* (as *amicus curiæ*) referred the court to two Irish decisions on the statute:

*The Waterford and Limerick Railway Company v.*

*Kearney*, 12 Irish C. L. R. 224; and

*Fosberry v. The Waterford and Limerick Railway Company*, 13 Irish C. L. R. 494.

*Cur. adv. vult.*

June 11.—The judgment of the Court (Blackburn, Mellor and Shee, JJ.) was now delivered by

BLACKBURN, J.—The question in this case was upon the construction of the Railways Clauses Act. The fact was, that the company had, in carrying a railway bridge over a highway, lowered the highway in order to bring it to a proper depth below the bridge; and the question raised was, whether or not the railway company were, under the Railways Clauses Consolidation Act, bound to keep in repair the slope for the road under the bridge, the descent from the road being part of the approaches to the bridge and works connected with the bridge under the terms of the statute. The case was argued by Mr. Bovill and Mr. Stavelly Hill; and we were rather inclined at the close of the argument to hold that the true construction of the Act was to cast upon the railway company the burden of maintaining the road. At the close of the argument Mr. Manley Smith, as *amicus curiæ*, informed us that there were two decisions in the court in Ireland upon the construction of the statute and we took time to look into those

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decisions, which we find are precisely upon the very point. In the first, the *Waterford and Limerick Railway Company v. Kearney*, 12 Ir. Com. L. Rep. 224, two of the learned judges, Fitzgerald and O'Brien, JJ., were of opinion that upon the true construction of the Act it was not to cast the burden of the maintenance of the road under those circumstances upon the railway company. Hayes, J. differed in opinion from them, and, so far as that decision went, it was two judges to one; but it was a decision of the Irish Court. Subsequently, there was a second case upon which this point arose, that of *Fosberry v. The Waterford and Limerick Railway Company*, 13 Ir. Com. L. Rep., where the question was raised before the Irish Court of C. P., and there, after considering the matter carefully, the full court (the Chief Justice and Ball and Keogh, JJ.) gave reasons, agreeing with the Irish Court of Q. B., in holding that the railway company were not liable at all; and Christian J. gave a somewhat different reason for his opinion, but he also agreed in the result that the railway company were not bound to repair the road under the circumstances. And I am bound to say, looking at the reasons given in that very carefully considered case in the C. P., they seem very strong reasons for the opinion that court entertained. We know that the decisions and opinions of law courts in England of co-ordinate jurisdiction are not final as those of courts from which there is no appeal, and they would not be binding on us, but still they are judgments which we are bound to treat with great deference and respect; still, if we take a different opinion, we should be bound to act on our own opinion, instead of considering the reasons given by those courts. The decisions given in the Irish courts are, of course, still less binding upon us; but we cannot say clearly, in this instance, that we ought to decide the other way. We think we ought to pay considerable respect to their opinions, and that upon this Act, which is very obscurely worded, though the inclination of our opinion would lead us to construe it the other way, yet the case is not sufficiently free from doubt to induce us to decide contrary to what they have decided upon the matter in that court. We, in deference to their opinion, and without attempting to say we think they are wrong, though it turns the balance where we have considerable doubt, must give judgment in this case in favour of the railway company, who were the apps., and consequently must decide that the magistrates were wrong. It is not a case in which costs can be given.

*Judgment for the apps., without costs.*

Monday, June 13, 1864.

REG. v. THE CORONER OF STAFFORDSHIRE.

*Coroner's inquisition—Evidence not upon oath.*

*The Court refused to quash a coroner's inquisition on the ground that evidence was received not upon oath, there being no mala praxis, and no mischief having resulted, and the jury having found their verdict upon the other evidence only.*

Rule nisi for a *certiorari* to quash an inquisition upon the body of a person whose death was caused by a boiler explosion at the ironworks of Messrs. Johnson, at Wolverhampton. A verdict of manslaughter was returned.

The ground of the motion was, that at the inquest the evidence of a boy, aged eleven, was taken, but not upon oath. From the affidavits on the other side, it appeared that the coroner in summing up told the jury to disregard his evidence, and that there was no reliance to be placed upon it; that the jury were of that opinion, and found their verdict upon the other evidence before them only.

D. D. Keane, Q. C. and W. J. Payne showed cause on behalf of the coroner, and T. Jones on behalf of the Crown.—This is not a case in which the court is bound to interfere *ex debito justitiæ*. Here there is no defect on the face of the inquisition, and no corrupt or indirect conduct on the part of the coroner, and the jury say they did disregard the evidence:

Jarvis on Coroners, 264 and 318, 2nd edit.;

Howell v. Lock, 2 Camp. 15;

Stalack's case, 1 Vent. 181;

Michael Barclay's case, 2 Sid. 90.

Macnamara in support of the rule.—It is conceded by the other side that the boy's evidence was illegally taken. That was contrary to 4 Edw. 1, st. 2, "De Officio Coronatoris." An inquisition *felo de se* carries with it the forfeiture of all goods and chattels and condemns to an ignominious burial. And as such consequences attach to it an inquisition, taken upon illegal evidence ought not to be allowed to stand good. It may be evidence in another proceeding:

Re Culley, 5 B. & Ad. 230;

Jones v. White, 1 Stra. 67;

2 Taylor on Ev. 1411;

Com. Dig. "Officer" G. 13;

2 Burn's Just. "Coroner," 42;

6 Vin. Abr. "Coroner," A. B.

COCKBURN, C. J.—I am very far from saying that if it had appeared that any actual mischief had resulted from the admission of this evidence, which was clearly irregularly taken on the inquest, this court would not have interfered. This is an application, however, which it is in our discretion to grant, and no mischief having been caused, and there being abundant evidence to sustain the inquisition, and the jury having disclaimed being influenced by it as to their verdict, I think we ought not to interfere.

The rest of the Court concurred.

*Rule discharged.*

### COURT OF COMMON PLEAS.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

Thursday, June 2, 1864.

WALLINGTON (app.) v. WILLES (resp.)

*Local Government Act 1858, 21 & 22 Vict. c. 98.*

*By sect. 65 of the Local Government Act 1858 it is enacted, that "memorials under sect. 120 of the Public Health Act 1848 shall be addressed to one of Her Majesty's principal Secretaries of State," and by sect. 81, that "all orders made by such secretary shall be binding and conclusive."*

*Held, upon an appeal under this Act, that the interest upon expenses incurred by a local board of health ran from the time the amount due was ascertained, and not from the time of the first demanding, and that the decision of the Secretary of State as to the amount of the claim for expenses and interest thereon was final.*

This was a case stated for the opinion of the court by justices under 20 & 21 Vict. c. 43.

CASE.

In the year 1852 the parish of Leamington was, by a provisional order of the General Board of Health, confirmed and made absolute by the Public Health Supplemental Act 1852, created a district for the purposes of the Public Health Act 1848, and the said Public Health Act, with the exception of sect. 50, was applied to and put in force within the said district.

On the 21st Sept. 1858, two streets within the district of Leamington, called respectively Russell-terrace and Farley-street, and which were not at

the time highways within the meaning of the said 69th section of the Public Health Act 1848, were not sewered, levelled, paved, flagged, channelled, metalled and made good to the satisfaction of the local board of health for the said district. Thereupon the local board, by notices in writing to all the owners within the meaning of the said Act, of the premises fronting, adjoining, or abutting upon the whole of the said streets respectively, required them respectively within one calendar month from the service thereof, to sewer, level, pave, flag, channel, metal and make good so much of the said streets respectively as their said premises respectively fronted or adjoined to, or abutted upon. Copies of the notices thus served on the resp. are hereto annexed and marked B and C. Such notices were not complied with by any of the said owners, and the local board thereupon executed the works mentioned or referred to in the said notices respectively, and incurred certain expenses in so doing.

The resp. was and is the owner of certain lands abutting upon the said street, called Russell-terrace, and also of certain other lands abutting upon the said street called Farley-street, and the proportion of the respective expenses calculated, according to the frontage of her said lands respectively, and settled by the surveyor under the said Public Health Act 1848, as due from her, was 642*l.* 12*s.* 3*d.* in respect of her lands abutting on Russell-terrace, and 92*l.* 2*s.* 6*d.* in respect of her lands abutting on Farley-street, making a total of 734*l.* 14*s.* 9*d.*

The local board have not at any time declared the said expenses to be private improvement expenses within the meaning of the Public Health Act 1848.

On the 21st Dec. 1859, payment of the sum of 734*l.* 14*s.* 9*d.*, being the aggregate of the above-mentioned proportions, with interest to that day, was duly demanded by the said local board of the said resp. On the 26th Dec. 1859, the resp. duly addressed to the Right Hon. Sir George Cornewall Lewis, Bart., the then Secretary of State for the Home Department, a memorial under the 120th section of the Public Health Act 1848, and the 65th section of the Local Government Act 1858, stating the grounds of her complaint against the said local board and appealing for relief in respect of the said sum of 734*l.* 14*s.* 9*d.* claimed by the said local board from her. She also duly gave notice in writing to the local board that she disputed the amount of the proportions of the expenses so settled by the surveyor as above mentioned. Thereupon the local board took the matter into consideration, and on the 20th Feb. 1860 they reduced the former proportion or sum to 613*l.* 7*s.* 3*d.*, the latter still remaining at 92*l.* 2*s.* 6*d.*, making a total of 705*l.* 9*s.* 9*d.*, and duly gave notice of this decision to the resp.

Within seven days after the receipt of this last-mentioned notice the resp. duly addressed to the said Secretary of State a second memorial under the sections before quoted, stating the grounds of her complaint against the said local board, and appealing for relief in respect of the said sum of 705*l.* 9*s.* 9*d.* claimed by the said local board from her. After an inquiry into the subject the Right Hon. Sir George Grey, Bart., the present Secretary of State for the Home Department, made an order thereon, dated the 20th Nov. 1863, to the following effect, namely, "that the resp. should in full of all demands pay to the said Leamington Local Board of Health the sum of 679*l.* 7*s.* 1*d.*, in respect of the works carried out by the said board." The said Sir George Grey also made a further order or certificate of the costs of the inquiry dated the same day. After the making of these orders, resp. on the 17th Dec. 1863 duly tendered to the collector of the said local board of health the sum of 679*l.* 7*s.* 1*d.*

awarded by the said Secretary of State, but the collector, acting under instructions from the said board of health, refused to accept the same, and the said board have since commenced proceedings under the said Public Health Act for the recovery in a summary manner of the said sum of 679*l.* 7*s.* 1*d.*, and also of interest thereon after the rate of 5 per cent. per annum from the said 21st Dec. 1859, to which they claimed to be entitled.

Accordingly, upon the 8th Jan. 1864 an information was laid before Charles Milward, Esq., one of Her Majesty's justices of the peace in and for the county of Warwick, by the app. Richard Archer Wallington, who was and is clerk to the said board, and who laid such information as such clerk and on behalf of the said local board.

The said information afterwards, on the 20th Jan. 1864, came on to be heard before us the undersigned justices of the peace in and for the said county assembled and acting together, and the respective parties appeared before us.

It was admitted that the said local board of health were entitled to the said sum of 679*l.* 7*s.* 1*d.*, but it was contended on behalf of the resp. that she was not liable to anything more than that, and that the question of interest was included in the order of the Secretary of State, which was made binding and conclusive under the said 81st section of the Local Government Act 1858; while on behalf of the local board it was contended that they were entitled to interest by force of the 62nd section, and that the Secretary of State had no power to entertain the question of interest.

Evidence was adduced before us on the part of the app., that the said notices to make the streets had been given and demand made for the expenses as above set out. That the resp. had duly memorialised the Secretary of State as above mentioned, and that, after inquiry into the subject, the Right Hon. the present Secretary of State for the Home Department made an order thereon dated the 20th Nov. 1863, and also a further order or certificate of the costs of the inquiry dated the same day.

After hearing the case we the said justices considered the said order of the Secretary of State was conclusive upon us, and we ordered that payment of 679*l.* 7*s.* 1*d.* be made by Mrs. Willes to the said local board in full of all demands in respect of the matters set forth in the said information.

The questions for the opinion of the court are:

1. Whether our decision was or was not right in point of law.

2. If the said local board are entitled to any interest in addition to the sum awarded by the Secretary of State, from what day or time, and on what sum is such interest claimable?

If our said decision was right, our order as made is to stand good; if not, we request the court to remit the matter to us in order that we may make a proper order in accordance with their decision.

Given under our hands this 22nd day of Feb. 1864.

JOHN P. GUBBINS.  
E. WHEELER.

*II. Lloyd*, for the apps., contended that the resp. was bound by sect. 62 of the Local Government Act 1858 to pay the interest demanded, and that such interest was to run from the date of the demand by the local board, and not from the date of the order made by the Secretary of State.

*Markby*, for the resp., who contended that the interest only ran from the time that the amount to be paid was ascertained, was stopped by the Court.

*ERLE, C.J.*—I am of opinion that our judgment should be for the resp. The 120th section of the Public Health Act 1848, which gives the power of appeal from the local board to the general board,



speaks only of expenses incurred by the local board in executing the necessary works, and as no mention is made of interest a claim for such cannot be made under that section. Then follows the Local Government Act 1858, by the 62nd section of which it is enacted that expenses shall be a charge upon the premises in respect of which they have been insured, and shall bear interest at the rate of 5 per cent. And by the 65th section the appeal shall be to the Secretary of State instead of to the general board; and as this provision follows that relating to the payment of interest, it is clear to my mind that it was the intention of the Legislature that the Secretary of State should adjudicate upon the whole claim, including interest.

WILLIAMS and BYLES, JJ. concurred.

*Judgment for the resp.*

Attorneys for resp., Bell, Steward and Lloyd,  
for Baker and Brown, Warwick.

### JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by JAMES PATERSON, Esq., of the Middle Temple,  
Barrister-at-Law.

*Saturday, July 23, 1864.*

(Present—The Right Hon. Lord KINGSDOWN, Sir  
E. RYAN and Sir J. ROMILLY, M. R.)

#### FALKLAND ISLANDS COMPANY v. R.

*Wild animals—Right to capture—Grant from Crown—  
Lease from Crown.*

*A grant of land in fee by the Crown, and also a licence  
to depasture cattle on Crown lands (which is in sub-  
stance a lease), carries with it the right to capture and  
appropriate all wild animals found on such land.*

*Where cattle had been introduced into an island, and in  
course of time many escaped and lived in a wild state:*

*Held, in construing a grant by the Crown of the lands,  
these wild cattle were to be treated as animals fera  
nature.*

This was an appeal from an order of the police court of Stanley, in the Falkland Islands, dated the 26th Feb. 1862, as to the right of the Falkland Islands Company to hunt and kill wild cattle on their lands. A penalty is imposed by the local statutes on all who, without lawful cause, hunt, kill, or wound wild cattle.

The Falkland Islands Company, in 1859, obtained from the Crown a grant in fee of the southern peninsula of the East Falkland Islands, with the power to hunt, catch, kill, or tame all live stock upon the same.

In 1860 the company also obtained a grant of 160 acres as follows:

Know ye, that for and in consideration of the sum of 96l sterling to us paid by the corporation of the Falkland Islands Company, we of our special grace, certain knowledge and mere motion have given, granted, and do by these presents, for us our heirs and successors, give and grant unto the said corporation and their successors all that lot or parcel of land, situated on the western shore of Port Salvador, north of the Rio Pedro, containing one hundred and sixty acres, and numbered 2 D, and more particularly described as to metes and bounds in the official plan or survey made by Arthur Bailey, Esq., surveyor, in the month of Jan. 1860, which plan or survey is now of record in the office of our Surveyor-General of the Falkland Islands and their dependencies. To have and to hold the said lot or parcel of land, and all and singular the premises hereby granted, with the rights, members and appurtenances, unto the said corporation and their successors for ever, he and they yielding and paying for the same to us, our heirs and successors, one peppercorn of yearly rent on the 1st Jan. in each year, or so soon thereafter as the same shall be lawfully demanded: Provided, nevertheless, that it shall at all times be lawful for us, our heirs and successors, or for any person or persons acting in that behalf by our or their authority, to resume and enter upon

possession of any part of the said lands which it may at any time by us, our heirs and successors, be deemed necessary to resume for making roads, canals, bridges, towing paths, or other works of public utility or convenience, and such lands so resumed to hold to us, our heirs and successors, as of our and their former estate, without making to the said corporation and their successors any compensation in respect thereof, so nevertheless that the lands so to be resumed shall not exceed one-twentieth part of the whole of the lands aforesaid, and that no such resumption shall be made of any lands upon which any buildings may have been erected, or which may be in use as gardens or otherwise for the more convenient occupation of any such buildings: and provided also, that it shall at all times be lawful for us, our heirs and successors, or for any person or persons acting in that behalf by our or their authority, to cut and take away any indigenous timber, and to search, dig for, and carry away any stones or other materials which may be required for making or keeping in repair any roads, bridges, canals, towing paths, or other works of public convenience or utility: and we do hereby save and reserve to us, our heirs and successors, all mines of silver and gold and other precious metals, and also all mines of coal in or under the said land, with full liberty at all times to search and dig for and carry away the same, and for that purpose to enter upon the said land or any part thereof.

There was also licence for depasturing cattle on the said lands.

The company, after obtaining these grants, used the lands for breeding and depasturing cattle. In 1860 the governor received a copy of new rules and regulations, and, among other things, a licence was to be granted on payment of a fixed sum empowering the holder to kill wild cattle. The company considered they had the right to kill the cattle. But the Government maintained the contrary, and, having summoned the company's manager for hunting and killing the cattle without a licence, the magistrates at the police court ordered the company to pay a large sum by way of penalty. The present appeal was then brought, and a special case was stated, and the question put to the Judicial Committee of the Privy Council was, whether, having reference to the rights of the apps. with regard to the said wild cattle, the proceedings and order are correct in point of law.

Sir H. Cairns, Q.C. and C. E. Pollock for the apps.

The Attorney-General (Palmer) and Melvill for the resps.

#### Authorities cited:

*Sutton v. Moody*, 1 L. Raym. 250;  
Year Book, 12 Hen. 8;  
1 Bl. Com. 420;  
*Morgan v. Bissell*, 3 Taunt. 55;  
Bac. Ab. "Leases," K.

Judgment was delivered by

Sir J. ROMILLY, M. R.—The question referred by Her Majesty to their Lordships is not, as is stated in the special case, whether, having reference to the right of the apps. with regard to the wild cattle, the proceedings and order of the governor, and of the chief or stipendiary magistrate referred to in the special case, are correct in point of law, but "whether under the freehold or leasehold grants, or either of them, made to the Falkland Islands Company, as set forth in the petition for leave to appeal, the company and their agents are entitled to kill and destroy wild cattle found on the lands, the subject of this grant." Prior to the year 1846 the whole of the soil of the Falkland Islands, and the absolute possession and dominion of all wild cattle and wild stock upon those islands, were the sole and exclusive property of Her Majesty, and such property and dominion still remain vested in Her Majesty, except so far as she may have granted any portion of this right to others. On behalf of the apps., the Falkland Islands Company, it is contended that Her Majesty has granted to them the exclusive right of killing wild cattle which may be found on the land sold by the Crown to the apps. during the period of their lease. In 1859 and 1860



grants of land of 160 acres each were made by the Crown to the Falkland Islands Company in fee, with a proviso securing to the Crown the right of re-entering on the land for the purpose of making roads, canals and other works of public utility, the right to cut timber, and to search for and carry away stones or other materials which might be required for making or keeping such works in repair, and also reserving to the Crown all mines of gold, silver, precious metals and coal, with full liberty to search for and carry away the same. There is no other reservation in the grant. Incidental to the grant of the land was granted a licence or lease to depasture stock on 10,000 acres, the limits of which were strictly defined in the instrument for a term of twenty years, in consideration of an annual rent of 10*l.*, subject to the same reservation as the grant of the land in fee-simple. Their Lordships are of opinion, that though this is entitled a licence to depasture stock, it is in law a demise of the land therein contained, to which the ordinary rights of a lessee attach, and consequently that the land thereby demised, subject to the rights of the Crown and the performance of the condition contained in the licence, belong to the Falkland Islands Company as their exclusive property during the period of the lease. It is not disputed that the law prevailing in the Falkland Islands must be considered to be the common law of England, modified only by such statutes as apply to these islands. Their Lordships are also of opinion that by the common law of England the grant of the land in fee-simple of the lots of 160 acres, and the demise of the lots of 10,000 acres, confers upon the grantees and lessees thereof the exclusive right of killing and taking all game, beasts of chase, and animals which are properly *feræ naturæ*, which may at any time be upon their land, so long as such animals may be and remain upon the land so granted or demised. It is contended, on the part of the Crown, that the wild cattle are not animals that come within this description; that it is matter of history that the Falkland Islands, when first taken possession of on behalf of Her Majesty, contained no such animals as wild cattle, horses, swine, or goats; and that these animals, which were not indigenous in the island, have been introduced by Her Majesty's subjects into the island; that some which escaped or were turned loose have bred, and have increased so prolifically as to have overrun these islands, but that they are only wild in the sense that they are not restrained by fences and boundaries; that such being the origin and nature of the animals they cannot properly be termed animals *feræ naturæ*. Their Lordships consider that it is not necessary for them to determine this question in the present case, because it appears to them that so far as regards any question between the apprs. and the Crown this question was determined between them in settling the terms of the agreement entered into between the Secretary of State for the Colonies and the apprs., which ended in a grant made to them by the Crown on the 8th Sept. 1859. Her Majesty's Emigration Commissioners were empowered to enter into the negotiation with the Falkland Islands Company, and to settle the terms of the grant on behalf of Her Majesty, and in doing so the Emigration Commissioners agreed with the Falkland Islands Company that the wild cattle should be treated as animals *feræ naturæ*, in which no property could be acquired until killed or taken. The Falkland Islands Company proposed that the grant should be made in these words:—"The Governor of the said Falkland Islands should grant the said company all that peninsula, &c., together with all live stock upon that peninsula, and upon the islands aforesaid." In reply to this the Emigration Commissioners stated that the words "together

with all live stock, &c.," would imply a property on the part of the company in any wild cattle which might be on their land. Now, the words in the heads of the agreement inclosed in the Colonial-office letter to you of the 20th Aug. are "the grant to carry the right to kill and tame wild cattle within the granted territory." The commissioners understand the intention of the Secretary of State to have been to allow the company the privilege of hunting and killing wild cattle which might be at any time on their land, but not to interfere with the general principle that wild cattle being *feræ naturæ* no property in them can be acquired. The alteration should therefore run "together with the power to hunt, kill, or tame all live stock," &c. This was assented to on the part of the company, and the words suggested by the Emigration Commissioners were accordingly adopted. Their Lordships, therefore, are of opinion that this must be treated as one of the terms of basis of the negotiation on the faith of which both the subsequent grants and licences to depasture cattle were applied for and made, and that it consequently follows that where the grants were made by the Crown to the company, it must be taken to have been treated on both sides that the wild cattle were to be considered as animals *feræ naturæ*, in the absence of any expression or reservation to the contrary. If this be correct, then their Lordships are of opinion that the Ordinance passed by the local legislature in 1853 does not affect the right of the apprs. The 37th section of that Ordinance did not prevent Her Majesty from granting plots of land on any terms that might be thought fit; and the words "without lawful cause" and "unlawfully," which are introduced into that section, seem to have been expressly inserted for the purpose of saving the rights of any person who might be so entitled. Their Lordships, therefore, are of opinion that in the absence of any reservation to the Crown of any right of killing or taking wild cattle on the lands granted or demised, it must be held that the right of killing and taking such cattle while on the lands granted or demised is included in such grant and demise, and is not prohibited by the 37th section of the Ordinance of 1853. And they will humbly recommend Her Majesty accordingly.

*Judgment for apprs.*

Apprs.' solicitors, *Bischoffe, Cox and Bompas.*  
Resp.'s solicitors, *Solicitors of the Treasury.*

#### ROLLS COURT.

Reported by H. E. Young, Esq., Barrister-at-Law.

Thursday, June 30, 1864.

THE ATTORNEY-GENERAL v. THE HOSPITAL OF ST. JOHN, BEDFORD.

*Charity—Advoeson—Trusts of—The Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 71.*

Where the court was satisfied, upon the evidence adduced, that certain charitable trusts were originally—viz., on or before A.D. 1280—impressed upon lands belonging to a hospital; that those trusts still remained untouched; that the master and the corporation of the hospital still existed, although some of the objects of the trusts had disappeared even prior to A.D. 1444; and although the corporation of the town of B. had subsequently acquired certain rights over the appointment of the mastership of the hospital, to which an advowson had always been attached: it was Held, that the acquisition by that corporation of their rights could not be assumed to have been for their individual benefit; that such acquisition did not supersede the prior and existing charitable trusts; that the hospital was a charity in the proper and ordi-

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any sense of that word; and that it and its property must be dealt with accordingly :

*Held, also, that the charity was within the Municipal Corporation Act (ubi supra), and that the corporation of the town of B. had no power to sell or dispose of the advowson.*

The facts of this case, the nature and effect of the arguments and the authorities cited in it, will sufficiently appear from the judgment of the M. R., *infra*.

The Attorney-General, Hobhouse, Q. C., and T. H. Terrell appeared for the informant.

Baggallay, Q. C. and Wickens for the defts.

The MASTER of the ROLLS.—In this case an information has been filed by the Attorney-General, against a corporation called the Master and Co-Brethren of the Hospital of St. John the Baptist, at Bedford, against the Rev. Henry Pearse, the master of the Hospital, and rector of the parish of St. John the Baptist, in Bedford, and against the corporation of the town of Bedford, praying a declaration that the whole of the lands belonging to or in the possession of the first-named defts., belong to the hospital, and are subject to the trusts of the hospital as declared by Robert de Parys; and that no part thereof belongs to the rectory of the said parish, or to the master of the said hospital, otherwise than as such master; and that a scheme may be settled for the application of the rents of the property. The information asks, in effect, for a declaration that the property of the hospital is subject to a charitable trust; and for a scheme for the better administration of the property itself, and for the better application of the income to be derived from it. Those objects are opposed by the corporation of Bedford on the ground that this hospital is neither a charitable corporation nor a charity in the ordinary sense of the word; but that the property or the principal part of it belongs to the rectory of St. John's, which is united with and inseparable from the mastership of the hospital; and that the advowson, or perpetual right of presentation to that rectory, belongs to and is vested in the corporation of the town of Bedford. The questions which I have to determine are: whether the whole or any part of the property belonging to the hospital was given for charitable purposes; and, if not the whole property, but a part only of it, then what part was so given? The first evidence produced of the original transactions is to be found in an entry in an ancient book of memoranda made on the 23rd Jan. 1400, and which professes to give an account of the charter of endowment of Robert of Parys, in the year 980. If that be a true account of a genuine document, it is difficult to discover any means by which to avoid concluding that the original foundation of the hospital was for charitable purposes, in the strict and ordinary meaning of the word. The original charter is not now produced; but if the document to which I am referring be correct, it was in existence in Jan. 1400; for, in the words of the entry at the foot of the memorandum, it is stated that the original letters of the foundation of Robert of Parys were then seen, examined and handled, and found to be under seal and free from all suspicion and defect. Some doubt is thrown on the date of that document. In the copy to which I have referred, the document is stated to bear date in the year 980. I was of opinion that either the date was miscopied, or a very serious doubt was cast upon the genuineness of the original document itself. I have, however, examined the evidence on this point very carefully, and I have come from it to the conclusion that the charter is an authentic document. I think that the date was erroneously altered by the copyist

from 1280 to 980. By that instrument, then, the copy of which appears to be professedly given in the exact words of the original, Robert of Parys is styled the founder of the new hospital, "Fundator Novi Hospitalis." Those, I think, are the words used. According to that document, the hospital was endowed and established for the support of two or three brethren—of whom the more advanced was to be the master—and also for the relief of free-born inhabitants of the town of Bedford in needy circumstances, to be presented to them for that purpose. It provides for their mode of living and their dress. It appears, however, by that document that, although Robert de Parys is styled *Fundator Novi Hospitalis*, three other persons had endowed the hospital with possessions, but who were all then dead. It appears also by other documentary evidence, which I have examined, that the hospital had really been founded in the reign of Hen. II. I cannot, however, allow that circumstance to destroy the statement made in the charter, or the unavoidable conclusion to be drawn from it. Robert de Parys had the power to declare what were the objects for which the hospital was founded, and the laws by which it was to be regulated. Proceeding then upon that conclusion, and considering the account of the objects of the original foundation to be correct, it follows that, if that charter has not been lawfully superseded by any subsequent act or proceeding, the whole hospital was given, at that time, for charitable purposes, and that its possessions were intended to be so applied. It also follows as a necessary consequence, that the subsequent endowments, unless otherwise specified by their respective grantors, were to be applied for the same purposes. That view is confirmed by many later endowments, which were made "Deo et Hospitali Sancti Johannis Baptistæ et fratribus ibidem Deo servientibus," and in some, "In sustentationem pauperum predicti hospitalis." The taxation of Pope Nicholas, in the time of Edw. I., omits all notice of eleemosynary institutions; and this hospital is not mentioned, although its existence at that time is proved incontestably. From the earliest time that any mention is made of the parish of St. John, it appears to have been attached to the hospital itself. If both the great and small tithes were taken by the master and brethren, and if they performed the ecclesiastical and parochial duties attached to the parish, the question whether it was a rectory or a vicarage was not a matter that would be kept very distinct. It was practically immaterial. The earliest notice of it amongst the papers before me is an entry in the episcopal records of Lincoln, in the year 1209. It is there entered among the benefices belonging to the archdeaconry of Bedford, as a "vicarage, in the Church of St. John, Bedford, which belongs to the brethren of the same town." If the great tithes were taken by the master as parts of the endowments of his office, that would be quite correct; but, as the parochial duties would be performed by the master, or by one of the brethren, the distinction between a rectory and a vicarage might easily have faded away. Accordingly we find that in the return made in the Rolls for the augmentation office, there is this statement: "The Hospital of St. John, in Bedford, was founded by Robert Parys; to the intent to find a master and a priest to sing and pray for the soul of the said Robert Henry St. John and others which should be thereafter benefactors to the said hospital. The church of the said hospital is the parish church of itself; and there belongeth to the same about eighty-nine houseless people, and the said master and incumbent of the said hospital is the parson, and serveth the cure there; and there is none other parson or curate to minister unto said parishioners there at times of visitation

but the said master and chaplain." Then it proceeds to give the value of the lands, and afterwards says: "There hath been no lands, tenements, or other hereditaments derived from the said hospital, since the 4th day of Feb. in the 27th year of the King's reign; albeit, as it is said, the predecessors of the incumbent there hath put away of the possessions which sometime did belong or were parcel of the said possessions, but in whose time, or what the value thereof was, or the intent thereof, cannot be known." For nearly a hundred years from 1280 to 1374, the master was regularly elected by the brethren, which is a clear proof of the existence of such persons as brethren, either residing in or belonging to the hospital up to the year 1374, when John Appeland was elected. When he vacated the office of master does not appear; but it is after an interval of seventy years that the next appointment of master is recorded. That took place in June 1444. That was on the presentation of the mayor of Bedford. From that time to the present the presentations have always been made by the mayor of Bedford. How that right became vested in him does not appear. It might have happened that the first mayor who appointed a master was one of the brethren of the hospital; and that subsequently that right was supposed to be vested in the mayor, in that character. It may have been that during the time of Henry the Sixth's reign the brethren had disappeared, and the mayor then assumed a function which no other person was capable of performing. It may also have been by some grant from the Crown. If it was by royal grant, all trace of it has disappeared. We are therefore left to speculate as to the most probable mode by which the patronage became vested in the mayor. The subsequent appointments during the remainder of the reign of Henry the Sixth seem to have partaken of the agitation which was then pervading the country; and from the beginning of June 1444 till the end of Aug. 1461, when Edward the Fourth was king, a period of seventeen years, no less than nine elections of masters of the hospital took place: a clear proof that some of the vacancies were compulsory. Down to the election of John Strynger, which took place in Henry the Eighth's reign in 1580, the master took an oath to observe the ordinances of the hospital. Since that time the oath has been discontinued. The presentation was made by the mayor, or by the mayor and burgesses. The person selected was appointed sometimes to the mastership alone; sometimes he is styled master or rector, and sometimes the presentation is to the hospital or parish church. In all cases the mayor presents *ratione officii*, and nowhere does it appear that the mayor was a brother of the hospital; but up to that time, that is, to the appointment of Strynger in 1580, the trusts of the original foundation are strongly impressed on the hospital and on its possessions. Nothing that has occurred since removes, or indeed, in my opinion, tends to abrogate or diminish the trusts so imposed. It is not, I think, necessary to go into any detailed enumeration or consideration of the facts connected with the subsequent history of the hospital. The result generally may be shortly summed up to this effect: A person of the name of Conyers obtained a grant from Queen Elizabeth of the reversion in the right to nominate the master on the next vacancy on the assumption that the hospital was a charity which had become vested in the Crown, under the statute of Chanttries, in the 1 Edw. 6. The interest of Conyers, such as it was, became vested in Williams, who was mayor of Bedford in the reign of James I., and he, and after him, several persons deducing title through him, claimed the right of nomination of a clerk to the mastership, as their private property under a grant from the

Crown. The decisions of the courts were uniformly against all such claimants. Divers of those cases have been reported. The first is *Cro. Eliz.* in 1588, reported 2 Cr. 790. Then again it appears to have been heard in 1616, in the reign of James I., of which copies of the record are produced; and again it was heard in the time of Lord Hardwick, in the reign of Geo. II. reported in *Willes' Reports*. Those cases do not, any one of them, regulate the case before me; but they are brought forward apparently to establish this conclusion, namely, that as Williams and his descendants endeavoured to fix a trust on this hospital, under which they claimed to be entitled, and as the court had in every case rejected the claims and decided against the trust, therefore there was no trust affecting the hospital. But the fact is, that the courts only decided that the trust on which the claimants relied, and which was necessary to support their contention, had no existence. The question, whether there existed a charitable trust which affected these lands of the hospital, in the sense in which it is now brought before me, never was raised. That appears by an examination of all the cases, and particularly by an examination of the case made, and decided in the *Ex.* in the reign of James I. What was raised in 1611 was this: a claim, apparently at the instance of Williams, was made to have a trust declared of these lands, belonging to the hospital, in such a way as that it should appear that the hospital was part of the possessions belonging to but concealed from the King; but no claim was made to the property of the hospital on the ground of its being a charity to be duly administered according to the trusts of its original foundation. In truth, if the decision had been the other way, and had established the particular trust insisted upon by Williams, it would have been fatal to the present case. It would have established the right of the Crown to the land, as forfeited under the statute of Chanttries. The decision was adverse to the claims of Conyers and Williams, as indeed it must have been, having regard to the reported cases on this subject, which are collected in *Adams v. Lambert*, 4 Rep. 104, b. They were much considered in an information filed against the Fishmongers' Company, in the case of *Kneeworth's Charity*, and *Preston's Charity*, 5 M. & C. 11, 16, where it appears by the whole current of authorities that if the primary object of a hospital was charity—the support, for instance, of a master and brethren—the adjunct of an injunction that they were to pray and sing for the souls of the founders and benefactors, did not taint the charity and render it all forfeitable to the Crown. Consequently, if the view that I take of this case be correct, and if it had in 1611 been proved that the hospital was originally founded and endowed for charitable purposes, and that the praying for the soul of a benefactor, or for the soul of the founder, was a mere adjunct, and not an essential part of the endowment, that would have been a complete answer to the claim of Williams, inasmuch as it would have removed the title of the Crown, under whose grant alone he could have derived any right, and under which alone he claimed. That is shown again in the case reported in *Willes*, 608. All that that case decided was, that, as between the corporation and a grantee from the Crown, the corporation was entitled to present. After a continued user of that right for upwards of 400 years, no one will now contest that right of the corporation. But that does not dispose of the question before me. That question is, did they exercise that right for their own individual benefit as a corporation, or as trustees of the charity of the hospital of St. John, and for the purposes for which that was founded? I was strongly pressed at the hearing with this argument—How did that right get to the corporation? whence

did the mayor derive his right to present to the mastership? The right is not now disputed; and if you cannot trace the origin of the right, it must be assumed that they acquired it as they did the rest of their corporate property, for their own individual advantage. But in my opinion the error in that reasoning, which likens the acquisition of the right of presentation to the acquisition of other property, the original grant of which is lost, lies in this: that I have here evidence of the nature of the property, and of the trusts attached to it, anterior to the right of the corporation; and that the acquisition of that right does not of itself supersede or destroy the prior trusts. If I were compelled to answer the question I have put as above, as to the mode by which the mayor obtained the right of presentation to the mastership, I should be disposed to say that the right was acquired by unresisted usurpation during the troubles of the reign of Henry VI. But it is not necessary for me to answer that question. The trusts originally impressed on the lands, with which the hospital was endowed, remain untouched. The corporation of the hospital is still in existence and in use, and the master still exists; and although the brethren have disappeared, and as far as I can ascertain have had no existence since 1444, and possibly since some even earlier date, still the discontinuance of one or even of more of the objects of the charity will not destroy the trusts if there be no doubt as to the origin and existence of them. Besides which, the poor still exist who receive alms as heretofore. It is true that the church is not distinct from the mastership; but I have already stated how it appears to me that that arose. In all respects, therefore, this hospital and its lands possess the qualities and are impressed with the obligations which belong to an eleemosynary institution, the principles and rules of which are to be found in the charter of Robert of Parys, in 1280. It is therefore, in my opinion, a charity in the proper and ordinary sense of that word, and its property must be dealt with accordingly by this court. In my opinion, this case is governed by the decision in the *Shrewsbury Grammar School case*, 1 M. & C. 632; and it falls within the 71st section of the Municipal Corporation Act, and not the 139th, and the corporation have not, in my opinion, any power under that Act to sell or to dispose of the advowson. There must, therefore, be a decree for a scheme to be settled by me in chambers for the future application of the revenues of the charity; and a declaration that no more leases are to be granted for lives, or otherwise than at a rack-rent. In settling the scheme I shall consider that the master is the principal officer of the charity. He performs the parochial duties belonging to the parish of St. John; but the whole subject of the scheme and the details of it, will have to be considered in chambers, and will be better done there; and respecting that I shall not therefore now insert any direction in the decree. I am of opinion that the costs of all parties must be taxed and paid out of the funds of the charity when there are any funds available for that purpose. Reserve further consideration with liberty to apply.

Solicitors, *Fearon and Clabon; Maples and Teesdale.*

July 26 and 28, 1864.

Re HACKNEY CHARITIES.

*Charity Commissioners—Order made by, in a contentious case—Appeal—Time for—Legal estate in charitable property.*

*Where the Charity Commissioners, without consulting counsel, made an order in a case submitted to them, and which was a contentious one within the Charitable Trusts Act 1860, s. 5, this court, on appeal, reversed a portion of the order, but directed the residue of it to stand over, to enable the parties to come to some arrangement between themselves.*

*Where inhabitants of a parish which is the object of a charity appeal from an order of the commissioners, neither their consent, nor that of the Attorney-General, is necessary to the appeal; secus, if a trustee, or a person acting in the administration of the charity, appeals; unless the gross yearly income of the charity exceeds 50l.*

*The time for appealing from an order of the Charitable Trust Commissioners runs from the end of that fixed for the publication of the notice of the order appealed from.*

*Where land was, in 1624, devised to the poor of the parish of H., to be distributed by the churchwardens for the time being of the said parish:*

*This Court was of opinion that the legal estate in the land was now vested in the churchwardens and overseers of the parish as a corporation.*

*Where, in 1679, a sum of 100l. was bequeathed "to the use of the poor of the parish of H. for the purchase of a piece of land," the rent to be bestowed in twopenny wheaten loaves of bread, and distributed every Lord's-day among the poor of the parish for ever; and a piece of land was accordingly purchased with the bequest, and conveyed to the then vicar and others of the inhabitants of the parish:*

*This Court was of opinion that the legal estate in that land was not now vested in the churchwardens and overseers of the parish as a corporation, because of the special trust attached to the bequest.*

This was an appeal petition, presented by two of the rated inhabitants of the parish of St. John, Hackney, and it prayed that an order of the Charity Commissioners, dated the 10th Nov. 1863, might be discharged or remitted for consideration. The facts of the case were shortly these:—

Valentine Poole, by his will dated in the year 1624, devised a piece of land called the Buttfield, partly freehold, and partly copyhold, unto the poor of the parish of Hackney, to be distributed by the churchwardens for the time being of the said parish. There had been no admission to the copyhold part of the land since 1808.

In the year 1671, Sir Stephen White conveyed a piece of land, called Raven Leys, to trustees and their heirs, upon trust to permit the churchwardens to receive the rents and dispose thereof for the relief of the poor of the said parish as should be directed by two or more of the inhabitants of the parish, other than the churchwardens, to be yearly chosen for that purpose by the parishioners at a vestry meeting, on Easter Tuesday.

Sir Stephen White, by his will dated in the year 1679, bequeathed to the use of the poor of the parish of St. John, Hackney, the sum of 100l. for the purchase of a piece of land; the rent to be bestowed in twopenny wheaten loaves of bread, and distributed on every Lord's-day among the poor of the said parish for ever. The 100l. was laid out in the purchase of four parcels of land in Hackney Marsh; and those parcels were, in 1680, conveyed to the then vicar and others of the inhabitants of the parish.

By the 59 Geo. 3, c. 12, "An Act to amend the laws for the relief of the poor," s. 17, it was in effect enacted,

That all buildings, lands and hereditaments which should be purchased, hired, or taken on lease by the churchwardens and overseers of the poor of any parish by the authority and for any of the purposes of that Act, should be conveyed, demised, and assured to the churchwardens and overseers of the poor of every such parish respectively and their successors in trust for the parish; and such churchwardens and overseers of the poor, and their successors, should and might, and they were thereby empowered to accept, take and hold, in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands and hereditaments, and also all other buildings, lands and hereditaments, belonging to such parish.

By the 3 Geo. 4, c. 72, "An Act to amend and render more effectual two Acts passed in the 58th and 59th years of his late Majesty, for building and promoting the building of additional churches in populous parishes," s. 11, it was in effect enacted,

That it should be lawful for the commissioners (in the said Acts mentioned) in every case in which they should be of opinion that it would be expedient to divide, or in which the said commissioners should have divided any parish or place into two or more distinct and separate parishes, district parishes or chapels, for ecclesiastical purposes, under the provisions of the therein recited Acts, to apportion, if the commissioners should, in their discretion, think it expedient, among such separate divisions of any such parish or place so made separate or district parishes or chapels for ecclesiastical purposes, any charitable bequests or gifts which should have been made or given to any such parish or place, or the produce thereof; and in any such case to direct that the distribution of the proportions of such bequests or gifts, or the produce thereof, as should be so apportioned to any such separate division of any such parish, should be made and distributed by the spiritual person serving the church or chapel of any such separate divisions, or the church or chapel wardens or select vestry of any such separate divisions, either jointly or severally, as the commissioners might in their discretion (regard being had to the nature of the bequest or gift, and the application thereof) think expedient.

In 1824, the parish of St. John, Hackney, was, by an Order in Council, duly divided, for ecclesiastical purposes, into three district parishes, called Hackney, West Hackney, and South Hackney, and each division was constituted a distinct rectory.

In 1833, the Commissioners for Building New Churches apportioned the charities of Hackney, and gave Poole's charity and White's charity, in different shares, to each of the three divisions, and directed them to be distributed by the respective rectors, churchwardens, and vestries for the time being of the divided parishes.

The instrument of apportionment also provided that the apportioned charities should be applied and distributed, in all respects, according to the original trusts thereof, and as the same were then distributed, except so far as the mode of distribution was thereby expressly varied.

By the 16 & 17 Vict. c. 137, "An Act for the better administration of charitable trusts" (the Charitable Trusts Act 1853) s. 32, it was in effect enacted that the district courts of bankruptcy and the County Courts should have jurisdiction in cases of charities, the gross annual incomes of which for the time being did not exceed 30*l.*, and by sect. 44, that a statement in any certificate or order of the Charity Commissioners, that the gross yearly income did or did not exceed 30*l.*, was to be sufficient evidence of the amount of the gross annual income of such charity for the purpose of determining the jurisdiction. By sect. 47 the secretary of the board was made the treasurer of public charities, and constituted a corporation sole; and

By sect. 48, where land held upon trust for any charity was vested in any persons other than persons acting in the administration and application of the rents, or where there were no trustees, the court having jurisdiction under the Act might order the land to be vested in the treasurer of public charities and his successors. But no such vesting order was

to be made in respect of land vested in a corporation without the consent of the corporation, or in respect of copyholds without the consent of the lord of the manor.

By the 18 & 19 Vict. c. 124, "An Act to amend the Charitable Trusts Act 1853," s. 15, it was enacted, that the two Acts should be read together, and the secretary of the board was made a corporation sole by the name of "the official trustee of charity lands," instead of the name of "treasurer of public charities."

By the 23 & 24 Vict. c. 136, "An Act to amend the law relating to the administration of endowed charities," and called "The Charitable Trusts Act 1860," s. 2, it was in effect enacted, that that and the two previous Acts should be read together; and by sect. 2 jurisdiction was given to the Board of Charity Commissioners to appoint trustees of any charity, and to vest real estate belonging thereto in the same way as the County Courts or the district courts of bankruptcy could under the Act of 1853. But by sect. 4, the board was not to make any order under the jurisdiction vested in them by any Act with respect to any charity of which the gross annual income (exclusively of the yearly value of any buildings or land used wholly for the purposes thereof, and not yielding any pecuniary income) should amount to 50*l.* or upwards, except upon the application of the trustees. And, by sect. 5, the board was not to exercise the jurisdiction thereby vested in them in any case which, by reason of its contentious character, or of any special questions of law or of fact which it might involve, or for other reasons, they might consider more fit to be adjudicated on by any of the judicial courts.

By sect. 7 a copy of every order was to be deposited in some convenient place for the space of one calendar month for public inspection.

By sect. 8 the Attorney-General, or any person authorised by him or by the said board, in the case of any charity, whatever might be the yearly income of its endowments; and any trustee or person acting in the administration of, or interested in, any charity of which the gross yearly income, to be calculated in manner therein aforesaid, should exceed 50*l.*, or any two inhabitants of any parish or district in which the same should be specially applicable, might, within three calendar months next after the definitive publication of any order of the said board, present a petition to the High Court of Chancery in a summary way, appealing against such order, and praying for such relief as the case might require; and,

By sect. 10, the jurisdiction vested by the Act in the said board was to be exercisable with reference to charities vested in any corporation sole or aggregate, who, either solely or jointly with any other person or persons, should also be the recipients of the benefit thereof.

No trustees had been legally appointed to either of the charities until the order now appealed from.

On the 10th Nov. 1863, the Charity Commissioners made the following order:

In the matter of the Charities of Valentine Poole and Sir Stephen White, in the parishes of Hackney, West Hackney and South Hackney, in the county of Middlesex. The Board of Charity Commissioners for England and Wales having considered an application in writing made to them on the 23rd Jan. 1862, in the matter of the above-mentioned charities by the rectors and churchwardens of the several parishes of Hackney, West Hackney and South Hackney, for the purposes of the following order, and it appearing to the said board that the endowments of the said charities consist of the several hereditaments and sums of stock mentioned in the said schedule hereto, and that the gross annual income of the said charities amounts to 30*l.* 12*s.* and 29*s.* 12*d.* respectively, or thereabouts, and upon public notice of the intention of the said board to make the order hereafter contained, having been given more than one calendar month previously to the date hereof, and no sufficient notice of any objection thereto or suggestion for the variation thereof having been received by the said board, do hereby order that the rectors and churchwardens of

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the said several parishes of Hackney, West Hackney and South Hackney, and their respective successors in office, by virtue of and during their tenure of office, be and they are hereby appointed to be the trustees for the administration and management of the said charities, and that the legal estate of and in the several pieces of land and hereditaments comprised in the schedule hereto, and all other real estate (if any) belonging to or held in trust for the said charities or either of them, be and the same is hereby vested in the official trustee of charity lands, and his successors in trust, for the said charities respectively.

The schedule comprised the Buttfild, the Raven Leys and the marsh land, and some stock arising from the sale of gravel from one of the fields. Notice of that order was posted on the 14th Nov., and expired on the 14th Dec. This petition of appeal was presented on the 12th March last. It stated the facts, to the effect already set forth, and also that the old parish of St. John, Hackney, was still undivided for all secular purposes, and was governed by a vestry and annually elected churchwardens and overseers. That the petition of appeal was presented on behalf of the vestry; and it charged that the order was wrong, as the legal estate in the trust premises was, by divers statutes, vested in the churchwardens and overseers for the time being of the old parish, who were the proper persons to act as trustees, and to administer the charities. It also stated that the land was of considerable value for building purposes, and when let on building leases would produce considerably more than 50*l.* per annum, and that under the circumstances there was a clear right of appeal; that an application had been made to the Attorney-General for his authority to appeal, but that he had declined to give it, and it had not been sanctioned by the commissioners themselves.

The petition then prayed that the order made by the Charity Commissioners on the 10th Nov. 1863 might be discharged, or remitted to them for their reconsideration; and that, if necessary, it might be declared that the lands in question were vested in the churchwardens and overseers of the original and entire parish, and their successors, for an estate in fee-simple by virtue of the 59 Geo. 3, c. 12, s. 17, as above stated.

It appeared that for some years past disputes had existed between the vestry of the united parish and the separate vestries of the ecclesiastical parishes, with reference to the charities in question, and an action at law arising out of the disputes was still pending. There was also a conflict of evidence as to the persons who had granted leases of the charity estates, but it appeared that each party had granted some.

*Selwyn*, Q.C. and *Prendergast* appeared for the petitioners, and contended that the legal estate in the charity lands was by the 59 Geo. 3, c. 12, s. 17, now vested in the churchwardens and overseers of the original parish:

*Doe v. Hiley*, 10 B. & C. 885;

*Rumball v. Munt*, 8 Q. B. 382;

*Churchwardens and Overseers of St. Nicholas, Deptford, v. Sketchley*, 8 Q. B. 394;

that the position of the legal estate was not affected by the division of the parish of St. John's or the apportionment of the charities under the 3 Geo. 4, c. 72, s. 11; that the churchwardens and overseers being a corporation, the legal estate could not be divested without their consent, which they did not give; and that the present case was clearly a contentious one, and one upon which the Charity Commissioner ought not, under the Charitable Trusts Act 1860, s. 5, to have made the order now in question. Lastly, the present petitioners, being inhabitants of the parish, had a right to appeal against the order of the commissioners, without either their sanction or that of the Attorney-General:

*Attorney-General v. Calvert*, 23 Beav. 248.

*Baggallay*, Q.C., and *Hitchcock* for the trustees appointed by the Charity Commissioners, argued that the petition was wrong in point of time (23 & 24 Vict. c. 136, s. 8); that either their consent or that of the Attorney-General was necessary: (16 & 17 Vict. c. 137, s. 44.) As part of Poole's land was copyhold, and as the trust of part of Sir Stephen White's was special, the legal estate had not become vested in the churchwardens and overseers, as contended:

*Attorney-General v. Lewin*, 8 Sim. 366;

*Re The Puddington Charities*, 1b. 629.

Moreover, the present churchwardens and overseers were not successors to those of the original parish, and therefore it was not now vested in them:

8 & 9 Vict. c. 70, s. 22;

18 & 19 Vict. c. 120;

19 & 20 Vict. c. 112;

*Re The West Ham Charities*, 2 De G. & Sm. 218;

*Ex parte The Incumbent and Churchwardens of Brompton*, 5 De G. & Sm. 626.

The order of the commissioners was right, and this appeal ought to be dismissed with costs.

*Hobhouse*, Q.C. (*T. H. Terrell* with him) appeared for the Attorney-General.

THE MASTER of the ROLLS.—I have a very strong impression on my mind that there is no difficulty about my jurisdiction in this case. I must own that I think the petitioners are entitled to appeal. By sect. 8 of the Act of 1860 the appeal must be presented within three calendar months next after the "definitive publication" of the notice of the order appealed from. By reference to sects. 7 and 8 it appears that those words must mean the final publication when the time for the receipt of suggestions and objections expires. The words "definitive publication" are not contained in the body of sect. 7, but they are found in the marginal note of that section. They do, however, occur in sect. 8. That being so, as the "definitive publication" was on the 14th Dec., and the petition was presented on the 12th March last, it was presented in due time. I am also of opinion that, by sect. 8, the authority of the Attorney-General is rendered unnecessary. Any trustee or person acting in the administration of, or interested in a charity, and who has therefore a personal or pecuniary interest, cannot appeal without the authority of the Attorney-General, or of the Board of Charity Commissioners, unless the gross yearly income of the charity exceeds 50*l.* But that restriction does not apply to two inhabitants of the parish. They may appeal whatever may be the income of the charity. With reference, however, to the merits of this case, there is considerable difficulty. I think it may be doubtful whether I have power to pronounce any decision as to the legal rights of the parties. It may also be a question whether I am not limited to the ascertainment of the validity or invalidity of the decision of the Charity Commissioners; whether I can grant all the relief the petitioners desire, or whether I ought not simply to discharge the order of the commissioners? This case is clearly a contentious one; and it was known to be such. It is true the commissioners are constituted the judges of what is to be considered a contentious case within the Act; but their decision is also made subject to appeal. They are prohibited from exercising their jurisdiction in any case involving special questions of law, or which they may consider more fit to be adjudicated upon by any of the judicial courts. The Attorney-General, after hearing the parties in this case, came to the conclusion that the commissioners had given a right decision in a contentious case. One opponent may not make a contentious case; but there was evidently a strong feeling in the parish upon the question involved in this petition. There

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*Re* REILLY—CONWAY v. RICHARDSON.

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are also conflicting Acts of Parliament to be construed and applied. There are, moreover, three classes of persons to be considered in this case: there are, first, those who hold the legal estate; then those who administer the charity funds; and last, those who receive the funds. To transfer the legal estate from the first class may be a very objectionable course to adopt, and may cause great dissension and more contention in the parish. I will therefore look into the various Acts before I give my final judgment.

*July 28.*—The MASTER of the ROLLS.—I have considered the statutes and the authorities cited in the arguments of this case, and I am of opinion that the Charity Commissioners have made a mistake as to the extent of their jurisdiction. Sect. 48 of the Act of 1853, which was incorporated in the Act of 1860, is the only clause that authorises them to make a vesting order. But that section provides that no such vesting order shall be made in respect of land vested in a corporation without the consent of the corporation, or in respect of copyholds without the consent of the lord of the manor. By the order appealed against, all the lands belonging to the two charities were vested in the official trustee. But, upon the authority of *Doe v. Hiley*, I consider that the legal estate was vested in the churchwardens and overseers as a corporation. That decision must be treated as good law, though it has sometimes been doubted. It follows therefore that the Charity Commissioners have no power to make a vesting order as to Buttfield and Raven Leys without the consent of the corporation; nor as to the copyhold part of Buttfield, without the consent of the lord of the manor. But they have power as to the marsh land, as there was a special trust annexed to the gift of that. Having regard to sect. 5 of the Act of 1860, I confess I am surprised that the commissioners should have thought fit to exercise their jurisdiction without the assistance of counsel. That was most desirable in a case which was clearly of a contentious character, and which involved many special questions of law. They have, in my opinion, exceeded their jurisdiction, and I think that part of their order, at all events, is invalid. There would, in my opinion, be great inconvenience in any such division of the charity property as is now sought. I will not, therefore, now make any order, but I will simply express an opinion, that the order of the Charity Commissioners cannot be sustained. I will direct the petition to stand over until the first petition day of Michaelmas Term, so that the parties may in the meantime agree upon the best course to be ultimately adopted.

Solicitors: *R. Ellis; C. H. Pulley; Fearon.*

### Ireland.

#### COURT OF QUEEN'S BENCH.

Reported by WILLIAM WOODLOCK, Esq., Barrister-at-Law.

CROWN SIDE.

*Monday, June 1, 1863.*

*Re* REILLY. (a)

*Habeas corpus—Costs.*

*Where a writ of habeas corpus had been allowed to go, and had been obeyed without argument,*

*Held, that the court had no authority to grant costs against the deft.*

*In this case a writ of habeas corpus had issued,*

(a) From the *Irish Jurist*, by permission.

directing the deft. to bring up the body of — Reilly, a child in deft.'s custody. The writ had been allowed to go, and had been obeyed without any argument, and the child handed over to his mother, who had obtained the writ.

*Purcell*, for the prosecutor, applied for costs against the deft.

*J. A. Curran*, jun. appeared for the deft., and resisted the application for costs.

The following authorities were cited:

*Re Cobbett*, 14 M. & W. 175;

*Dodd's case*, 2 De G. & J. 510; s. c. 4 Jur. N. S. 291;

Stat. 56 Geo. 3, c. 100, s. 3.

The COURT held that they had no jurisdiction to grant costs under the circumstances.

*Tuesday, Nov. 17, 1863.*

(Before LEFROY, C.J., HAYES and FITZGERALD, JJ.)

CONWAY v. RICHARDSON.

*Case stated by magistrates—Striking out—Costs.*

*Where a case stated by magistrates was struck out, it not having been transmitted, and notice of it not having been served as required by the statute, the Court refused to give costs against the appellant.*

This was a case stated by the justices of Tyrone under the 20 & 21 Vict. c. 43.

*Fetherston H. Lowry* moved on notice that the case stated should be struck out of the Crown paper on the grounds that the app. had not served the resp. with a notice and a copy of the case stated within three days after receiving it from the justices, and had not within three days transmitted the case to the court. The affidavits of the resps. and the petty sessions clerk of Cookstown deposed that the justices signed the case on the 24th Oct., that by the direction of the app. it was forwarded by post, and the letter registered, to the attorney, who must have received it on the 26th. The resp. was not served with the notice or copy of the case until 2nd Nov.; and on the same day the officer of the court received the case. Counsel cited

*Morgan v. Edwards*, 5 H. & N. 415;

*Woodhouse v. Woods*, 29 L. J. 149, M. C.

*M'Cauleland, Q.C.*—The court having struck out the case from want of jurisdiction, cannot give costs:

*Fraser v. Fothergill*, 14 C. B. 298.

*F. Lowry contra.*—The app. by transmitting the case has brought himself within the jurisdiction; and per *Alderson, B.*, in *Peters v. Shannon*, 10 M. & W., 214, every person who comes before a court is liable to the jurisdiction of the court as to costs. But the cases of *Carr v. Stringer*, 1 E. B. & E. 125, and *Reg. v. Padwick*, 8 E. & B. 704, are clearly in point, that where a case has been dismissed for want of jurisdiction the court has power to give costs. *Fraser v. Fothergill* is clearly distinguishable. The court never had any jurisdiction, and the resp. had done nothing to bring him within the jurisdiction.

LEFROY, C.J.—Strike out the case; the court says nothing about costs.



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M'DONALD v. BULWER.

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## COURT OF COMMON PLEAS.

Reported by J. FIELD JOHNSTON, Esq., Barrister-at-Law.

Nov. 5 and 6, 1862.

M'DONALD v. BULWER. (a)

*Trespass—Demurrer—Construction of 12 Vict. c. 16.*

*A justice's search-warrant by which a party is arrested must be founded on an information which discloses a charge of felony, or contains a statement of facts from which it may fairly be inferred that a felony has been committed.*

*And therefore where the information stated that A.B. had neglected to return a gun which had been lent to him, and for which he had been repeatedly asked, and that the person swearing the information had reason to believe it was in the possession of C. D., and nothing more; and the magistrate, knowing C. D. to be a pawnbroker and residing within his jurisdiction, issued a warrant, by virtue of which the pawnbroker was arrested, he was held to have exceeded his jurisdiction and to be liable in an action of trespass (following Lawrenson v. Hill, 10 Ir. C. L. R. 177.)*

*The 2nd section of the Justices of the Peace Protection Act, 12 Vict. c. 16, did not contemplate a case as where A. B. is plt. and C. D. deflt., where there be technicalities to be adhered to.*

*And therefore a defence to an action of trespass under the circumstances stated above, that it was afterwards ordered in the same matter that the gun should be restored to the person who swore the information, and that that order had not been quashed or reversed, was held to be good on general demurrer, notwithstanding that the title of the information was different from the title of the certificate of the order.*

*A search-warrant, by which the property when found is directed to be brought together with the person in whose possession it is found, becomes, so soon as the property is so found, a warrant to secure the personal attendance of such party, and therefore falls within the provisions of the 12 Vict. c. 16, s. 2.*

The third count of the summons and plaint complained that the deflt., on the 13th Sept. 1859, caused and procured the plt. to be arrested and taken into custody, and to be detained in such custody, and to be taken in such custody in and along divers public streets in the town of Athy to a court house, and there to be detained in custody for the space of four hours then next following. The fourth count complained that the deflt. on the said 13th Sept. 1859, assaulted the plt. and unlawfully imprisoned him for four hours. To these, and to each of them respectively as a distinct defence, the deflt. pleaded that at the respective times of committing the respective acts in said counts respectively mentioned the deflt. was a justice of the peace duly assigned to keep the peace in and for the county of Kildare: and that on the 13th Sept. 1859, one Francis A. Mills, of Athy, in the said county, came before the deflt. as such justice, and duly made an information upon oath before the deflt., as such justice, in the words following, that is to say, that "he the said Francis A. Mills, about two months previous to the said 18th Sept. 1859, lent a gun to one Patrick Leonard; and that upon several occasions he the said Francis A. Mills asked the said Patrick Leonard to return the said gun to him, the said Francis A. Mills, but the said Patrick Leonard neglected so to do; and that he, the said Francis A. Mills, had reason to believe that the said gun was then in the possession of the plt. in the town of Athy," the said plt. then being a pawnbroker in the said town, and within the petty sessions district of

(a) From the *Irish Jurist*, by permission.

Athy, to the knowledge of the deflt., whereupon the deflt., as such justice, issued a search-warrant under his hand and seal, directed to one C. H. Lawson, then being a sub-inspector of the authorised constabulary of the said county, and authorising and requiring him, on receipt of the said warrant, to enter in the daytime with the necessary and proper assistance into the house of the plt. and make diligent search there for the said gun; and if the said constable should find the same, or any part thereof, to bring it together with the person in whose possession the same should be found before the deflt. or some other of the magistrates, justices of the peace for the said county, to be further dealt with according to law, by virtue of which warrant the constable therein named entered the house of the plt., being situate within the jurisdiction of the deflt. as such justice, in the daytime, to search for the said gun, and did accordingly search therefor and found the said gun in the possession of the plt., which gun the plt. then stated to the said constable had been pawned by the said Patrick Leonard, and was then held in pawn by him, the plt., as such pawnbroker, whereupon the said constable took the said gun and arrested the plt., using no unnecessary violence in so doing, for the purpose of bringing the plt. before the deflt. or some other justice of the peace of the said county, to be dealt with according to law; and did accordingly bring him in such custody along the streets in the said county mentioned to the court-house of Athy, in the said county, before the deflt. and one Benjamin Lefroy, then duly assembled at the petty sessions in the said court-house in and for the district of Athy, for the purpose of being dealt with by the said justices according to law, at which court-house the plt. was in due course of business of the said petty sessions in and for the said district, under and by virtue of the said warrant, detained for a short time in the custody of the said constable until the said plt. and the said gun should be dealt with according to law in respect of the premises. And the plea averred that the said several acts were respectively done after the passing of a certain statute passed in the 12th year of Her present Majesty, entitled "An Act to protect justices of the peace in Ireland from vexatious actions for acts done by them in the execution of their office;" and that the said respective acts so complained of were respectively done in the manner hereinbefore stated by the deflt. in the execution of his duty as such justice of the peace for the county of Kildare, and with respect to a matter within his jurisdiction as such justice. The deflt. pleaded a further defence to each of these counts respectively, which stated in addition to what was contained in the above plea that it was afterwards, to wit, on the 13th Sept. 1859, ordered in the same matter by the said justices that the plt. should enter into a recognisance to appear at the said court-house on the next day for holding the petty sessions at said court-house in and for the said county and answer the charge of having in his possession a gun which was feloniously and fraudulently pawned by the said Patrick Leonard, and that the said plt. having entered into such recognisance appeared at the said court-house according to the exigency of the said recognisance, whereupon an order was made in said matter and duly recorded by the justices of the peace for the said county then and there assembled in the presence of the plt., that the said gun should be restored to the said Francis A. Mills; and that said orders respectively were in full force and effect, and had not, nor had either of them, nor had the said warrant, been quashed or reversed. The plt. demurred to the first defence on the ground that the several matters therein alleged in fact showed that the acts complained of were done in a matter of



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which by law the deft. as such justice either had not jurisdiction, or in which he exceeded his jurisdiction, and that the averment that the said acts were done with respect to a matter within his jurisdiction was an inference of law not only unsustained by the preceding averments, but contradicted by them. The plt. demurred to the second defence, for that the warrant was not the subject of a *certiorari*, and could not be quashed as it was not an adjudication; and neither of the orders was an order or conviction within the meaning of the 2nd section of the 12 Vict. c. 26.

*Byrne* (with him *Armstrong*, Serjt.) in support of the demurrers.—This first defence does not disclose any case of a criminal character sufficient to warrant the arrest of the plt. The 11th section of 26 Geo. 3, c. 43 (the Pawnbrokers Act) contemplates the law being put in motion by the pawnbroker. [MONAHAN, C. J.—The pawnbroker may arrest a party coming to pledge whom he suspects, but in this instance it was not the pawnbroker who arrested.] The 13th section requires a sworn information, which must state an unlawful pawning; but in this information there is no mention made of a pawnbroker nor of an unlawful taking, so that there was no subject-matter for the justice's jurisdiction; nor had he a right to arrest either the plt. or the person who pawned the gun. The gun was stated to have been lent, and the justice could do no more than issue a search-warrant. But supposing there was a subject-matter of jurisdiction so far as Leonard was concerned, there was such an excess of jurisdiction as justifies this action. The 1st section of the Justices of the Peace Protection Act, the 12 Vict. c. 16, requires that for any act done by a justice within his jurisdiction the action shall be on the case, and shall allege malice and want of probable cause; but what the deft. did here was not with respect to a matter within his jurisdiction. The 2nd section preserves the action of trespass where the matter was not within his jurisdiction, or where he has exceeded his jurisdiction. *Lawrenson v. Hill*, 10 Ir. Com. Law Rep. 177, is an authority in point, and decides that an information which discloses no criminal offence cannot be helped out by parol evidence, and that a general jurisdiction over the subject-matter of inquiry will not protect a magistrate from an action of trespass under this 2nd section if in the particular instance of issuing the warrant he acted without or in excess of jurisdiction. This case is indistinguishable from *Lawrenson v. Hill*. It was argued there that if there was jurisdiction at all the action did not lie. The cases of *Barton v. Bricknell*, 13 Q. B. 393, and *Leary v. Patrick*, 15 Q. B. 266, underwent a great deal of discussion in *Lawrenson v. Hill*, and in the latter of these there plainly was a subject-matter of jurisdiction. Lord Denman's observation in *Cauld v. Seymour*, 1 Q. B. 892, that the magistrate's "protection depends not on jurisdiction over the subject-matter but jurisdiction over the individual arrested," is pertinent to the present case; because so far as this information is personal it only points to the possession of the gun. It cannot be validated by subsequent evidence of facts (*Paley on Convictions*, 55); but the averment in this defence that the acts complained of were done with respect to a matter within the deft.'s jurisdiction as a justice is an inference of law not only unsustained by the preceding allegations of fact, but contradicted by them. With regard to the second defence, we cannot deny that the second order made—the order to restore the gun—was a judicial act, but we submit that in this 2nd section what the Legislature contemplated was judicial procedure against the person. Here the proceeding was against a thing, and the warrant is not the subject of a *certiorari* (*R. v. Lediard*, Say. Rep.

6), nor any other act than judicial acts: (*R. v. Lloyd*, Caldecott's Rep. 309.) The section requires that the order be made "in the same matter;" but the matter wherein the warrant was issued was a matter in which Francis A. Mills was complainant, and Patrick Leonard was deft., whereas the matter in which the alleged orders were made was a matter in which Francis A. Mills was complainant, and the present plt. was deft. The language of the information as well as its title, and the language used in the certificates of the orders, as well as their titles, show that it was not the same matter. The matter wherein the alleged orders were made was the matter of a complaint not begun till after the issuing of the warrant and the commission of the acts complained of. We submit that the deft. should produce the originals or certified copies of the information, warrant and orders upon the argument of this demurrer.

*H. P. Jellett* (with him *J. T. Ball*, Q.C.) contra.—It is sufficient if a legal offence can be inferred from the warrant: (*Cave v. Mountain*, 1 Man. & Gr. 262.) A justice is not liable in trespass for having issued a search-warrant upon facts sufficient. There need not be a positive and direct averment upon oath that goods are stolen: (*Else v. Smith*, 1 Dowl. & Ry. 102.) What a search-warrant ought to contain will be found in 2 Hale's Pleas of the Crown, pp. 113 and 150. A criminal offence could not by any means have been inferred from the information in *Lawrenson v. Hill*; and it was on this ground that Pigot, C. B. held the magistrate was not protected from an action of trespass. By the 20 & 21 Vict. c. 54, s. 4, any bailee of property fraudulently converting the same to his own use is made guilty of larceny. What are the facts disclosed upon the face of this information? That a gun was lent two months previously, and was repeatedly asked for. It is not necessary to show that a jury must make this out to have been a larceny. All that is necessary is to show that the justice might fairly apprehend a larceny had been committed. *Cave v. Mountain* decides this case. [BALL, J.—There a felony was charged.] And here it was committed. A felony is only a conclusion of law. The facts amounted to felony. [MONAHAN, C. J.—The information does not charge a conversion of the property.] A neglect under such circumstances amounted to a refusal. Leonard was asked repeatedly. The magistrate may be sued in an action on the case for improvidently issuing the warrant, but he is not liable in trespass. A search-warrant is partly a ministerial and partly a judicial act: (*Webb v. Ross*, 4 Hurl. & Norm. 115.) With regard to the second defence, I submit the search-warrant will be held to have been against the person in whose possession the gun was. Therefore, the subsequent orders are truly stated to have been made in the same matter. The plt. seeks to avoid this consequence by insisting that we are to produce the originals or attested copies of these orders to be compared by the court on this demurrer. The records of an inferior court cannot be inspected: (1 *Saunders's Rep.* 8 b.) The plea contains an averment which states the information, and the plt. seeks to contradict the record on the argument of this demurrer.

*J. T. Ball*, Q. C.—As to the first defence, I admit there is no felonious charge in the information; but that is irrelevant. It might be otherwise, as between Leonard and the magistrate, but not where a pawnbroker was concerned. [MONAHAN, C. J.—The information does not state the plt. was a pawnbroker.] No; but every pawnbroker is amenable to the justices in whose district he is.

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This man was not only a pawnbroker, but a pawnbroker within the debt's jurisdiction. Every search-warrant must contain an order to bring before the justice the person with whom the property is found. The pawnbroker tells the constable the gun has been pawned with him. [MONAHAN, C. J.—Would not that be making the validity of the warrant depend upon *ex post facto* circumstances? I could understand that argument if the plea stated the constable had himself arrested the pawnbroker?] The 13th section of the Pawnbrokers Act has no word of felony in it; it is enacted "for the better enabling all persons to recover their goods and chattels." The object of that Act was the restoration of the property, not the detection of felony in the person pawning. Unlawfully, in that section, does not mean feloniously; it means improperly. No one but the owner of a thing can legally pawn it. The words of the Act ought rather to be strained to import what may be necessary to maintain the magistrate's jurisdiction. If the subject-matter upon which a magistrate is engaged be within his jurisdiction, he is protected from an action of trespass, and can only be sued in an action on the case for a malicious use of his authority. The whole controversy turns upon these words in the 1st section of the Justices' Protection Act, "with respect to a matter within his jurisdiction." These two sections, the first and second, were intended to provide for three cases. 1. Where the subject-matter is within the magistrate's jurisdiction. 2. Where the case is *ultra vires* of the magistrates. 3. Where there is excess of jurisdiction. There is no English case which decides that if there be jurisdiction, the magistrate is not protected. As to *Barton v. Bricknell*, there was no jurisdiction in that case to put a man in the stocks for two hours. Where the duty of a magistrate is not simply ministerial, he is not liable in an action unless he can be fixed with malice: (*Linsford v. Fitzroy*, 13 Q. B. 247.) [MONAHAN, C. J.—If neither the facts nor the charge authorised the act, can it be said to be within his jurisdiction? There is no statement that Leonard unlawfully got the gun, or pawned the gun, or that the gun was claimed by the pawnbroker *quod* pawnbroker. If neither the charge nor the facts amount to what would authorise a warrant, can there be jurisdiction?] Given a jurisdiction over the subject-matter, and a state of facts which convince the magistrate in his conscience that he has jurisdiction, he is to be protected except from an action for a malicious use of that jurisdiction. The question here is, must the court not take it that the facts were proved when the warrant states them? The warrant is legal on the face of it. To hold with the *plt.*, the court must go behind the warrant: *Brittain v. Kinnaird*, 1 Bro. & B. 432; *Re Clarke*, 2 Q. B. 619.

[CHRISTIAN, J.—The information being deficient, the magistrate makes up for the deficiency by recitals in the warrant. BALL, J.—It seems to me that he has imagined persons, places and transactions.] The imagination is not greater than that instanced in *Brittain v. Kinnaird*. As to the second defence, it is founded on the following clause in the 2nd section of the Justices of the Peace Protection Act: "Nor shall any such action be brought for anything done under any such warrant which shall have been issued by such justice to procure the appearance of such party, and which shall have been followed by a conviction or order in the same matter, until after such conviction or order shall have been so quashed." A search-warrant is not a warrant of decision, or of condemnation, or of punishment. What was the object of this warrant? It was to bring the man with whom the property was found, that the magistrates might adjudicate on whose property it was. This, and all

that followed, was subject to be quashed in the Court of Q. B. There that order must have stood or fallen by the facts. [MONAHAN, C. J.—In the case of wages being due, &c., a magistrate may order them to be paid. Now, I imagine he has no right to issue a warrant to bring a party before him, to the end that he may order him to pay the wages.] The clause never included such a case. It applies only where the warrant is a preliminary step. The magistrate could not take the gun from the pawnbroker without issuing a warrant, without bringing him before him to investigate the facts.

*Armstrong*, Serjt. in reply.—The doctrine laid down in *Lawrenson v. Hill* that a general jurisdiction is not sufficient, but that the particular thing done by the magistrate must be within his jurisdiction, was not new:

*Grady v. Hunt*, 1 Ir. Jur. N. S. 10;

*Newbould v. Colman*, 6 Ex. 189.

The facts disclosed here are insufficient to authorise this proceeding either under the 20 & 21 Vict. c. 64, or the Pawnbrokers Act, 26 Geo. 3, c. 48. There is no conversion of the property alleged. Innocence is compatible with all the facts, and the information would make a bad count in trover. The goods, not the person, may be taken under the Pawnbrokers Act, and that upon a sworn information that they were unlawfully obtained. There is none such here, and if there were, the jurisdiction is exceeded by directing the body to be taken. The 9 Geo. 4, c. 55, s. 56, requires the oath of a credible witness that a felony has been committed. The whole foundation is a felony charged. [MONAHAN, C. J.—How can that be when the section speaks of offences punishable upon summary conviction?] They are all felonies nevertheless: (1 Nunn & Walsh, 253.) As to the second defence, it is unnecessary to say anything about the warrant being quashed, for the 2nd section of the Justices of the Peace Protection Act does not require it. According to the plea, the warrant is a search-warrant, and search-warrants are not within the meaning of the Legislature in this section at all. The difference between warrants and search-warrants is old and clear. This 2nd section contemplates a person known and charged with an offence. How can there be a process to compel a party to appear where there is no *persona nominata*? The ordinary warrant to bring up a person charged with an offence, is the warrant meant in this section. What was the exigency of this search-warrant? Not to bring up any person in particular. Suppose, when the *plt.* was brought up, the gun had been ordered to be given back to him, what would be said of his going into the Court of Q. B. to quash that order, an order to get back his own property? Again, even if search-warrants were meant to be included, the subsequent order must be made in the same matter. There is no matter here. There is no debt. Until the order to restore the gun, no matter existed. We are out of this section altogether, but if not, then that section requires that the order be in the same matter; and the allegation in the plea that it was in the same matter makes no matter, for there was no matter to make it in.

*Cur. adv. vult.*

Nov. 21. — MONAHAN, C. J., having stated the facts and pleadings, delivered the judgment of the court.—To support the first of these pleas it has been argued that this warrant appeared to be an ordinary search-warrant; that if a felony is committed, and supposing the magistrate has reasonable grounds for believing that the stolen goods are in the custody of a certain person, it is his duty to issue a search-warrant, with a direction to bring the stolen property and the person in whose possession found; and if

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this information contained a statement that a felony had been committed, or that from which it might fairly be inferred that a felony had been committed, no subsequent facts are wanted to justify what was done. But the word made use of in this information is "neglected." It is not stated that Leonard refused to restore the gun; it is not stated that the gun was stolen, nor is anything stated from which that might be inferred. It is not stated that the gun had been pawned without the knowledge or consent of the owner, from which there might be inferred facts which would give the magistrate jurisdiction. We were referred by the deft.'s counsel to the 20 & 21 Vict. c. 54, s. 4, which enacts that "if any person, being a bailee of any property, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk, or otherwise determine the bailment, he shall be guilty of larceny." But it is never said that Leonard converted the gun to his own use, i.e., it does not appear on the information; it does appear afterwards. The validity of the warrant cannot depend upon subsequent events. Mr. Ball preferred resting the case upon the Pawnbrokers Act. The 13th section of the 26 Geo. 3, c. 43, was passed "for the better enabling all persons to recover their goods and chattels," and requires a statement on oath that the goods were unlawfully taken, and that there was just cause to suspect they were knowingly and unlawfully taken to pawn. Does the information set out in this pleading contain these requisites? There must be an unlawful taking alleged: there is none here. Next it must appear that the property was pawned: that does not appear. Next, that the pawnbroker had knowingly taken them to pawn: *a fortiori* that does not appear. And grant that all these things were in it, where is the authority under this Act to arrest the pawnbroker at all? Unsuccessful as was the attempt to find a felonious charge, the endeavour to bring the case within the Pawnbrokers Act is more forlorn. It only remains to be seen whether, upon this state of things, an action of trespass can be maintained against the magistrates. This question depends upon the construction of the Justices of the Peace Protection Act (12 Vict. c. 16), the 1st section of which provides that every action to be brought against a justice for any act done within his jurisdiction, or with respect to a matter within his jurisdiction, shall be on the case as for a tort. No criminal offence is alleged in this information, and we have to determine what jurisdiction the magistrate had to arrest. *Lawrenson v. Hill* is a much stronger case than the present. In it the written information did not contain a charge of felony, but there was parol evidence which showed grounds for concluding a charge of felony. The Court of Ex. held that, since the written information did not contain a charge of felony, the magistrates either had no jurisdiction, or exceeded their jurisdiction. *A multo fortiori* must we so hold in this. We cannot distinguish this case from *Lawrenson v. Hill*. I confess that irrespectively of that case I entertain no doubt that if a magistrate, though acting *bond fide*, issue a warrant to arrest a man upon an information which contains no charge of felony, he exceeds his jurisdiction. We are bound by *Lawrenson v. Hill*, but into the cases there cited I shall not myself enter, because, independently of that case, I feel no doubt. The demurrer to the first defence must, therefore, be allowed. The second defence involves a question of greater difficulty. It states that it was afterwards ordered in the same matter that the plt. should enter into a recognisance to appear on the next day for holding the petty sessions, and that the plt. having appeared, an order was made in said matter that the gun should

be restored, and that said orders and warrant have not been quashed or reversed. This plea depends upon a clause in the 2nd section of the Justices' Protection Act, and it affords an answer to the present action. It is averred as a matter of fact, though I for one do not think much of the averment, that the order was made in the same matter. If it appeared otherwise I should not consider myself bound by the statement in the plea. I do not think this section contemplated a case as where A. B. is plt. and C. D. deft., where there be technicalities to be adhered to. The warrant is founded on the information, and it is—Search C. D., and bring the gun here. We think this was a warrant to bring C. D. before the magistrate. For what purpose? To be dealt with according to law, i.e., if a felony had been committed to send him to gaol, or to order the gun to be restored; because there is no doubt that though the magistrate had not jurisdiction to arrest, he could not have ordered the gun to be restored without first summoning the pawnbroker to show cause against his doing so. We think (however informal the complaint) that the order was an order made in the same matter. Very possibly the framer of this Act of Parliament did not contemplate such a warrant as was issued here, but the case of an ordinary warrant, where there is an option to issue a warrant to arrest or to issue a summons. We think in result and consequence that when the gun was found in this man's possession, this warrant became a warrant to secure his personal attendance. The demurrer to the second defence is overruled, and there being one good answer to the action, there must be

*Judgment for the deft.*

### CONSISTORIAL COURT OF DUBLIN.

*Saturday, Dec. 5, 1863.*

THE OFFICE PROMOTED BY THE REV. LAUNCELOT  
DOWDALL v. REV. JAMES HEWITT. (a)

*Offertory—Proprietary chapels—Alms—Napier's Act.*

*The alms collected, whether at the offertory or during Divine service, in a proprietary chapel, not having a district assigned to it, belong as of right to the rector of the parish in which the chapel is situated, to be disposed of as he and the churchwarden shall direct, and that notwithstanding Napier's Act, 14 & 15 Vict. c. 72.*

The facts of this case will sufficiently appear from the judgment of the court. The question arose on the admissibility of the articles.

Dr. Walsh, Q. C., advocate for the promovent.

Dr. Ball, Q. C., advocate for the impugnant.

Dr. BATTERSBY, Q. C., V. G.—This is a suit promoted by the Rev. Launcelet Dowdall, rector of the parish of Rathfarnham, against the Rev. James Hewitt, incumbent or perpetual curate of Zion Church Rathgar, in the same parish, to compel the latter to pay over the alms collected in said church according to law, and that he may abstain from misapplying same in future. The pleading states these alms to have been collected at the "offertory" as sacramental alms. No such proceeding as this has been taken in Ireland before, except in the case of *Magee v. The Bishop of Cashel*, and, from the statements made on the last court day, it would appear that the present suit had arisen not so much from a desire to settle the right to this offertory, as from the circumstance that, upon Mr. Hewitt's

(a) From the *Irish Jurist*, by permission.

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appointment to the perpetual curacy of Zion Church, he insisted on a title to discharge the duties of rector or some of them, throughout the whole parish of Rathfarnham, a title which Mr. Dowdall denied; and to prevent Mr. Hewitt getting a footing in the parish by having a district assigned to his church pursuant to the statute in that behalf, Mr. Dowdall refused to consent to the assignment of such district by the archbishop, and commenced this suit. If Mr. Hewitt made such claim, he mistook his rights; for, as a curate with a district, he could not go beyond it, and, not having a district, as the fact is, he could not perform any of the offices of a minister out of his chapel without incurring severe penalties. Mr. Dowdall, on the last court day, was willing that a district should be assigned to the Zion Church, and that the right to the offertory should be referred to the archbishop. Mr. Hewitt postponed until this day his assent or dissent from that proposition, and he now refuses it. The first question seems to be, what is the offertory? The term appears to signify both that part of the Communion Service which is read while the alms are being collected, and the alms then given. Rubrick, 2 Edw. 6, M. Gib. Cod. 474, it is said, "Whyle the clearks do sing the offertory, so many as are disposed shall offer to the poore mene's box, everyone according to his habilitie and charitable mynd." Ayliffe in his *Parergon*, 393, says: "It was always the custom for the communicants to offer something at receiving the Sacrament, as well for holy uses as for the relief of the poor, which custom is, or ought to be, observed at this day." Before the Reformation, it appears that the priests of proprietary chapels were in the habit of taking these offerings to themselves, to the prejudice of the incumbent of the parish; and to prevent this it was provided by a legateine constitution of Othobon, Cardinal Legate, 52 Hen. 3, A. D. 1267, quoted 1 Bolingbroke, E. L. 279, that—"When a private person desires a proper chapel and the bishop grants it for a just cause, yet he always uses to add, 'So that it be done without prejudice to the right of another.' And we, pursuing the same wholesome method, ordain and strictly charge that the chaplains ministering in such chapels as have been granted with a saving to the rights of the mother church, restore to the rectors of that church, without making any difficulty, all the oblations and other things which ought to come to the mother Church, if they had not intercepted them, and which, therefore, they cannot in justice retain. If anyone contemptuously refuses to do it, let him be suspended till he hath made restitution." The offertory was anciently for the use of the priest, but at the Reformation it was changed into alms for the poor: (1 Burn, E. L. 370; Ayliffe *Parergon*, 394.) Ayliffe says that this change was made by the statute 25 Hen. 8, which abolished altar oblations to the priests; but however this may be, it is clear that at this day, according to the Rubric, "Money given at the offertory shall be disposed of to such pious and charitable uses as the minister and churchwardens shall think fit, wherein, if they disagree, it shall be disposed of as the ordinary shall appoint." Now, who are "the ministers and churchwardens?" Are they those of the parish church only? or are they the officiating clergymen and churchwardens of every chapel, included in the words of the Rubric? The Act of Uniformity (17 & 18 Car. 2, c. 6), s. 1, reciting that "as nothing conduceth more to the honour of God, the settling of the peace of a nation, which is desired of all good men, nor to the advancement of religion, than an universal agreement in the public worship of the Almighty God, both Houses of Convocation had presented

unto His Majesty's Lord Lieutenant one book, hereunto annexed, intituled 'The Book of Common Prayer,' &c. Therefore, to the intent that the greatly desirable work of uniformity in Divine worship may be obtained, and that every person within this realm may certainly know the rule to which he is to conform in public worship and administration of sacraments, and other rites and ceremonies of the Church of Ireland," it enacts that all ministers shall be bound to say and use the Morning Prayer in such order and form as is mentioned in the said "book." And by sect. 2, "every minister shall openly, publicly, and solemnly read the Morning and Evening Prayer, by and according to said Book of Common Prayer; and after such reading, shall openly and publicly before the congregation there assembled declare his unfeigned assent and consent to the use of all things in the said book contained and prescribed, on pain of deprivation." Now, that "book," in the part relating to the Communion Service, provides that "whilst the sentences of the offertory are in reading, the deacons, churchwardens, or other fit persons appointed for that purpose, shall receive the alms for the poor, and other donations of the people, in a decent basin to be provided by the parish for that purpose." And, subsequently, that after divine service is ended, the money given at the offertory shall be disposed of as I before said. The law on this subject was fully considered and explained by Sir John Nichol, in the case of *Moysey v. Hillcoat*, 2 Hag. 30. That was a suit promoted in 1828 by Dr. Moysey, rector of the parish of Walcot, to compel Dr. Hillcoat, owner and officiating minister of the chapel of Queen's-square, licensed on the nomination of the said Dr. Moysey, to pay over to said rector the money collected at the offertory in said chapel. The licence of Dr. Hillcoat was nearly in the same words as that of Mr. Hewitt, except that the former authorised the performance of "all ecclesiastical duties belonging to said office," which authority is not included in the licence to Mr. Hewitt, and the latter also excepts baptisms and marriages. Dr. Moysey had himself acted as curate of the chapel, and as such received the various offerings while curate, which he afterwards claimed as rector from the succeeding curate. Dr. Hillcoat insisted that the sacramental alms received in the chapel had been constantly, since the opening thereof in 1785, at the uncontrolled disposal of the minister therein officiating and of the proprietors thereof. Sir John Nichol, p. 48, says: "*Primâ facie*, all parochial duties are committed to, and imposed upon, the parish incumbent, and all fees and emoluments arising from the performance of those duties, in like manner, belong to him. Of common right, all parochial dues, whether from tithes or other sources, belong to the presentee of the patron;" and at p. 49: "Chapels possess no parochial rights, unless acquired by a composition with the patron, incumbent and ordinary." "I am not aware of any chapels where the patrons or proprietors (forming themselves into a sort of joint-stock company) can appropriate a portion of the church dues:" (p. 53.) "The nomination appoints Dr. Hillcoat to perform the office of officiating minister of Queen's Chapel, &c. There is nothing that appoints Dr. Hillcoat to the exercise of all parochial rights, to the cure of souls, and to the occasional administrations, in all parts of the parish, and it does not grant anything which belonged to Dr. Moysey as rector, neither the parochial duties, nor the surplice fees, nor the power of interfering and intromitting in all rights, duties and offices which had been committed to Dr. Moysey as incumbent of the parish:" (p. 54.) "The alms received during the reading of the offertory before the Communion are specially directed by the Rubric

to be collected in a decent basin, to be provided by the parish, which shows that the collection, wherever made, is a parochial matter, with which persons connected with a private chapel have no concern. Again, after the Divine service is ended, the money given to the offertory shall be disposed of to such pious and charitable uses as the minister and churchwardens shall think fit, wherein, if they disagree, it shall be disposed of as the ordinary shall appoint. These directions as to the 'parish' and the 'churchwardens' who are officers of the parish and not of the chapel, lead me to construe the 'minister' to mean 'the minister of the parish,' and they show that the Rubric intended that alms received at the Communion, as well as at private chapels in the parish church, should be at the disposal of the minister of the parish, and of the churchwardens, and should not belong to the officiating minister, nor to the proprietor of such chapel. In any view that I am able to take of this case, I cannot consider that this chapel has acquired any local rights at all encroaching on the parochial rights which belong to the parochial incumbent, beyond those to which he has directly and specifically consented, viz., the payment for accommodation by those who take pews. To the emoluments arising from those pews, Dr. Hillcoat, uniting both characters, of officiating minister and sole proprietor, is entitled; but to them he is limited. Here is no district, no chapelry which connects any particular inhabitant with this chapel; here is nothing carved out of the parish, nor out of the parochial rights of the rector. The general duties of the parish rest upon the rector; he is bound to perform them, and he is entitled to all the emoluments derived from them. This is the policy of the law, to keep these duties entire and simple, unless they have been subdivided and parcelled out by competent authority:" (p. 56.) In Watson's Clergyman's Law, 311, referring to the Statute of Uniformity, it is said: "If in reading the Morning and Evening Prayers the minister shall stand or sit when he is directed to kneel, or kneel or sit when he should stand, or shall read them in other order than is appointed, or shall omit anything that is appointed to be read on certain days, or misplace the prayers in reading them, or read in one day what is appointed to be read on another, or do not celebrate and administer the sacrament in such order and form as is appointed, he is punishable by law;" which shows that the Rubric must be implicitly obeyed. Mr. Hewitt's advocates admit that down to the passing of the Act 14 & 15 Vict. c. 72, in the year 1851, Zion Chapel would have been considered a proprietary chapel, as described by Sir John Nichol; but they say that this chapel, by sects. 2, 23 and 27, is made a perpetual cure and benefice, and the officiating clergyman therein a perpetual curate and incumbent, and therefore, that he had acquired within his chapel all the rights which the incumbent of the parish and churchwardens previously had. But the words "incumbent" and "benefice" confer no right or power, and whether perpetual or temporary, the clergyman of a proprietary church is not a complete incumbent with all the attributes of a rector. The latter can baptize and solemnise matrimony, when admitted and instituted, without any special licence: (Watson's Clergyman's Law, 314.) Mr. Hewitt can do neither, for these matters are expressly excepted from his licence, and he is but a curate, though a perpetual one, having authority to the extent of his licence but not further or otherwise. And even if he had a district assigned to his church under sect. 13, by sect. 14 it is provided that "nothing therein contained shall be construed to discharge the incumbent of any such parish, a portion of which shall be included in any such district, or any other ecclesiastical person having cure of souls within the same, or

his successors, from the cure of souls or other parochial duties in any such district, but which said cure of souls shall remain as heretofore." From which it plainly appears that the rector is not ousted of any of his rights by the appointment of a curate, though an independent one, to perform divine service within the chapel, or even beyond it to the extent of his district, if a district be assigned to him, which has not been done here. It is then urged that by sects. 25 and 27, chapelwardens may be elected, who shall have the like authority within the said church or chapel as churchwardens in the case of a parish church have, and shall be competent to recover by all proper means and proceedings the pew rents, and other dues belonging to the said church or chapel; and that therefore the curate and chapelwardens are entitled to receive and distribute the offertory. These sections, however, do not mention the offertory as the English Act does, and they appear to apply only to the ordering of matters within the church, and to the recovery of pew rents and such things as may be legally recovered, but not to the offertory, which is purely voluntary as a part of the ceremony, and cannot be recovered if refused by the communicants. It is to be observed, too, that, so far as appears upon the libel before the court, no chapelwardens of Zion Church have been appointed, and the claim of Mr. Hewitt is, to receive this offertory himself, and to distribute it amongst his congregation as he thinks proper, without the assistance or control of any churchwardens or chapelwardens. This would involve a state of things wholly unknown to the church. The congregation of Zion Church consists of the pewholders and the occupiers of free seats, without reference to, or any connection with, any particular parish or district. Mr. Hewitt cannot visit as clergyman, or go through any part of the parish in order to ascertain the state of the parishioners. Sect. 14 allows him "the care of the sick and other pastoral duties," only in case of a district being assigned to his church, and if he were to distribute the offertory where his licence confines him within his own chapel, he could only do so to such persons as might come there for alms, no matter from whence, unless he and his trustees and pewholders should think proper to divide it amongst themselves. A forcible argument against Mr. Hewitt's view of the statute arises from the English Act 8 & 9 Vict. c. 73, s. 6, which provides for the appointment of churchwardens for district chapelries, and enacts that money given at the offertory at such churches shall be disposed of by the minister and churchwardens of such church, in the same manner as the money given at the offertory at any parish church is by law directed to be disposed of by the ministers and churchwardens of such parish. There is no such provision in any Irish Act. Sect. 7 of the same English Act provides for the appointment of churchwardens for any new church without a district, and does not authorise them to interfere with the offertory, but enacts that if a district be assigned to such a church, they shall thenceforth have the same power as churchwardens appointed under the previous section; thus showing that the Legislature considered that, without express words to the contrary, the right of the rector and churchwardens to the offertory would continue in a parochial district, and that, in the case of a church without a district, it ought not to be taken from them. In the case of *Magee v. The Bishop of Cashel*, 9 I. E. R., 319, before Lord St. Leonards, it appeared to have been conceded by all parties, that offertory received in a proprietary chapel belonged to the incumbent and churchwardens of the parish, and not to the curates or trustees; but the case went off on another point. The case of *Reg. v. Poor Law Commissioners* 2 J. & S. 721, has been relied on

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Re HENDERSON—Re HEWSON.

[ASSESSED TAXES.]

as showing that the minister of a district church is the minister meant by the Rubric. It seems to me to point the other way, and to show that in such a case the rector of the parish continues rector of the district, with all his original rights and privileges, except only the right in the curate to officiate in the district. In that case the district of Grange-gorman was made a "separate and distinct district or parish," under the statute 7 & 8 Geo. 4, c. 48, ss. 23, 24, 25, 26; and by sect. 29 it was enacted "That every such district or new parish do be formed under the authority of that Act shall have all parochial rights by law appertaining to any parish for the purposes in that Act mentioned, and for all other purposes whatever in like manner, to all intents and purposes as other parishes may by law be entitled unto; and that every such district or new parish shall be discharged and exempted from all claims and charges whatsoever as part of any former parish or parishes, saving, nevertheless, to the rectors or incumbents of the several adjoining parishes and their successors, all their rights as rectors or incumbents of the respective portions of such districts." Napier's Act does not contain any such terms as the foregoing, nor does it anywhere profess to confer upon the curate a parish or parochial rights, and yet in that case it was held that under the Poor Law Act, 1 & 2 Vict. c. 56, which provides that in the appointment of a chapel, preference should be given to some clergyman of the Established Church officiating within the parish in which the workhouse should be situated, the rector or vicar of the original parish continued to be the principal clergyman "officiating" within the district or the parish, and the person responsible for the due administration of spiritual duties towards the inmates of the poorhouse, and that, upon the refusal of the perpetual curate, the curate of the parish was entitled to the appointment. The Court of Q. B., thus taking the same view of the subject as Sir John Nichol, I cannot see any privilege or power in a perpetual curate, under Napier's Act, which the curate before Sir John Nichol had not. Both derived authority from the bishop's licence, and from that only. Of the two, the licence of the former was, if anything, the more comprehensive; and I am bound by the authority of that eminent judge. But, taking the judgments of the two courts together, it is plain that both looked upon the incumbent of the parish as still continuing rector of that part of the parish within which the new church is, and, as such, minister for all matters not expressly taken out of his control by statute, which the offertory was not; and therefore he, as such minister, and the churchwardens of the parish, are the persons to dispose of the offertory, whether collected in the parish church or in other churches or chapels within the parish. On this motion the court has no power to do more than either admit the pleading to proof or reject it. But it is clear, and, indeed, admitted by the advocates on both sides, that down to the year 1851 the curate of a proprietary chapel could not interfere with the neighbouring parishioners, nor take to himself or for his own purposes the money contributed at the offertory. For the reasons already given, it appears to the court that the law continues the same now as it was before in the case of the curate of a proprietary chapel without churchwardens and without a district, such as Mr. Hewitt appears to be. The apparent object of the law is to leave the rector of a parish to discharge the duties of it upon his own responsibility and without the interference of other persons who might, perhaps, be gifted with more zeal than discretion; and for this reason even the bishop, without the consent of the incumbent, cannot authorise any clergyman to interfere in his parish. Whether the law in this respect be wise, it is not for this court to say;

but, being as it is, this motion must be refused with costs, and the libel admitted to proof, and a day assigned to Mr. Hewitt to answer it.

## DECISIONS OF THE JUDGES

ON

## CASES RELATING TO THE ASSESSED TAXES.

Monday, Feb. 15, 1864.

(Before PIGOTT, B. and SHEE, J.)

Re HENDERSON.

*Inhabited house duty—Officers' apartment in a pauper lunatic asylum.*

*The steward of a pauper lunatic asylum appeals against an assessment for apartments occupied by him therein, rent free, in virtue of his office. The Commissioners relieve the app.:*

*Commissioners right.*

At a meeting of the commissioners of assessed taxes, holden at the Sessions-house, Clerkenwell-green, on Wednesday the 26th Feb. 1864:

Mr. George Henry Henderson, steward of the Pauper Lunatic Asylum at Colney Hatch, in the parish of Friern Barnet, in the county of Middlesex, appealed against an assessment made on him for the year 1860, for inhabited house duty, schedule (B.), under the 14 & 15 Vict. c. 36, upon a rental of 60*l.*, duty 2*l.* 5*s.*, and claimed a total exemption therefrom.

The asylum was built by the justices of the peace for the county of Middlesex, pursuant to the Act of 8 & 9 Vict. c. 126, for the reception of pauper lunatics only, and the app., as the steward thereof, has certain furnished apartments within the said asylum assigned to him as an official residence, rent free, the regulations of the asylum making it compulsory for the steward to reside therein.

The apartments on which the assessment was made are within the building of the said asylum, and under the same roof, and form part and parcel of it, and have no separate external entrance.

By the 25th section of the above Act of 8 & 9 Vict. c. 126, it is enacted that no building erected for the purposes of a lunatic asylum shall be assessed to window duty, and the app. contends that, inasmuch as the inhabited house duty was imposed in lieu of such window duty, it was the intention of the Legislature that the asylum should be exempt in like manner from the inhabited house duty.

The Commissioners, referring also to the 48 Geo. 3, c. 55, schedule (B.), exemption, case 4, which does not, as in the case of the second exemption under schedule (A.) of the same Act (window duty), except from the benefit of the exemption the apartments occupied by the officers of the hospital, &c., and to case 2437, relieved the app.

Mr. Edward Thomas Boorman, the surveyor for the Crown contended that the Act referred to did not wholly apply in this case, inasmuch as the asylum itself was not assessed to the inhabited house duty, but only that portion of the building occupied by the officers as their official residences, and which he considered clearly liable to assessment, and, being dissatisfied with such determination of the commissioners, demanded a case for the opinion of Her Majesty's judges, which we, the major part of the commissioners present upon the hearing of the appeal, state and sign accordingly.

The cases of Dr. Tyerman and other officers of the asylum, whose apartments are similarly situated with those of the app., stand over to abide the decision of Her Majesty's judges in this case.

THOS. ELSOM,  
WM. ANDERSON,  
RICHARD MORELAND,  
DANL. WILDBORE. } Commissioners.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is right.

Re HEWSON.

*Inhabited house duty—Lunatic asylum.*

*Manager of a lunatic asylum for the reception and relief of persons of the middle rank of life appeals against an assessment. Some patients receive direct relief from the charity; some pay a little more than their actual cost; others pay higher rates. The Commissioners relieve the app.:*

*Commissioners wrong.*

At a meeting of the commissioners of assessed taxes, held at Stone, 1st April 1863:

[ASSESSED TAXES.]

Re MONCKTON—Re DAW.

[ASSESSED TAXES.]

J. D. Hewson, Esq., M.D., manager of Cotton-hill Lunatic Asylum, attended by the direction of the trustees to appeal against an assessment to the inhabited house duty on the said asylum for the year 1862-63, amounting to 7l. 10s on the annual value of 200l.

In the year 1814, 1000l. was left to the Staffordshire Infirmary to found a lunatic ward for the reception of persons of the middle rank of life, whose circumstances were not such as to enable them to pay the high rate charged in private asylums, but whom it was very desirable not to degrade to the rank of paupers.

The trustees of the infirmary handed the legacy over to the visitors of the county Pauper Lunatic Asylum, who appropriated a ward for the purpose of the charity, and to enable them further to increase its usefulness, subscriptions and donations were solicited, a few patients were admitted at remunerating rates, the profits derived from which were applied to the purposes of the charity. Upwards of 400 patients were relieved, at rates from 2s. 6d. to 15s. per week, from the opening of the charity in 1814 to the year 1848, when, in consequence of the urgent demands for increased accommodation for pauper lunatics, the separation of the two institutions was decided upon, and the Cotton-hill institution was built. The funds were derived from donations and from the amount paid by the visitors of the county asylum to the subscribers for their share in the said asylum, and from money borrowed by the trustees of Cotton-hill institution.

In the new building accommodation was specially provided for persons of superior rank, who were expected to contribute to the charge of maintenance according to their pecuniary ability.

In 1854 the new building was opened, with an annual income derived from subscriptions of about 180l. per annum; fifty patients were transferred from the county asylum to Cotton-hill, of whom twenty-one were receiving relief from charity.

At the close of the year 1862 there were 122 patients on the books, the average weekly cost per annum of whom had been 17. 3s. 11d., of this number 64 have received direct relief from the charity, in sums varying from 1s. to 21s. 5d. per week; 85 were paying from 2s. to 30s. per week. Although this class paid a little more than their actual cost, still as they could not receive the same accommodation in private asylums at a less rate than 42s. per week, they, to a certain extent, benefited by the charity.

13 paid 42s.

7 paid from 2 to 3 guineas per week.

4 paid from 3 to 4 guineas per week.

During the last eight years 6857l. 15s. 4d. has been appropriated to the relief of the poorer class of patients, and of this sum the amount for the last year was 1251l. 19s. 6d., whilst the amount of subscription was only 177l.

The apprs. contend that as no pecuniary profit arises to any person, and that as the asylum is maintained partly by charitable contributions, it comes under the exemption No. 4 of the Act 48 Geo. 3. c. 55, which exempts "any hospital, charity school, or house provided for the reception or relief of poor persons."

The surveyor, however, was of opinion that as the majority of the patients in the year 1862 cannot be regarded as poor persons in the meaning of the Act, the asylum does not come within the exemption, and is therefore rightly assessed.

The Commissioners having a doubt as to the liability of the asylum discharged the assessment upon the understanding that the surveyor demanded a case for the opinion of Her Majesty's judges, which we, the commissioners present, state and sign accordingly.

GEORGE FORD,

SAMUEL BURTON WRIGHT, } Commissioners.

W. J. LOCKER.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong.

Re MONCKTON.

*Inhabited house duty—Town-hall.*

*Town clerk of a borough appeals against an assessment for a town-hall. No person resides in the hall, which is complete in itself; but there is a wing built subsequently to the building of the hall, communicating therewith by a door in which the town crier resides for the purpose of taking care of the hall, and of carrying on his duties as billet master. The Commissioners confirm the assessment:*

*Commissioners wrong.*

At a meeting of the commissioners of the land and assessed taxes, holden at the Town-hall, Maidstone, on the 26th March 1863:

Mr. John Monckton, town clerk of the borough of Maidstone, appealed against an assessment for the year 1862 to the inhabited house duty of 200l. on the corporation of Maidstone, in respect of premises occupied and used by them as a town-hall.

The town-hall of Maidstone formerly contained a council-

chamber, committee-room, and a court of justice; no person residing on the premises. A few years ago an adjoining house was pulled down, and a wing to the town-hall erected on the site thereof.

The town crier, who is also billet master, resides with his wife and family in rooms on the ground-floor of this new wing of the hall, for the purpose of cleaning and taking care of the hall, and also for carrying on his duty of billeting soldiers, &c., when requisite. The front room on the ground-floor of the wing of the building is used as a dwelling-room by the crier.

No reduction was made in the town crier's wages when the rooms were given to him. A door, of which the crier kept the key, was made from the crier's rooms into a passage leading to the court of justice, and by passing through that door and passage he reaches the court, and from thence he can get into the main staircase, and thence all parts of the building without going out of doors.

The various rooms in the town-hall are used by the town council for their meetings, and also for public meetings by the trustees of the poor, the pavement commissioners, and the magistrates. None of the rooms are used as offices by the town clerk or other official (except the billet master's office in the wing as above mentioned), nor are any of the rooms ever let for any purpose.

The town-hall would be quite perfect if the communication with the crier's apartment were stopped up; that communication having been made solely for the more convenient access of the crier to the town-hall.

On these facts Mr. Monckton contended that the town-hall was not an inhabited dwelling-house within the meaning of the Act, and therefore exempt from tax; and also that, if liable, 200l. was an excessive valuation.

The surveyor, on behalf of the Crown, submitted that the occupation by the town crier of the rooms in the wing above described, as a residence and office for billet master, such room having an internal communication with the entire building, made the whole town-hall liable to inhabited house duty, and cited case 2597 in support of this view.

The committee confirmed the assessment at 200l. Mr. Monckton, being dissatisfied with this decision, demanded a case for the opinion of Her Majesty's judges.

We, being two Commissioners present at the meeting, as above mentioned, do hereby state and sign such case accordingly.

Dated this 23th day of May 1863.

D. SCRATTON } Commissioners of Land

EDWD. BERTON } and Assessed Taxes.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong.

Re DAW.

*Inhabited house duty—Office of commissioners of sewers.*

*Clerk to commissioners of sewers, city of London, appeals against an assessment on the offices of the commission. For convenience of access to other offices there is an internal communication with the Guildhall, but no person dwells or has ever dwelt on the premises. The Commissioners relieve the appr.:*

*Commissioners right.*

At a meeting of the commissioners for carrying into execution the several Acts of Parliament relating to the duties of assessed taxes in the City of London, on the 25th March 1863:

Mr. Joseph Daw, clerk to the Commissioners of Sewers for the City of London, appealed against an assessment for the duty on inhabited houses charged on the offices occupied by the said commissioners in the ward of Bassishaw for the year 1862, and rated at 200l. value.

The app. stated that the premises have been lately rebuilt expressly for the offices of the commissioners of sewers for the city of London; that they are in no way adapted for a dwelling-house, nor have they ever been so occupied. For the convenience of access to other offices of the commissioners adjoining the above in Guildhall, there is one internal communication on the first floor. That on the site on which the commissioners' offices are built formerly stood the town clerk's office, which was partly occupied as a dwelling; but that the town clerk's house has since been pulled down, and the present offices erected on the site thereof.

The surveyor submitted that the 5th rule of 48 Geo. 3. c. 55, schedule (B.) expressly provides that halls or offices belonging to any body politic or corporate that are lawfully charged with the payment of any other taxes or parish rates shall be assessed to house duty, and he contended that, as the premises in question are the hall and offices of a body corporate, and are assessed to parochial rates, the assessment to the house duty ought to be maintained. The surveyor further observed that the fact of an internal communication with Guildhall, which is clearly liable, and is assessed to house duty, does in fact extend the liability to an assessment to these premises also. The words of the rule being, "every hall or office whatever belonging to any person or persons, or to any bodies politic or corporate, or to any company that are or may be lawfully charged with the payment of any other taxes or



## [ASSESSED TAXES.]

## Re ENFIELD—Re S. AND G. HADFIELD.

## [ASSESSED TAXES.]

parish rates, shall be subject to the duties hereby made payable as inhabited houses."

The app. admitted that the premises in question were assessed to parish rates.

The Commissioners, having considered the facts of the case, were of opinion that the offices so occupied by the commissioners of sewers, which is a separate and distinct body to the corporation of London, although such offices have an internal communication with the Guildhall, no part of which is occupied as a dwelling, were not chargeable to the duty of inhabited houses, and discharged the assessment.

The surveyor demanded a statement of the case for the opinion of Her Majesty's judges.

EDMUND HODGSON,  
R. O. BUCKNALL,  
JOHN E. DAVIES,  
J. ROBERTS.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is right.

## Re ENFIELD.

*Inhabited house duty and male servants—  
Lunatic hospital.*

*Trustees of a lunatic hospital appeal against assessments for inhabited house duty and for four male servants. The hospital is provided for lunatics, not paupers, paying sums the highest of which is only partially remunerative. Three of the male servants are employed in nursing and waiting upon the patients, the fourth as nurse and watchman only. The Commissioners confirm the assessments:*

*Commissioners wrong.*

At a meeting of the commissioners of assessed taxes held at the town-hall, in the town and county of the town of Nottingham, on the 9th Sept. 1862, for the purpose of hearing appeals against the first assessment for the said town for the year 1862-63:

William Enfield, Esq., appealed on behalf of himself and the other trustees of the lunatic hospital at the Coppice, Nottingham, against an assessment which had been made upon the said trustees in respect of the inhabited house duty for the said hospital, and for four male servants, which he contended were exempted under the Acts relating to the duties of assessed taxes.

As regards the inhabited house duty, the commissioners found that the hospital is a building provided for the reception and relief of lunatics who are not paupers, for whose maintenance and medical attendance sums varying from 6s. to 25s. per week each are paid. That in receiving applications for admission, no person is disqualified by reason of being in affluent circumstances, and that as a fact persons in good circumstances are admitted upon payment of the maximum charge of 25s. per week. That the full charge is made in all cases in which the trustees are not satisfied of the inability of the parties to pay the same. In each case in which the trustees are so satisfied an abatement is made in the weekly charge proportionate to the want of means on the part of the applicant.

At the date of the last report, the hospital contained forty-five patients, who paid the respective sums set forth in the following statement, and in aid of some of whom further sums set forth were contributed out of the charitable fund of the hospital as necessary to meet the actual costs of their maintenance and medical attendance:

Number of Patients.	Amount paid per Week.	Amount paid per Annum.	Contributions out of Funds of Hospital.
	£ s. d.	£ s. d.	£ s. d.
13	1 12 0	845 0 0	
4	1 1 0	218 8 0	46 12 0
2	1 0 0	104 0 0	28 0 0
11	0 18 0	514 16 0	200 4 0
1	0 15 0	39 0 0	26 0 0
2	0 14 0	72 16 0	57 4 0
1	0 13 9	33 16 0	31 4 0
4	0 12 0	124 16 0	135 0 0
1	0 10 0	26 0 0	39 0 0
2	0 9 0	46 16 0	83 4 0
2	0 8 0	41 12 0	88 8 0
1	0 7 0	18 4 0	46 16 0
1	0 6 0	15 12 0	49 8 0
45		2,099 16 0	829 0 0

The fourth exemption under schedule (B.) of the Act 48 Geo. 3. c. 55, exempts from house tax any hospital, charity school, or house provided for the reception or relief of poor persons.

The trustees contend that the building is exempt from house tax as being a hospital: that it is certainly a hospital for the cure of persons suffering from disease; it has always been called a hospital, and has all the usual features of a hospital, namely, it was founded and built with charitable donations, it is an

institution for the relief of persons suffering from a most distressing disease, and it is managed by charitable persons not deriving any pecuniary benefit from it, but, on the contrary, assisting it by their subscriptions, and having under their direction the house surgeon, matron and servants.

The trustees further contend that the building is exempt from house tax as being a house for the relief of poor persons.

The patients are not paupers, but the greater part of them are poor persons, and the rate of pay, which for board, lodging and attendance in no case exceeds 25s. per week, and in the other cases varies from 21s. to 6s. per week, shows the inmates to be poor persons; and even these small payments are in numerous cases contributed by the benevolence of relatives and friends, who wish to save these poor persons from becoming paupers supported by the poor-rates.

The sum of 25s. only pays the costs of food, maintenance and care, and gives nothing in the shape of rent. It is submitted that the above facts show that the building is a hospital, and is also for the relief of poor persons, and therefore exempt from house tax.

As respects the male servants, the commissioners found that the four for whom exemption was claimed are male attendants upon the patients in the hospital, and it was admitted that three of them were employed to look after the male insane patients, in performing the duties of nurses, and in dressing, shaving, waiting upon them at their meals, brushing their clothes, cleaning their boots and shoes, and any other necessary or needful thing which cannot or ought not to be intrusted to be done by themselves. The fourth attendant is up all night as a nurse and watchman, but he does not perform any of the other duties above mentioned, he does not dress, shave, or wait on them, brush their clothes, or clean their boots.

The surveyor submitted that there was no exemption for male servants so employed, and referred to Judges' Cases, numbers 703, 916 and 1157, in all of which they were held to be chargeable.

The trustees contend that as these cases apply to private asylums and not to public hospitals, they do not apply to the present question.

They further contend that there is no word in the Act descriptive of the attendants upon the patients at a public lunatic hospital, the nearest designation being "*valets de chambre*." That private asylums are open for the reception of rich persons, used to be attended on by *valets de chambre*, and in those establishments there may in some cases be persons employed strictly as "*valets de chambre*," but that the patients in this and other lunatic hospitals are not persons who would have been waited on by a male servant if in sound mind, and the term "*valet de chambre*" cannot be stretched to include persons who are really "male nurses," and who are employed merely because, from the mental condition and violence of the patients, the employment of female nurses would not be practicable.

The Commissioners, in view of these facts, and of the further fact that exemption from inhabited house duty is already granted to the county lunatic asylum for paupers at Sneinton, near Nottingham, which fact, however, the appa. contend does not affect the question, were of opinion—

- 1st. That the hospital is not a hospital for the reception and relief of poor persons within the meaning of the Act; and
- 2nd. That the way in which the male attendants were employed rendered the trustees liable to be assessed for them as domestic servants, and they therefore confirmed the assessment under both schedules, with which decision the app. being dissatisfied, he requested that a case for the opinion of the judges might be stated, which we, the commissioners present, have stated accordingly.

THOMAS CULLEN,  
J. WATSON, } Commissioners of  
WILLIAM FELKIN, } Assessed Taxes.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong.

## Re S. AND G. HADFIELD.

*Inhabited house duty—House occupied as solicitor's offices, but also inhabited.*

*Solicitors appeal against an assessment for a building occupied by them as their offices, but inhabited also by their errand-man and his wife. The Commissioners confirm the assessment:*

*Commissioners right.*

At a meeting of commissioners of assessed taxes, held at the Tax-office, 21, Mount-street, Peter-street, Manchester, on the 24th Sept. 1862, for the purpose of hearing appeals against the first assessments for the year 1862-63:

Messrs. Samuel and George Hadfield, solicitors, appealed against an assessment to the inhabited house duty upon the building of which their offices in Manchester form part.

They also denied their liability altogether in April last against the assessment for 1861-62, but only succeeded in reducing it from 180l. to 160l. The facts to be considered in respect of both assessments are the same.



**ASSESSED TAXES.] Re BIRKENHEAD, & C JUNCTION RAILWAY CO.—Re CURTIS. [ASSESSED TAXES.**

The building, which (except the three top rooms and the conveniences and staircase to them) is occupied by the appa. as solicitors' offices only, is the property of their father, George Haddfield, Esq., M.P., between whom and the Chancellor of the Exchequer there ensued a correspondence, resulting in a recommendation by the latter, on the 16th May 1862 (after a report from the surveyor), that a case should be stated for the opinion of Her Majesty's judges.

The three top rooms of the building, which is three stories high, are let off to, or occupied by, John Turner, the appa.'s errand man, and his wife, and their occupation of them is considered in the amount of his wages, which is equivalent to letting at a rent.

The building is situated at the corner of Fountain-street and Marble-street; the office door and entrance are in Fountain-street. There are also a doorway and entrance in Marble-street to a staircase up to Turner's rooms at the top of the building. The Marble-street doorway and entrance and this staircase are used only by Turner and his wife. From this staircase there are two doorways, one communicating with the general offices occupied by the appa., the other with Turner's rooms.

The office door in Fountain-street is locked up from the inside at night, and the office door on the staircase is then locked up from the staircase, and the keys kept by Turner.

It is the duty of Turner and his wife to enter the offices from their rooms through the inner door on the stairs, for two purposes only, viz., one to pass through the offices to lock and unlock the front door in Fountain-street, and the other for Mrs. Turner to dust and clean the offices; but there is, nevertheless, during the night (and so there would be if they resided at a distance from the offices), the facility, and nothing (except a sense of duty and the appa.'s orders, and a risk of loss of situation) to prevent either Turner or his wife from entering into and using the offices for any purpose.

As a matter of fact, however, they do only enter for the two purposes just particularised, which are performed by them without assistance, and could, of course, be just as well accomplished by their passing along the few yards of street between Marble-street and Fountain-street doors.

The rooms occupied by Turner have distinct and separate conveniences, and are not used for cooking or other service for the offices, and their privacy is in every way respected.

The appa. contended against their liability to assessment, on the ground that the building was erected upwards of thirty years ago for Mr. Haddfield, M.P., then a solicitor, by an eminent architect, with especial reference (in contemplation of its being used as now) to non-liability to window tax, for which inhabited house duty has been substituted, and that the only attempt ever made to assess it to window tax (the circumstances having been similar to the present ones) was successfully resisted on appeal, and that no attempt has been made to assess it to the inhabited house duty until the year 1861-62, though the circumstances have throughout been similar.

They also contend that, under the circumstances, the rooms occupied by Turner constitute a distinct tenement, which alone is to be considered for the purposes of duty, from which it is exempt, being worth less than 20*l.* per annum, and that the connexion of the offices with the staircase from Marble-street entrance is not such as to bring them into charge.

They also (while guarding themselves from being committed by the printed instructions furnished to assessors, which are merely official views, and do not decide the law) referred to the third exemption in such instructions, and contended that it applied *a fortiori* to such part of the building as is occupied by them, which has never been used for the purpose of residence.

The surveyor on the other hand contended that as there was an internal communication to and from all parts of the building, the entire building was therefore chargeable under the 48 Geo. 3, c. 55, schedule (B); and he further contended that by the exemption granted by 6 Geo. 4, c. 7, s. 7, to houses occupied for purposes of carrying on trade, or exercising professions in the daytime only, and extending, under certain conditions, to the watching and guarding of such premises by a servant at night, it is expressly provided that no servant shall be allowed to dwell in any such house as a place of residence.

The surveyor therefore urged that the three rooms occupied by Turner and his wife constituted the usual abode and residence of those persons, they having in fact no other place of residence, and that such a general occupation by them cannot be considered "for the purposes only of watching and guarding the premises" belonging to the appa.

The surveyor referred to cases 2299 and 2597 in support of the assessment.

The appa., however, contended that in neither of these cases does there appear to have been separate doors, entrances and conveniences to the parts resided in, or other such circumstances as to constitute them distinct tenements, and that case 2299 does not apply, because the duties are performed by Turner and his wife without assistance, and that case 2597 was decided on grounds peculiar to municipal corporation.

The appa. also requested to have the commissioners' confirmation of the reduced assessment for the year 1861-62 included in this case, having regard to the Chancellor of the Exchequer's recommendation, which was not made until after the close of the financial year, and therefore could not be followed within it. They have not paid the duty for either year.

The commissioners having carefully considered all the facts, particularly with reference to the occupation of the top rooms

of the building, and the internal communication from them to and from the offices, and having referred to and read the cases to which their attention had been called by the surveyor, confirmed the assessment, with which the appa. were dissatisfied, and requested a case might be stated for the opinion of Her Majesty's judges, which is hereby stated and signed accordingly.

THOS. BARGE, }  
WILL. JOYNSON. } Commissioners.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is right.

**Re The BIRKENHEAD, LANCASHIRE AND CHESHIRE JUNCTION RAILWAY COMPANY.**

*Inhabited house duty—Railway station, &c.*

*A railway company appeals against an assessment for station offices and house therewith connected, occupied by station-master. The bedrooms of the house are partly over the offices. The Commissioners confirm the assessment:*

*Commissioners right.*

At a meeting of the commissioners of assessed taxes, held at Oakmere, on the 28th Aug. 1862:

The Birkenhead, Lancashire and Cheshire Junction Railway Company appealed against an assessment made upon them of 25*l.* for the inhabited house duty, in respect of the station offices and the house and premises occupied by their station-master at Frodsham.

The house in question is connected, on the ground floor, with the booking office, waiting-room and ladies' room, which form the company's offices; and upstairs there are four bedrooms occupied by the station-master, partly over the rooms used by him as a residence, and partly over the company's offices.

The appa. claimed to be wholly exempt; the surveyor contended the contrary, referring the commissioners to the case No. 2397.

The Commissioners confirmed the charge; but the appa. being dissatisfied demanded a case for the opinion of Her Majesty's judges, which we state and sign accordingly.

S. WOODHOUSE,  
T. F. MARSHALL.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is right.

**Re CURTIS.**

*Inhabited house duty—Question of value.*

*App. appeals against an assessment at 35*l.* in respect of a house alleged to be held on lease at 24*l.* The premises are found to be held, with five cottages of an admitted value of less than 15*l.*, at a reserved rent of 50*l.* The Commissioners confirm the assessment:*

*Commissioners right.*

At a meeting of the commissioners of assessed taxes, held at the Police office at Middleton Cheney, on Monday the 26th Aug. 1861, for the purpose of hearing appeals against the first assessments for the year 1861-62:

Thomas King Curtis, of Brackley, Saint James, draper, appealed against a charge made on him for inhabited house duty at 35*l.* per annum in respect of a house and premises at Brackley.

App. stated that he occupied a draper's shop, house and out-buildings as tenant under a lease dated within the last seven years, under which he had always paid, and was now paying, a reserved rent of 24*l.*, the landlord covenanting to keep the said premises in repair and to pay landlord's taxes, and he contended that the assessment ought to be made on the said reserved rent of 24*l.*

He refused to produce the lease, and said it was not in his possession. He produced the last poor-rate of the parish of Brackley, Saint James, based on a new valuation made within the last twelve months, and pointed out the following cases, which, he stated, showed that his premises were assessed to the house duty at a higher rate than other premises in the same parish:

	Gross Estimated Rental.	Rateable Value.	House Duty.
	£ s. d.	£ s. d.	£ s. d.
Curtis, Draper.....	25 0 0	15 18 4	17 6
Dearlove, Chemist.....	25 0 0	15 18 4	10 0
Siret, Chemist .....	24 0 0	16 0 0	10 6
Judge, Grocer .....	22 0 0	16 0 0	11 0
Hawkins, Ironmonger ..	25 0 0	22 0 0	15 0
Clarke, Ironmonger ...	24 10 0	16 10 0	10 0

[ASSESSED TAXES.]

Re TURLE—Re FOTHERGILL—Re JUSTINS.

[ASSESSED TAXES.]

App. also produced a receipt for 25*l.*, which purported to be for a half-year's rent and "goodwill" of his house and premises.

The surveyor, Mr. Leach, contended in support of the charge that as the house and premises, with five cottages, were held under a lease, dated within the last five years, at the yearly rent of 50*l.*, the app. was liable to be assessed on the amount of rent less the annual value of the cottages, and he having on a former appeal against the assessment for the year 1857-58 admitted that 15*l.* was more than the annual value of the cottages, was therefore liable to be assessed on the remainder of the rent, viz., 35*l.*

The Commissioners confirmed the charge, but app., being dissatisfied, demanded a case for the opinion of Her Majesty's judges.

We, the commissioners by whom the appeal was heard and determined, have accordingly stated and signed this case for the opinion of Her Majesty's judges.

R. S. CARTWRIGHT, } Commissioners of  
A. J. EMPSON. } Assessed Taxes.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is right.

### Re TURLE.

#### *Inhabited house duty—House rented at 19*l.* 19*s.**

App. appeals against an assessment on 20*l.* in respect of a dwelling-house rented at 19*l.* 19*s.* The Commissioners, in view of the rent, relieve the app.:

Commissioners wrong.

At a meeting of the commissioners of land and assessed taxes held at the Inland Revenue-office, Taunton, on the 27th Aug. 1861:

Mr. Richard Turlé appealed against an assessment made on him for inhabited house duty in the sum of 20*l.* in respect of a dwelling-house which he rents and occupies in the borough of Taunton.

The app. being sworn, stated that his *bona fide* rent was nineteen guineas, for which amount he produced receipts, and he stated that the sum had been agreed on for the purpose of avoiding liability to the tax.

The gross estimated rental in the poor-rate is 22*l.*

The assessment to the property-tax under schedule (A.), 19*l.* 19*s.* for the year 1857.

The surveyor contended, on the authority of cases 2233 and 2438, that the party was liable.

The Commissioners, being satisfied that the actual rent agreed to be paid was nineteen guineas, and no more, *relieved* the app., with which decision the surveyor being dissatisfied, demanded a case for the opinion of Her Majesty's judges, which we hereby state accordingly.

Dated this 15th day of February 1862.

WILLIAM BARRETT, }  
EDW. EASTON, } Commissioners.  
JOHN BARROWFORTH, }  
CHAR. BALLAM. }

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong.

### Re FOTHERGILL.

#### *Inhabited house duty and duty for dog—Question of value and use of dog.*

App. appeals against an assessment for dwelling-house in 65*l.*, contending that the value is 50*l.* only, also for a dog as being kept for the care of cattle. Commissioners find the value of the house 60*l.*, and that the dog is not kept *bona fide* for the care of cattle, and confirm assessments, house duty on 60*l.*:

Commissioners right.

At a meeting of the commissioners of land and assessed taxes for the Hundred of Broxtowe South, "Nottingham," held on the 26th Aug. 1862:

James Fothergill, Esq., appealed against an assessment on him to the inhabited house duty of 65*l.* in respect of a house, outbuilding and garden, his property, situated in the parish of Beeston, and the duty of 12*s.* for a third dog.

The app. stated that his house and premises were not worth 65*l.* per year, and showed by the poor-rate the gross estimated rental to be 50*l.* per annum, and the rateable value 34*l.* per annum, and he submitted that the gross estimated rental was the real value of the property in question.

It was also shown by the app. that several other houses in the said parish had been assessed upon that value. With respect to the dog, that it was kept for the care of cattle at his farm, about two miles distant from his dwelling-house, but admitted that the dog was always kept at his private house,

Beeston, but when he visited the farm he took it with him; was also used as a house dog.

That the dog was not a pure sheep and cattle dog. The parish assessor, who knew the house and premises well, stated that the same were well worth the amount charged, and that he could procure a tenant at 70*l.* per annum if the premises were to be let.

That the gross rental in the poor-rate was under the value, compared with the rentals of some of the property in the parish.

The house is assessed to the property tax at 65*l.* per annum.

The surveyor, Mr. Wyatt, contended that the property should be assessed on the full annual value, namely, upon the rent which could be obtained for the same if let from year to year; and with respect to the dog, that it was unnecessary for the purposes stated, and also that the dog was used for other purposes, namely, as a house dog.

The Commissioners having considered the several before-mentioned statements (one of them having a personal knowledge of the house and premises in question) were of opinion that the full annual value of the house, &c., was 60*l.* per annum, and reduced the assessment accordingly, and also decided that the dog was not *bona fide* kept for the care of cattle and confirmed the charge.

The app. being dissatisfied demanded a case for the opinion of Her Majesty's judges, which we hereby state accordingly.

As witness our hands this 24th day of Sept. 1862.

E. J. LOWE, }  
H. C. BREWSTER. } Commissioners.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is right on both points.

### Re JUSTINS.

#### *Inhabited house duty—Railway-station—Question of value.*

Railway company appeals against an assessment on 30*l.* for a station, producing professional evidence valuing the house at not more than 19*l.* The Commissioners, considering the premises worth 20*l.*, confirm the assessment at that sum:

Commissioners right.

At a meeting of commissioners of land and assessed taxes, held at the Seasons-house, Sleaford, on the 13th Feb. 1863:

Mr. Hipplesey Justins appealed on behalf of the Great Northern Railway Company, lessees of the Boston, Sleaford and Midland Counties Railway, against a surcharge made by Mr. Rusby, surveyor of taxes, on 30*l.* for inhabited house duty upon their station at Quarrington, occupied by the clerk in charge, John Lewin.

Mr. Justins produced a certificate from Mr. Nathan Roberts, valuing the whole of the premises at 17*l.*; but, as the commissioners were not satisfied therewith, they, at Mr. Justins' request, adjourned the case to their next meeting on the 8th April, in order to afford him the opportunity of having the personal attendance of his witnesses.

On the 8th April 1863, Mr. Justins again attended with his valuers.

Mr. Nathan Roberts, of Heckington, sworn, states that he valued the line for poor's rate, and estimated the gross value of the station at 17*l.*, but the whole line and buildings are assessed to the poor in one sum.

Mr. William Ansell Kirby, the company's engineer at Boston, sworn, states that he estimates the gross value of the station at 19*l.*, viz., six rooms, &c., occupied by a clerk, at 10*l.* 6*s.*, and the company's offices and waiting-room at 10*l.* 15*s.* He values all the premises at 2*d.* per superficial foot.

The Commissioners, however, considered that neither of these valuations were so much, upon comparison with other houses in the vicinity, as the premises were worth to let, and they were satisfied that the annual value was not less than 20*l.*, at which amount they confirmed the assessment; but the app. being dissatisfied with such decision demanded a case for the opinion of Her Majesty's judges, which is hereby stated and signed accordingly.

JOHN MACKINNON, }  
J. TOMLINSON. } Assessed Taxes.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is right.

*Re WELFORD.**Inhabited house duty—Question of value—19L 19s. rent.**Solicitor appeals against an assessment on 20L, on the ground that the rent is 19L 19s. The Commissioners, considering the house worth 20L, confirm the assessment:**Commissioners right.*

At a meeting of commissioners of land and assessed taxes for the division of Tindale Ward, in the county of Northumberland, held at the Court-house in Hexham Abbey, on Tuesday 25th Aug. 1863, for the purpose of hearing and determining appeals against the first assessments for the year ending 5th April 1864:

Mr. Thomas William Welford, of Hexham, solicitor, appealed against a charge made upon him for inhabited house duty at 20L. App. stated that the rent paid by him was only 19L 19s. per annum.

The surveyor contended that the house was worth 20L, and that, Ltd for the inhabited house duty, it would have been fixed at that sum, and referred the commissioner to cases No. 2280, 2372 and 2475.

The Commissioners, without doubting that the taking was *bona fide* on the part of the app., considered the house to be worth 20L per annum, and confirmed the assessment.

The app. was dissatisfied with their decision, and requested a case for the opinion of Her Majesty's judges, which is hereby stated and signed accordingly.

JOHN F. BIGG,  
NICHOLAS MAUGHAN,  
FREDERICK GIFFS.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is right.

*Re GRIGSBY.**Inhabited house duty—Question of value—House only partially tenanted.*

*Dissenting minister appeals against an assessment for a house formerly occupied by him at 22L, but of which he alleges he now occupies a portion only, at a rental of 14L. The communication between the occupied and unoccupied portions is interrupted only by doors, the keys of which are in possession of the app. The Commissioners relieve the app.:*

*Commissioners wrong.*

At a meeting of the commissioners of assessed taxes for the division of Lower Arundel, Sussex, on the 30th Aug. 1863:

The Reverend David Grigsby, a dissenting minister, appealed against an assessment made upon his dwelling-house to the inhabited house duty, upon an annual value of 20L.

The app. stated that he occupied only part of the house at a rent of only 14L per annum; that the rest of the house was shut up; that the doors between the occupied and unoccupied parts were locked, and the keys kept by himself, but the communication between the two parts of the house was not otherwise cut off; that he occupied the whole of the garden, and that there was an understanding between him and the landlord that the unoccupied portion of the house should not be let to another person without his (Mr. Grigsby's) assent. The app. also stated that he had previously held the whole house at a rent of 22L, which he admitted to be the value thereof.

Mr. Kirkpatrick, the surveyor, contended that as the house was not divided otherwise than by locking up the internal doors, the app. must be treated as the occupier of the whole house, and was liable to the assessment.

The Commissioners relieved the app.; but the surveyor being dissatisfied with their determination demanded a case for the opinion of Her Majesty's judges, which we hereby state and sign accordingly.

J. L. ELLIS,  
W. TOWNLEY MITFORD.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong.

*Re BENNETT.**Inhabited house duty—House occupied by a clergyman rent free.*

*Clergyman appeals against an assessment in 200L for house occupied by him rent free, on the ground that he is prohibited from letting it. The Commissioners allow an abatement on that account:*

*Commissioners wrong.*

At an adjourned meeting of the commissioners of assessed taxes, held at the Town-hall, in Christchurch, in and for the

division of New Forest West, in the county of Southampton, on the 24th Aug. 1863:

The Reverend Alexander Morden Bennett appealed against an assessment of 100L, made upon him for inhabited house duty, and increased to 200L for the year 1863-64.

The app. is the perpetual curate of Bournemouth, and as such has the privilege of residing in the house, the subject of appeal, but he is prohibited from letting off the whole or any portion thereof, by reason of which he claimed an abatement on its annual value, to which he objected, as being too high at the assessment of 200L.

The Commissioners, after hearing the app.'s statement, considered the value of the house to be 180L, and that the app. was entitled, on account of the prohibition to let off any portion of the house, to an abatement therefrom of one-sixth, or 30L, and accordingly reduced the assessment to 150L.

The surveyor contended that a clergyman's house was not entitled to any special exemption, and that it should be assessed, as if it belonged to any other person, at the full annual value which was fixed by the commissioners, viz. 180L. He therefore demanded a case for the opinion of Her Majesty's judges, which we, a majority of the commissioners present at such decision, hereby state and sign accordingly.

W. W. FARR,  
THOMAS ENTWISTLE,  
W. CLAPFORD DEAN.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong in deducting one-sixth from the annual value.

*Re COPE.**Inhabited house duty—Rate of duty—Farmhouse, farmer being also a mine agent.*

*Farmer and mine agent appeals against a charge at the higher rate in respect of his dwelling-house, which is the farmhouse likewise. He occupies and is assessed for another house for his offices as a mine agent, but never resides there. His income as a mine agent is found to be greater than his income as a farmer. The Commissioners relieve the app.:*

*Commissioners wrong.*

At a meeting of commissioners of land and assessed taxes, acting in and for the district of Brimstone West, in the county of Salop, held at the Public-office in Shifnal, on the 27th Aug. 1863:

James Cope, of Albrighton, appealed against the charge of 20L inhabited house duty, at ninepence in the pound.

The app. is a farmer and mine agent. His farm consists of a dwelling-house, farm-buildings and seven-and-six acres of land, the rent of which is 254L. He resides in the house, and contends that it is occupied as a farmhouse only, and is his exclusive residence, his business of a mine agent being carried on in offices at Wolverhampton, a distance of eight miles therefrom, for which he is assessed to inhabited house duty, but where he never resides.

The surveyor, Mr. R. G. Carter, contended that the party was not chargeable at sixpence in the pound, inasmuch as a house occupied by a person carrying on another business, from which he derived an income equal to or greater than that derivable from the farm, which is the case with the app. he being charged at Wolverhampton under schedule (D) of the income-tax, upon a greater amount than the amount defined by the law to be the income arising from the occupation of the land in question, cannot be said to be a house *bona fide* used for the purposes of husbandry only, as required by schedule (D) of the Act 14 & 15 Vict. c. 36, and in support quoted cases numbered 2799 and 2538.

The Commissioners, being of opinion that, as Mr. Cope carried on his business of a mine agent in offices at Wolverhampton, the house which is his actual residence, and is taken with the land, and included in the rent of 254L, should be considered as occupied by him solely for the purpose of husbandry, and as such chargeable at sixpence instead of ninepence in the pound, relieved the app.

Whereupon the surveyor, being dissatisfied with the decision, requested that a case be stated for the opinion of Her Majesty's Judges, which we, the commissioners who heard the case, have stated and signed accordingly.

G. HOLYOAK,  
GEORGE T. O. BRIDGMAN,  
ARTHUR C. LACOE.

Commissioners of land and assessed taxes, acting in and for the district of Brimstone West in the county of Salop.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong.

[ASSESSED TAXES.]

*Re ADAMS—Re MONCK—Re TWEEDY.*

[ASSESSED TAXES.]

*Re ADAMS.**Male servant—College servant.*

*Member of the governing body of St. John's College, Oxford, appeals against a charge for a male servant. He keeps his carriage in the College stables, where it is cleaned by a servant of the college. Commissioners confirm the assessment:*

*Commissioners right.*

At a meeting of the commissioners of land and assessed taxes, acting in and for the division of the University of Oxford, held at the Delegate's room, at Oxford, on the 25th Nov. 1861:

Arthur Robert Adams, Esq., D.C.L., of Saint John's College, Oxford, appealed against the charge in the first assessment for the current year for one male servant, schedule (C.) 11. 1s.

The app. admitted that he kept a carriage with two wheels, and a horse at the college stables, but objected to the charge for the servant on the following grounds:

1. That he had never hired any male servant to clean the carriage for which he paid duty.
2. That he had never employed any male servant to perform that duty.
3. Because, although his carriage or dog cart is cleaned, it is cleaned by a servant of the college, by orders from the college, and not from his orders.
4. That the college pays duty for the same male person as its servant, and that the said college employs the said servant in no other way.
5. That he pays the said groom a weekly payment for the keep of his horse, and that it would be just as correct to charge him with every person who washed the carriage, if he kept the said horse and carriage at a livery stable.
6. That he has no power of dismissing or reproving the said person if he should refuse to wash or clean his carriage. His only remedy in such a case being to complain to the college authorities, who might or might not discharge or reprehend such servant.
7. That he is a member of the governing body of St. John's College, and as such that he has a right to keep his carriage in the college stables.
8. That if the said male person does not perform the duty of washing carriages the college will have paid duty for a servant who has no duties to perform.

Mr. Henry Wootton, the surveyor, contended on the part of the Crown, that the app. employed the male person in question to clean his carriage and horse, and although such person was not his servant, but the servant of the college authorities, who paid him for attending to horses belonging to fellows of the college out of the common funds of the said college, yet being chargeable to the duty imposed on a carriage, he was liable to the assessment for a servant under 16 & 17 Vict. c. 90, rule 2.

We, the undersigned commissioners, considering the app. liable to the duty, confirmed the assessment, with which decision Dr. Adams expressed himself dissatisfied, and requested a case for the opinion of Her Majesty's judges, which we, the commissioners then present, have stated and signed accordingly.

Dated this 29th day of Jan. 1862.

FREDERICK CHARLES PLUMTREE.  
JAMES NORRIS.

PICOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is right.

*Re MONCK.**Male servants—Trainers of race-horses.*

*Gentleman appeals against charges for eight male servants, in respect of a professional training groom and his apprentices employed in training app.'s race-horses. The Commissioners confirm the assessment:*

*Commissioners right.*

At a meeting of the commissioners of land and assessed taxes for the division of Morpeth, in the county of Northumberland, held at the Borough Justice-room, Morpeth, on the 2nd April 1862, for the purpose of hearing appeals against the additional first assessment:

Sir Charles Monck, of Belsay Castle, in the said division and county, appealed against charges of 11. 1s. for a male servant above eighteen years of age and 3s. 12d. for seven male servants under that age.

The app. stated that he kept and trained race-horses at his private residence, and employed the eldest servant referred to as a professional training groom to train such race-horses. That he, the servant, was a man regularly brought up to the business of training horses, and was employed by app. solely to train his. That some of the younger males alluded to were apprentices, bound to such trainer for the purpose of learning the art of training race-horses, and that the others were only

assistants to him in his business. That the whole of the persons so charged for were exclusively employed in the training and care of app.'s race-horses, and were not menial servants, did not wear livery clothes found by app., nor did app. provide them lodging, board, or clothes, nor did they sleep or eat in his house, nor were the horses attended by them ever employed by app. for any other purpose or use than racing, nor did the servants in question ever attend upon the app. personally in his use of horses of pleasure for which he pays the ordinary tax of 11. 1s. each. And the app. further offered his opinion that as the tax of 81. 17s. on each race-horse had been imposed some years ago as a separate tax on horses used for racing, and was so much higher a tax than that for ordinary horses of pleasure, which is 11. 1s. each, the intention of the Legislature was that the tax of 81. 17s. each should cover both horses and their attendants.

The Commissioners did not require the surveyor to reply to app.'s statement, but confirmed the charge.

The app. not being satisfied with this decision, demanded a case for the opinion of Her Majesty's judges, which we, the commissioners present at the hearing of the said appeal, do hereby state and sign accordingly, and submit that the app. is chargeable with the duties mentioned, on the ground that the several duties charged became payable by reason of the individuals being employed as grooms or helpers in app.'s stables, and being exclusively so engaged, and that although the person employed as the private trainer of app.'s race-horses was master of the apprentices, or grooms, or helpers, yet the whole were solely employed by the app. in the characters mentioned, and so were chargeable with duty.

Given under our hands this 2nd day of April 1862.

JOE. YOUNG.  
ROBERT COULL.  
THOMAS SWAN.

PICOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is right.

*Re TWEEDY.**Male servant—Labourer employed in stables and garden.*

*Gentleman appeals against an assessment for a labourer employed as helper in his stables and garden, on the ground that such employment is occasional only. The Commissioners relieve the app.:*

*Commissioners wrong.*

At a meeting of the commissioners of assessed taxes acting in and for the division of West Powder, in the county of Cornwall, held at the Town-hall, Truro, on the 6th Sept. 1862, for hearing and determining appeals against the first assessment of the year 1862-63:

Robert Tweedy, Esq., of Truro, banker, was charged in the first assessment, upon his own return, as follows:

	£	s.	d.
Butler .....	1	1	0
Coachman .....	1	1	0
Gardener .....	1	1	0
Helper in stables .....	1	1	0
Two four-wheeled carriages .....	7	0	0
Three horses (E.) .....	3	3	0
Four dogs .....	2	8	0
Armorial bearings .....	2	12	9

He appealed against the duty for the helper in the stables, considering that as the man was hired as a farm labourer for a farm of eight acres, was paid weekly, and has his services in the stables were occasional only, he was not liable to be assessed.

He admitted that the servant in question was sometimes, when he arrived at his residence late at night, occasionally employed in the stables, but could not state how often; and that when he had no work on the farm, and was required by the gardener, he was also employed in the garden.

Mr. Yewens, the surveyor, contended that sufficient had been admitted to render Mr. Tweedy chargeable for the fourth servant, and referred to rule 6 of the 16 & 17 Vict. c. 90, in which it is stated that "The said duties shall extend to every person who shall be employed in the capacity of a helper in the stables, although such person shall be retained for the purposes of husbandry;" and although the man was ostensibly hired as a farm labourer, yet it appeared evident that he was to assist the coachman whenever his services were required; and he drew attention to the establishment kept, alleging that as the coachman was often employed in driving his master and the family to different places, it was quite impracticable for him to attend to, and keep in proper order, three horses (E.) and two four-wheel carriages, without the frequent assistance of the man in question, and cited cases 2496 and 2515 in support of the assessment.

The majority of the commissioners present being of opinion that app. was not liable for the labourer, discharged the assessment upon him.

Whereupon the surveyor being dissatisfied with the decision

[ASSESSED TAXES.]

Re WALKER—Re NUNN—Re REY—Re GODDARD.

[ASSESSED TAXES.]

demanded a case for the opinion of Her Majesty's judges, which we hereby state and sign accordingly.

FRED. WEBBER,  
WILLIAM P. KEMPE, } Commissioners.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong.

Re WALKER.

*Male servant—Licensed victualler.*

*Licensed victualler appeals against an assessment for a man employed generally as a servant. The Commissioners confirm the charge:*

*Commissioners right.*

At a meeting of the commissioners of assessed taxes acting for the the division of Middleton, in the county of Lancaster, held on the 19th Feb. 1862, for the purpose of hearing appeals: John Walker, of Oldham-below-Town, innkeeper, appealed against a charge made on him for a person called a servant, waiter, or house porter. Schedule (C.) No. 1, 11. 1s.

The app. being sworn, stated:—"I have one man servant, but I claim exemption as a licensed victualler. He takes care of horses and generally acts as a servant; he gets the beer into the cellar; he cleans the windows outside, whilst the females clean them inside; he cleans mine and my wife's shoes; he also cleans the guests' shoes and boots. We had only twenty-six lodgers as travellers last year 1860-61. He cleans the knives and forks; and I claim exemption on the ground that I am an innkeeper and keep only one servant. He, the servant, sleeps in the house, and I give him five shillings a-week and his board. I have no horse or gig."

The Commissioners confirmed the charge, but the app. being dissatisfied with their decision requests a case for the opinion of the judges, which we hereby state accordingly.

E. ARBOTT WRIGHT,  
A. WOXINGTON,  
SAM'L RADCLIFFE, } Commissioners.  
JON. HAGUE.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is right.

Re NUNN.

*Male servant—Wine and spirit retailer's apprentice.*

*Wine and spirit merchant appeals against a charge in respect of an apprentice under eighteen years of age, who waits on the guests who come to the spirit vaults. The Commissioners relieve app.:*

*Commissioners wrong.*

At a meeting of the commissioners of assessed taxes, held at the Bear's Head Hotel, Newtown, on the 2nd Sept. 1863, to hear appeals against the first assessments for the year 1863-64:

Mr. James Nunn, wine and spirit merchant and retailer, of Newtown, appealed against a charge made on him for a male servant, 21s. The app. is chargeable, and charged for a two-wheel carriage, 15s., but he keeps no horse, and when his carriage is used he hires a horse from a postmaster, and the ostler of such postmaster always acts on such occasion as the groom. He has an apprentice, under eighteen years of age, who waits on the guests who come to the spirit vaults, but does not perform any household duties or act as groom upon any occasion. Under these circumstances he contends that he is not liable to be taxed for a servant.

The surveyor of taxes contended that, as it is admitted that the lad acts as waiter, his being an apprentice does not affect his master's liability, there being no exemption granted by the Act of Parliament, and that the assessment ought not to be wholly discharged, but only reduced to 10s. 6d. In consequence of the decision come to by the judges in case 2398, the surveyor did not press the charge with respect to a groom.

The Commissioners, however, decided on discharging the assessment, entirely on the ground that it is necessary for the lad to wait on his master's customers in order to learn the business, and therefore the latter cannot be liable to pay duty for him as a servant.

The surveyor, being dissatisfied with this decision, requested that a case might be stated for the opinion of Her Majesty's judges, which we, the commissioners present, hereby state and sign accordingly.

CHAS. THOS. WOONAM.  
B. JONES.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong. App. should be assessed at 10s. 6d.

Re REY.

*Male servants—Attendants in a private lunatic asylum. Keeper of a private lunatic asylum appeals against a charge for persons employed in waiting upon patients. Commissioners relieve app.:*

*Commissioners wrong.*

At a meeting of the commissioners of assessed taxes for the district of Kensington, held at 12, Broadway, Hammermith, on the 9th Sept. 1862:

Mrs. Harriet Rey, of Hammermith, appealed against a charge made upon her for two male servants, schedule (C.), No. 1.

The app. admitted that the servants were employed by her in an asylum for lunatics as keepers or nurses to her patients, that their duties consisted of nursing, dressing, waiting upon them at their meals, brushing their clothes, reading to them and attending them for any other necessary purpose.

The app. contended that, as the servants charged for were employed solely to look after and attend upon the patients, and not kept or used as domestic servants, she was exempt from the duty, schedule (C.), No. 4.

The surveyor in support of the charge produced cases Nos. 703 and 916, and contended that the persons for which the charge was made were, by the nature of their employment, "domestic servants," being employed in some one or more of the various capacities enumerated in schedule (C.), No. 1, 3d Geo. 3, c. 93, and consequently liable to duty as such.

The Commissioners having heard the app., and also the surveyor in support of the charge, were of opinion that the app. was not liable to the charge of such servants, and relieved her, with which decision the surveyor was dissatisfied, and requested a case for the opinion of Her Majesty's judges, which is hereby stated and signed accordingly.

JOSEPH CROOKES,  
JOHN BIRD,  
ROBT. M. PIPER, } Commissioners.  
W. LONDON.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong.

Re GODDARD.

*Male servants—House porters and watchmen in a bank.*

*Sub-agent to a branch Bank of England appeals against a charge for persons employed in the day as house porters and messengers, and on alternate nights as watchmen. The Commissioners confirm the assessment:*

*Commissioners wrong.*

At an adjourned meeting of the commissioners of land and assessed taxes, held at the commissioners' offices in Newcastle-upon-Tyne, on the 18th Nov. 1863, for the purpose of hearing appeals against the first assessments for the year 1863:

Daniel Haill Goddard, Esq., sub-agent of the Newcastle branch of the Bank of England, appealed against a charge made upon the bank for two male servants, schedule (C.), No. 1, 21. 2s.

The app. stated that the two men, who wear the livery of the Bank of England, sleep on the premises every alternate night, that they wait upon the clerks, who have dinner in a room on the premises, but it is no part of their duty to do so, and the dinners of some of the clerks are cooked upon the premises, and that they delivered letters, &c., to the bank customers, and act as house porters at the bank.

The Commissioners, considering that there was no exemption for such male servants, confirmed the charge.

The app. being dissatisfied (stating that the men are householders and pay rates and taxes, that they do not live on the bank premises, that they take their meals at their own homes and remain at the bank every alternate night as watchmen; that their duties at the bank during office hours are to bring up from the safes the boxes and books required during the day, and to put them back at the close of business; to run with messages, parcels and letters to the customers of the bank; that they occasionally bring in refreshments for the clerks, to be eaten by them in a room set apart for the purpose; that this is no part of their duty, but is done to oblige the clerks and at their request, and that neither of the men is employed by either the agent or sub-agent (who live on the premises) for any domestic purpose whatever), demanded a case for the opinion of Her Majesty's judges, which we hereby state and sign accordingly.

HENRY ANGUS,  
HENRY ENGLEDEW,  
JOHN BREKID.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong.

[ASSESSED TAXES.] *Re COLMAN—Re DAVENPORT—Re WOOLF—Re BRAYNE.* [ASSESSED TAXES.]*Re COLMAN.**Male servant—Groom policeman.*

*Superintendent of police appeals against a charge in respect of a "groom policeman" who attends to his horse and carriage. Commissioners relieve the app.:*

*Commissioners wrong.*

At a meeting of the commissioners of assessed taxes, acting in and for the division of Sevenoaks, held at the Crown Inn, Sevenoaks, on the 4th Sept 1863:

George Colman, superintendent of the county police for the division of Sevenoaks, appealed against a charge of 1l. 1s. made on him in the first assessment for a servant.

App. is assessed upon his own return for one two-wheeled carriage, 15s., and one horse 21s., which horse and carriage are the property of the county, and groomed and cleaned, and the horse harnessed and taken in and out of the carriage, as occasion may require, by a policeman who is called "groom constable," whose business is to look after the horse and carriage, and who is subject to general police duties. The policeman receives no pay for these services beyond his ordinary pay as an officer of the police force.

App. therefore contended that he was not liable to the charge for a servant and referred to the printed case No. 2606.

The Crown surveyor, Mr. Harry Munro, contending the contrary, and citing the Judge's cases Nos. 2494, 2542, 2543 and 2544, in support of the correctness of the charge, the commissioners relieved the app.

The surveyor, being dissatisfied, demanded a case for the opinion of Her Majesty's judges, which we hereby state and sign accordingly.

W. LANRARD.  
J. P. ATKINS.

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong.

*Re DAVENPORT.**Establishment—Executor's liability.*

*Executor appeals against an assessment for establishment of deceased, who died on the 18th April in the year of assessment. Commissioners confirm the assessment:*

*Commissioners wrong.*

At an adjourned meeting of the commissioners of assessed taxes for the division of Weobley, Hereford, held at the Lion Inn, Weobley, on the 9th Dec. 1862:

George N. Davenport, Esq., of Foxley, in the parish of Yazor, appealed against an assessment made upon him, upon his own return, as an executor of his late father, John Davenport, Esq., for the under-mentioned articles:

	£	s.	d.
Nine servants at 21s. ....	9	9	0
One servant at ..... ..	0	10	6
Three carriages at 70s. ....	10	10	0
One ditto at 40s. .... ..	2	0	0
Ten horses at 21s. .... ..	10	10	0
Two ditto at 10s. 6d. ....	1	1	0
One pony ..... ..	0	10	6
Six dogs at 12s. .... ..	3	12	0

and claimed to be relieved from the charge on the ground that he personally did not keep the articles in question between the 5th April 1861 and 6th April 1862, that his father died on the 18th April 1862, and that as no assessment was made upon him in his lifetime, he as executor was not liable to the charge made upon him.

The app. still keeps and uses the establishment, with the exception of one or two articles which have been recently discontinued.

The surveyor, Mr. R. James, in support of the assessment, contended that he was decidedly liable by 43 Geo. 3, c. 161, s. 34, which enacts, "That where any person or persons chargeable with the duties hereby made payable shall die, in every such case the executors and administrators of the persons so dying shall be and are hereby made liable to and charged with the payments which the persons so dying were chargeable with."

The Commissioners confirmed the assessment, but the app. being dissatisfied with their determination requested a case for the opinion of the judges, which we, the undersigned commissioners who heard and decided the appeal, have hereby stated accordingly.

W. EDWARDS, } Commissioners.  
R. S. COX. }

PIGOTT, B. and SHEE, J.—We are of opinion that the determination of the commissioners is wrong.

Thursday, June 26, 1862.

(Before BYLES, J. and WILDE, B.)

*Re WOOLF.*

*House used for purposes of business only—57 Geo. 3, c. 25—Two rooms only occupied by a policeman and his wife to take care of the premises.*

*App. claimed exemption from the charge on him at 180l. for house duty in respect of a house used for purposes of business only, he residing in another house charged to the duty. The surveyor contended that, as a policeman and his wife inhabit and abide in two of the rooms, the party was not entitled to the exemption granted by the 57 Geo. 3, c. 25, s. 1. The Commissioners confirmed the charge:*

*Commissioners right.*

At a meeting of the commissioners of assessed taxes for the parish of St. George, Hanover-square, held at their office, 11, South Molton-street, on the 7th Nov. 1860:

Mr. Benjamin Woolf appealed against an assessment of 180l. made on him for inhabited house duty, at 6d. in the pound, for the year 1860, of Bond-street, Piccadilly.

App. stated that the whole of the house is used for business purposes, and no one resides therein except a policeman and his wife, who take care of the premises at night, and that he, the app., does not have any benefit from the man residing there, nor does he or any one in his employ have anything cooked there; the app. further contended that he is not liable to house duty, otherwise every empty house in the occupation of a policeman would be liable.

The app. states that he pays house duty on his private house, which is in another district.

The surveyor submitted that the app. was liable to the assessment, inasmuch as the policeman and his wife inhabiting and abiding in two rooms (the attics) took the case out of the exemption allowed by the 57 Geo. 3, c. 25, s. 1, and the commissioners, being of the same opinion, confirmed the charge, whereupon Mr. Wolf demanded a case for the opinion of Her Majesty's judges, which is hereby stated and signed accordingly.

Geo. DODD, } Commissioners of  
THOMAS DAVIDSON, } Assessed Taxes.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

*Re BRAYNE.*

*Post-office—Apartments occupied as a residence—48 Geo. 3, c. 55, sched. (B.)*

*Postmaster claimed relief from house duty assessed on him at 60l. for his dwelling-house. He contended that, as the house is the property of the Crown, and certain rooms therein are used by himself and his assistants for official purposes, it was exempt under case 1, schedule (B.) of the 48 Geo. 3, c. 55; but if not, that the assessment ought to be reduced to the annual value of the apartments occupied by himself and his family. The Commissioners confirmed the full assessment, but in case that decision should be found wrong, and that the app.'s apartments only are chargeable, they considered their annual value 20l.:*

*Commissioners right.*

At a meeting of the commissioners of assessed taxes, held at the Spread Eagle Hotel, Rugby, on the 26th Aug. 1860, for the purpose of hearing appeals against the first assessment for the year 1860-61:

John Brayne, of Rugby aforesaid, postmaster, appealed against an assessment made upon him of 60l. for inhabited house duty for the year 1860-61 in respect of his dwelling-house at Rugby aforesaid, in a portion of which he carries on his duties of postmaster, and relied upon the following exemption in the Act 48 Geo. 3, c. 55, schedule (B).

"Case 1. Any house belonging to His Majesty or any of the Royal family, and every public office for which the duties heretofore payable have been paid by His Majesty or out of the public revenue."

From the app.'s statement upon oath the Commissioners find the following facts:

That the app. is duly appointed postmaster to the post-office at Rugby by Her Majesty's Postmaster-General; that he, together with his wife, one child and two domestic servants, occupies the house the subject of the assessment; that certain rooms in the house are used by the app. and his assistants in the discharge of his official duties as postmaster, but which rooms are internally connected with the remainder of the

## ASSESSED TAXES.]

## Re WHIMPER—Re RAWLE—Re HAYES.

## [ASSESSED TAXES.]

house occupied by himself and family, the whole being under one and the same roof; that about twelve months ago the whole house was purchased by the Crown, up to which period it belonged to a private individual, and no duties have ever been paid by the Crown or out of the public revenue in respect of the house in question or any part thereof, but on the contrary, the window duty and afterwards the house duty was always paid by the occupier. The app. further claimed to have the assessment reduced to the annual value of the apartments occupied by himself and family. But, upon the foregoing facts, the Commissioners were of opinion that the case did not come within the exemption quoted, and confirmed the full assessment (see case 1507).

With which decision the app. being dissatisfied, and requesting a case for the opinion of Her Majesty's judges, we, the majority of the commissioners who heard the same, do hereby state this case accordingly. Should Her Majesty's judges be of opinion that the decision of the commissioners is wrong, and that the app. is liable only in respect of the apartments occupied by him and his family, we find the annual value thereof at 20l.

PETER VAN NOTTEN POLE, } Commissioners.  
JAMES ATT. }

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

## Re WHIMPER.

House belonging to Her Majesty—48 Geo. 3, c. 55—Occupied by the Lieutenant-Governor of the Tower.

Lieutenant-Governor of the Tower of London claimed exemption from house duty in respect of the house occupied by him in the Tower as a servant of Her Majesty. One room therein is furnished as an office by the Commissioners of Works, and another is set apart for the use of the deputy-lieutenant. The surveyor contended that the house was liable to assessment as an ordinary dwelling-house. The Commissioners discharged the assessment, considering the Tower to be a royal palace within the exemption, case 1, sched. (B.) 48 Geo. 3, c. 55:

## Commissioners right.

At a meeting of the commissioners of assessed taxes for the division of the Tower, held at their offices, No. 33, Spital-square, Middlesex, on the 6th March 1861:

Frederick Whimper, colonel and major of the Tower of London, in the said division, appealed, through the agency of J. Aubrey, Esq., High Bailiff of the Tower, against a charge made upon him for inhabited house duty in respect of the house occupied by him as Lieutenant-Governor of the Tower for the year from the 5th April 1859 to 5th April 1860, which charge is as follows, viz.:

Names of Street or Place and Christian and Surname of Occupier.	Description as to trade and purposes for which the premises are occupied.	Rent or annual value.	Duty.
F. A Whimper ...	Lieut.-Colonel .....	£80	£3

On behalf of the app. it was stated that the house in question is the Queen's, and occupied by the app. as a servant of Her Majesty, and by her command; that the app. has no permanent tenure, and that it is under Her Majesty's control, and is part and parcel of the Tower of London, which is and always has been a royal palace, and is therefore exempt from house tax (see case 1, sched. B. 48 Geo. 3, c. 55). The app. further stated such tax never had been paid, and that he was liable to removal from the said house at any moment Her Majesty placed any other of her servants in it.

The app. further stated that two or three years since a demand for land tax had been made in respect of the said house, but that the Lords of the Treasury had issued an order that it was exempt from that tax, and that it had never since been put in assessment or applied for.

The surveyor contended that the house, although belonging to the Crown, was an inhabited house within the 14 & 15 Vict. c. 36, and liable to duty as an ordinary dwelling-house, and in support of the assessment cited cases 2608 and 2609.

It appeared that the house in question had not been charged inhabited house duty prior to 1859; but the income-tax, under schedule (A.) duty on 80l., had been duly assessed and paid by the app., but that Colonel Whimper says that it was so paid by him in error.

It was also shown that one room was furnished as an office by the Commissioners of Works and Buildings, and that another is exclusively set apart for and used by the Deputy-Lieutenant of the Tower, Lord de Ros; the remaining portion is furnished partially only by Colonel Whimper, but no one room in the establishment is exclusively furnished by him, but certain furniture is added for his own comfort.

The Commissioners discharged the assessment, considering

the Tower to be a royal palace within the meaning of the exemption; whereupon Mr. Gracewood, the surveyor, requested a case for the opinion of the judges, which we, the undersigned commissioners who heard and decided the appeal, have hereby stated accordingly.

GEORGE ORROR.  
JOHN CANTER.  
JAMES GATKA.  
THOMAS BANKFIELD.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

## Re RAWLE.

Police station—48 Geo. 3, c. 55, sched. (B.)

Police station assessed to the house duty at 40l. Six rooms are occupied by a police sergeant and his family and three constables under him. The part occupied by the app. is of the annual value of 16l. He contended that, as the premises were not occupied by the officers beneficially, and as the whole are liable to the reception of prisoners and may be used as lock-ups, the police station was exempt under schedule (B.) case 4, of 48 Geo. 3, c. 55. The Commissioners discharged the assessment:

## Commissioners right.

At a meeting of the commissioners of assessed taxes, held at the Sessions-room, at Lawfords-gate, Gloucester, on Tuesday, Sept. 25, 1860, for hearing appeals against the first assessments for the year 1860-61:

Sergeant George Rawle, of the Gloucestershire police force, appealed against an assessment made on the police station in the borough of Thornbury, to the inhabited house duty on 47l. value.

App. stated that the premises in question are a police station and petty sessions court belonging to the county of Gloucester, and that six rooms are occupied by himself, his family and the three police constables under him; that the part occupied by app. is of the value of 15l. at the outside. The app. contends that there is no beneficial inhabitancy in him, as contemplated by the Inhabited House Duty Act; that he and the constables are under the orders of the superintendent and chief constable of the county, and are subject to removal from station to station without notice; that the premises are not occupied by them beneficially, further than for county and public purposes, and they pay no rent; that in the event of riots or other necessity the whole of the premises are liable to the reception of prisoners; and that police stations, being lock-ups and places for the temporary reception and confinement of prisoners, are exempt from house duty under the 48 Geo. 3, c. 55, sched. (B.), case 4.

There is an internal communication throughout under the same roof, and the value, as regards the six first-mentioned rooms, being under 20l., is not disputed by the surveyor on the one hand, neither is the value at which the whole premises are rated disputed on the other hand.

The surveyor referred to cases 1885, 2806 and 2131, under which he contended that the whole of the premises are assessable.

We, the Commissioners present, discharged the assessment; but the surveyor, being dissatisfied, demanded a case for the opinion of Her Majesty's judges, which we hereby sign and allow.

Given under our hands this 31st day of Dec. 1860, at the sessions room, at Lawfords-gate in the said county.

WILLIAM MIREHOUSE, } Commissioners.  
EDWARD SAMPOX. }

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

## Re HAYES.

Rooms used for offices, &c., in the Town-hall at Wolverhampton—48 Geo. 3, c. 55, sched. (B.)

Town clerk of Wolverhampton appealed against an assessment upon the corporation at 300l. house duty for their premises, used for the purposes of offices by the town clerk, borough surveyor, rate collector, &c. Some of the rooms are used as committee rooms, and there is a hall or council chamber. There is an internal communication to and from all parts of the building. It was contended that the premises were exempt, as the only part occupied as a residence by the mill keeper and his wife was under the annual value of 20l. The



## ASSESSED TAXES.]

## Re MANBY—Re HODGSON.

## [ASSESSED TAXES.]

*Commissioners confirmed the assessment with reference to the Act 48 Geo. 3, c. 55, sched. (B.), rule 5.*

*Commissioners right.*

At a meeting of the commissioners of assessed taxes, held at the Corn Exchange, Wolverhampton, on the 18th Feb. 1861, for the purpose of hearing appeals against the additional first assessments and supplementary charges for the year 1860-61:

Mr. Edwin John Hayes, solicitor and town clerk of the borough of Wolverhampton, appealed against an assessment upon the corporation of their premises to the inhabited house duty, at the sum of 300*l.* per annum.

The app. contended that the inhabited rooms or apartments hereinafter mentioned are under the value of 20*l.* per annum, and that if the whole of the rooms, &c., are to be assessed the assessment shall be on such sum as shall be fixed by the Income Tax Commissioners at their next meeting, it being contended on behalf of the corporation that the assessment at 300*l.* is too high, and that 160*l.* per annum would be the proper amount.

The parties charged are "the Corporation of Wolverhampton." They are in fact the mayor, aldermen and burgesses acting under a charter of incorporation under the Municipal Corporation Act, 5 & 6 Will. 4, c. 76; they also act by the council of the said borough as the local board of health, under the Public Health Act 1848, and as the local board under the Local Government Act 1858. The premises on the ground floor consist of the town clerk's office comprising three rooms, the accountant's clerk's office, borough surveyor's office, rate collector's office and the inspector of nuisances' office; the rooms on the first floor consist of the council chamber or hall, an anteroom for hall, and three committee rooms, and the rooms on the second floor are occupied as the residence of the hall keeper and his wife, they having the care of the whole, which is one entire building. The hall keeper receives a weekly wage of 2*s.* which is paid by the corporation. There is an internal communication to and from all parts of the building.

The whole premises are vested in the municipal corporation under the Municipal Act, and the local board pay a rent of 30*l.* per year for the joint use of the property.

The app. contended that the building excepting the apartments occupied by the hall keeper and his wife, and which he considers under the value of 20*l.*, did not constitute such an "inhabited dwelling-house" as is contemplated by the 1st section of the 14 & 16 Vict. c. 36; and he further contended that the "inhabited" house duty is a tax imposed and granted in lieu and instead of duties assessed and levied according to the number of windows or lights therein, as set forth in schedule A. according to the rules in such schedule A. to the 48 Geo. 3, cap. 55, and not according to the rules in schedule B; and that as he contended no window tax would, according to rule 9, of that schedule A. be payable on any other part of the building than the said apartments, and these apartments would not under the 14 & 16 Vict. be chargeable, being under the annual value of 20*l.*, they were exempt.

The surveyor on the other hand contended that the whole of the building is chargeable under rule 5 of schedule B. to the said Act of 48 Geo. 3, and cited cases Nos. 153, 367, 2096, 2131, 2283, 2370, 2528, in support of the assessment; to which the app. replied, that taking it to be so they are entitled to the exemption under rule 5 of exemptions to such schedule B., and that in either view they are not chargeable.

The Commissioners, however, considering that the duties made payable upon inhabited dwelling-houses by the 14 & 16 Vict., notwithstanding they were in lieu of the window tax, should be charged and assessed according to the rules and regulations contained in the schedule B. to the Act 48 Geo. 3, c. 55, rule 5, and not according to the rules and regulations contained in the rule 9, schedule A. of the same Act, confirmed the assessment, with which the app. being dissatisfied, requested a case might be stated for the opinion of Her Majesty's judges, which is hereby stated and signed accordingly.

THO. WM. FLETCHER, } Commissioners of  
JOSEPH BENNETT, } Land and As-  
F. H. G. BARRA, } sessed Taxes.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

## Re MANBY.

*Rooms used for various purposes in the Corn Exchange, Wolverhampton—Two only used as a residence.*

*App., on behalf of the directors of the Wolverhampton Corn Exchange, appealed against an assessment on their premises to the house duty at 275*l.* per annum. The building consists of a hall used as a corn exchange which is occasionally let for holding concerts, &c.; a news-room; a room let to ironmasters, which is also used by the District Commissioners of Taxes, cellars, law library, and two other rooms in which the secretary and his wife and family reside. There is an internal*

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*communication throughout. It was contended that the premises were exempt, as the only part occupied as a residence was under the annual value of 20*l.* The Commissioners confirmed the assessment with reference to the Act 48 Geo. 3, c. 55, sched. (B.), rule 5:*

*Commissioners right.*

At a meeting of the commissioners of assessed taxes, held at the Corn Exchange, Wolverhampton, on the 18th Feb. 1861, for the purpose of hearing appeals against the additional first assessments and supplementary charges for the year 1860-61:

Mr. William Manby, solicitor, Wolverhampton, as one of the directors of the Wolverhampton Corn Exchange, appealed against an assessment of their premises to the inhabited house duty at the sum of 275*l.* per annum.

The app. admitted for the purpose of the appeal that the assessment was fair if the whole of the rooms and cellars, &c. hereinafter mentioned are chargeable.

The company is incorporated under the Joint Stock Companies Act, and their building consists of a hall used as a corn exchange, and this room is frequently let for the purpose of holding concerts, delivering lectures to corn merchants and others who frequent the market, and who pay various annual sums for the accommodation, and as an auction room, and for other public purposes; a general news room, which the directors supply with papers, and for admittance to which an annual subscription is paid; another room which they let to the ironmasters to hold their weekly and quarterly meetings in, and which is also used by the Commissioners of Taxes for holding their appeal meetings in, and for which they pay 1*s.* per day, and for other purposes; cellars let off as distinct holdings for warehousing purposes; a room let to solicitors for a law library; and two other rooms in the basement in which the secretary to the company, his wife and family, reside, they having the care of the whole, which is one entire building. The secretary receives a salary of 60*l.* a-year, which is paid by the directors. There is an internal communication to and from all parts of the building.

The app. contended that the building, excepting the apartments occupied by the secretary and his wife and family, and which he considered under the value of 20*l.*, does not constitute such an "inhabited dwelling-house" as is contemplated by the 1st section of the 14 & 16 Vict. c. 36, and he further contended, that the "inhabited" house duty is a tax imposed and granted in lieu and instead of duties assessed and levied according to the number of windows or lights therein, as set forth in schedule A. according to the rules in such schedule A. to the 48 Geo. 3, c. 55, and not according to the rules in schedule B, and that, as he contended no window tax would, according to rule 9 of that schedule (A.), be payable on any other part of the building than the said apartments, and these apartments would not, under the 14 & 16 Vict., be chargeable, being under the annual value of 20*l.*, they were exempt.

The surveyor on the other hand contended that the whole of the building is chargeable under rule 5 of schedule B. to the said Act of 48 Geo. 3, and cited cases Nos. 153, 367, 2096, 2131, 2283, 2370, 2528, in support of the assessment; that such schedule B. applies to the inhabited house duty authorised to be raised, and not to the window duties; though, even taking it to be so, they might be considered to be entitled to the exemption under rule 5 of the exemptions to such schedule B., and that in either view they are not chargeable.

The Commissioners, however, considering that the duties made payable upon inhabited dwelling-houses by the 14 & 16 Vict., notwithstanding they were in lieu of the window tax, should be charged and assessed according to the rules and regulations contained in the schedule B. to the Act 48 Geo. 3, c. 55, rule 5, and not according to the rules and regulations contained in the rule 9, schedule A. of the same Act, confirmed the assessment; with which the app. being dissatisfied, requested a case might be stated for the opinion of Her Majesty's judges, which is hereby stated and signed accordingly.

THO. WM. FLETCHER, } Commissioners of Land  
JOSEPH BENNETT, } and Assessed Taxes.  
F. H. G. BARRA, }

BYLES J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

## Re HODGSON.

*Offices of a solicitor, forming part of his dwelling-house—5 Geo. 4, c. 44, s. 4.*

*Solicitor, whose rent was 24*l.*, charged to the house duty at 26*l.* One of the rooms on the ground-floor, with the chambers over it, is used as his office, and the office is not connected internally with the dwelling-house. He contended that the office was exempt, and deducting 6*l.* as the value of the office from the rent that the house was only worth 18*l.* a-year, and that therefore he was not liable. The surveyor opposed the claim of*



ASSESSED TAXES.]

Re ROUNTHWAITE—Re WYATT—Re CLARK.

[ASSESSED TAXES.]

*exemption with reference to the 5 Geo. 4, c. 44, but the Commissioners discharged the assessment :*

*Commissioners wrong.*

At a meeting of the commissioners acting in execution of the Acts relating to assessed taxes, held at the Court-house, Keighley, on Monday, Aug. 28, 1861 :

Mr. Hodgson is a solicitor residing at Keighley, having a house at the annual rent of 24*l.*, assessed at 26*l.*, one of the rooms on the ground-floor of this house with the chamber over the same being used as an office in his profession of a solicitor.

The office has an external entrance, and is not connected internally with the portion of the house used as a dwelling-house.

Mr. Hodgson appealed against the charge upon the ground that there being no internal communication between the inhabited portion of the house and the room used as an office, the latter should be considered as exempt, and that deducting the value of the office estimated at 6*l.* from the rent, the inhabited portion of the house would be worth 18*l.* only, and therefore that he was not liable to the charge.

Mr. Irwin, the surveyor, contended that there was no exemption in the Acts of Parliament which clearly applied to the case, and that therefore the app. should be held liable to the charge. The surveyor further pointed out that the exemption (*vide* 5 Geo. 4, c. 44, s. 4) would not apply to this case, an essential condition of that exemption being, that the person to whom such exemption is granted should reside in a dwelling-house or part of a dwelling-house charged to the inhabited house duty.

The Commissioners, however, concurred in the view taken by the app. and discharged the assessment; whereupon the surveyor demanded a statement of the facts of the case, for the opinion of Her Majesty's judges, which is hereby stated accordingly.

JNO. BRIGG, } Commissioners for  
JNO. G. SAYDEN, } Standcliffe East.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is wrong.

#### Re ROUNTHWAITE.

*Farmhouse—43 Geo. 3, c. 161, s. 10.*

*Farmer charged to the inhabited house duty at 20*l.* in respect of a house in a country town which he occupied with a farm. The farm-buildings are on the opposite side of the road to the house. He contended that he ought not to be assessed, as he considered the house without the farm not worth more than 12*l.* a-year. The Commissioners, being of opinion that the house, with the offices, yards and garden, was of the annual value of 20*l.*, confirmed the assessment :*

*Commissioners right.*

At a meeting of the commissioners of assessed taxes acting in and for the division of Buckrose, East Eiding of York, held at the Queen's Head Inn, in North Grimston, on the 21st Aug. 1860, for the purpose of hearing appeals for the year 1860-61 :

James Rounthwaite, of Howsham, in the said division, farmer, appealed against an assessment made upon him of 20*l.* for inhabited house duty, at 6*l.* in the pound, in respect of his dwelling-house, household and other domestic offices, yards and garden therewith occupied.

App. stated that he occupied the house in respect of which the assessment is made with stable and gighouse, garden and all other necessary outbuildings for the occupation of a farm. That the house is a farmhouse, and together with the outbuildings mentioned is occupied for the purposes of husbandry only. That the rent of the house and farm together is 220*l.* per annum exclusive of tithes. That the house is not rated distinct from the farm in the poor-rate. That the house is in the town street of Howsham, and the farm-buildings are on the opposite side of the road. That he considers the house without the farm is not worth more than 10*l.* or 12*l.* per year. That he objects to state what rent he would give for the land and farm-buildings if there were not the house and domestic offices attached. That he objects to state whether he considers the land worth as much as 200*l.* without the house attached. That he objects to state on his oath that he would not give 20*l.* a-year for the house, providing he had the farm, and there was no house convenient which he could take at a less rent. The house in question is about eleven miles from York, and about nine miles from Malton.

The Commissioners being of opinion that the house, together with the household offices, yards and garden, occupied as a farmhouse, was of the annual value to the app. of 20*l.* per annum, confirmed the assessment; whereupon the app., being dissatisfied, demanded a case for the opinion of Her Majesty's

judges, which we the undersigned, being the commissioners who heard the appeal, do hereby state and sign accordingly.

JOSEPH MARSHALL, } Commissioners.  
T. W. RIVIN. }

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

#### Re WYATT.

*Shop—Cabinet-maker—14 & 15 Vict. c. 36.*

*Cabinet-maker claimed to have the assessment on him reduced from 9*d.* to 6*d.* in the pound. App. exposed goods for sale in the forecourt of his premises, but he had no shop-window on the ground or basement story. The Commissioners reduced the assessment to the lower duty :*

*Commissioners wrong.*

At a meeting of the commissioners acting in the execution of the several Acts relating to the duties of assessed taxes in and for the division of the Isle of Wight, held at the Guildhall, Newport, on Saturday the 16th March 1861, for the year 1860 ending 5th April 1861 :

Frederick Wyatt, of West Cowes, in the parish of Northwood, cabinet-maker, appealed against the charge of inhabited house duty at 9*d.* in the pound.

The app. stated that goods were exposed to sale in the forecourt of the premises. There is no shop-window on the ground or basement story, the rooms being fitted up and used occasionally by himself and his family. All the goods in the house being for sale, there is a warehouse at the back of the house in which goods are deposited, but they are exhibited only in the avenue or court in front of the building. The app. also stated that he occasionally lets lodgings, but the front rooms on the ground-floor are never let or used otherwise than as before stated.

The Commissioners, referring to a minute passed on the 4th Sept. 1854, whereby it appeared that the assessment upon the same premises was reduced from 9*d.* to 6*d.* in the pound, and the premises in question remaining precisely the same as at that period, reduced the assessment from the higher to the lower rate of duty; but the surveyor, contending that the premises were not of that description as would come under the denomination of a shop, demanded a case for the opinion of Her Majesty's judges, which we hereby state and sign accordingly.

Given under our hands this 6th day of July 1861.

H. P. GORDON, } Commissioners of  
A. S. HAMOND, } Assessed Taxes.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is wrong.

#### Re CLARK.

*Shop.*

*App. claimed to have the assessment on him reduced from 9*d.* to 6*d.* He keeps a registry office for servants, sells coals, and his wife sells artificial flowers, but as no goods, wares, or merchandise were exposed for sale in the window or in the shop, the surveyor contended that the premises were not used as a shop within the meaning of the Act. The Commissioners confirmed the assessment :*

*Commissioners right.*

At a meeting of the commissioners of assessed taxes, held at the Guildhall, Bristol, on Tuesday, Sept. 10, 1861, to hear appeals against the first assessment for the year 1860 :

Charles Clark, of 20, St. Augustine's-place, appealed against an assessment under schedule B. of 40*l.* at 9*d.* in the pound.

The app. stated that he keeps a registry office for servants, and also sells coal, and that his wife has frequently sold artificial flowers, and be therefore contended that he was only liable to be charged 6*d.* in the pound.

The surveyor contended that the premises were not used as a shop within the meaning of the Act, no goods, wares, or merchandise being exposed for sale either in the window or the shop, the former being filled with bills of servants wanted or waiting situations, and the latter being fitted up as a waiting-room for the various applicants.

The Commissioners present confirmed the assessment; but app., being dissatisfied, demanded a case for the opinion of Her Majesty's judges, which we hereby sign and allow.

Given under our hands this 22nd day of November 1861, at the Council-house, Bristol.

CHRISTIE J. THOMAS, } Commissioners.  
R. G. BARROW. }

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.



## ASSESSED TAXES.]

## Re FRY—Re KERRIDGE—Re BALLHATCHETT.

## [ASSESSED TAXES.

pose of hearing and determining appeals against the first assessments of assessed taxes for the year 1860 ending April 5, 1861:

Mr. Thomas Skinner, of the Harold Mews, St. Leonards, livery-stable keeper and riding-master, appealed against an assessment of

1 servant .....	£ s. d.
1 two-wheel carriage drawn by one horse .....	1 1 0
3 horses (saddled, &c.) .....	0 15 0
	3 3 0

The Crown surveyor stated to the commissioners that the assessment for a servant was in respect of one of app.'s stablemen employed in grooming app.'s carriage and horses; the two-wheel carriage assessed was a gig used in driving about the town for orders; and that the horses were ridden by the app.'s two sons and his assistant, in his business as a riding-master, in teaching their pupils to ride, and in accompanying riding parties.

Mr. Skinner grounded his non-liability on the facts that the carriage and horses were included in a licence to let twenty carriages and thirty horses, granted to him by the Board of Inland Revenue; that the carriage was used entirely in his business, having his name, address and occupation painted on a board affixed behind, which was removed when the carriage was let to hire; and that the horses ridden by his sons and his assistant were taken indiscriminately from his stables, no particular horses being kept for their exclusive use, and that when they accompanied their customers an extra charge was made.

The surveyor contended that Mr. Skinner was liable to the assessments for the horses, on the ground that the licence granted by the Board of Inland Revenue was for horses, and solely to let for hire, and that when they were ridden by his sons and assistant they could not be considered to be let for hire, and referred to cases 2407, 2408 and 2498, and to the following letter from the Board of Inland Revenue to the clerk to the commissioners of the district on the subject:

"Inland Revenue, Somerset-house,  
London, W.C.

19th June 1860.

Sir,—With reference to your letter of the 9th inst., I am directed to inform you, that horses ridden by riding-masters and their assistants in teaching their pupils, and included in their excise licences, are liable to the assessed tax duty under schedule F.

Robert Grouse, Esq.

Your obedient servant,

(Signed) T. SARGENT."

Also, that Mr. Skinner was liable to assessment for the gig, it not being such a description of vehicle as was intended by the exemption under 16 & 17 Vict. c. 90, sched. D., and referred to cases 2406 and 2449; and that the fact of the board on which the name, &c., were painted could at any time be taken off would render it liable to assessment, and referred to case 1913. In support of the assessment for the servant, he stated that if Mr. Skinner was liable for the horses and carriages he would be liable for the servant as well.

The Commissioners discharged the whole of the assessment; whereupon the Crown surveyor demanded a case for the opinion of Her Majesty's judges, which is hereby stated and signed accordingly.

Given under our hands this 28th day of Feb. 1861.

FREDERIC TICKHURST, }  
THOMAS HICKS. } Commissioners of Assessed Taxes for the division of Hastings borough, in the county of Sussex.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right as to the three horses, but wrong as to the servant and carriage.

## Re FRY.

## Similar to the preceding case.

At a meeting of the commissioners of land and assessed taxes acting in and for the borough of Hastings, Sussex, held at the office of their clerk in the said borough, on the 19th Sept. 1860, for the purpose of hearing and determining appeals against the first assessments of assessed taxes for the year 1860 ending April 5, 1861:

Mr. Frederick Fry, livery-stable keeper and riding-master, Hastings, appealed against an assessment of

1 servant .....	£ s. d.
1 four-wheel carriage .....	1 1 0
2 horses .....	2 0 0
	2 2 0

The Crown surveyor stated to the commissioners that the servant was one of the app.'s stablemen employed in grooming his carriage and horses; that the carriage was a four-wheel chaise used by him for private purposes in going to his farm, and in occasionally driving his family out; and that one of the horses was the one ridden and driven by himself, and the other ridden by his assistant in his business as a riding-master.

Mr. Fry grounded his non-liability on the fact that the carriage and horses were included in a licence to let nine carriages and twelve horses granted to him by the Board of Inland Revenue.

The Commissioners confirmed the assessment of the servant, carriage and one horse, but discharged the assessment on the second horse ridden by the assistant; whereupon the surveyor,

having used similar arguments in support thereof as in the accompanying case of *Re Skinner*, demanded a case for the opinion of Her Majesty's judges, which is hereby stated and signed accordingly.

Given under our hands this 28th day of Feb. 1861.

FREDERIC TICKHURST, }  
THOMAS HICKS. } Commissioners of Assessed Taxes for the division of Hastings borough, in the county of Sussex.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

## Re KERRIDGE.

## Similar.

At a meeting of the commissioners of land and assessed taxes acting in and for the borough of Hastings, Sussex, held at the office of their clerk in the said borough on the 19th Sept. 1860, for the purpose of hearing and determining appeals against the first assessments of assessed taxes for the year 1860, ending April 5, 1861:

Mr. George Frederick Stanley Kerridge, of the Swan Mews, Hastings, livery-stable keeper, riding-master and horse dealer, appealed against an assessment of

1 servant .....	£ s. d.
1 two-wheeled carriage .....	1 1 0
3 horses .....	0 15 0
	2 3 0

The Crown surveyor stated to the commissioners that the servant was one of the app.'s stablemen employed in grooming his horses and carriage, the two-wheeled carriage was a gig used by him in his business, and that the horses were ridden by himself and his two assistants in his business as a riding-master.

Mr. Kerridge grounded his non-liability on the facts that the carriage and horses were included in a licence to let fifteen carriages and twenty horses granted to him by the Board of Inland Revenue; that the carriage was used entirely in his business, having his name, address and occupation painted on a board affixed behind, which was removed when the carriage was let for hire; and that the horses ridden by himself and his assistants were taken indiscriminately from his stables, no particular horses being kept for their exclusive use, and that when they accompanied their customers an extra charge was made. He also contended that as he was assessed to the horse dealers duty he or any one in his employ could ride his horses, all of which were for sale, without rendering them liable to assessed taxes. He likewise produced an account book, purporting to show that the horses ridden by his assistants were let to them at so much per week, dated from the commencement of Aug. 1860, which was not entertained by the Commissioners.

The Crown surveyor in support of the assessment made use of similar arguments as those employed in the accompanying case of *Re Skinner*; he also contended that the fact of Mr. Kerridge's being assessed for horse dealers duty did not allow him or the assistants employed by him in his business as a riding-master to ride horses free of duty, and that the fact of the horses being let by the week to the men was merely an evasion of duty which could not be sanctioned by the Legislature.

The Commissioners, however, relieved the app. from the whole of the assessment; whereupon the surveyor demanded a case for the opinion of Her Majesty's judges, which is hereby stated and signed accordingly.

Given under our hands this 28th day of Feb. 1861.

FREDERIC TICKHURST, }  
THOMAS HICKS. } Commissioners of Assessed Taxes for the division of Hastings borough, in the county of Sussex.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right as to the horses, but wrong as to the servant and carriage.

## Re BALLHATCHETT.

*Two-wheeled carriage charged to the assessed taxes, which was used for carrying passengers before the taking out of the excise licence—16 & 17 Vict. c. 90.*

*App. claimed to be relieved from a charge on him for the year 1861-2, for a carrier's cart at 1l. 6s. 8d., used occasionally for carrying passengers, on the ground of his having taken out an excise licence to let the carriage for hire in April 1861. The surveyor contended that the licence would not entitle the party to exemption until the year commencing 5th April 1862. The Commissioners relieved:*

*Commissioners wrong.*

At a meeting of the commissioners of land and assessed taxes acting in and for the division of Haytor, Devon, held at

[ASSESSED TAXES.]

Re BAYLEY—Re GRIFFITHS—Re CORBETT.

[ASSESSED TAXES.]

the Globe Hotel, Newton Abbott, on the 29th Aug. 1861, for the purpose of hearing appeals against the first assessments made for the year 1861, ending 5th April 1862:

Thomas Balfhatchett, of Ipplepen, a basket-maker, appealed against an assessment of 1*l*. 6*s*. 8*d*., under schedule D, in respect of a carriage with two wheels used occasionally to carry passengers, and 10*s*. 6*d*., under schedule F., for a horse used to draw the said carriage.

He claimed to be relieved from the charge to the assessed taxes for the year 1861, ending 5th April 1862, upon the ground of his having taken out a licence in April 1861 to let the said articles to hire, and had since that period paid duty for the same to the excise.

The Commissioners, being of opinion such licence would exempt him from the duties to the assessed taxes charged for the current year, relieved him from the assessment, but Mr. Mahby, the Crown surveyor, contended that the assessments to the assessed tax duties for the current year being made upon articles kept or used between 5th April 1860 and 5th April 1861, the fact of the licence being taken out in April 1861 would not entitle the party to exemption from the duties chargeable under the Assessed Tax Acts until the year commencing 5th April 1862; he therefore demanded a case for the opinion of Her Majesty's judges, which we hereby sign and allow accordingly.

Witness our hands this 27th day of Dec. 1861.

WM. FLAMANK, } Commissioners of  
WM. CREED, } Assessed Taxes.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is wrong.

#### Re BAYLEY.

*Claims of exemption—16 § 17 Vict. c. 90—Farmer's carriage built like a dog-cart.*

*Farmer claimed exemption for a two-wheeled carriage used solely in his business, never for pleasure; the carriage was constructed like a dogcart, to carry four persons back to back. The Commissioners confirmed:*

*Commissioners right.*

At a meeting of the commissioners of assessed taxes acting for the district of Holsworthy, Devon, held at the White Hart Hotel, Holsworthy, on the 21st Aug. 1861, for the purpose of hearing appeals against the first assessments for the year ending 5th April 1862:

Mr. Daniel Bayley, of the parish of Clawton, Devon, farmer, appealed against a charge of 1*l*. 6*s*. for a two-wheel carriage under schedule D.

The app., on being sworn, stated that he kept the carriage, a dogcart, entirely for agricultural purposes, and it was only used in his trade as a farmer; it had never been used for pleasure; it was constructed to carry four persons, who sat back to back in it; it has a dashboard and three springs, steps on each side in front, but none at the back. When more than two persons ride in it the back is let down as a footboard, and gig harness is used with horse drawing it.

The surveyor contended it was a dogcart, and did not come within the exemption.

The Commissioners, concurring with the surveyor, confirmed the charge.

The app. thereupon demanded a case for the opinion of Her Majesty's judges, which we hereby state and sign accordingly.

WALTER WM. MELNUTSH, } Commissioners  
WILLIAM EDGCOMBE, } present.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

#### Re GRIFFITHS.

*Claims of exemption—16 § 17 Vict. c. 90—Light cart on springs—Used to markets and fairs.*

*Similar claim for a light cart on springs, marked with the name, &c., used by app. or his wife and family to fairs and markets, usually taking with them their farm produce. The commissioners confirmed:*

*Commissioners wrong.*

At a meeting of land and assessed tax commissioners, held at the Church House Inn, Forden, on Saturday the 24th August 1861, for the purpose of hearing appeals against the first assessments for the hundred of Causes Lower:—

Mr. John Griffiths, farmer and pig dealer, of Forden, appealed against a charge made on him for a two-wheeled carriage, 1*l*.

On examination it appeared that the vehicle in question (which was produced to the commissioners) is a light cart on springs of the construction generally used by farmers and small trades in the country, being adapted as well for the con-

veyance of the person as for the carriage of light loads when necessary.

It is marked on the side with Mr. Griffiths' name and place of abode, and is furnished with a moveable seat and a step. The use to which it is put is to convey the app. or his wife and family to and from fairs and markets, and on these occasions they usually take with them some of the farm produce (such as poultry, butter and eggs), and bring back groceries or goods for family use. It did not appear that the cart is used for purposes of pleasure.

The surveyor of taxes contended that the vehicle in question is not "a waggon, van, cart, or other such carriage" within the meaning of the exemption; that such exemption is limited to vehicles of heavy construction, such as are expressly intended for and wholly confined to the carriage of loads or burdens in the ordinary course of trade or affairs of husbandry; and that, as the cart is evidently constructed for the conveyance of the person and is principally used for that purpose, the assessment ought to be confirmed. In support of this view he submitted to the commissioners the case No. 2560, decided by the judges.

The majority of the commissioners present being of opinion that the carriage in question does not come within the meaning of the exemption, and that both in its construction and the use to which it is put it is like the one referred to in case 2560, confirmed the assessment. The app., being dissatisfied, demanded a case for the opinion of Her Majesty's judges, which we the commissioners present have stated and signed accordingly.

Mr. Harrison dissented from the decision come to by the majority of the commissioners, and urged that if vehicles of a heavy construction are the only ones not liable the latter part of the exemption 5, schedule D., of 16 & 17 Vict. c. 90, viz., "except for conveying the owner thereof or his family to or from any place of divine worship," would not have been put in the Act of Parliament, as it could never be supposed that vehicles of a heavy construction would be used to convey the owner or his family to a place of worship. Therefore, as Mr. Griffiths' cart was not used for any purpose of pleasure, it was exempt.

Given under our hands this 19th day of November 1861.

J. ROBINSON JONES, } Commissioners.  
R. S. HUMPHREYS, }

BYLES, J. and WILDE, B.—We are of opinion, that the determination of the commissioners is wrong.

#### Re CORBETT.

*Servant—16 § 17 Vict. c. 90—Pony cart—Pony.*

*App. charged for a servant in respect of the man who looks after his carriage and pony which were used for pleasure as well as for business. The Commissioners relieved.*

*He also claimed exemption for a pony cart charged at 10*s*., stated to be used for business, but in which he admitted having on several occasions taken his children. The Commissioners relieved.*

*Charged also for a pony at 10*s*. 6*d*., used in a similar manner. The Commissioners reduced the charge to 5*s*. 3*d*.:*

*Commissioners wrong.*

At a meeting of commissioners of land and assessed taxes, holden at the office of their clerk, Edward Knocker, Esq., Castle Hill, Dover, on the 4th Sept. 1860, for the purpose of hearing appeals against first assessments:

Charles Corbett, on behalf of the firm of Corbett and Iggulden, farmer, boot and shoe and portmanteau dealers, &c., appealed against a charge for a servant 2*l*., a pony cart 10*s*. and pony 10*s*. 6*d*., on the ground that the pony and cart were used entirely in his business as a farmer, to wit, to convey the party to and from their farm at Capel. The cart is a small spring cart, and is suitable for pleasure purposes, although rather dingy and shabby in appearance.

The party admitted having on several occasions taken his children from Dover to and from the farm at Capel in the cart, and it was proved that he had also taken up a friend more than once.

The surveyor, Mr. J. H. Moore, contended that as the party resides at Dover, the market town, and uses the cart ordinarily as a means of conveyance to and from his farm at Capel, the exemption in favour of market carts does not apply, but that the cart must be considered as a private conveyance, and that the fact of the party having taken his children out occasionally, and also ridden in the cart in company with other persons, was sufficient of itself to establish his liability.

We, however, having doubts of the party's liability discharged the assessment on the servant and cart, and reduced the charge on the pony to 5*s*. 3*d*.; but the surveyor, being dissatisfied with our decision, requested a case to be drawn out

ASSESSED TAXES.] *Re DUTTON AND THOROGOOD—Re BUCKENHAM—Re CALVERT.* [ASSESSED TAXES.]

for the opinion of Her Majesty's judges, which we state and sign accordingly.

Given at Dover, in the county of Kent, this 19th day of March 1861.

(G. C. POUND, }  
E. CIBBIT. } Commissioners.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is wrong.

*Re DUTTON AND THOROGOOD.*

*Servant—Four-wheeled van—Horse.*

*Shoemakers charged for a servant in respect of the man who was employed to look after their horse and four-wheeled van, which carriage, although alleged to be used solely for the conveyance of goods in business, was, the surveyor contended, from its construction liable. The Commissioners confirmed:*

*Commissioners right.*

*Claimed exemption for a four-wheeled van, constructed and used for delivering goods in their trade, built on springs, with a covered body, with an open seat in front padded and cushioned, marked with the name and address and the words common stage cart, and never used for pleasure. The Commissioners discharged the assessment:*

*Commissioners right.*

*Horse charged at 1s. 1d., used in a four-wheeled van, solely for conveyance of goods in business. The Commissioners, considering that the carriage, from its construction, did not come within the exemption, confirmed the charge for the horse at 1l. 1s.:*

*Commissioners wrong.*

At a meeting of commissioners of land and assessed taxes, held at the Sessions-house, Newington Causeway, on the 8th Nov. 1860, to hear appeals against the assessments for the year 1860, ending 5th April 1861:

Messrs. Dutton and Thorogood, of Stones End, shoemakers, appealed against an assessment for a servant, 21s., charged under schedule C. of the Act 16 & 17 Vict. c. 90, for a four-wheeled carriage, 40s., charged under schedule D. of the same Act, and for a horse, 21s., charged under schedule E. of the same Act.

The app. stated that the carriage in question was constructed for the purpose of delivering goods in the course of their trade as shoemakers; that it was built on springs, with a covered body in which the goods were deposited; that it had an open seat in front, padded and cushioned, for the driver and another to accompany him, with a hood attached to be raised or lowered as the weather required; that the name of the firm and the place of abode was painted on the carriage; that it was never used for pleasure or personal convenience, nor otherwise than for trade purposes; that the turnpike toll demanded on this carriage is more than that for an ordinary carriage in consequence of its being classed as a van, and further that it was marked with words "common stage cart," in pursuance of the directions of the Board of Inland Revenue in 1853, numbered "11", under which the vehicle has been held to be exempt; and under these circumstances the app. claimed exemption, under the 5th case of exemption under schedule D. of the said Act, and that the assessment in respect of the driver should be discharged, and that on the horse reduced to 10s. 6d.

The Commissioners present discharged the assessment on the servant and carriage, and reduced that on the horse to 10s. 6d.; but the surveyor, being of opinion that the vehicle in question was neither wagon, van, nor cart, nor other such carriage as would come within the exemption No. 5, above referred to, but such as might at any moment be used as a private carriage, requested that the case might be submitted for the opinion of Her Majesty's judges, which we the commissioners have signed accordingly.

(ROBERT ALEXANDER GRAY, }  
J. E. HOBSON, } Commissioners.  
RICHARD A. ROBERTS.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

*Re BUCKENHAM.*

*Licensed hawker—16 & 17 Vict. c. 90.*

*Licensed hawker claimed exemption for a large square four-wheeled carriage van on springs, used solely in conveying his goods, constructed with a door to admit the goods, and a seat outside for the driver, marked with his name and address. The Commissioners relieved:*

*Commissioners right.*

At a meeting of the commissioners of assessed taxes, held at the Swan Inn, at East Harding, on the 21st March 1861, for the purpose of hearing appeals against supplementary charges for the year 1860-61:

Mr. Thomas Buckenham, of North Lopham, a licensed hawker, appealed against a charge of 2l. for a four-wheeled van with springs under schedule D. 16 & 17 Vict. c. 90. App. stated that the van in question was solely and exclusively used by him in conveying his goods as a cloth and linen hawker, and that the construction was such (being a large heavy square covered van, with a small door to admit the goods into it and a little seat outside for the driver, and built expressly to convey his heavy cloth and linen goods about the country) that it was quite impossible to use it for pleasure or any other purpose whatever except in his business, and that his name and address are properly painted thereon; he therefore claimed to be relieved of the charge under the following exemption to schedule D., viz.—

"Any wagon, van, cart, or other such carriage kept truly and without fraud to be used solely in the course of trade or in the affairs of husbandry, and whereon the Christian name and surname and place of abode of the owner shall be legibly painted; provided that such carriage shall not on any occasion be used for any purpose of pleasure or otherwise than as aforesaid, except for conveying the owner thereof or his family to or from any place of divine worship."

The Commissioners were of opinion that the charge must be dismissed; but before deciding the case they directed their clerk to apply to the Board of Inland Revenue on the subject, who in reply was referred by the Board to cases Nos. 2582 and 2584 as bearing on the subject; but such is not the fact: as in the first case the surveyor grounds his claim entirely on the construction of the carriage therein referred to, which is light and smart and capable of conveying persons as well as goods, whilst the van now in question is a heavy covered carriage, and utterly unfit to convey any person except where the driver sits; and in the second case referred to the surveyor also there makes his claim on the ground of the carriage in question not being a cart, van, or wagon for the conveyance of heavy goods, but to carry needles and pins, and is undoubtedly of the same construction as in the last case; this case also therefore does not apply to the present appeal, as the van in question is entirely used for the conveyance of very heavy goods. Under these circumstances, and looking at the exemption to schedule D. before named, the Commissioners relieved the appellant; whereupon the surveyor, Mr. H. F. Yeaman, expressed himself dissatisfied, and after referring to cases 1325, 2285, and 2346, he requested a case for the opinion of Her Majesty's Judges, which we the Commissioners, who heard the case, hereby state and sign accordingly.

(C. H. BROWN, }  
A. COCKELL, } Commissioners of  
T. B. WILKINSON, } Assessed Taxes.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

*Re CALVERT.*

*Four-wheeled carriage.*

*App. claimed exemption for a four-wheeled carriage, constructed and used for delivering millinery, built on springs, with a covered body, with an open seat in front, marked with the name and address, and never used for pleasure. The Commissioners confirmed the assessment:*

*Commissioners wrong.*

Thomas Calvert, 12, Edward-street, Hoxton, appealed against the duty on a four-wheeled carriage draw by one horse for the purpose of conveying and delivering goods (millinery) in his trade. The carriage is on springs, with a covered body in which the goods are deposited, with a seat in front for the driver, and is accompanied by his servant boy; the name and address is in fine spider lines on the side thereof; never used for pleasure.

App. contends such carriages used for trade are exempt. The Commissioners confirmed the charge, on the principle—

## ASSESSED TAXES.]

## Re WILLS—Re TURNER—Re KENT.

## [ASSESSED TAXES.]

of case 2564; whereupon the app. demanded a case, which we sign accordingly.

Dated this 2nd day of October 1861.

GEORGE OFFOR.  
J. J. FOWNER.  
THOS. WINKFIELD.  
JEREMIAH LAKE.  
JAMES GIBSELL.

BYLES, J. and WYLDE, B.—We are of opinion that the determination of the commissioners is wrong.

## Re WILLS.

*Butcher, who farmed land, charged to the duty of 1l. 1s. for his riding-horse—16 & 17 Vict. c. 90.*

*App. who was a butcher, claimed to have the assessment on him for a riding horse at 1l. 1s. reduced to 10s. 6d., on account of his occupying land which he farmed. The surveyor contended that as the party did not get his livelihood principally by farming, he was chargeable to the higher duty. The Commissioners reduced the assessment to 10s. 6d.:*

*Commissioners wrong.*

At a meeting of the commissioners of land and assessed taxes acting for the division of Haytor, Devon, held at the Globe Hotel, Newton Abbot, on the 29th Aug. 1861, for the purpose of hearing appeals against the first assessments made for the year 1861, ending 5th April 1862:

Francis Thomas Wills, of the parish of St. Nicholas, butcher appealed against an assessment of 1l. 1s. made upon him for the year above mentioned under schedule E, in respect of a horse used for riding, &c., and claimed to have the said assessment reduced to the duty of 10s. 6d., stating that he occupied land and should be rated as a farmer.

The surveyor for the Crown opposed the claim on the ground that the party did not obtain his livelihood principally by farming, he having for several years past made a return of 100l. a-year as the profits of his trade of a butcher, upon which amount he has been assessed to the income tax and paid the duty, but the whole of the land occupied by him did not amount to more than 100l. per annum rent, one-half of which amount, namely 50l. only, would be considered by law to be his profit from the farm.

The Commissioners, having some doubt on the matter, gave the app. the benefit of the same, and relieved him to the duty of 10s. 6d.; upon which Mr. Malby, the Crown surveyor, demanded a case for the opinion of Her Majesty's judges, which we hereby sign and allow.

Witness our hands this 27th day of Dec. 1861.

WM. FLAMME, } Commissioners of  
WM. CREED, } Assessed Taxes.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is wrong.

## Re TURNER.

*Farmer and lime-burner charged for three of his husbandry horses—16 & 17 Vict. c. 90.*

*Farmer, who was also a lime-burner, claimed exemption from an assessment on him for three husbandry horses (schedule F.) 10s. 6d., which he lets for hire to men in his employ, for drawing limestones to the lime-kilns. The surveyor contended that as the letting was not occasional and the horses were used in a distinct trade, the exemption claimed should not be allowed. The Commissioners relieved:*

*Commissioners wrong, app. being chargeable for two horses.*

At a meeting of the commissioners of assessed taxes acting in and for the division of Shebbear North, Devon, held at their Clerk's office, in Bideford, within the said division and county, on the 9th July 1861:

William Turner, of Bideford, appealed against an additional assessment made upon him for three horses, schedule F., at 10s. 6d. each, for the year 1860-61:

App. on being sworn, stated that he was a farmer and lime-burner, and had fifteen or sixteen horses, four of which were occasionally used at the limekilns, and that if they did nothing else two would be sufficient; that he never used more than four, but had three horses at the present time working at the limekilns; it being only in the busy season of the year that he worked four, and when not so employed they were worked on his farm, the busy season not continuing six months.

App. considered himself exempt from assessment for the horses in question, inasmuch as he let them to hire to men in his employ for the purpose of drawing the limestones from

the beach to the limekilns, all his limeburning work having been done by contract or piece work with those men, with whom he had no written contract; that if during the time the men were using the horses for drawing the limestones he had required them for farming purposes and had taken them away from the men without their permission the contract would have been broken; that the men neither kept nor fed the horses. App. therefore relied on the latter part of the 8th exemption clause of the Act of Parliament, 16 & 17 Vict. c. 90, Schedules E. and F., which states that "such horses or mules, although occasionally used by such person or let by him for the purpose of drawing for hire or profit," are exempt from assessment.

The surveyor (Mr. Colquhoun), in support of the assessment, referred the commissioners to cases decided by the judges, Nos. 597, 774, 1055, 1086, 1087, and 1096, wherein horses used in trade by a farmer are clearly defined, and contended that the app. was the owner of the horses and that they were used in his trade; in proof of which the surveyor produced to the commissioners a debtor and creditor account given in by the app. when he appealed against an assessment under schedule D. of the Income Tax Act, wherein he deducted for the keep of four horses, which must be taken as conclusive evidence of his having been the owner thereof, and of their having been used in his trade as a limeburner.

That the app. having stated he let the horses to hire to his workmen was only for the purpose of evading the additional assessment, and that it was not such an occasional letting to hire as is contemplated by the Act of Parliament referred to, and moreover, that the exemption claimed was inapplicable to horses used in a distinct trade, but merely to farm horses occasionally used for drawing burdens, such as fuel, &c., or occasionally let to a gentleman or neighbour for a similar purpose, and also that horses used in a distinct trade are liable to be assessed at a duty of 10s. 6d. each, otherwise it would scarcely be necessary to retain schedule (F.) in the list of schedules, as those are the principal horses to be charged under it.

The Commissioners, however, relieved the app. on the ground of his having let the horses to hire to his workmen; with which decision the surveyor expressed himself dissatisfied, and requested a case for the opinion of Her Majesty's judges, which we hereby state and sign accordingly.

Witness our hands this 27th day of Aug. 1861.

JOHN PTEE,  
J. SALTREY WILLETT, } Commissioners.  
E. W. VIDAL,

H. F. W. Hatherly,  
Clerk to Commissioners.

BYLES, J. and WYLDE, B.—We are of opinion that the determination of the commissioners is wrong, the app. being chargeable for two horses.

## Re KENT.

*Innkeeper selling horses for other persons but not on his own account—52 Geo. 3, c. 93.*

*Innkeeper, who was also a horse breaker, charged to the horse dealer's duty. He denied having bought or sold for himself although he admitted selling horses at fairs and elsewhere, but for persons only who employ him to break, from whom he receives remuneration for his time and expense, but no commission or profit. The Commissioners confirmed:*

*Commissioners wrong.*

At a meeting of the commissioners of land and assessed taxes, holden at the Sessions House in Wisbech, on Wednesday 12th Sept. 1860, for the purpose of hearing appeals against the first assessment for the year ending Lady-day 1861 for the parish of Wisbech St. Peter:—

Thomas Kent, of Wisbech St. Peter, innkeeper and horse-breaker, appealed against a charge of 14l. 16s., made upon him for horse dealers duty.

The app. stated on oath, that he has neither bought nor sold a horse for himself, or on his own account, since Lady-day 1859. Between Lady-day 1859 and Lady-day 1860 he has hidden and sold, at fairs and elsewhere, five horses. Sold two horses last Winnoull Fair, one for Mr. Holah and one for Mr. Hart. Generally charges 6s. per day for his time, or the actual expenses incurred. Does not get any commission or profit by the sale of horses, merely does it for those who employ him to break their horses. Considers himself a horse shaver. Received from Mr. Holah about 9s. for his own and the horse's expenses; about 2s. of this would be for his time. Has never sold horses or shown them except for those who employ him to break for them. Has broken horses for Mr. Holah. Received from Mr. Hart nothing for himself; Mr. Hart was at the fair himself. Paid the horse's expenses and he repaid me. Mr. Hart in reality sold the horse himself and took the money, I only rode it.

The Surveyor referred to case No. 2214 in support of the assessment, and the majority of the commissioners present, feeling bound by the decision in the case referred to,

[ASSESSED TAXES.] *Re HARRISON—Re MATTHEWS—Re PHILLIPS—Re GRIFFITHS.* [ASSESSED TAXES.]

confirmed the charge. The appellant, being dissatisfied with their decision, demanded a case for the opinion of Her Majesty's Judges, which was, the majority of the commissioners by whom the appeal was heard, hereby state and sign accordingly.

JOHN BROWN, Chairman.  
THOS. P. HOLMES.  
HUGH WOOLLE.  
JOHN TAYLOR.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is wrong.

*Re HARRISON.**Similar.*

At a meeting of commissioners of assessed taxes acting for the Division of Wigan, held at the Town Hall, Wigan, on the 12th Sept. 1861, for the purpose of hearing appeals against the first assessments 1861-2:—

Mr. James Harrison, innkeeper, residing at Wigan, appealed against a charge of 13l. 15s., under schedule H. of 52 Geo. 3, c. 93, for horse dealers' duty; and stated upon oath, that he bought a stallion which he took about the country for a time and then sold him, about August 1860. He then bought another horse to work with one he was breaking in, which horse he sold in Nov. 1860; a third horse he stated was left with him which was sick, and he was to sell it when cured; he made attempts to do so but could not, and then returned it to the owner in Dec. 1860. App. bought a pony and used it himself for a while and then sold it; his wife transacted the sale as he was ill in bed at the time; the party who bought it left it at app's stables two months, and then wished to dispose of it again, and app. being now recovered drove the pony to Chorley, and sold it to a Mr. Cross, and handed the money to the owner without receiving anything for his trouble; he further stated that he accompanied Messrs. H. and W. Liptrout into Oxfordshire, to advise them on the purchase of a stallion, which they bought on his recommendation, and that he only received for his services payment for his time and his travelling expenses; finally, in reply to a question put by the surveyor, he admitted that he had attended Warrington, Wigan, and Chester horse and cattle fairs. The commissioners being of opinion that the purchase and sale of horses for other people, and the attendance at fairs, rendered him liable to the charge, which they thereupon confirmed. The app., being dissatisfied with their decision, requested a case for the opinion of Her Majesty's Judges, which we hereby state and sign accordingly.

WM. LAMB, }  
THOS. COOK, } Commissioners.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is wrong.

*Re MATTHEWS.**Veterinary surgeon buying and exchanging horses.*

*Veterinary surgeon who had bought and exchanged horses with a view to profit, charged as a horse dealer. The Commissioners confirmed:*

*Commissioners right.*

At a meeting of the commissioners of land and assessed taxes, held at the Tree Inn, Stratton, on Tuesday 29th Jan. 1861, for the purpose of hearing appeals against additional assessments:—

Robert Matthews, of Kilkhampton in the said division, appealed against a charge of 13l. 15s., made on him as a dealer in horses, for the year 1859, ending 5th April 1860.

The app. on his oath, stated that he was a veterinary surgeon, and farmed about two acres of land. That he did not buy four horses between April 1859 and April 1860; could not say he did not buy three during that time, but thought the only horse he bought within the year of charge was of Mr. Stapleton; that he gave 15l. for it; that he kept it two months and finding it too big, he exchanged it, and got a few shillings in exchange; that he would not say he did not exchange six horses between April 1859 and April 1860, he did not think it was more than six, certainly not more than eight; thought there was no harm in doing it; that he had a large family, and was glad to get a little; that he parted with several because they fell with and threw him; that he was not aware that he bought a horse for any other person during the year; that he did not buy either of the horses with a view to sell again; that he required only one horse for the purpose of his business; that at one time he had two horses, but one of them was lame.

The appellant contended that as his evidence only admitted one case of sale, the other transactions having been by way of exchange, he was not liable to the duty.

The surveyor referred to case 1041, and contended that the facts, as admitted by the app., showed a sufficient dealing to

render him liable to duty, and that an exchange really constituted a buying and selling.

The commissioners, considering the app. liable to duty, confirmed the charge. The app. being dissatisfied with the determination, requested a case for the opinion of Her Majesty's Judges, which we submit accordingly.

CLEMENT B. KINGSTON, }  
CECIL N. BRAY, } Commissioners.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is right.

*Re PHILLIPS.*

*Crest on plate not that of the owner—16 & 17  
Vict. c. 90.*

*Auctioneer charged for armorial bearings, who admitted having kept and used certain articles of plate, purchased by him at sales on which was a crest. He contended that he was not liable as it was not his crest. The Commissioners relieved.*

*Commissioners wrong.*

At a meeting of commissioners of assessed taxes, held at Haverfordwest, on the 3rd Sept. 1860, Mr. Henry Phillips, of St. Thomas, Haverfordwest, appealed against the charge of 13s. 2d. for armorial bearings, year 1860-61.

The app. stated that he was an auctioneer, and from April 1859-60 he had kept and used certain articles of plate which bore the crest of another person, the articles having been purchased by him at different sales. The app. contended that he was not liable, on the ground that the crest was not his own. The commissioners coincided in that opinion, and discharged the assessment; whereupon the surveyor, Robert Wyatt, requested a case for the opinion of the judges, which is hereby stated and signed accordingly.

Dated this 10th day of Dec. 1860.

W. BINKER, }  
JAMES THOMAS, } Commissioners.

BYLES, J. and WILDE, B.—We are of opinion that the determination of the commissioners is wrong.

*Re GRIFFITHS.**Cattle dealer buying and selling colts.*

*Cattle dealer charged as a horse dealer. He admitted that it was his practice to buy unbroken colts, which he grazed and improved on his farm, and to sell them generally after keeping them for twelve months, but sometimes sooner. The Commissioners relieved.*

*Commissioners wrong.*

At a meeting of the commissioners of assessed taxes, held at Eglwyswrr, on the 21st Jan. 1861:—

John Griffiths, of Forest, in the parish of Kilgerran, appealed against a supplementary charge of 13l. 15s., for horse dealers' duty for the year 1860, ending 5th April 1861, made upon him by Mr. Robert Wyatt, the surveyor of taxes for the said district.

The appellant made the following statement upon oath:—

"I live at Kilgerran, in the county of Pembroke, and buy and sell cattle, and did so between April 1859-60. I employ no person to buy cattle for me or on my account, but I employ from two to ten men to assist me in taking the cattle so purchased from fair to fair, and to find keep for them. When the men have a large number of beasts to drive I allow or permit them to ride one of my horses, and sometimes two; the horses are sometimes the property of the men themselves. Between April 1858-9 and 1859-60 I purchased each year about a dozen horses, including unbroken colts; the colts were purchased for the purpose of being grazed on my own farm, and to improve them they were kept about twelve months and then taken to England for sale. Six of the colts were taken to Barnet Fair in Sept. 1859, and were offered for sale, but I could not dispose of them. In the following December these colts were removed from Barnet to Beigate Fair, but the night previous to the fair four of them were stolen; the other two were offered for sale, and one of them was sold, and the remaining one was taken to Brighton for sale, and is now unsold.

"It is my practice yearly to buy young colts about two or three years old, graze them for twelve months, and then sell them unbroken. The horses are sometimes used by the drivers before they are resold, but are generally sold by me at the end of the year, when the fairs are over; but sometimes, when a long way from home, I sell them before the end of the year and buy others within the year when again required. I am duly assessed for my profits as a cattle dealer, and do



V.C. K.]

Re **TITUS THEWLIS**—**FELKIN v. HERBERT**.

[V.C. K.]

not consider that buying and selling the horses and colts as before mentioned renders me liable to the horse dealers' duty."

The commissioners who heard the case were of opinion that the app. was exempt, and decided accordingly; with which determination the surveyor was dissatisfied, and requested us to state the case for the opinion of Her Majesty's Judges. The surveyor contended that the buying and selling as before mentioned was sufficient to constitute a horse dealer, and referred to cases 1878 and 2413.

Dated this 26th day of Jan. 1861.

W. MATTHIAS, } Commissioners.  
L. L. THOMAS, }

**BYLES, J. and WILDE, B.**—We are of opinion that the determination of the commissioners is wrong.

### Re **TITUS THEWLIS**.

*Annual value of house*—14 & 15 Vict. c. 36—43 Geo. 3, c. 161, s. 10.

*App. charged to the inhabited house duty at 40L. He contended that he was only liable to be assessed upon 28L, which was the amount of his rent as a tenant from year to year. The surveyor maintained that as the annual value of the house in the poor's rate book was 32L the assessment should be made upon that sum. The Commissioners reduced the assessment from 40L to 32L.*

*Commissioners wrong. The assessment should be reduced to 28L.*

At a meeting of the Commissioners of Assessed Taxes held at the Zetland Hotel, in Huddersfield aforesaid, on Thursday, the 6th of Sept. 1860, for the purpose of hearing appeals against the 1st assessment for the year 1860, ending April 1861:—

**Titus Thewlis**, of Upperhead-row, in Huddersfield aforesaid, appealed against an assessment of 40L made upon him to the inhabited house duty for the year 1860-61, in respect of a house occupied by him in Upperhead-row aforesaid.

From the app.'s statement the Commissioners elicit the following facts:—

The house stands in the poor's rate book for the township of Huddersfield aforesaid as follows:—

	Gross Estimated Rental.	Rateable Value.
<b>Titus Thewlis</b> .....	32L	24L

And the amount of rackrent paid is 25L per annum, without any deduction.

The app. contended that he was only liable to be assessed upon 28L, as he was only tenant from year to year.

The surveyor for the Crown contended that as the rateable value in the poor's rate book was only made upon three-fourths of the value, the assessment should be made upon 32L, the annual value in the poor's rate book.

The Commissioners, upon hearing both statements, reduced the assessment from 40L to 32L; but the app., being dissatisfied, demanded a case for the opinion of Her Majesty's Judges, which we have accordingly set forth.

Geo. ARMITAGE,  
WILLIAM WILLIAMS

**WILDE, B. and BYLES, J.**—We are of opinion that the determination of the commissioners is wrong.—The assessment should be reduced to 28L.

### V. C. KINDERSLEY'S COURT.

Reported by **JOSUA MITCALFE** and **G. T. EDWARDS, Esqrs.**  
Barristers-at-Law.

Feb. 10 and 25, 1864.

**FELKIN v. HERBERT.**

*Public Health Act, 11 & 12 Vict. c. 63—Easement—Right of drainage.*

*A local board of health instituted a suit against the owner of a certain ditch for filling up the ditch, thereby obstructing an ancient easement which the plds. possessed in the flow of water through the ditch, and interfering with their right to the free use thereof for sanitary purposes:*

*The plds. claimed the easement with regard to the drainage of the whole district, whereas it appeared that from the nature of the locality the ditch in question could carry off only the surface water which collected on an undulating space of ground 114 yards in length.*

*Bill dismissed with costs, principally on the ground that the proper remedy for a Board of Health to resort to in such a case was under the provisions of the Public Health Act 11 & 12 Vict. c. 63.*

*Where a party claims an easement, and proves only a part of his claim, the easement proved constitutes a different easement from the one claimed, and the claimant cannot obtain relief.*

This cause now came on upon motion for decree. On the 1st April 1861, a motion for an injunction had been made by the plt. as the officer of the Local Board of Health for the district of Sheerness, to restrain the deft. the Right Hon. Sidney Herbert, the then Secretary for War, and Richard Berridge, and Henry Bateman Jenkins, their agents and workmen, from stopping up a certain ditch abutting on High-street Miletown, Sheerness, they being part owners of the soil, by filling it with earth and soil, and thereby interfering with the right of the plds. to the free use of the ditch for sanitary purposes. The V. C. refused the motion on that occasion, on the ground that both parties must have the public interest at heart, and he considered that there was no such invasion of those interests, nor was there sufficient injury to call for the interference of the court. During the period which had since elapsed Mr. Sidney Herbert, afterwards Lord Herbert, and Sir George Cornwall Lewis, his successor, who was made deft. to the bill, had both died, and the present deft. was Earl De Grey and Ripon, as Secretary for War. The ditch, which in consequence of these proceedings has obtained the *soubriquet* of "Chancery-ditch," is in the immediate neighbourhood of the High-street, Miletown, and is upwards of half a mile in length.

Various steps have from time to time been taken in the suit (see 8 L. T. Rep. N. S. 788; sub nom. *Felkin v. Lewis*; also 9 L. T. Rep. N. S. 635). The bill was amended in May last, and the cause now came on upon motion for decree. The defts. by their answer maintained that there never was any intention on their part to do what was imputed to them; that the plt. well knew the same, and that the expense of the suit, which was very great, had been wilfully caused.

The plds. on the other hand, insisted that they had possessed a right for upwards of thirty-years, previously to 1858, the period when the acts complained of commenced, to an easement, consisting of a drain from a pair of cesspools situate immediately opposite the ditch. In the course of the argument reference was made to the powers of the Local Board of Health under their Acts of Parliament. A correspondence had taken place between the plt. as officer of the board, and Colonel Montagu, an official at the War Office, and under the direction of the latter, the ditch was being filled up when the suit began. Colonel Montagu in one of the letters disclaimed any intention of doing what was imputed to him, and upon notice given the works were stopped. The case resolved itself into three questions—first, whether the plt. had a right to institute the suit; secondly, whether there was any case for an injunction at the time the bill was filed; and thirdly, whether there was now a case for a mandatory injunction.

The hearing of the cause occupied the court twelve days.

*Baily, Q. C. and Hallett*, for the plds.

*Glasco, Q. C. and E. F. Smith*, for Messrs Berridge and Jenkins.

The Attorney-General (Sir R. Palmer) and *Wickens* for the Crown.

*Baily, Q. C. in reply.*



The VICE-CHANCELLOR referred to the position of the parties, to the relief that was asked, and to the powers conferred by the Public Health Act (11 & 12 Vict. c. 63), by which, he observed, the local board had means given them to exercise their powers without the necessity of coming to a court of equity. He then described minutely the position of the district and the mode of drainage, and the locality of the ditch in question. He observed, that the whole neighbourhood was remarkably flat, and the High-street in particular had many almost imperceptible undulations, and it was in one of these undulations, which extended about 114 yards, that the ditch in question and three pairs of cesspools were situated, so that, as to surface water, nothing but the rainfall in that particular space could be carried into the ditch. Those cesspools had been subsequently converted, and a drainpipe made into the ditch; and it clearly appeared from the evidence that that portion of the surface water which collected upon the 114 yards of the High-street passed into the ditch. What right had the local board to come to this court? Upon looking at the bill it appeared that they claimed an easement as to all Miletown, Sheerness, with the streets, &c., particularly the High-street; whereas it was clear that, with respect to this ditch, the only easement they really possessed was as to the 114 yards in question. This was quite irrespective of the Public Health Act; whatever powers they had under that Act formed no part of their present contention. It was a rule of law that, where a party claimed an easement, either as to ancient lights, water, &c., if he claimed one easement, and only proved a part, that part constituted a different easement, upon which he could have relief. So, as to right of pasturage, where a right to feed cattle generally was claimed, and a right to feed sheep only was proved, that was not sufficient. If in this case a pipe was laid down to include a larger area than the 114 yards, it was a simple usurpation, and brought the case within the principle of *Renshaw v. Bean*, 11 Q. B. 124, where it was settled that the owner of a servient tenement had a right, if the owner of the dominant tenement sought to extend by usurpation the easement which he already possessed, to obstruct his ancient easement, if necessary to do so in order to obstruct the usurpation. The most common cases on this question were those which related to easements of light. The present was not the case of a right to water below a certain point, for, although the local board had a right to drink or boil away their water, they had not a right *quoad* the easement to carry away any filth through the ditch to another place. There was nothing to prevent the local board from calling upon the defts. under the powers of their Act to remove any filth, &c.; but they did not choose to do that, but rested their case solely on the question of easement. The evidence showed that in the heaviest rain no obstruction had ever taken place by means of the grip; but it was said that there would be an obstruction owing to the steepness of the banks of the ditch, and the nature of the soil; that, however, was not proved on the balance of evidence. Then came the question as to what was asked about restoring matters to their original state by mandatory injunction. It appeared to him that the plt.'s own witnesses proved that the former condition of things was far worse than the present. That appeared to be so with regard to the public health. It was remarkable that the plt. did not insist on the restoration, but on the laying down of pipes, and this had been over and over again offered to be done, and the pipes which the local board had in store were referred to for that purpose. It was a matter of the strongest consideration with him that the new system of drainage

had been carried to a point within twenty yards of the ditch, and could be adopted immediately as the cheapest and simplest plan. The public interest appeared to be sacrificed for a so-called right, and because the ire of the local board had been raised. It was to be regretted that the suit had been instituted, and, more particularly so, as the works were discontinued the instant the notice had been given. Colonel Montagu's letter was also disregarded, and on all these grounds the bill must be dismissed with costs, including the costs of the motion.

Solicitor for the plt., *Nichols and Clark*; for the defts., *Messrs. Berridge and Jenkins, Willoughby, Cox, and Lord*; for the Crown, *Solicitors for the Treasury*.

### EXCHEQUER CHAMBER.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

#### ERROR FROM THE COURT OF QUEEN'S BENCH.

Wednesday, May 11, 1864.

(Before ERLE, C.J., WILLES, J., BRAMWELL and CHANNELL, BB., KEATING, J. and PIGOTT, B.)

REG. on the prosecution of the VESTRY OF ST. MARYLEBONE v. THE BOARD OF WORKS FOR THE STRAND DISTRICT.

*Parish—Boundary—Metropolitan Local Management Act—Contribution order.*

*The parish A. was created by a statute of Charles II. out of parish B., and the boundary of A. was described as the houses abutting on a street, the houses on the other side of the street being in the third parish M. The parish of M. had always treated the middle of the street as the exact boundary line of their parish:*

*Held (affirming the judgment of the Q. B.), that the boundary of parish A. extended ad medium filum via.*

*A street in more than one parish was placed by an order of the Metropolitan Board of Works under the exclusive management of one vestry (18 & 19 Vict. c. 120, s. 140). That vestry by sect. 160 made order on the other parish for contributions towards the repairs of the street:*

*Held (affirming the judgment of the Q. B.), that though certain items might be improperly charged, yet if any part of the sum claimed was due, a mandamus might issue.*

Error alleged by the defts. upon a judgment of the Court of Q. B. in favour of the prosecutors on a special case stated for the opinion of that Court.

The report of the case in the Q. B. will be found in 9 L. T. Rep. N. S. 374.

A mandamus was issued commanding the board of works for the Strand district to pay to the vestry of St. Marylebone certain moneys required for defraying the expenses of the Metropolitan Local Management Act (18 & 19 Vict. c. 120) in pursuance of two orders made in that behalf by the vestry of St. Marylebone in respect of "that part of the parish of St. Anne, Soho" (now in the Strand district board of works) "placed under the management of the vestry of St. Marylebone by an order of the Metropolitan Board of Works made the 6th March 1857."

Issues raised on the return to the *mandamus* came on to be tried before Cockburn, C. J. in *Mid-dlesex* after *Michaelmas Term 1860*, and a verdict was returned for the prosecutors, subject to leave reserved to the defts. to move to enter a verdict for them. Subsequently, by consent, this special case was stated for the opinion of the Court of Q. B.

EX. CH.] VESTRY OF ST. MARYLEBONE V. BOARD OF WORKS FOR THE STRAND DISTRICT. [EX. CH.]

*Novill, Q. C. (Macnamara with him).*—The leading facts in the case are these:—The two orders in question were made by the Marylebone Vestry, on the 14th Aug. 1858, and the 18th June 1860, pursuant to sect. 160 of the Metropolis Local Management Act, which came into operation on the 1st Jan. 1856. On the 6th March 1857, the whole of Oxford-street was placed under the exclusive management of the vestry of St. Marylebone, under the powers of sect. 140 of that Act. The first order includes expenses incurred before the 6th March. Each order charges the Strand district with a sum bearing the same ratio to the whole sum expended in maintaining the southern half of the whole of Oxford-street, that the length alleged to be within St. Anne's, Soho, bears to the whole length of Oxford-street. The parish of St. Anne's, Soho, was formed out of St. Martin's parish, by the 30 Car. 2, which enacted that, "all that precinct included within the bounds hereinafter expressed," should form the new parish, "with all the east side of Soho-street, to the sign of the Red Cow, being the corner house at the north end of the said Soho-street, abutting upon the King's highway or great road, with all the houses and grounds abutting on and upon the said road leading from the said sign of the Red Cow to the aforesaid house known by the sign of the Crooked Billett." The "King's highway or great road" is now called Oxford-street, and Soho-street is now Wardour-street, and the Red Cow is now a woollen warehouse, 382, Oxford-street, at the north-east corner of Wardour-street, the Crooked Billett is now 440, Oxford-street, at the corner of Crown-street. By the 2 Will. & M. c. 8, for paving and cleansing the streets of London and Westminster, all streets were to be repaired and paved "at the cost of householders, inhabitants in any such streets, by each householder repairing and paving the street before his own house unto the middle of such street." By the 10 Geo. 3, c. 23, s. 10, it was enacted (*inter alia*) that that part of Oxford-street within the parish of St. Anne's, was to be taken as part of the parish of St. Marylebone, to be put under the control of certain commissioners, with reference to paving, lighting and cleansing. From the year 1771 to the year 1855 rates were made by the parish of St. Marylebone, under the statutes, upon the occupiers of the houses on the south side of the part of Oxford-street in question, towards the paving of the street. For the last thirty years the parishioners of St. Marylebone had perambulated the boundaries of their parish to the middle of the road in Oxford-street; whilst, on the other hand, the parishioners of St. Anne, Soho, had perambulated the boundaries of their parish only to the pavement of the south side. First, on the true construction of the statutes and facts set out in the case, the boundary of the parish of St. Anne, Soho, is the line of houses on the south side of Oxford-street, and it does not extend *ad medium filum viae*, and therefore the parish of St. Anne, Soho, is not liable for these expenses. The rule that, where a close of land abuts on a highway, the presumption is that half of the highway passes with the conveyance of the close (*Berridge v. Ward*, 10 C. B. N. S. 400), does not apply. This is the case of a parish created by an Act of Parliament, with a defined boundary, and there ought to be no presumption that the boundary extends further than as defined. Secondly, the orders in question are bad for including expenses incurred before the 6th March, when the part of Oxford-street in question was put under the management of the Marylebone vestry; and also because the sums charged are not for the work actually done on the part of Oxford-street in question, but for an aliquot part of the expense of repairing the whole of the south side of Oxford-

street, proportioned to the length of the part supposed to be in St. Anne, Soho. There is no power to charge for retrospective expenses; and the actual expense only of the part repaired belonging to St. Anne's is what St. Anne's is liable to. The only mode of obtaining redress was to question the validity of these orders by refusing to pay them. The auditors appointed under the 18 & 19 Vict. c. 120, could not entertain the question of their validity:

*St. Botolph Aldgate v. Whitechapel District Board of Works*, 29 L. J. 228, M. C.; 2 L. T. Rep. N. S. 504; *The King v. The Mayor of Gloucester*, 5 T. R. 346.

*D. D. Keane, Q. C. (Petersdorff, Serjt., with him)* for prosecutors, was stopped by the court.

*ERLE, C.J.*—I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. This is a *mandamus*, obtained by the parish of St. Marylebone, commanding the Strand Union District Board of Works to contribute two sums of money, to defray certain expenses incurred by the parish of Marylebone, in executing the Act for the Better Management of the Metropolis (18 & 19 Vict. c. 120). The return of the Strand Union Board raises the important question, whether the parish of St. Anne, Soho, comprises the part of Oxford-street abutting upon houses which are clearly within the parish of St. Anne, Soho. According to the strict meaning of the words of the Act, 30 Car. 2, "houses and grounds abutting on the said roads," taken alone, the boundary would include the houses and exclude the street. But the case sets out a great quantity of evidence tending to the conclusion that it was the intention of the Legislature to include part of Oxford-street, as well as the houses abutting on the road, and we therefore come to the conclusion, that the part of Oxford-street in question was included in the parish of St. Anne, Soho. In a conveyance of a close, the expression "abutting on a highway," commonly carries with it the right to the soil *ad medium filum viae*, and there is nothing we think to prevent that rule of construction being applied in the present case. The jury and the court below have come to the conclusion, and we think it a proper one, that the part of Oxford-street in question is in the parish of St. Anne, Soho. That is the substantial question raised by the first issue on the return. The second issue in substance is, that the sums ordered to be paid were for the repairs of parts of Oxford-street, not in the parish of St. Anne, Soho. That is the same issue as the first in another form. The third issue is, that the debts do not pay the sum demanded because the first order includes expenses incurred between January and the 6th March 1857, when the order of the Metropolitan Board was made which placed Oxford-street under the management of the Marylebone vestry. I think that there are several answers to that objection. It is by no means clear that the very peculiar powers given by the Act would not extend to works done between January and March; and it is clear that these are works which the parish ought to pay for to some one. Whether that be so or not, and whether it is objectionable that the mode of levying the rate is by charging the parish an aliquot part of the expenses of repairing the whole of Oxford-street, proportioned to the length of that part of that street in the parish of St. Anne's, or whether there is any objection as to the amount ordered to be paid, the *mandamus* being to pay such sum as the vestry shall require for the purposes of the execution of the Act, if anything be due, the *mandamus* ought to issue. It would be extremely pernicious to lay down a rule, that if one wrong item were inserted by mistake, no sum at all could be levied. The Strand Union were bound to pay what was due, and they have no right according to law to refuse to pay anything because part of the sum ordered has been erroneously

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arrived at. In the court below Blackburn, J., in his judgment touches on this point. He says, "If the fact of an order, good on its face, having been made for a sum which had been erroneously arrived at, was to make the order itself void, so that every individual ratepayer could object to his quota, it would be singularly inconvenient." The principle of this *mandamus* is in accordance with the law as to the apportionment of rate in 2 Inst. 508. As to the powers of the auditors, I do not think that under this statute the auditors have any power to relieve the parish of St. Anne, Soho. From what has been stated during this argument, I expect that the attention of the Legislature has been drawn to the point of not leaving the power to the vestry without appeal. If there be no power of appeal, the order of the Marylebone vestry would, I think, be conclusive. The *mandamus* is for the sum required for the expenses. If the proper amount were tendered, there would be a perfect answer to any application for an attachment.

BRAMWELL, B.—I am of the same opinion. The *mandamus* does not mention any sum which it requires to be paid. We have not properly before us the question of figures, only the expenses that have been incurred, and are therefore not in a condition to say how much ought to be paid.

The other judges concurred.

*Judgment affirmed.*

Attorney for the prosecutors, E. G. Randall; for the defts., J. H. Lewis.

#### COURT OF COMMON PLEAS.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

Feb. 4 and May 23, 1864.

HODGSON (app.) v. LITTLE (resp.).

*Salmon Fisheries Act 1861 (24 & 25 Vict. c. 109).*

*What is a fishery within the meaning of sect. 20—Obstruction to free passage of fish.*

*The occupier of a fishing mill-dam removed the hecks, but left a sliding door down, which, with the hecks, had been used for catching salmon:*

*Held, that the fishery did not cease to be a fishery because part of the machinery for catching fish had been removed, notwithstanding that, had the part left been removed, the milling power would, to a certain extent, have been injured; and that the occupier of the mill-dam had been rightly convicted under sect. 20 for not removing every obstruction which might interfere with the free passage of fish during the close season.*

This was a re-argument of the case already reported in 8 L. T. Rep. N. S. 358, and 14 C. B., N. S., 111, with these differences in the statement of facts, namely, first, that the finding that "locks and cruives were synonymous terms" was struck out; secondly, that it was found that lifting or removing the sliding doors would, to some degree, injuriously affect, but not ruinously, the milling power; and, thirdly, that it was expressly found that the sliding door was necessary for the mill as well as for the fishery.

Manisty, Q.C. appeared for the app.

Davidson (R. Fowler with him) for the resp.

*Curr. adv. vult.*

WILLES, J. now delivered the judgment of the court.—This was in effect a re-argument of the case reported in 14 C. B., N. S., 111, with these differences in the state of facts; namely, first, that the finding

that "locks" and "cruives" were synonymous terms is struck out; secondly, that it is found that the lifting or removing the sliding doors or sluices would, to some degree, injuriously diminish, though it did not destroy, the milling power; and thirdly, it is expressly found that the sliding doors or hatchets were necessary for the fishery as much as for the mill. Upon the argument, the whole question being decided in the former case was re-opened. The question is, whether a conviction of this app. under the 22nd section of the 24 & 25 Vict. c. 109 (An Act to amend the laws relating to Fisheries for Salmon in England), was valid? The app. had a fishing mill-dam, with a fish-lock through it; at the head of that lock was a hatch, or sliding door, which moved in grooves; when this door was down no salmon could pass within three feet of the door; and down-stream was a frame in which the up-stream hecks of the fish-lock were placed, when the lock was used for taking salmon; and when this was done the sliding door or hatch was raised. This was, of course, to allow of a rush of water through the lock, against which the fish, following their natural instinct to ascend the river, would make what way they could, and so swimming up the lock and being stopped by the up-stream hecks, and prevented from returning by the down-stream hecks or inscales, would be caught in a trap. When this was effected the final capture might, perhaps, be aided by letting down the sliding door or hatch so as to leave the fish high and dry, though this is not at all necessary, and was not the first occasion of lifting the sliding door or hatch to cause a stream, and consequently an attraction to the fish, in the first instance in order to make such sliding door or sluice a part of the fishing apparatus; if it were necessary, then it is clear that part of the fishery may have been obstructed, whereby the fish is prevented from passing in and through the lock or box. The app. kept down the sliding door, and moved the hecks after the period mentioned in the 20th section, which kept down the sliding door, and hence the conviction. It was argued on behalf of the app. that though language is used in this Act which the court cannot understand, so as to give effect to such terms as "crib," "cruive," or "inscale," as being within the meaning of the section, and enough is not found by way of explanation to justify the conviction, to which it must be answered we are bound to inform ourselves of the meaning of the words used by the Legislature. The Act is unfortunately not in precise words. Through the decay of the salmon fisheries on this part of the coast, these terms are not of frequent use, but they were used by persons acquainted with the subject, and then again we find it explained in Jamieson's Dictionary: wherever the word "box," "cruive," or "crib" is used it is strictly applicable to the fish-lock in question, and indeed to the greater part of these contrivances. The salmon are enticed into an inclosed space where they are cribbed and confined in a "crib," "box," or "inscale." Then again the word "obstruction" is a well-known word of most general import, and that the sliding-door or sluice is an obstruction to the free passage of the fish in and through the locks within the app.'s fishery and mill-dam is clearly made out, in fact, so that if it was a fishery within the Act the case falls within the words of the 20th section. That it was a fishery was decided in the former case between the same parties. It was originally intended for fishing, and had been formerly used for fishing, and it was still capable of being used for fishing by shutting the box and lifting the sliding door or hatch. That it had not been sometime used for fishing only shows that it was a fishery out of use, not that it was not one. Now it seems that being made and completed for

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use, this was a fishing mill-dam, and none the less a fishery because it also was used as a mill-dam. The interpretation clause is express: "Fishing mill-dam shall mean a dam used or intended to be used partly for the purpose of catching or facilitating the catching of fish, and partly for the purpose of supplying water for milling or other purposes." It was further urged that the conviction was wrong, because, though damage to the milling power was likely to result from the lifting the sliding door or hatch, it was a damage for which it was said the Legislature could not have intended to impose a penalty. The answer, however, is twofold. First, the Act is one for redressing the great mischief and wrong from the restriction of the supply of food of very great national importance, and recites "that salmon fisheries, in England," &c. Then follows a series of enactments against catching fish in particular manners, and amongst others with fixed engines. This would apply to fishing mill-dams against fishing-weirs, and fishing mill-dams unless "lawfully in use at the time of the passing of this Act by virtue of a grant or charter or immemorial usage," and against taking at unseasonable times, or out of what is fixed by the Act as close times. Then follows the 20th section by which "the proprietor or occupier of every fishery for salmon shall within thirty-six hours after the commencement of the close season cause to be removed and carried away from the waters within his fishery the inscales, becks, tops and rails of all cruives, boxes, or cribs, and all planks and temporary fixtures used for taking or killing salmon, and all other obstructions to the free passage of fish in or through the cruives, cribs and boxes within his fishery." Then follow the sections which provide for the weekly close time. Then the 23rd and 24th sections follow for providing for the attaching of fish passes to existing dams, and the 23rd is important, because it is subject to the express qualification not to be found in sect. 20, "so that no injury be done to milling power." Then follows the 25th, as to the attaching of fish passes, with no such qualification. The 26th provides for the supply of water to passes. Then follow sections for imposing restrictions as to the construction of fishing weirs and dams, and others for more effectually enforcing the Act. From this review it is clear that fishing mill-dams were considered by the Legislature to be injurious to the salmon fishery, and were therefore placed under special restrictions; that where it was intended that the provisions of the Act were not to apply if they interfered with the milling power, that was expressly stipulated; that there is no such restriction in sect. 20; that that section rendered penal the continuance of any obstruction to the passage of fish through the box of a fishery; that the fishing mill-dam is a fishery expressly dealt with as such by the statute; and that as the sliding door or hatch was kept down at a prohibited time, and constituted an obstruction to the passage of fish through the box, the conviction was right and ought to be affirmed, and, as on the former occasion, with costs.

*Conviction affirmed.*

*Thursday, June 2, 1864.*

GERRING v. BARFIELD.

*Highway—User—5 & 6 Will. 4, c. 50.*

*Where an innkeeper had used a piece of ground, which was part of a public highway, for twenty years for standing the vehicles of his guests on market-days:*

*Held, that such user was no answer to an information against him for obstructing the highway under the 72nd section of the Highway Act.*

CASE.

At a petty sessions holden at Faringdon in and for the division of Faringdon on the 19th Jan. last, before us, the undersigned, Thomas Leinster Goodlake and Henry Tucker, two of Her Majesty's justices of the peace in and for the said county of Berks, an information preferred by Frederick Henry Barfield, the district surveyor of the Faringdon highway board (hereinafter called the resp.) against Charles Gerring, innkeeper (hereinafter called the app.) under sect. 72 of the Act 5 & 6 Will. 4, c. 50, charging for that he the said Charles Gerring, on the 5th Jan. last, at the parish of Faringdon, in the said county of Berks, unlawfully and wilfully did obstruct or cause to be obstructed the free passage of a certain highway there situate, leading from Marlborough-street to Gloucester-street, by then and there placing or causing to be placed, and leaving or causing to be left thereon certain carriages or other vehicles for a long and unreasonable time, to wit, two hours and upwards, and without just cause, contrary, &c., was heard and determined by us, the said parties respectively being then present, and upon such hearing the app. was duly convicted before us of the said offence, and we adjudged him to pay the sum of 6d. fine and 16s. 6d. the costs incurred by the said resp.

And whereas the app., being dissatisfied with our determination, upon the hearing of the said information, as being erroneous in point of law, hath, pursuant to sect. 2 of the statute 20 & 21 Vict. c. 43, applied to us in writing, within three days after the said determination, to state and sign a case setting forth the facts and the grounds of such our determination as aforesaid, for the opinion thereon of Her Majesty's Court of C. P. at Westminster.

At the hearing of the aforesaid information it was proved, on the part of the informant, the resp. in this appeal, that the deft., the app. in this appeal, had on the day named, which was the ordinary market-day of the town of Faringdon, placed divers gigs or carts on a certain piece of ground opposite the house of the app., which is a public inn, and which piece of ground lies between the two streets before named, and until the recent erection of a corn exchange was (with a portion of Marlborough-street and its footpath) the site of the corn market.

It was also proved that this piece of ground had been invariably repaired at the expense of the parish out of the highway-rate, and had been stoned and metalled the same as the other streets and roads in the town and parish, and had also been recognised as a highway by the highway board of the district.

It was also proved that by reason of the vehicles being so placed on the ground the free and ordinary passage between Marlborough and Gloucester-street had been made less convenient. The waste land of the manor of Faringdon, within which the town is situate, and the right to toll on cattle, corn and goods sold and delivered therein, belong to Daniel Bennett, the lord of such manor; and the app. proved that he had been in the habit of placing his customers' gigs in the street in front of his house, but not on this particular piece of ground, on market-days, for a long period of time far exceeding twenty years, without making any payment to the lord or his lessee; but, in this instance, he had, by arrangement, paid the lessee 1s. for the privilege of placing them there. He also proved that sums had been occasionally taken by the said lessee from licensed hawkers and other traders selling their wares, by auction and otherwise, on the said piece of ground, vans and carts belonging to whom were left during such sales, and during any portion of the market-day thereon. It was also proved that public exhibitors had occasionally been permitted to occupy such piece of ground on making a payment to the lessee for the privilege.

It was not shown however that any payment had ever been made in respect of empty vehicles standing on the ground in question until the present occasion, but it was proved that a money payment had been occasionally made to the lessee for such a purpose in respect of a piece of ground lying in front of another inn in the town, and between the carriage road and footpath, and which last-mentioned payment was shown to have commenced upwards of twenty years last past. It was contended on the part of the deft., the app. in this appeal, first, than the two streets over which the public passed could be approached from either side, irrespective of any obstruction caused by the vehicles being placed on the piece of ground in question, inasmuch as such vehicles occupied no larger space than had been accustomed to be occupied for the purpose aforesaid, and that no obstruction of the free passage within the meaning of the Act had therefore been proved, and that, even assuming a slight abridgment of the free passage did exist, yet that being on the ordinary market-day, the uninterrupted use of the ground for purposes for a period long exceeding twenty years would be an answer to the proceedings. And, secondly, that the evidence adduced showed a right in the lord of the manor to authorise the appropriation on market-days of the piece of ground in question for the purposes aforesaid, and that although the vehicles complained of were not actually used in the sale, or in the conveyance for the purpose of sale of marketable articles, yet that they were entitled to the like advantages, inasmuch as they belonged to farmers and traders attending the market for strictly market purposes, and that in some instances the sample sacks in ordinary use in corn exchanges were conveyed in such vehicles.

We, however, being of opinion that the evidence given before us proved the ground in question to be part of the highway, and that an obstruction to the free passage of the same had been created within the meaning of the 72nd section of the Act, 5 & 6 Will. 4, c. 50, and being also of opinion that the voluntary payment to the lessee of the lord of the manor for the privilege claimed in this and the other case mentioned was not in the nature of a market toll, which in the case of empty vehicles could, according to the custom, be legally demanded, gave our determination against the app. in the manner before stated. The questions of law arising on the above statement therefore are: Whether the circumstances set out proved an obstruction to the free passage of the highway within the meaning of the Act; and whether it was any answer thereto that the app. had exercised the privilege of placing empty vehicles on the street near, for a period of twenty years and upwards, on market-days; and whether the fact of his making a payment to the lessee of the tolls (coupled with the fact of a similar payment having been made in the other case referred to for a period of twenty years and upwards) can be considered in the nature of a market toll, and would give him any right to use the piece of ground in question for the purpose mentioned.

Whereupon the opinion of the Court of C. P. is asked upon the said question of law whether or not we, the said justices, were correct in our determination as aforesaid, and as to what further should be done or ordered by the said court in the premises.

THOMAS L. GOODLAKE.

HENRY TUCKER.

*Cole*, for the app., contended that he had a perfect right to do what he did by custom, and that it must be held that when this piece of ground was dedicated to the public, it was a limited dedication subject to the rights of the lord of the manor. He cited

*Reg. v. Smith*, 4 Esp. 110;

*Elwood v. Bullock*, 6 Q. B. 383.

*J. O. Griffiths*, for the resp., was not called on.

ERLE, C. J.—We think that, notwithstanding this piece was a triangular piece of ground between two streets, nevertheless there was evidence brought before the magistrates which justified them in finding that this was part of the highway. It was a piece of ground through which people passed if not obstructed, and, if so, it was a highway, and the public had a right to pass over it. A highway may be dedicated to the public, subject to certain rights; but there is no evidence here to justify the user claimed. The innkeeper used this piece of ground when his yard was too full; and although the vehicles might be the property of farmers attending the market, that fact would not give any right.

WILLIAMS, J.—I am of the same opinion. The magistrates found as a fact, that this was a highway. Then the question arises, had the app. any right to use it as he did? There is no proof that on particular days an obstruction might be put there.

WILLES, J.—The only evidence for the app. is, that he had been in the habit of using this piece of ground for more than twenty years: that is, that the public tolerated the obstruction as long as they suffered no inconvenience from it; but now they in all probability find it inconvenient, and therefore wish to prevent its being used by the app. any longer.

BYLES, J.—I concur.

*Judgment for resp. with costs.*

## COURT OF ARCHES.

(CANTERBURY.)

Reported by Dr. SWABET, of Doctors'-commons.

Feb. 5 and 6, May 5 and 23, 1864.

(Before the Right Hon. S. LUSHINGTON, D.C.L., Dean.)

HILL AND BAILEY v. HASKEW.

*Church-rate — Illegal item — Liability of "prebendal" and "common" lands — Inequality of assessment — Apportionment of costs on rate pronounced invalid.*

*In the circumstances of an extensive parish and upwards of 2000 ratepayers the Court held an item of 10l. for the expenses of collecting a church-rate not to be illegal; and, assuming it to be illegal, held the item not of sufficient amount to vitiate the rate.*

*Prebendal lands, liable to the repair of the chancel of the church, are not rateable to church-rate.*

*Generally, all property assessable to poor-rate (with the exception of church property) is liable to church-rate.*

*To sustain a church-rate the churchwardens must be in a position to show the court that the properties rated were in substance fairly and equally assessed on some principle; the principle adopted seems immaterial, provided the result is substantial equality.*

*When the Court pronounces against a church-rate, and condemns the ptes. in costs generally, it may condemn the deft. in such part of the costs as were occasioned by unfounded objections raised by his pleadings.*

This was a suit, by letters of request from the Chancellor of the Diocese of Lichfield, promoted by the churchwardens of the parish of Tamworth, to recover 1l. 14s. 1½d., alleged to be due from the deft. as his proportion of a church-rate made for the parish of Tamworth on the 11th Oct. 1861, at the rate of 1½d. in the pound. The libel was in the usual form, and the churchwardens' estimate for the rate was as follows:

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An estimate of the sums necessary for repairing the parish church, and for the other purposes chargeable on the church-rate from Easter 1861 to Easter 1862:

	£	s.	d.
Repairing the south-east pinnacle, also the mullions to the clerestory on the north side, and other repairs .....	40	0	0
Repairing lead roof and flashings .....	10	0	0
Painting iron fencing, gates, &c. ....	25	0	0
Repairing windows .....	10	0	0
Carpenter, bricklayer, washing surplices .....	15	0	0
Coals .....	10	0	0
Wine and bread .....	13	0	0
Insurance .....	4	2	6
Cleaning and dusting church, &c. ....	18	0	0
Two headles .....	10	0	0
Brooms, mops, &c. ....	6	0	0
Printing and stationery .....	4	0	0
Churchwardens' expenses, being sworn into office and fees .....	2	0	0
Ringin prayer bell .....	6	10	0
Winding up and cleaning clock, &c. ....	6	0	0
Making and collecting rate .....	10	0	0
Two new stoves, piping and repairs .....	20	0	0

£208 12 6

The above estimate was presented by the churchwardens at the meeting held in the vestry of the parish church of Tamworth, pursuant to public notice, on the 11th Oct. 1861, and adopted.

JOHN MOULD, Chairman.

The case was ultimately disposed of on the ground of serious inequality in the assessment (on which point the pleadings were of considerable length, and a vast bulk of depositions reduced to writing was before the court), and the rate pronounced invalid.

The other points raised by the allegation on behalf of the deft. were as follows: First, that the churchwardens had a balance of 10*l.* 1*s.* in hand at the time the rate in question was made; secondly, that there were arrears of previous rates amounting to about 50*l.*, which might have been collected if proper diligence had been used; thirdly, that the rate in question was calculated to produce about 232*l.*, that the ordinary yearly legal expenses chargeable on church-rate amounted to 160*l.*, and the rate therefore void by reason of excess; fourthly, that the estimate of sums necessary for repairing the parish church and for the other purposes chargeable on the church-rate contained items either altogether illegal to be charged on a church-rate, or the amounts thereof were grossly in excess of the actual requirements; in particular, that 25*l.* for painting iron fencing, gates, &c., was greatly in excess of the sum necessarily required for such purpose; that 2*l.* as expenses of the churchwardens on being sworn into office greatly exceeded the fees and expenses legally payable; that 10*l.* for making and collecting the rate was altogether illegal.

The responsive allegation admitting a balance in hand of 10*l.* 1*s.* alleged the good arrears to be no more 19*l.* 14*s.* 11*d.*, and explained an admitted variation between the value of properties in the poor-rate and church-rate assessment, first, by reference to certain cottage property rated to poor-rate under the Small Tenements Act (18 & 14 Vict. c. 991), which was not applicable to church-rates; by certain corporation tolls not included in the poor-rate; by the various modes of dealing with a canal which ran through different townships of the parish; and by reason of certain prebendal lands assessed to poor-rate, but alleged not to be liable to church-rate, inasmuch as they were liable to the repair of the chancel. Certain alleged omissions were accounted for as being rights of common, not liable to either poor, county, or church-rate. The responsive allegation also counterpleaded the particulars alleged in the deft.'s allegation to establish the general inequality and unfairness of the assessment.

The case was argued on the 5th and 6th Feb. by Dr. Robertson and Dr. Swanby on behalf of the churchwardens; by Dr. Deane, Q.C. and Dr. Tristram on behalf of the deft.

Cur. adv. vult.

On the 5th May Dr. Lushington delivered an elaborate judgment, parts only of which are here printed; the parts omitted referring mostly to details of evidence as to value of properties necessary to the decision of the particular case, but of no general importance or interest.

Dr. LUSHINGTON.—This is a cause of subtraction of church-rate, alleged to have been duly made for the parish of Tamworth. The parish of Tamworth consists of seven divisions, viz.: the borough of Tamworth, Castle Liberty, the townships of Wigington, Fazely, Bolehall and Glascote, Amington and Wilnecote. The rate in question was of 1*½d.* in the pound; the date of its being made was Oct. 11, 1861, and it was to cover the expenses of the church from Easter 1861 to Easter 1862. The deft. offers many objections to the validity of the rate: that it was excessive in amount; that it included illegal items; that it was laid on a totally false principle; and that many properties were overrated, others underrated, others omitted altogether. I will begin by disposing of several of the objections respecting which I find no difficulty and entertain no doubt. In all cases of church-rate it is necessary to bear in mind the circumstances of the parish for which it is made. True it is that the same principle must govern all cases of church-rate, but the application of those principles may depend on the peculiar circumstances of the place. I will presently illustrate this observation by reference to facts. First, it is objected that the present rate of 1*½d.* in the pound was unnecessary and excessive, on the ground that there were arrears of former rates due, and that no such rate was required for the proper expenditure of church-rate purposes. It appears that the parish church of Tamworth is an ancient and large building; the sums which it is alleged might be recovered for arrears are very trivial, and the necessary expenditure, amounting to 232*l.* 1*s.* or thereabouts, does not appear to me, either by reference to the evidence, or considering the circumstances of the parish, its extent or its valuable property, to be excessive. I shall certainly not pronounce against the validity of the rate on that ground. Secondly, in the estimate for the expenses to meet which the rate was made, there is an item of 10*l.* for collecting the rate, and it is contended that this item is illegal, and that the churchwardens are bound to perform the duty themselves. As a general proposition this argument may be well founded, but I am not disposed to admit its validity in a case like the present, where there are seven separate divisions of the parish, above 2000 rate-payers, and 2000 properties liable to assessment, and in aggregate value amounting, at the least, to 35,000*l.* But I will assume that this is an illegal item, and assume, for the purpose of the argument only, that it was not in the power of the vestry to sanction it; yet if all this were so, I would not quash the rate on that account. I know of no authority which would require me to adopt so severe a measure, and none has been cited; and upon a rational view of these questions, it would, I think, be preposterous to expect a properly accurate knowledge of the law in all these minute particulars. Thirdly, as to the omission to rate prebendal lands, I need make no observations. It is not now, and could not be, contended that they are rateable to a church-rate. I pass by also the objection with regard to Staffordshire and Warwickshire moors. Fourthly, I now proceed to the important question raised in this case, the validity of the rate on account of the method of its assessment. In considering this question, I propose to divide the subject into two heads:—1. The law applicable to the making of church-rates. 2. The facts of this case. The law: Church-rates are of great antiquity

existing for centuries before any poor-law was established. They have no original legal connection with each other, none by statute law. It would be a vain exhibition of industry to trace the progress of church-rates from early days to the present time. Many ancient customs interfered with the ordinary mode of assessing to church-rate. In the *Poole* case stock-in-trade was held by the delegates to be assessable. (a) But passing by these exceptions, and looking to the modern practice, which must be my rule, I apprehend the law to be that all property in lands or houses, collieries, mines and canals are assessable to church-rate; in fact, that all property assessable to poor-rate is assessable to church-rate, with the exception of property belonging to the Church. That all property assessable must be assessed upon the same principle; but, provided all be assessed on the same principle, it matters not whether the valuation be high or low so that all are equally assessed. That omission to rate valuable property may render a church-rate illegal is an indisputable proposition, but it does not therefore follow that small and accidental omissions, not really affecting the rate, would have that consequence. It is acknowledged law that neither this nor any other ecclesiastical court has power to amend a church-rate, but it does not therefore follow that trivial errors, incidental to all such transactions, would render the rate illegal. If the omissions are many or important the rate is invalid. It is also quite clear that no rate can be just and equal, and therefore legal, if some be rated at a much higher rate than they ought to be and some on too low a scale. But here you must observe that such misrating must be clearly proved and on matters of importance; minor errors, inevitable in a large parish with numerous ratepayers, can produce no such effect. The law requires that the ratepayers of the whole parish should be equally assessed to the church-rates; of course, I do not mean an absolute equality, that is impossible, but the adoption of a principle of assessment, and a carrying out that principle so as to attain a reasonably just and equal contribution. In assessing to church-rates the law knows nothing of townships, the rate must be laid as if the whole were one township. An assessment might be equal as between different townships, looking only to the aggregate value of the property of each township; but if it was at the same time unequal as between individual properties in any one township, the rate founded upon it would be invalid. Again, poor-rates have no legal connection with church-rates. The poor-rate assessment is governed by its own law, and is subject to a particular course of appeal not applicable to church-rates. I am not aware of any law or case which prescribes that the poor-law assessment is binding in a case of church-rate. Sir J. Nicholl said it might be referred to, but no more: (*Lambert v. Weall*, 4 Hagg. 100.) An assessment for the church-rate is not necessarily invalid because it does not agree with that for the poor-rate; nor, if founded upon the poor-rate assessment, is it therefore necessarily valid; it will be valid only if the poor-rate assessment is fair and uniform. An assessment to the poor-rate, unless appealed against or if confirmed upon appeal, is binding on all till a new assessment is made, but such assessment has no legal or binding effect upon church-rate. It would be perfectly competent to any person assessed, according to the poor-rate assessment to church-rate, to impeach the assessment at any time; such assessment might, when recently made, be *prima facie* evidence of equality, but no more. It is not, I think, to be denied that the law as to church rates is in a most unsatisfactory state; but though I have no doubt that this is so, and that it imposes

great burdens on those who have to execute it, yet, nevertheless, it is their duty to strive to make their acts conformable to what they believe to be the law. I can hardly conceive a task of greater difficulty than, as the law stands, to make a valid church-rate in extensive and populous parishes. Independently of many other facts, the task to assess equally to church-rate a town like Tamworth, covering a space of 10,000 acres and containing 2464 assessable properties, is a herculean task. And whatever may be the result of this case, I feel bound to express my opinion that Mr. Hill, the churchwarden, has most meritoriously exerted himself to fulfil his onerous duty. The most important question to be decided in the case depends upon the ascertainment of facts, and by far the most important of the facts is a clear understanding of the principle upon which the rate has been framed; the general rule intended to be followed with certain exceptions. I have no hesitation in saying that I have experienced very great difficulty in this investigation. I never yet met a church-rate case involved in so much intricacy. It would appear that the basis upon which this church-rate assessment was laid was for all the townships except Wilnecote, the then latest (i. e., the immediately preceding) assessment for the poor-rate; and for the township of Wilnecote, a poor-rate assessment, but not the latest. Mr. Hills says, "The poor-rates set forth the annual value and the rateable value of the properties in the parish, and we have gone principally by the poor-rates as to both values." Again, Mr. Shaw says, "The several properties within the said parish were assessed to the church-rate in question, with very few exceptions, according to the amounts at which the same were assessed to the then last several poor-rates in the borough of Tamworth and Castle Liberty, and the respective townships of Fazeley, Wigginton, Bolehall and Glas-cote, and Amington." The particular mode in which the rate-book was drawn up is thus described by Mr. Hill: "Mr. Bull and I corrected the church-rate book of 1860, with the latest poor-rate book of each township, and then we pencilled in 1860 church-rate books any alterations (i. e., any divergences from) the said poor-rate books, and then had the church-rate book of 1860, with the alterations copied into a new book." For Wilnecote, as above mentioned, the poor-rate book, adopted as the basis for the church-rate, was not the latest. The reason for that was as follows:—On Sept. 13, 1861, two months only before the church-rate was voted, there had been a new assessment for the poor-rates of Wilnecote township, and the result was a large increase of the aggregate rateable value, namely, 4928*l.* 17*s.* 6*d.* as compared with 3139*l.* 5*s.* 6*d.* But at the date of the church-rate this assessment was under appeal. The appeal was subsequently dismissed, but on technical grounds only. However, the assessment so made has been acted upon ever since for the poor-rates. Under these circumstances, Mr. Shaw recommended Mr. Hill, the churchwarden, not to adopt the new rate assessment, but to adhere to the old poor-rate assessment, on the ground that the old poor-rate assessment for Wilnecote was upon the same scale with the existing poor-rate assessments for the other townships, and was fair; whereas the new poor-rate assessment for Wilnecote was on a much higher scale than the existing poor-rate assessments for the other townships, and therefore could not be acted upon without hardship to the inhabitants of Wilnecote. Assuming that these facts are true, the reasoning of Mr. Shaw seems quite correct. This, then, is the acknowledged method upon which the church-rate was calculated. For the present, I will assume it to be fair, and proceed to inquire how far it was carried out. If it had been carried out

(a) See *Miller v. Bloomfield and Shade*, 1 Add. 499.



[ARCHES.]

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[ARCHES.]

exactly, of course the poor-rate and the church-rate would exactly tally. It appears, however, that there was very considerable difference, even for the aggregate of the rateable value for every township except Fazeley.

	Poor-rate.			Church-rate.		
	£	s.	d.	£	s.	d.
Boro' of Tamworth	5950	8	4	6303	17	11
Castle Liberty ...	903	6	4	836	9	7
Fazeley .....	6922	10	5	6922	10	5
Wigginton .....	9311	2	1	8614	16	7
Wilnecote .....	3139	5	6	3174	8	2
Bolehall & Gloscote	5822	0	6	6214	3	2
Amington .....	4021	9	3	3828	2	7

These differences clearly require explanation, and the supporters of the church-rate do accordingly offer some explanation. I think it will be unnecessary to follow the items for each township, it will be sufficient to point out the principal causes which are alleged for the variation. They are as follows: 1. Prebendal lands. 2. Corporation tolls. 3. Sundry alterations. 4. Small Tenements Act. 5. The canal. 1. Prebendal lands were included in the poor-rate assessment, but not in that of the church-rate. 2. Corporation tolls were included in the church-rate assessment, but not in that of the poor-rate. It is needless to say that in these two respects the churchwardens acted rightly. 3. A third cause of variation was that in the church-rate assessment were inserted some properties which had been improperly omitted from the poor-rate assessment, or some improper valuations were corrected. On principle, no doubt it was the duty of the churchwardens to correct any mistake that existed in the books which they took as the basis of the church-rate; but how was this done? Mr. Hill says, "If I happened to pitch upon any assessment which I thought or knew was very incorrect, I altered it, as was the case in a few instances." And again, "I was guided principally by the poor-rate assessment, making in some instances such alterations as I considered from my knowledge of the properties were necessary to put the parish upon an equality." This certainly appears to be a very rough haphazard mode of proceeding, and what increases the difficulty is, that Mr. Hill does not state upon what scale these new valuations were made, except that he considered they put the parish on an equality, but to this I shall advert more particularly hereafter. 4. The Small Tenements Acts. Two of the divisions of the parish, viz., the borough of Tamworth and Wilnecote, but these only, were affected by the Small Tenements Act, which prescribed that cottages of less value than 6*l.* per annum should for the poor-rate be assessed to the landlord instead of the tenant, and their rateable value should be taken to be only three-fourths of the annual value. As the statute did not apply to church-rates, some modification was required in adopting the poor-rate book, the first step in each case being to enumerate with the names of their respective occupiers the cottage properties which in the poor-rate book had been lumped together for assessment to the landlord of them all. The next step was to disregard the reduction of the rateable value introduced by the statute; this seems to have been done quite fairly for the borough of Tamworth, for in the church-rate the rateable value of the cottages in the borough is ascertained upon the same scale as that which had always been, and still was, in use for the properties not being cottages within the operation of the statute, and which had been in force for the cottages themselves before the passing of the statute, viz., 10 per cent. reduction from the gross annual value fixed by the original poor-rate assessment; but for Wilnecote the churchwardens adopted a different course. Mr. Hill states, "The cottage property in Wilnecote I had inserted in

our rate at the gross estimated value of the poor-rate assessment" (i. e. without deduction), and the reason he alleges for this is, "because I considered the gross estimated value was taken so low as in fact still to leave a good margin, but I calculated it as being on an equality with all the rest of the parish." And again, "because even that gross estimated rental was so low that it was only in reality the rateable value." Now, for all the other properties in Wilnecote which were not subject to the Small Tenements Act, a large deduction from the gross estimated value was made to fix the rateable value, a deduction varying from 18 to 25 per cent., if not a full 25 per cent. It would appear then beyond a doubt that on the small cottages in Wilnecote an increased value was placed, whilst upon cottages of the same character in the borough of Tamworth the ancient valuation was retained. I am at a loss to see how this can be justified; something more is required than Mr. Hill's assertion that his conviction is that the plan he adopted was fair and equitable, and brought the whole of the parish on an equality as regarded their assessment to the church-rate. 5. The canal. The Coventry Canal passes through three townships, viz., Castle Liberty, Amington, and Bolehall and Gloscote; and for the poor-rate, each of these townships is rightly assessed for the part of the canal within its own limits thus: Castle Liberty, 103*l.* 14*s.* 8*d.*; Amington, 164*l.* 17*s.* 7*d.*; Bolehall and Gloscote, 144*l.* together, 412*l.* 11*s.* 10*d.* In the church-rate it is otherwise; the whole of the church-rate for the canal passing through the three townships is thrown upon one only, viz., upon Bolehall and Gloscote. It is thus charged, 103*l.* 14*s.* 3*d.*, 164*l.* 17*s.* 7*d.*, which properly belongs to Castle Liberty and Amington, and 214*l.* 3*s.* 9*d.* Bolehall and Gloscote proper; being an excess of 70*l.* 8*s.* 9*d.* over the 144*l.* on which the poor-rate was assessed. I cannot find any satisfactory explanation of this transaction, though perhaps I may conjecture one. It may be that all the proprietors being the same, it matters not whether they were assessed in one township or several; otherwise there would be injustice. But I will assume that the discrepancies of the church-rate assessment from the poor-rate assessment of 1861, constitute no injustice, and therefore that the church-rate assessment was fair. It now remains to be considered whether the poor-rate assessment was fair; for, as I have said before, a church-rate founded upon a poor-rate assessment is valid, not because it was so founded, but only on condition of that assessment being fair and uniform. This question may be conveniently divided into two. First, was the assessment originally fair? Secondly, was it fair in the year 1861? First then, was the assessment originally fair? When, by whom, and on what principle was it made? This part of the case is unfortunately not brought out in the evidence. The sum of what is deposed is as follows:—Wilnecote was assessed in 1826 by a Mr. Dumolo. Tamworth was assessed about twenty-five or thirty years ago, and it is said by competent professional valuers. The date of the assessment of Castle Liberty was different, but it is not specified. The date of the assessment of Fazeley, Amington, Bolehall and Gloscote and Wigginton is not stated at all, but it was certainly many years ago. A question here arises: the assessment being made at different times, the value of the properties must have increased at least something in value during the intervals, and when an assessment was made for a township it could not be fair as between that township and the other divisions of the parish, and therefore between the individual occupiers, unless the scale of valuation was lowered from the scale of the preceding assessment. But what trace is there of this having been the case? None whatever;



[ARCHES.]

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[ARCHES.]

in fact, the principle of every one of the assessments is unknown. Before I examine the assessment for each division of the parish it may be useful to state what was the principle adopted in the case of a recent poor-rate assessment made by the order of the board of guardians for the borough of Tamworth under the recent statute, 25 & 26 Vict. c. 103; an assessment carried out by Mr. Hill himself, assisted by two builders, a surveyor and two overseers. The principle was first to estimate the gross annual value, and then, in order to fix the rateable value, to make the following deductions, according to the kind of property in each case, viz. for land only, 5 per cent.; land and houses, 10; houses (above 60*l.* in value), 20; cottages, 25; warehouses, mills and factories, 25. Now, in the poor-rate, upon which the church-rate was founded, no such graduated scale seems to have been adopted. To sum up, then, this part of the case. It would appear that the assessments for the poor-rate were made at different times for the different divisions of the parish, but all many years ago; that the rates of deduction made from the gross estimated rental in order to fix the rateable annual value, where stated, varied as between one division of the parish and another, and in Wilnecote varied considerably between different properties; in no case either the principle which fixed the deduction, still less that which fixed the variation, being discernible. In four of the townships the rate of deduction is unknown. It is hardly possible that a church-rate, the assessment for which was founded upon these various assessments, could be fair and uniform. That these assessments were uniform there is not a shadow of direct proof; there is only the fact, which, indeed, is not to be forgotten, that these assessments did serve to fix the poor-rates and the church-rates for the parish for many years without dispute; and the bare assertion of Mr. Hill, Mr. Shaw (men of great local experience, but directly interested in supporting the church-rate), and of one or two others, that in their opinion the assessments worked fairly and uniformly throughout the parish. But one argument adduced by them in support of this view shows how small is the value of these general assertions. The rate is attempted to be justified in the pleadings and in the evidence, on the ground that, taking one township with another, the rateable annual value was about 3*l.* per acre. It need hardly be said that equality between townships is not necessarily equality between all the individual properties in those townships, and, indeed, has nothing to do with the matter. But to carry the case further, I will now assume, contrary to my opinion, that these various assessments were uniform, so that, at the date of the last of the assessments being made, all the divisions of the parish were assessed at the same rate. But the question now must be considered, were they fair in 1861? This could only be the case if two conditions were observed: first, if all new properties which had arisen since the date of the assessment had been not only inserted in the list, but rated at a corresponding scale; secondly, if all the properties in the original assessment, and all the new properties from the date of their being inserted in the list, had advanced in value at a uniform rate. The first of these conditions Mr. Shaw deposes was observed. He says: "About twenty-five or thirty years ago a valuation of all properties within the said parish for poor-rate was made by competent professional valuers, and from that date to this (with the exception of a recent alteration in the township of Wilnecote) the assessments to the poor-rate have been made upon the rateable value established by such valuation; and from time to time, as new properties have sprung up and come within the sphere of rating liabilities, the same have been immediately estimated, when

required, by competent professional valuers, and since 1848 the same has been done under the Act 11 & 12 Vict. c. 103, s. 7, and, so far as regarded rateable value, on the scale of the said valuation heretofore particularly referred to, by which means all the properties throughout the parish, new and old, were kept comparatively equal, and the proportionate equality maintained justly throughout the whole parish, in accordance with the system and principle which had for so many years prevailed in this parish, and which I depose, speaking from an accurate knowledge thereof, is a just, fair and equitable principle." Again: "Of course mines, collieries, and new works of various kinds have sprung up during the last twenty-five years, but as they so sprung up they were inserted in the rates in the mode I have explained in chief. The new properties, as they arose, were brought to the rateable value by the same scale as pre-existing properties; the assessment has been altered as additions were made to properties, and as new properties sprung up, but always on the principle I have so often set forth, viz., the valuation made twenty-five or thirty years ago." Further, it seems very doubtful whether, in estimating the value of the collieries and the factories, the fixed machinery has been taken into account. [The learned Judge then commented on the evidence on this point, and continued.] The result seems to be this, that there is beyond doubt a great quantity of fixed machinery in the parish; and that the churchwardens are unable to show at what rate it was valued, or even that it was valued at all. They simply copied the assessment of the houses containing fixed machinery from the poor-rate book. But, supposing there were no omissions in the poor-rate book, and that every new property, fixed machinery and all, as it came into existence, was inserted in the book; still, in order that justice should be observed, these supplementary assessments should be upon the same scale as the original ones. But this would manifestly require the adoption, not of the same rate of deduction from the gross estimated annual value, but of a lower rate; for since the old properties were yearly becoming more valuable, the original assessment became more and more an undervalue, and consequently, to avoid disproportion, every assessment of a new property should be upon a lower scale than the anterior assessments. I have been unable to discover any evidence that any change was made in the scale of valuation from time to time. But, supposing every assessment was fair at the time when it was made, could the whole be fair for 1861? If there were no changes at all, of course it would be so. If there was a change in all the properties, and to the same or nearly the same degree, the assessment would at the end of twenty-five years be nearly equal. But if changes had taken place, if some properties had greatly increased in value and some remained stationary or decreased, the assessment to a rate made upon it would be unequal, and if unequal unjust. The question therefore is narrowed to this inquiry: looking at the whole parish, has there not been such a variation in the value, such a change from the assessments of 1838, as would make the rate unequal? This question may be investigated in two ways: first, the reasonable probability of what must have occurred; what in the ordinary course of such matters must have taken place save from the occurrence of extraordinary circumstances; secondly, by examining the evidence given in this case, the new rate for Wilnecote and other testimony. First, then, as to the probability of unequal changes having taken place. Consider the circumstances of the case. Tamworth, an extensive and populous parish, seven divisions—the borough itself, Castle Liberty, and five townships—in all covering 10,000 acres, a population of many thousand persons, the number

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of assessments, upwards of 2000; different kinds of property, town houses and country houses, cottages, factories, collieries; agricultural land, both pasture and arable. The interval of time to be covered is twenty-five years at the least. During this period population must of course have multiplied and wealth increased; houses must have been rebuilt, enlarged, pulled down; some lands must have come into better, others fallen into worse cultivation, others, again, remained as they were. Special disturbing causes are not absent. Two new railroads have been established, and several mines and collieries opened. I speak not of the assessments on railroads, or collieries, or mines (I will presume they have been duly rated), but of their necessary effect upon the other property, the increased demand for houses, for gardens, for all the produce of the land. It is, I think, wholly impossible that the increase of population, of trades, of collieries, of any species of manufacture, should not in twenty-five years most materially alter the valuation, and alter it not merely by increasing the values of all properties uniformly, but by the changes, the essential changes, in the relative values of individual properties. It is, I believe, impossible that all property should have increased equally. Demand, which augments value, affects in different proportions the properties adjacent and those distant. I am strongly impressed with the conviction that this reasoning will not easily admit of an answer; but I am not content to rest upon it without much further investigation. I must look to the evidence and alterations as proved by the evidence, and not rely upon theory. Secondly, and now as to the evidence. Mr. Shaw is the only witness who ventures positively to assert that all the properties throughout the parish have increased at a uniform rate. This evidence in one respect deserves particular attention, for Mr. Shaw is a gentleman of knowledge and ability, and has undoubtedly used the most praiseworthy diligence to make the rate conformable to law according to the principle he deemed it right to adopt. But, for the reasons I have already given, I must say that I am greatly surprised at the statement that the value throughout the whole parish has increased, and that the increase has generally been uniform. I cannot but doubt the possibility of this evidence being correct; I cannot reconcile it with the other evidence which I am about to quote. Mr. Dean is of opinion that the value of land has increased more than the value of houses. Mr. Clarson admits that in the borough the value of cottage property has increased disproportionately to the house property. Mr. Dumolo is of the same opinion. Mr. Hill admits the same. But he proceeds to justify the retention of the old assessment unchanged, for the following curious reasons: He says, "I should think such increase (in the cottage property of the borough) has been in the ratio of from 40 to 50 and 100 per cent, which, taking the proportion which the cottage property in quantity bears to the entire property within the borough, and diffusing such increased cottage value over the whole, it would, in my opinion, about give an increase of 10 per cent. on the borough of Tamworth within the last twenty-five years on the rateable value of the whole property therein." By the process of diffusion, any rate could be proved fair. Mr. Dumolo recognises that some townships, Wiggington and Amington, have not advanced like others, Bolehall and Wilnecote. Testimony to the same effect is given by Mr. Clarson. The effect of this evidence is, as might be expected, that the values of all kinds of property have increased, but not in the same proportion; it would indeed have been nothing short of a miracle if they had, for the same causes could not have affected all different kinds of property in the same degree. It is

quite manifest that, if this evidence be true, a rate made on the old assessment must be unequal both as regards the whole parish and the individual ratepayers. In conclusion, I am well aware that there are many facts and much evidence in this case which might properly form the subject of discussion, and which I have omitted to notice—omitted to notice because they are not, in my opinion, necessary to show the foundation of my ultimate conclusion. My judgment is founded exclusively upon the admitted facts in the case and evidence for the plts. I am under the necessity of pronouncing against the validity of this rate. I have no doubt that the churchwardens themselves considered the rate to be fair. But the fact is that, instead of taking care that the rate should be just to each person, they were bent upon making the rate conformable to the poor-law assessment, and of observing the ancient proportions in which each township had contributed to both church-rates and poor-rates. I am of opinion that the original basis adopted by the churchwardens is wholly untenable; that it would have been next to impossible, by all the care and attention that could be bestowed upon it, that a valid, equal and fair church-rate could be framed; and further, that a poor-rate founded on a valuation of twenty-five years' standing could not afford the means of making a fair church-rate; and further, that the alterations were wholly insufficient to remove inevitable inequalities, which indeed are proved by the evidence. I have already stated the reasons, the facts and evidence which lead me to this conclusion. In making a church-rate the greatest precision is necessary; we have for this position the high authority of Bayley, B.; but there is another and more important reason: neither this court, nor even the Judicial Committee sitting as an ecclesiastical court, has any authority to correct or amend a church-rate in any particular. Such is, as I have no doubt, the unquestioned state of the law, and no wonder difficulties arise, for the law has remained unamended from time whereof memory of man is not to the contrary—a great contrast to the poor-law, which has from time to time been amended and rendered more just and practical. I well know it may be said, what were the churchwardens to do with a three-halfpenny rate and 2400 ratepayers? What but follow the accustomed practice: why incur greater trouble and expense? The answer is, no reasons of convenience can alter or make law; and I cannot venture to depart from what I believe to be unquestionable law; indeed the law of the case has not been questioned by the counsel for the churchwardens, and, knowing the learning of those counsel, I should have been much surprised if it had. As to costs, I must condemn the churchwardens in all costs, except those occasioned by the introduction of the question of rating the prebendal lands; these the deft. must pay.

On the representation of the counsel for the deft. the question of apportionment of the costs was reserved for the further consideration of the court, but on the 23rd May, after hearing counsel on the point,

Dr. LUSHINGTON adhered to the decision as stated above.

*Nelson and Son*, proctors for the plts.

*E. W. Crose* for the deft.

[IRELAND.]

REG. V. RATHMINES AND RATHGAR IMPROVEMENT COMMISSIONERS.

[IRELAND.]

## COURT OF QUEEN'S BENCH.

(IRELAND.)

Reported by WILLIAM WOODLOCK, Esq., Barrister-at-Law.

CROWN SIDE.

## REG. V. THE RATHMINES AND RATHGAR IMPROVEMENT COMMISSIONERS. (a)

*Public highway—Mandamus—Stat. 11 & 12 Geo. 3, (Ir.) c. 31—10 & 11 Vict. c. 34—10 & 11 Vict. c. ccliii. (loc. and pers.)*

*The trackway along a canal, vested in the Grand Canal Company by stat. 11 & 12 Geo. 3 (Ir.) c. 31, is a public highway, and since the passing of the Towns Improvement Act is to be repaired by the Improvement Commissioners in whose district it is:*

*So held, by O'Brien, J. and Hayes, J.: dissentientibus Lefroy, C. J. and Fitzgerald, J.*

*The proper remedy to compel the commissioners to repair is by mandamus:*

*So held, by O'Brien, J. and Hayes, J.: dubitante Lefroy, C. J., and dissentiente, Fitzgerald, J.*

This case came on upon demurrers to the pleas put in to the return to a writ of *mandamus*, and also to certain rejoinders filed to the replications to those pleas.

The facts of this case sufficiently appear in the argument and judgments.

*Jellett and M'Donough, Q. C.* for the defts.—Three questions arise in this case: first, as to the liability of the commissioners to keep the road in question in repair; secondly, as to the structure of the pleadings on behalf of the Crown; thirdly, as to the applicability of the writ of *mandamus* in a case of this description. With respect to the first question, it is to be determined very much with reference to the condition of things antecedent to the Towns Improvement Act 1847, and also with reference to the provisions of the Rathmines Improvement Act of 1847, and of the Rathgar Improvement Act 1862. The allegation of the Crown is, that within the Towns Improvement Act and the Rathmines Improvement Act, this is a highway which the commissioners are bound to repair. Sects. 47, 48 and 49 of the Towns Improvement Act are relied upon by the Crown, and also sect. 3, the interpretation section, by which the word "street," when used in the Act, is to mean "road;" and sect. 28 of the Rathmines Act, 10 & 11 Vict. c. ccliii., is that under which the Crown says it has the right to compel the commissioners to keep this road in repair. But this portion of the road cannot be considered a public highway in any sense. The only modes by which a highway could be created at common law were by prescription, by dedication, by Act of Parliament, or as a way of necessity. The Act under which this trackway was formed is the 11 & 12 Geo. 3 (Ir.), c. 31, ss. 33 & 34, *Rex v. The Inhabitants of Netherthong*. The correct way of making a turnpike-road a public highway is to declare it so by Act of Parliament. There is no authority or principle to show that under such terms as are used in sect. 33 of the 11 & 12 Geo. 3 (Ir.) c. 31, and having regard to the circumstances, the trackway along the canal, which is private property, is to be deemed a public highway. The purpose of the Act was to carry out a private speculation. By sect. 33, the clear profits of the undertaking are to be divided among the proprietors. With respect to the dedication of a road by the owners to the public, there must be two things concurrent—an intention by the owner to dedicate, and

an adoption of the act by the public. If the use by the public is referable to the purpose of affecting some particular object of the owner, and not to the purpose of creating a highway, a public highway will not be created: (*Barradough v. Johnson*, 8 Ad. & Ell. 99; *Rex v. Richards*, 8 T. R. 684.) The state of affairs established by the statutes in fact amount to an arrangement made by the township of Rathmines, the grand jury of the county and the corporation of Dublin; sects. 28 & 29 of the Rathmines Improvement Act: (*Blakemore v. The Glamorganshire Canal Company*, 1 M. & K. 162.) Sects. 23 & 24 of the Rathgar Improvement Act 1862 are very important; so also sects. 25 and 26, and stat. 7 & 8 Vict. c. 106, ss. 62 to 66, exclude the power of putting a turnpike-road in repair within this district. The powers of the grand jury originally were given by sects. 64 and 65 of the 6 & 7 Will. 4, c. 116. The effect of sect. 65 was to throw on the owners of turnpike-roads the duty of keeping them in repair. This is either a turnpike-road by stat. 11 & 12 Geo. 3, or else a private road established by a mercantile company for their own purposes; in either cases it does not fall within the definition of a highway. All the profits go to the canal company, and none to the commissioners. The remedy, if any, against the commissioners is by indictment; sect. 49 of the Towns Improvement Act:

*Reg. v. The Trustees of the Oxford and Witney Turnpike Roads*, 12 Ad. & Ell. 427.

The *Solicitor-General* (Lawson, Q. C.) and *Sallican, Serjt.* (with them *Griffith*) for the Crown.—If this road was dedicated to the public one year before the passing of the Rathmines Improvement Act, it is enough. We charge that this was at the time of the Act so dedicated, and then nothing but an Act of Parliament could do away with the effect of the dedication. The trackways were not vested in the company by the Act of 11 & 12 Geo. 3, c. 31; all that the Act did was to give them power to erect toll-bars on the trackway. Then, as to the substantial question in the case. Are the Rathmines commissioners bound to repair this road? We say that they are. It may be that the canal company is bound to do so also, but that does not get rid of the liability of the commissioners. The effect of the stat. 11 & 12 Geo. 3, c. 31, is to constitute this a public highway to all intents and purposes. Any person tendering the toll is at liberty to use the road; and the company could not exclude any one who complied with the terms mentioned in the Act. [*Fitzgerald, J.*—Would there not spring from the statute an obligation on the company which takes the tolls to keep the road in repair?] That may be; but the Crown is at all events entitled to make the commissioners repair the road; the commissioner may then recover over against the company, and force it to keep the road in repair, and apply the tolls for that purpose. The definition of a highway will be found in *Dovaston v. Payne*, 2 Sra. L. C. 94, and this comes within it. The setting up of toll-bars would not destroy the liability of the inhabitants of a parish to repair a road:

*Rex v. The Inhabitants of St. George's, Hanover-square*, 3 Camp. 222;

*Reg. v. The Inhabitants of Lordmere*, 15 Q. B. 689;

*Sutcliffe v. Greenwood*, 8 Price, 535;

*Rex v. The Inhabitants of Oxfordshire*, 4 B. & Cr. 194;

*Reg. v. The Inhabitants of Brightside Bierlow*, 13 Q. B. 933;

*The Northam Bridge Company v. The London Railway Company*, 6 M. & W. 428;

*The Surrey Canal Company v. Hall*, 1 M. & Gr. 392.

One of the objects of the Rathmines Improvement Act, incorporating the general Towns Improvement Act, is to keep the roads in repair, so that this is one of the objects to which the rate can be applied. That Act was amended by the Rathmines and

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Rathgar Improvement Act of 1862, s. 23 of which is important. It is a mistake to say that the grand jury have no power to repair a turnpike-road; sect. 50 of the general Grand Jury Act gives the largest powers of repair to the grand jury. We submit that on the authorities this is clearly a public road; that the commissioners have power to raise rates on the district for the repairs; and that if they please they have power to compel the canal company to apply their tolls on the repairs. The proceeding by *mandamus* is correct:

*Reg. v. The Bristol Dock Company*, 2 Q. B. 64;

*Reg. v. The Severn and Wye Railway Company*, 2 B. & Ald. 646.

The only authority on the other side is the *dictum* of Lord Denman in *Reg. v. The Trustees of the Oxford and Witney Turnpike Roads*, 12 Ad. & El. 427, but he never intended to decide the general principle, and if he did, he has overruled himself in *Reg. v. The Bristol Dock Company*.

M'Donough, Q.C. replied.

*Cur. adv. vult.*

June 23.—FITZGERALD, J.—In this case, the question arises on the return to the writ of *mandamus*, and the subsequent pleadings. I shall advert very shortly to the *mandamus*. [His Lordship then shortly stated the *mandamus*.] The commissioners, in their return, say first, "that the said road in the annexed writ mentioned and described, or any part thereof, is not, and before or at or during any of the said several times in such writ in that behalf mentioned, never was a public highway," and stopping there, there is a full and complete return to the writ. On that there is a full return, and all the questions in the case could have been raised on it; but, very probably with a view to raise more completely the question of law, it goes on to state a number of matters which set up argumentatively the same proposition. [His Lordship then read the rest of the return.] That I have called an argumentative statement of certain matters which, if well founded, would show that the road in question was not a public highway. I do not propose to follow the pleadings further; they are very complicated, but whether in the return or traverse, the facts necessary for the decision seem to be conceded on both sides. There is no fact in controversy, and I make out that two questions of law arise: first, is the road in question a street within the meaning of the statute 10 & 11 Vict. c. 34—a street or road, which the defendants are bound to keep in repair? and secondly, is the proceeding by *mandamus* the proper remedy in the case? The facts appear to be, that before the statute 11 & 12 Geo. 3, c. 31 (Ir.), the road was one of the trackways of the Inland Navigation Corporation. By the Act of Geo. 3, constituting the Grand Canal Company, the property of the corporation, including the trackways, were transferred to the Grand Canal Company, and this piece of roadway is one of the trackways which were so vested in the Commissioners of Inland Navigation, and which were so transferred. The further facts are that, subsequently to the passing of the 11 & 12 Geo. 3, c. 31 (Ir.), the Grand Canal Company erected a toll-bar across this trackway, and from that time to the present the public have enjoyed the privilege of passing along the trackway, and using it for all purposes, paying a toll to the company, and that since the passing of that Act it has remained vested in the company, and has been, subject to this user, in the possession, use, and enjoyment of the company, and furthermore it is a road which, if repaired at all, has been so by the company, and has not been the subject of grand jury presentment. I propose to offer an opinion on the case independent of the pleadings. I cannot understand why the

parties should not have raised the question in a convenient form for the court, as there is not a single fact in controversy between them. The first of the statutes relating to the duties of the Rathmine Commissioners is the Rathmines Improvement Act, 10 & 11 Vict. c. ccliii. (loc. and pers.) The 4th section of that Act provides that the Towns Improvement Act of 1847 shall be incorporated with it. The 25th section recites, "that by the County of Dublin Grand Jury Act, the grand jury of the county of Dublin are empowered to make presentment for the making and maintaining of roads and bridges within the county comprising the Rathmines district, and that the making and maintaining of such works within the district are transferred to the commissioners, and the expenses thereof made chargeable upon the rates authorised to be levied by the commissioners;" and it then enacts "that from and after the passing of this Act it shall not be lawful for the grand jury of the said county to make presentment for the making or maintaining of any road or bridge, or any other work within the said district, which the said commissioners are hereby authorised and empowered to make or maintain, and that in consideration of the said district being hereby made chargeable with the cost of making and maintaining the roads, bridges, and other works which the said commissioners are hereby authorised to make and maintain within such district, it shall not be chargeable with the cost of making or maintaining any other like works within the county or barony save and except those the cost of which, under the said Act of the 7th and 8th years of Her Majesty's reign, are chargeable upon the county at large." And I may say generally of this Act, that in erecting Rathmines into a township, the general intention of the Act as to works or roads, was to place the commissioners in the same position as the grand jury had previously been in, while on the other hand the district was, save for certain purposes, exempted from grand jury taxation. The question will shortly turn on the statute 10 & 11 Vict. c. 34, and some difficulty will arise from its being one of those Acts in which an attempt was made to provide in one Act for two countries having in this respect totally different institutions. The Act is one which may be incorporated with special Acts. In the interpretation clause, without which there scarcely would have been a question, it is said that the word "street" shall extend to and include any road, square, court, alley and thoroughfare within the limits of the special Act. I advert specially to this, that the word "street" is to be interpreted as meaning road or thoroughfare. We now turn to the clauses of the Act under the head of "paving clauses," and by the 47th section it is enacted "that the management of all the streets which at the passing of the special Act are, or which thereafter become, public highways, and the pavements and other materials, as well in the footways as carriage-ways of such streets, and all buildings, materials, implements, and other things provided for the purpose of the said highways by the surveyor of highways or by the commissioners, shall belong to the commissioners. Now, we have not in this country anybody corresponding to the surveyors of highways in England, and it is on this that the difficulty arises, but I believe we never had—certainly not since the grand jury system came to be worked—any such body. It will be observed that by sect. 47 it is the management of the streets which is vested in the commissioners, but with the management were transferred to them the pavements and other materials, and the buildings, &c., provided for the purpose of the said highways. Then by sect. 48 the commissioners, and none others, shall be the surveyors of all high-

ways within the limits of the township, and within those limits they shall have all such powers and authorities, and be subject to all such liabilities, as any surveyors of highways are invested with or subject to by virtue of the laws for the time being in force. Again, I observe on this section that really, if it is applicable to Ireland, I do not know what its meaning is, or what the powers of the commissioners are, they being the powers of surveyors of highways. I have already adverted to the fact of there being no such body in Ireland as that of surveyors of highways, and no laws that I am aware of applicable to Ireland vesting in surveyors of highways any powers at all. Then sect. 49 enacts "that the commissioners shall be guilty of a misdemeanor for refusing or neglecting to repair any public highway within the limits of the special Act, and shall be liable to be indicted for such misdemeanor in the same manner as the inhabitants thereof, or of any parish, township, or other district therein, were liable before the passing of the special Act;" that is for refusing or neglecting to resort to or put in force the powers which surveyors of highways have under the laws in being. Again I advert to this section, that the misdemeanor created by it is for neglecting to exercise the powers of surveyor of highways, and that for that neglect they may be indicted for a misdemeanor. Now, it will be seen that these provisions are wholly inapplicable here, and yet they are the things that we have to deal with, there being no such law in force in Ireland as that alluded to in them, and really I do not know how this liability was to be carried out. The 50th section, which enacts that the trustees of any turnpike-road shall not collect any toll on any road within the limits of the special Act, or lay out any money thereon, is important. This section was not much adverted to, but it seems to me to have a very important bearing on the case, because, while on the one hand it deals with the question of ordinary turnpike-roads and the trustees of those roads, who are generally acting under some Act of Parliament for the public, it leaves wholly untouched the trustees of the Grand Canal Company, who are not trustees for the public, so that while the 50th section deals with the case, if there had been one here, of a public road vested in trustees for the public, it leaves the 11 & 12 Geo. 3, c. 81, and the powers and rights constituted by it, untouched. By sect. 51 "the commissioners may from time to time cause any or all of the streets under their management, or any part thereof respectively, to be paved, flagged, or otherwise made good, and the ground or soil thereof to be raised, lowered, or altered in such manner and with such materials as they think fit; and they may also pave or make, with such materials as they think fit, any footways for the use of passengers in any such street, and cause such streets and footways to be repaired from time to time." These are the sections which it is important to advert to. But it will be seen that whatever rights the whole constitute, there must have been a Queen's public highway—nay, more, it must have been one under such circumstances as that the surveyors of highways, if any such, would have been bound to exercise their powers on it, and in respect of which the inhabitants would have been liable to an indictment. The Rathgar Improvement Act is also recited in the *mandamus*, but it has no more bearing on the case than the other. It just exempts the district provided for by it from grand jury taxation, and transfers the roads to the commissioners; but such was the general intention of those two Acts, to create self-government, to vest powers in commissioners, and to give them, if such could be, the powers of surveyors of highways, and to declare them guilty of a misdemeanor, and subject to be indicted in case of their refusal or neglect

to exercise their powers, just as the inhabitants of the parish or township would have been liable, before the passing of the special Act, to have been indicted. The question will be found to turn, not on the special construction of any one of these provisions, but on the provisions of the 11 & 12 Geo. 3, c. 81 (Ir.), for it appears to me that the character of this road turns very much on the provisions of that statute. That is the Act which enables the present company to carry on and complete the Grand Canal. It will be necessary to advert to three of its sections. The first is sect. 16, by which certain things there specified are transferred to the new company. But to pass from that we then come to sect. 33. I should say that by the sections antecedent to that one, this new company is in its character a trading company; that is, a company associated together to carry on business as water carriers, and to make profits in that way. Accordingly for the profit of their canal they are empowered by the Act of Parliament, by the sections antecedent to sect. 33, to take certain tolls and rates, but as they had certain other property, sect. 33 provides "that it shall and may be lawful for the said company to erect one or more turnpikes upon and across any of the trackways which now are or shall be made on either side of the said navigation, and to take and receive the following tolls, for which they may detain and sell, as is usual at other turnpikes." The road in question on the pleading appears to be one of the trackways mentioned in the statute 11 & 12 Geo. 3, c. 81. The company are not authorised to turn these trackways into public roads, nor are the trackways turned into public roads, but they are empowered to take tolls. The section then enumerates what those tolls are to be, but those tolls are not for the public, but are the private property of the canal company. Sect. 34 provides "that such toll shall be paid only at one gate, and but once in any one day, and that no road which is now public shall be thereby obstructed." Upon referring to these sections the obvious meaning of them is, that these trackways are not public roads, and that no regulation of the canal company shall interfere with the public traffic. But the Act of Parliament takes a distinction itself between a public highway and a trackway for the use of which the company is entitled to take toll. It appears from the pleadings that one of these trackways is that road from Latouche's-bridge to Clanbrasil-bridge, on which the company have created toll-bars, and on which they have permitted the public to traffic; but they have exercised the entire control and dominion over it, and for aught that appears on the pleadings, this is still one of the other trackways used as such, or property a right to use which is vested in them by the Act of Parliament; and I am not aware of any Act which authorises any one to take from the company that trackway. Now we will see the importance of the Towns Improvement Act. Sect. 51 of that Act enacts that "the commissioners may from time to time cause all or any of the streets under their management, or any part thereof respectively, to be paved, flagged, or otherwise made good, and the ground or soil thereof to be raised, lowered, or altered, in such manner and with such materials as they think fit; and they may also pave or make, with such materials as they think fit, any footways for the use of passengers in any such street, and cause such streets and footways to be repaired from time to time." That section is incorporated with the Rathmines and Rathgar Acts, but would not apply to the case of the Grand Canal Company, who are the owners of a road, in respect of which they are entitled to take tolls, and not trustees of a public road. On these Acts the question which I propose to consider is, whether this

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trackway has become a Queen's highway, so as to bring it within the meaning of the Towns Improvement Act, and transfer the liability to repair to the Rathmines Commissioners, and authorise them to go on the trackway and repair it while it remains vested in the company. With respect to this obligation to repair, a number of cases were cited to establish that, though a road be a turnpike trust, still the common law remedy on the parish to repair would exist, and might be enforced by *mandamus*, though the trustees are entitled to take tolls for the purpose of repairs. I will refer to one only, *Reg. v. The Inhabitants of Lordsmere*, 15 Q. B. 689. The question there was whether the parish was bound to repair a road passing within its limits, which had been constructed by the trustees of a turnpike trust, originally created for twenty years, but still in force, and the question was, whether that was a case in which the parish was bound to repair. It was contended that, according to the common law of England, the parish was bound to repair every public highway within its limits, and that it mattered not whether that was of ancient origin or of recent origin; but that once it became a public highway by dedication, the parish was bound to repair. Such was the question raised in that case, and Lord Campbell says there: "If the township is liable at all, it can only be on the ground that the road was a common Queen's highway; and, therefore, if the township is liable, the road is properly described. The question therefore is, whether it be proved that, at the time when the grand jury found the bill, the road was a common Queen's highway? I think that it was one, for statute Geo. 4, c. lviii., authorised the trustees to make the road, as a turnpike-road; and in the preamble the Legislature declare that the road would be a convenience and advantage to the public at large. The Act does not in so many words say that the road shall, when made, be a public highway; and great reliance was placed by the deft.'s counsel on the absence of any such express words. I consider that, however, immaterial; for the Act gives the public a right to use the road, and makes it open to the public. Besides, if express words were necessary, the Act incorporates stat. 3 Geo. 4, c. 126, which does contain words to that effect. Then it is argued, in effect, that the imposition of tolls on those using the road prevents it from being a public common highway. The deft.'s counsel were forced to admit that, if an ancient highway were turned into a turnpike-road, the imposition of tolls would not prevent its continuing to be repairable by the parish; but a distinction was made between an old and a new highway in that respect. But I am of opinion that the rule of law is, that the parish is liable to repair all highways, whether new or old. I concur in what is said on that subject by Abbott, C.J. in *Res v. Netherthong*, "By the general rule of law, the inhabitants of any district who were liable to the repair of all the roads there, previously to the introduction of a new highway, are also liable to the repair of that highway. Where the new road has been made by private persons, dedication by the owner of the soil, and user by the public, and adoption by the parish, are, according to my notion of the law, material circumstances, as proving that an irrevocable licence to use the way has been given to the public, and as being evidence that the way is a public common highway: the liability of the parish to repair is a consequence of its being a public highway. In the present case, the road has become a highway, not by the dedication of the owner of the soil, but by virtue of the Act of Parliament which gives all persons a right to use it for the purposes of traffic till the Act expires, that makes the road a public highway; and an incident to that is, that the township must repair it." He then goes on to deal

with the case of *Res v. Mellor*, where the period during which, by the Act, the road was to be a highway had expired before the road was out of repair, and the court determined that it had ceased to be a public highway. The distinction was taken in *Reg. v. The Inhabitants of Lordsmere*, that so long as the Act continued in force the road was a public highway, and the parish was therefore liable. Now, I take it from that, that in reference to all roads in England, before any liability to repair can arise in the parish, they must be roads irrevocably dedicated to the public by the private owners, and accepted as public highways, or if they are made by Acts of Parliament, there must be words in the Acts which make them Queen's public highways; and as to the imposition of tolls, it appears to me that that would scarcely make any difference as to the character of the road, once it was established to be a highway, for the trustees are trustees of the highway to maintain it. The tolls are a fund to maintain it, but if they are insufficient, their existence does not supersede the liability of the parish. In the cases which arose in reference to roads established by Act of Parliament in England, it will be found that by the Act they were made Queen's public highways; and therefore, by that observation, I dispose of those cases. It therefore remains to be considered whether this is a Queen's public highway? and on the best consideration I can give, I think it is not so, in that sense which would transfer it to the commissioners of the township of Rathmines, and make them liable to repair it. What I rely upon as showing this is, that this is still one of the trackways of the canal, subject to be used by the company in its whole extent, subject to their user as a trackway for the purposes of their navigation; and from all I can see, it may be necessary now or hereafter to use the entire of it; but there it remains as their private property, though subject to any rights the public have acquired in the meantime. But has there been any dedication of this road to the public, or an acceptance of the road by it? I can find none such. It is not a dedication to say, "Upon this road, which we must retain, we give you liberty to pass, paying a toll which will go into our private funds." How have the company dedicated this in a manner that would make it a Queen's highway, would vest it in the Rathmines Commissioners, would have formerly authorised the surveyors of highways, if any, to enter on and repair it, so as to make it more convenient for public traffic; and would now authorise the commissioners to enter on it and repair it as they think fit? What is there either in the 11 & 12 Geo. 3, c. 3, to declare this to be a public highway? The distinction is even taken in the Act between this trackway and a public road; and there is in the provisions about toll-bars a declaration that they are not to interfere with the use of any public road. Well, I can find nothing in the subsequent dealings inconsistent with the position which the Legislature gave the canal company, when it passed the 11 & 12 Geo. 3, c. 31, and authorised them to erect a toll-bar. Now, a matter was stated in the course of the argument which we cannot take into consideration. It is said that a diversion had taken place, and that the true trackway was a path along the canal. That may be the case, but it does not appear on the pleading, and we can only take into account what there appears. On the whole, therefore, it appears to me that this, being a portion of the trackway of the canal, has not become a Queen's public highway within the meaning of the 11 & 12 Vict. c. 84, or within the meaning of the interpretation clause of that Act. The second question was debated when the case was before us on the conditional order, namely, whether a *mandamus* was in this case the proper remedy, or, rather, whether it was a remedy

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at all. On the part of the prosecutor it was said to be the proper remedy; and authorities were cited in which it was said that the courts in England had granted a *mandamus*. On the other side authorities were cited, in which it appeared to be decided that the courts in England never granted a *mandamus* to compel commissioners to repair, but left the parties to their remedy by indictment. One reason was that it was more convenient, and also that the fine imposed on conviction would be expended on the repairs of the road. However that may be, that is not the question I propose to consider, but the question as to whether a *mandamus* is the proper remedy, having regard to the fact of the liability, if any, on the Rathmines Commissioners, being imposed by the Towns Improvement Act, and the neglect to perform it being declared to be a misdemeanor and punishable by indictment by the same Act which imposes the obligation. I allude to the 40th section, which says that "the commissioners shall be deemed guilty of a misdemeanor for refusing or neglecting to repair any public highway within the limits of the special Act, and shall be liable to be indicted for such misdemeanor in the same manner as the inhabitants thereof, or of any parish, township, or other district therein, were liable before the passing of the special Act." The question was before the court on the conditional order, and in making absolute the order, the court guarded itself against intimating any opinion on the question. The Lord Chief Justice, in delivering judgment, expressly stated that the object in making absolute the order was, that the question might be raised more solemnly on the return, and I myself, in adding an observation or two, took care to guard myself in like manner. The impression on my mind was, that it was imprudent to make the order absolute, because an indictment was the true remedy. I find, from the note taken by the reporter of the court, that in following the Lord Chief Justice, I pointed out that the insertion of the remedy in the statute not alone affects our discretion in issuing the writ, but takes away the discretion. That point appears to have been decided in *Rex v. Robinson*, 2 Bur. 799, where Lord Mansfield laid down the law as follows: "The rule is certain, that where a statute creates a new offence, in prohibiting and making unlawful anything, which was lawful before, and appoints a specific remedy against such new offence (not antecedently unlawful, by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued, and no other, and this is the resolution in *Castle's case*, Cro. Jac. 643;" and the ruling in *Castle's case* supports Lord Mansfield. Now, the way I apply that is this. The obligation to repair is the creature solely of statute. It could not be otherwise, as the commissioners themselves are created only by statute, and in respect of the township, there was no obligation to repair before, as the obligation lay on the county of Dublin through the grand jury. So the same statute which creates the obligation gives the remedy by indictment, and I read it "punishable by indictment and not otherwise," unless by a class of cases on the Grand Jury Acts, where an information may be filed. No doubt has ever been cast upon *Rex v. Robinson*. It has been recognised in many cases, especially in *Rex v. Carlisle*, 3 B. & Ald. 161, and applying that rule to the present case, it appears to me that though this is a *mandamus* sought for by the Attorney-General prosecuting on the part of the Crown, this is not a question of discretion; that the discretion is taken away, and that though we made the order absolute, still it is open to us on the return to the writ, as a matter of law on which we were wrong. On those grounds, therefore, I

am of opinion that judgment should be given for the commissioners.

HAYES, J.—When I look at this brief, and find that some twenty-seven points have been put forward to be relied on, I feel I am under a personal obligation to Mr. Jellett for having put them under a sort of hydraulic pressure, and reduced them to three points, which I therefore take up. The first question is, whether a writ of *mandamus* is properly applicable to cases of this description, or whether the party should not be left to an indictment. The next is as to the structure of the pleadings. The next is the question as to the liability of the defts. to repair the road in question. As to the first, the 49th section of the Towns Improvement Act, which is incorporated with the Rathmines Improvement Act, enacts [His Lordship read the section, which has been already given], and it is contended, on the authority of the case of *Reg. v. Robinson*, that the remedy by indictment alone is applicable; but the answer to that, I take it, is a short one. This is not the case of an offence created by statute, which, while creating the offence, also appoints a specific remedy. The offence of neglecting to repair a highway, whosoever may be the party liable to it, whether parish, individual, or any other person, the offence is one at common law, and all the statute does is to transfer to the commissioners the liability which had rested on the parish, but which in Ireland, since the grand jury system was introduced, has been discharged by presentment. The question, then, is, can the remedy by *mandamus* be resorted to as a concurrent and more efficacious remedy than that by indictment; and was the court right in granting the *mandamus* as it did? It purports to be granted on the prayer of the Attorney-General. No case indeed was cited of such a grant, but if we are to be governed by the analogy of the writ of *certiorari*, the exercise of the court's discretion is so much a matter of course that the Attorney-General might almost demand it as a matter of right. The case most strongly relied upon against the propriety of granting the *mandamus* was that of *Rex v. The Trustees of the Oxford and Witney Turnpike Roads*. There two parties had a contest as to the repair of a road. One of them applied for a *mandamus*, and the Court refused it. Though I do not altogether concur in the observations of Lord Denman, I think the court was right. It is an abuse of the writ to make it merely ancillary to a contest between individuals. The case here is very different. The Attorney-General alleges a duty in a public body, and a neglect of that duty, and so he comes here not so much to punish, as to remedy a public mischief. I think that a case within the scope of the writ, and that the court was right in making absolute the conditional order for the *mandamus*. The next question is as to the pleadings. The 79th section of the Common Law Procedure Act 1856 is important. It enacts that "the provisions of the Common Law Procedure Amendment Act (Ireland) 1853, and of this Act, so far as they are applicable, shall apply to the pleadings and proceedings upon a prerogative writ of *mandamus* issued by the Court of Queen's Bench, but subject to any general rules which the said court may make, and which it is hereby empowered to make in relation thereto." This enactment seems to have been lost sight of by both sides. Neither party applied to the court for permission to file a surrejoinder. Passing by this as a mere irregularity, let us look at the general purport of the return. It is averred that this never was a highway. If this is so, *cadit questio*. Then the defts. go on to state several matters intended to show that the road was not such a road as the defts. are bound to repair. The return being in the nature of a plea in excuse, the



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defts. may set out any number of matters which are not inconsistent with each other; and the defts. having set out as many several matters as they think fit, the prosecutor is authorised to plead to, or traverse all or any of the material facts so pleaded. He is not obliged to plead to the whole return, but may select such portions as he thinks material, and make them the subject of a traverse or a plea in confession and avoidance. We now come to the third question. By the 11 & 12 Geo. 3. c. 31, the Grand Canal Company was incorporated for the purpose of carrying on to completion a project which had been undertaken by commissioners, but which was then still unfinished. From the 2 Geo. 1, the Legislature had been engaged in a grand scheme for promoting the inland navigation of the country. Very large sums of money had from time to time been voted, but as the difficulty and expense of the undertaking seemed to increase with its progress, it was resolved in 1771 to have recourse to private enterprise, and then a joint-stock company was formed. By sect. 16 of the 11 & 12 Geo. 3, all the property then vested in that inland corporation, and all moneys granted for the same purpose, were transferred to the Grand Canal Company, and full powers were given to it for completing the works; and as a remuneration for the expense to which they should be put, power was given to them by the 27th section to levy certain rates and duties, therein mentioned, on goods and passengers carried on the canal. By sect. 33 the company is entitled to take tolls on vehicles passing along its trackway, for which tolls it may distrain and sell; and sect. 35 enacts that the clear profits which shall arise to the company from the several duties vested in them by the Act, or so much thereof as shall be thought proper, shall at fixed periods be paid to and amongst the respective proprietors of the joint stock, in proportion to their shares and interests therein. Now, before passing to a later period of legislation, it may be well to notice the state of the law then as to turnpikes. In 1729 the first turnpike-road Act was passed in Ireland. During the ten years then following, Acts were passed for turnpikes on twenty-nine different lines of road. Each Act begins with a recital that the road to which it relates is out of repair and dangerous and cannot be kept in repair by the ordinary course appointed by the laws and statutes of the realm. It then constitutes a board of trustees to levy tolls from passengers, and gives the trustees powers of distress and sale. It then directs the tolls so levied to be applied first in defraying the expenses of procuring the Act, and then in defraying the expenses of repairing the road, and paying salaries, and the trustees are empowered to borrow money. By the 3 Geo. 3. c. 11, special provisions are made as to the tolls on the trackways of the Inland Navigation Corporation. The 5th section enacts, that in order to preserve and keep in repair the several track-roads which then were or thereafter might be made along any canal or navigable river, by the direction of the said corporation, it should from and after the 1st May 1764 be lawful for the said corporation to erect or cause to be erected, one or more gate or gates, turnpike or turnpikes, in, upon, or across any track-road or other road, which now is or hereafter by the direction and order of the said corporation shall be made along or on the banks of any canal or navigable river, and also such toll-house or toll-houses as they shall judge necessary; and the corporation may from time to time appoint such toll and duties to be there demanded, received and taken, as mentioned in the section, as they shall think fit and reasonable; and all the tolls or duties which shall be collected or received, the necessary charges of collecting the same being first deducted, shall be applied to repair and keep up the said road, and if

not wanted for that use, to such other use for the benefit of the works undertaken or to be undertaken by the corporation; and then it gives a power of distress and sale for levying the tolls. Now let us observe here, that the Inland Corporation was maintained not as a public body for its own advantages like the canal company. It was a great company constituted for a great public object; it was supported by taxes laid on the public, so as to create a fund to carry out the project, and therefore not a farthing was to be laid out for the benefit of the Inland Navigation Corporation, but all was to be laid out for the works themselves. Let me here mention also that this is the more important because it appears from the pleading before us that the piece of road here was one of the very pieces of ground for which this enactment was made. This was the state of the law previous to the passing of the Grand Canal Act, at the time these trackways were vested in the corporation for public purposes. There can be no reasonable doubt, then, whether we consider the language of the statute, or the facts, that the trackway was one of the highways of the kingdom, and that the erection of turnpikes was tolerated only by reason of the necessity of securing a fund for the repair of the road. I find nothing in the 11 & 12 Geo. 3 which militates against this. Even without the aid of modern authorities, I would not hesitate to hold that, as soon as the Grand Canal opened for traffic, and turnpikes were raised, it became at once in every part of it a public highway in dedication, over which all subjects of the King had free right of passages at all times, and it could not be said to be in the exclusive possession of the company. The acts also of the company are evidence of a dedication. Are we to be told that what till then was unquestionably a public road was by force of that Act reduced to a private road, and the public denuded of rights which they had enjoyed, and for which they had paid? It is said that the tolls here are to be for the benefit of the shareholders. But it is averred in the return that this trackway had never been repaired by grand jury presentment, and this being the ordinary course, therefore the trackway could not be a highway. This leads me to say a word as to the jurisdiction of grand juries over public roads. At common law the obligation vested in the parishes, and this continued in full force till the institution of the grand jury system, which, I believe, derives its origin in the 10th Car. 1. Now, the object of that was not to annul, but to supersede it by providing a more effectual means of repair. But even the public roads were not exempt from grand jury supervision. Accordingly, by 17 Geo. 3. c. 50, the treasurer of the road might be summoned before the grand jury and examined, and if money was found to be in the treasurer's hands, the grand jury was entitled to make an order to have it expended on the repair of the road. Then we have the 36 Geo. 3. c. 55 (Ir.), sect. 87 of which enacts that nothing in the Act contained "shall extend, or be construed to extend, to take away from any grand jury the power or the obligation of repairing any turnpike-road within their counties, but that every such turnpike-road may be repaired or widened, or footpaths made thereto, in like manner and under the like regulations as if that Act had not been made. It is true that that Act is not applicable to the county of Dublin, but it is a strong legislative declaration, that making a road a turnpike-road does exempt it from grand jury supervision; but this supervision is not to be exercised unless the road is in a bad state of repair. [His Lordship then referred to *Rex v. Netherthorpe*; *Rex v. Oxfordshire*; and *Reg. v. Brightside Bierlow*, and continued:] Such being the state of the law at the time of the passing of the Rathmines Improvement Act, by the incorporation of the Towns



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Improvement Act, the management of all streets was transferred to the commissioners. The inhabitants of the district were exempted from grand jury cess, and the commissioners by sect. 49 were declared guilty of a misdemeanor for refusing or neglecting to repair any public highway within the limits of the special Act, and by sect. 50 it was enacted that the trustees of any turnpike-road should not collect any toll upon any road within the limits of the special Act, or lay out any money thereon. In consideration of the township being made chargeable with the cost of making and maintaining the roads, bridges and other works which the commissioners were authorised to maintain and make within the district, it is enacted by sect. 28 of the Rathmines Improvement Act, that the district should not be chargeable with the cost of making or maintaining any other like works within the county or barony, save and except those, the cost of which under statute 7 & 8 Vict. c. 106, are chargeable upon the county at large. By the Rathgar Improvement Act of 1862, 25 Vict. c. 25 (loc. and pers.) the commissioners are still more sedulously invested with jurisdiction over the roads in their townships. Sect. 23 of that Act enacts that the "grand jury of the county of Dublin shall not have any jurisdiction, power, or authority with respect to the making or maintaining of any of any road or bridge within the district, but all roads and bridges within the district shall be made and maintained by the commissioners at the cost of the district, and the grand jury shall not have any jurisdiction, power, or authority with respect to any other works within the district; and by sect. 24 the commissioners are to have the like jurisdiction, power and authority as to making and maintaining roads and bridges within the district as by statutes 6 & 7 Will. 4, c. 116, and 7 & 8 Vict. c. 106, are vested in the grand jury. Such, then, being the state of the law, little more is required than a calm consideration of it to lead us to a conclusion as to the invalidity of this return. Many cases have been cited: from them all it appears to me that we must hold this to be a highway, and that not the less so because there is a turnpike on it. We need not consider whether sect. 50, as to the collection of tolls, empowers the commissioners to collect tolls; be that as it may, the duty of the commissioners, as it appears to me, is to repair the road.

O'BRIEN, J.—There are two principal questions in this case. It is not my intention to discuss the various matters which are stated in the pleadings. I agree with my brother Hayes's observations in respect to them, and I think, notwithstanding their complication, we are in a position to decide the questions arising in the case. One is, whether the commissioners must repair the road in question; the next is, whether the writ of *mandamus* is the proper remedy? Even if we were now to consider whether we should make the conditional order absolute, I should come to the conclusion that it was a proper case for a *mandamus*. Granting that there is another remedy, I believe the general principle will be found collected in Tapping on *Mandamus*, p. 24-5, that though, as a general rule, a *mandamus* will not issue where there is another equally effectual remedy, yet it will issue where the remedy is not equally convenient. Now, what will be the result of the judgment on *mandamus* for the Crown? That the commissioners will be directed to do the act required. In the case of an indictment the only result will be a fine. It is true, that the fine may be applied in the repairs. It is, therefore, to be considered that the application here is by the Crown, not by an individual, or by even a public officer; but here is an application by the Crown to

compel the commissioners to do a duty which is thrown on them by the Act of Parliament. I shall refer to a case on this very subject; I allude to *Reg. v. The Bristol Dock Company*, 2 Q. B. 64. In that case the writ issued, and a return was made to it, and upon the argument on the return, one objection taken was that the *mandamus* was not, and that an indictment was, the proper remedy in the case. Here is Lord Denman's judgment upon that particular point, "On argument, objection was taken to the writ, because it only enjoined the doing that for omitting which the company are liable to indictment. But we think, even if such an objection did not come too late after the writ has issued, that it is entitled to no weight. Those who obtain an Act of Parliament for executing great public works are bound to fulfil all the duties thereby thrown upon them, and may be called upon by this court so to do. If this breach of contract causes a public nuisance also, that cannot dispense with the necessity of a specific performance of the obligation contracted by them." Here the commissioners assume to themselves the duty which these Acts impose. I think, therefore, that that authority, and those cited in Tapping at the page which I have mentioned, show that the objection cannot be sustained even if it were open, as to which I see great difficulty once the writ has been granted. However, the other question is one which it is perfectly open to the parties to raise here, namely, whether this is a highway, the obligation to repair which is thrown on the commissioners? Now, the first Act to which I shall refer is the General Towns Improvement Act of 1847, which is incorporated in the two special Acts. The 3rd section of that Act contains these words: "The word 'street' shall extend to and include any road, square, court, alley, and thoroughfare within the limits of the special Act," and the 47th, 48th and 49th are the sections which bear more immediately on the question in the case. The 47th says that "the management of all the streets, which at the passing of the special Act are or which thereafter become public highways, and the pavements or other materials, as well in the footways as carriage-ways, of such streets, and all buildings, materials, implements, and other things provided for the purposes of the said highways, by the surveyors of highways, or by the commissioners, shall belong to the commissioners." And sect. 48 says that "The commissioners, and none others, shall be the surveyors of all highways within the limits of the special Act, and within those limits shall have all such powers and authorities, and be subject to all such liabilities, as any surveyors of highways are invested with or subject to by virtue of the laws for the time being in force; and the inhabitants of the district within the said limits shall not in respect of any lands situate within the said district be liable to the payment of any highway rate, grand jury cess, or other payment in respect of making and repairing roads within the other parts of the parish, township, barony, or place in which the said district or any part thereof is situate." This was an Act of Parliament intended to apply both to England and to Ireland. It is certainly a very inconvenient mode of legislation, because words and phrases are used in a general Act of this sort, which are wholly inapplicable to the state of things in Ireland. So that what we must do, unless there is something manifestly repugnant, is to apply it so far as the state of things in Ireland enables us to do. A good deal of stress was laid by Mr. M'Donough on the phrase "surveyors of highways," and on the fact that no such office was known in Ireland. Be it so: the result is that the provisions as to surveyors of highways do not apply to Ireland; but the substantial part of the section, that relating to the management of streets, and the

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vesting of pavements and materials, &c., in the commissioners, does apply: as also that part of sect. 48 which exempts the inhabitants of the districts from payment of highway-rate and grand jury cess. They comes sect. 49, enacting that "the commissioners shall be deemed guilty of a misdemeanor for refusing or neglecting to repair any public highway within the limits of the special Act, and shall be liable to be indicted for such misdemeanor in the same manner as the inhabitants thereof, or of any parish, township, or other district therein, were liable before the passing of the special Act." That seems to me to put the remedy by indictment against the commissioners on the same footing as the remedy by indictment against the inhabitants. Well, I believe, in the recollection of any one no such thing was known as an indictment against the inhabitants of a parish in this country; and I think, if there was an indictment against the commissioners to be supported by this section alone, it would be very difficult to maintain it. Well, we now come to the Rathmines Improvement Act, which incorporates the general Towns Improvement Act, and sect. 28 recites the transfer of the powers of the grand jury to the commissioners. It is said that this cannot apply in the present case, because in point of fact the grand jury never presented for or interfered with this road, but on looking at the 28th and 33rd sections of the Rathmines Act, and the corresponding sections of the Rathgar Act, it is manifest that, though their effect was to transfer to the commissioners all the powers of the grand jury, there is nothing to limit their powers to what the grand jury had. The commissioners had had by the general Act the fullest powers to manage all streets within their district. The grand jury had certainly nothing to do with this particular road, but there is nothing in the 28th section of the Rathmines Act either expressly or by implication to show that the commissioners are only to deal with the roads which the grand jury had. Then the question is, is this a road the repairing of which is cast on the commissioners? In my opinion it is. The state of the law, the several Acts of Parliament relating to the canal company, have been fully stated by my brothers. I shall only refer to one, the 11 & 12 Geo. 3, c. 31 (Ir.). The 33rd section of it allows the company to erect turnpikes on their trackways, and to take tolls, and sect. 34 provides "that such toll shall be paid only at one gate, and but once in any one day; and that no road which is now public shall be thereby obstructed." That provision as to public roads not being obstructed cannot be relied on as drawing any distinction between the trackway and public roads; but the Legislature gave the public a right to use that as a highway, provided they paid a toll. The power of the company is limited to the amount of the toll, and to its being paid but once. Subject to those provisions, I think the company had a right to the road, and I think it is a public road within the meaning of those subsequent Acts. What is the definition of a highway? A very short definition will be found in the note to *Dovaston v. Payne*, 2 Sm. L. C. 128. It is there said, "A highway is a passage which is open to all the King's subjects." The writer goes on to say: "Mr. Wellbeloved defines it to be a thoroughfare; but there are still doubts whether a highway must necessarily have been originally a thoroughfare; and it seems, at all events, that if a highway were stopped at one end, so as to cease to be a thoroughfare, it would in its altered state continue a highway: (per Patteson, J., *Rex v. Marquis of Downshire*, 4 A. & E. 713.) However, I have adopted the above definition as the safest; since, whether or no a passage to be open to all the King's subjects need be a thoroughfare, it is clear that

every passage which is open *de jure* to all the King's subjects must be a highway." That this is a highway to which the public have a right to resort, is clear. That case in 15th Q. B. 689 is decisive on that proposition. It will be observed, in reading the judgment of Lord Campbell and of the other judges of the court, that they held that the fact of the party who dedicated the road having a toll on it does not prevent it from being a highway. Upon that state of things, what is the reason why these parties should not be bound to repair? Is it the fact that the canal company receiving the toll may be the party primarily liable. That may be; but the commissioners are answerable to the Crown, and if the canal company have received tolls, and are bound to keep the road in repair, it is open to the commissioners to proceed against them. Upon these grounds, I think that our judgment should be for the Crown.

LEFROY, C. J.—On the first question in this case, I am of so doubtful an opinion, namely, whether a *mandamus* would lie, that I would rather concur with my brother Fitzgerald, for the purpose of leaving it an open question to have more consideration than it has had from me. The inclination of my mind is to follow the doctrine laid down by Lord Mansfield in the case cited by my brother Fitzgerald. On that part of the case I give no definite opinion, but I concur for the present in the view taken by my brother Fitzgerald. With respect to the main question, whether this was a public road, the duty of maintaining which was thrown on the commissioners because it was a public road, I must say, if I were to go into the case as I should desire to do, I could do little more than take the line and follow the course which has been so clearly, and, in my mind, so satisfactorily taken by my brother Fitzgerald, leading to the conclusion which he came to, and in which I fully concur, that this was not a highway within the meaning of either the special Act or the Towns Improvement Act. The ground upon which it has been argued that this was a public road, was by speaking of a dedication—a dedication created by the Act of Parliament or authorised by it, and acted upon, or created by the company *pleno jure*, having got the property—the land, which they have by their Act dedicated to the public. Well, now, with respect to the act of dedicating it to the public, and making these trackways public roads, or making it imperative on the company to contract or control their absolute right over these trackways; see what the effect of giving that construction to the Act of Parliament would be. It would literally make it *felix de se*. Can any man who ever saw the way in which the canal company carry on business in respect to these trackways, suppose that they could for an hour carry on business if they were subject to be interrupted by the general use of the public going along the road, while their horses were drawing their boats by the same road? And while that is going on, the whole body of the public is to be at liberty to take up the trackway as it pleases! The object of the Act of Parliament was to give the company the power of allowing the public to use the road, simply as a source of revenue, so far as they conveniently could; but they were not forced to relinquish to the public this right of ownership, which was essential to their enjoyment of their property. The object was to allow the company to turn these trackways to account, for their benefit, so far as they conveniently could; and they were allowed to erect toll-gates and take tolls, and with a view to raise a revenue so far as they conveniently could, they are allowed to open these trackways to the public, as often, and so long, as they may find it convenient and

compatible with the carrying on of their work. They were obliged to make a profit as far as they could, consistently with the Act of Parliament, but are we to consider that as a grant to the public of a right which would be totally inconsistent, if it were to be carried out, with the great principle of the Act, which is to benefit this great public concern, and to induce persons to engage in it by giving them the property in these trackways, and enabling them to make as much profit as possible, not to place them in a state of impossibility of carrying on their work, but to give them an additional advantage? As has been observed by my brother Fitzgerald, there is a plain distinction on the face of the Act between the public highways and these trackways. The very provision showing this distinction is decisive, and therefore I confess without repetition; and I could not, without repetition, add anything to the line of argument which he has taken, without going further into the case than this. Looking at the object and recitals of the Act, I would say that it would be giving it a monstrous construction and making it *felix de se*, if the construction now contended for were to prevail. I concur with my brother Fitzgerald in *omnibus*; on the first question in order that it may remain open, but as to the other I have no doubt at all.

The COURT being equally divided, Fitzgerald, J., as the junior judge, withdrew his judgment, and there was

*Judgment for the Crown.*

#### V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON and EDWARD WENLOW, Esqrs., Barristers-at-Law.

Wednesday, Nov. 9, 1864.

CUBITT v. SMITH.

*Building contract—Regulations of the Board of Works—Costs.*

*Where a man, under contract to build according to a specified plan, and according to the Metropolitan Building Acts, commenced building according to the plan, which was in some particulars in contravention of the Building Acts, and upon being cautioned by the board, stopped building, and refused to proceed; it was*

*Held, that he was bound to rebuild in conformity with the plan, modified so as to meet the requirements of the statutes.*

This bill was filed for the purpose of enforcing the performance of a contract entered into on the 7th April 1859, between the plts. Mary Anne Cubitt, George Cubitt and Andrew Cuthell, executrix and executors of the will of the late Thomas Cubitt, and the deft. George Smith, builder; whereby the plts. agreed to demise to the deft. a piece of ground and wharf on the south-east side of the Pimlico-road, and south-west side of St. George's-road, abutting south-east on the Grosvenor-canal, together with a house to be erected thereon, as thereafter mentioned, together with the exclusive use of the canal, for the term of sixty-six years from Lady-day 1858, at the rent of 70*l.* per annum.

The deft. agreed that he should not be entitled to the lease thereby agreed to be granted until the house thereby agreed to be built should have been built and roofed in; and he also agreed that he would, within eighteen months from the date of the agreement, erect and build, in a good and workmanlike manner, a brick dwelling-house, with all proper and necessary drains, fence walls, and appurtenances, of the value of 700*l.* at the least, such house to be built not less than three stories high

above the basement, and in elevation to be of a character corresponding with the house erected by Messrs. Lambert and Chapman, on the north-east side of St. George's-road, fronting the Pimlico-road, and near to the premises thereby to be demised, "or according to an elevation, section, plan and specification to be previously approved of, in writing, by the plts., and according to the Act or Acts of Parliament for the time being in force for the regulation of buildings in and near the metropolis, and to the satisfaction of the plts. or their successors in title, and of the surveyor for the time being of the ground landlord of the said premises, not only as regarded the mode of doing the work, but also as to the quantity, quality, species and scantling of the timber and other materials to be used." There was a proviso for re-entry if the deft., his executors or administrators, should not in all things perform that agreement, so far as the same related to and ought to be performed by him.

Soon after the execution of the agreement the deft. entered into possession of the land, and had ever since made use of it for his purposes of business as a builder.

After eighteen months, the time specified in the agreement within which the building was to be commenced, had elapsed, the deft. began to build the house according to a plan signed by one of the plts. The boundary wall on the east side and the foundations had been completed, and brickwork had been carried to the height of about three feet. The front line of the intended house next Pimlico-road projected three feet beyond the adjoining one, the occupier of which objected to the house being built in that manner, and complained to the Metropolitan Board of Works, who thereupon informed the deft. that he must build in a line with the adjoining house.

The bill alleged that the plt. (Cuthell), at the request of the deft., went to look at the building, and after having done so, informed the deft. that he considered there would be no difficulty with the Board of Works if he explained the matter to them, and met their views so far as they were reasonable, and the deft. promised that he would do so, and modify his plans so as to meet their views. The deft., however, did not proceed with the building, and the ground on which he had commenced it, with scaffold poles erected on the front and flank, and inclosed by an unsightly fence, was then in the same condition in which it was when the deft. stopped building in the latter part of 1861.

The plts. further stated that they were unable to obtain a lease of the premises comprised in the agreement from the ground landlord until such a house as that described in the agreement had been built, and they were therefore compelled to take the present proceedings.

The bill prayed that the deft. might be decreed to erect and build, in a good and workmanlike manner, &c., on the said piece of ground fronting the Pimlico-road, a brick dwelling-house with all proper necessary drains, of the value of 700*l.* at the least, &c. (following the language of the agreement), and near to the premises by the said agreement agreed to be demised; and to be built to the satisfaction of the plts., and of the surveyor for the time being of the ground landlord, &c.; the plts. being ready and willing to waive the benefit of the provisions of the said agreement relative to the approbation of themselves and the landlord's surveyor, if the court should decline to give the plt. the relief before prayed, without such waiver. Also, that the deft. might be decreed to accept a proper lease of the premises at the time and on the terms mentioned in the said agreement, the plt. offering to execute such lease. Also, for damages for the breach of contract.

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The deft., by his answer, alleged that he had been in communication with the Board of Works, and had endeavoured, but without success, to remove or modify their objections to the intended house; but he denied that he had promised to modify his plans so as to meet their views, inasmuch as the alterations required by the board would have had the effect of depriving him of the benefit of the foundations, for which he had, with the knowledge of the plt., paid the sum of 400*l.*, and also of taking away a portion of land eligible for building.

*Malins*, Q.C. and *Fischer*, for the plts., contended that the deft., according to the agreement, was bound to build a house. He must either complete that already commenced, and take upon himself the responsibility of acting in defiance of the regulations of the Board of Works, or erect one afresh, in conformity with those rules. On the other hand, the plts. were perfectly willing to relieve the deft. from his contract altogether, by receiving back the land and applying it to their own purposes. One of these alternatives must be adopted; and they asked for the costs of the suit.

*Bacon*, Q.C. and *G. S. Law*, for the deft., argued that, owing to the intervention of the Board of Works, it had become impossible specifically to carry out the agreement. To build in accordance with the plan therein specified would be to act in direct opposition to the board, and that the deft. was not prepared, and could not be compelled, to do so. The house had been commenced in accordance with the plans specified in the agreement, and the plts., at the time of its commencement, had raised no objection. 400*l.* had been already spent by the defts. in its erection, and this sum would be lost were he compelled to begin again. It would be a peculiar hardship, and one which the court would not inflict, but rather leave the plts. to their remedy at law. They cited

*Norris v. Jackson*, 1 J. & H. 319;  
*Brace v. Wehnert*, 25 Beav. 348.

**THE VICE-CHANCELLOR.**—The agreement is peremptory in its provision that a house shall be built which shall be in accordance with the Acts of Parliament for the time being in force for the regulation of buildings in and near the metropolis. That is a perfectly clear and sensible stipulation, and it is one which bound both parties. The deft., however, undertakes to show that, by the terms of the agreement, he was bound to erect a building which would be in violation of the regulations of the Board of Works; or, in other words, that he was bound by the agreement to erect a building which would be in violation of its own terms, which was nonsense. A plan has been approved of, which in every respect shows what the elevation, and the form, and the dimensions of the house were to be. There was an inadvertence as regards the site of the house as delineated upon the plan, and it was not such as to meet with the approval of the Board of Works. But there is not enough to show that the site might not be adapted to the regulations of the board. It is said, however, that if it were so adapted the deft. would be exposed to a loss of 400*l.*, and that therefore the agreement ought not to be performed by him. The cases cited are of no authority in this case, because here a plan has been approved of by both parties, and all done except as to the site, and that is to be regulated by the regulations of the Board of Works. The bill prays that the deft. may be decreed to erect a building according to the plan approved of, except so far as it relates to a site of the house, which must be according to the Acts of Parliament in force for the regulation of

buildings in and near the metropolis. The declaration will be, that the agreement must be specifically performed, and it appearing that a plan has been approved of except as to the site, the deft. be ordered to erect a house accordingly, save that it must be in accordance with the Acts for the regulation of buildings in and near the metropolis. If it had not been for the course pursued by the deft., I would have made the decree without costs, the demerits being equal upon both sides; but under the circumstances I will not deprive the plt. of his costs.

Solicitors: for the plts., *James and John Hopgood*; for the deft., *Law, Hussey and Hulbert*.

### COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Friday, Nov. 11, 1864.

PRICE AND ANOTHER V. KIRKHAM AND ANOTHER.

*Loan society—Principal and surety—Bond—Action on against surety—Notice to surety of principal's default—Equitable defence—Printed rules of society, how far binding on surety.*

In an action upon a bond and a promissory note, *defts.* pleaded, by way of equitable defence, in substance, that the bond and note were made by *defts.* as sureties for *P.* in his lifetime, to secure the payment by *P.* to a loan society whereof *plts.* were treasurer and secretary, of 50*l.* by weekly instalments of 5*s.*, and that the said bond and note were made upon the terms and conditions that *defts.* should only be liable thereupon to the extent of any deficiency in the amount of such payments by *P.*, and that in the event of *P.* becoming more than four weeks' payments in arrear, the committee (whereof the *plts.* were members) should immediately inform *defts.* of the same. Averments of *P.* becoming more than four weeks in arrear, and failure of the committee, or *plts.*, or any person, to inform *defts.* thereof until a long and unreasonable time after *P.*'s death, and after the death of a co-surety with *defts.*, whereby *defts.*' risk as sureties was improperly increased, and they were precluded from enforcing payment by *P.*, and were greatly damaged:

*Held*, that a rule, in a book of printed rules of the society, stating that "if any member who has had his share advanced becomes more than four weeks' payments in arrear, they (the committee) should immediately inform the sureties of the same, and have power to institute legal proceedings against them," even if it were binding and obligatory upon members of the society as between themselves, yet was no part of the contract between the *plts.* who were members, and the *defts.* who were not members, and did not enable *defts.*, as sureties, to set up the want of such notice as an equitable defence to *plts.*' action.

**Declaration.**—First count:

On the joint bond of *defts.* dated 8th Dec. 1856, whereby they became bound to *plt.* in 100*l.* conditioned for payment of 50*l.* on 1st Jan. 1857 and afterwards on 1st Jan. 1857 said 50*l.* became and was due and payable to *plt.* and was still unpaid. Second count:—On the joint promissory note of *defts.* of the like date for 50*l.* payable to *plt.* on demand for value received, and default in payment, and with the common money count. Claim 23*l.* 11*s.* 2*d.*

**Pleas:**

2. Equitable plea to first count. That the bond was made and entered into by *defts.* solely as sureties for one *Poole* in his lifetime, now deceased; that is to say, to secure the payment by *Poole* to a certain loan society, whereof *plts.* were treasurer and secretary respectively, of 50*l.* by weekly instalments of 5*s.* And the said bond was made and entered into by *defts.* upon the terms and conditions that *defts.* should only be liable upon such bond to the extent of any deficiency in the amount of the payments to be so made by *Poole*, and that in the event of *Poole*'s becoming more than four weeks' payments in arrear, the committee (whereof *plts.* were then and during all the

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time herein mentioned members) should immediately inform defts. of the same. Averments of materiality of the observance by plts. of the said terms, of which plts. at the date of bond and always had notice, that Poole afterwards became more than four weeks in arrear; that neither the committee, nor plts., nor any person informed defts. of the same immediately, nor until the expiration of a long and unreasonable time after Poole's death and the death of a co-surety with defts., &c., whereby defts.' risk as sureties was improperly increased and defts. were precluded from enforcing payment by Poole.

3. Equitable to the first count. That defts. made the bond solely as sureties of Poole, and for the purpose of securing payment by him of the money, in plea 2 mentioned, by the instalments and in manner therein mentioned, and upon terms and conditions that defts. should be only be liable to the extent therein mentioned, whereof plts. then and always had notice. Averment of subsequent forbearance and giving of time by plts. to said Poole, without defts.' consent, for a good consideration for payment of the said instalments, beyond the time when the same respectively became due, to wit, until the death of the said Poole, whereby defts. were greatly damaged.

5 and 6. Equitable pleas to second count applicable to the promissory note, similar in terms to the second and third pleas to the first count applicable to the bond.

The plts. are the treasurer and secretary of the Derby and Derbyshire Mutual Loan and Investment Society. The defts. are sureties for a loan of 50*l.* advanced to one Poole, a member, since deceased. The amount actually advanced to Poole was 24*l.*, for which he had to repay 50*l.* by weekly instalments, the defts. joining in the bond and note as sureties only. Poole repaid to the society in his lifetime, by weekly instalments, 27*l.* 18*s.* 10*d.*; the last payment appears to have been made in May 1859. He died in Sept. 1859, and a co-surety about two years ago. No notice was ever given to either of the defts. that the loan had not been repaid until service of the writ in this action, in May 1862.

In rule 11 of the printed rules of the society is the following passage:—"If any member who has had his share advanced becomes more than four weeks' payment in arrear, they (the committee) immediately inform the sureties of the same, and have power to institute legal proceedings against them."

At the trial before Martin B., at the London sittings after last Trinity Term, a verdict was found for plts., and leave was reserved for defts. to move to set it aside, and enter a verdict for defts. on the ground that the facts disclosed an equitable defence, and leave was also given to amend the pleadings if necessary, and a rule having been accordingly obtained by Field, Q.C. to that effect in this term,

Hayes, Serjt. (with Mellor), for plts., now showed cause against it. [MARTIN, B.—I take it that, if on the facts there is a defence, the defts. are not confined to the plea as drawn, but will be entitled to frame their plea to meet the case.] The defts. were sureties for a member of the loan society, but were not themselves members of the society. On a member's obtaining a loan he has not only to pay the 5*s.* a-week, but he, together with a surety, enters into a contract such as that contained in the bond and promissory note on which this action is brought. Defts. rely on the clause in rule 11 as to the surety's having notice of the principal being in arrear. [BRAMWELL, B.—These rules are, so to speak, the constitution of the society, and as between the members rule 11 may be applicable, but how does it apply to the surety who is not a member?] Where there is a clause in an agreement between a principal and a debtor, in which there is a term in favour of the principal and surety, if there is a breach it will operate in discharge of the surety. But that is not so here. As between members, the rules are binding; but here there was no breach of contract, unless it is open to defts. to qualify the bond and note by setting up this rule, which is solely between the mem-

bers, and with which the sureties have nothing to do: (*Brown v. Langley*, 4 M. & G. 466; 12 L. J. N. S., 62, C. P.) In that case, too, a copy of the rules was given to the defts., which was not so here. Prejudice to the surety is the foundation of these cases: (*Watts v. Shuttleworth*, 1 L. T. Rep. N. S. 515; 5 H. & N. 235; 29 L. J. 229, Ex.; affirmed in error, 5 L. T. Rep. N. S. 58; 7 H. & N. 353.) But that case is distinguishable, for there it was part of the contract that the principal should insure, and it was a breach of that contract which prejudiced and so, as the court held, discharged the surety. Here there was nothing of that kind; in fact, by the indulgence given, the sureties are here only called on to pay about half the 50*l.*; whereas, had they been called on at the first moment, they would have had to pay all. [POLLOCK, C. B.—Surely no mere forbearance or abstinence of the creditor from suing the principal, provided he does not give time, releases the surety?] These rules cannot be imported into the contract as a matter of evidence; and secondly, they do not bind plts. to give the notice at all; they merely give them the power to do so if they choose. [PIGOTT, B. refers to *Gordon v. Roe*, 8 E. & B. 1065; 27 L. J. 185, Q. B.]

L. Kelly (with whom was Field, Q. C.) contra, for defts.—Rule 11 was obviously made not only to regulate the rights of the principal, but the position of the sureties to protect them. Nor is there any reason why that should not be so. What is the object or utility of the rule if the surety is not to have notice and be put on the *qui vive* as soon as the principal becomes in a precarious condition. The plea sets up a good equitable defence. It is obvious defts. were only sureties for the due performance of the contract by the principal. [POLLOCK, C. B.—Is there any case which says that a creditor is bound to exercise and enforce all and every condition which it may be in his power to do against a debtor?] Rule 11 is relied on as a contract between the parties on the faith of which defts. became sureties. True they entered into a bond to pay 50*l.* in two months, and a promissory note on demand for the same amount; but they knew that was not the real contract, but that the principal was to pay 5*s.* a-week. The general doctrine laid down in *Pooley v. Haradine*, in E. & B. 431; 26 L. J. 156, Q. B., is relied on by defts. here, that equitably, under the C. L. P. Acts, a surety may show that he is a surety, and then is entitled to all his rights as such—one of such rights in the present case being to have immediate notice of the principal's default. That case was affirmed in the Ex. Ch. in *Greenough v. McCreland*, 2 L. T. Rep. N. S. 570; 30 L. J. 15, Q. B. Had defts. been sued on the bond at the expiration of the two months, they might equitably have shown the circumstances under which they executed it. By plts.' default they have lost their remedy against their principal, and their risk is increased also by the death subsequently of a co-surety, and so they are greatly prejudiced.

POLLOCK, C. B.—I believe that we are all of opinion that this rule ought to be discharged. I cannot express my views better than in the language used by my brother Bramwell in the course of the argument. The general rule of law in respect to matters of this sort, where there is a surety, is this: the creditor is entitled frequently to make his demand for a certain period, and to enforce it in a certain way; but provided he does not tie his own hands up so as to prevent him from acting, he is not at all bound to do so. He may abstain from using any right that he possesses, and whether that is advantageous to the surety or not is not the question. The thing to be considered is, is he bound to do it? If he is not bound to do it, the

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[C. P.]

surety cannot compel him. I think no case has been cited in any degree countervailing the doctrine that has been laid down, and for that reason I think the rule ought to be discharged.

BRAMWELL, B.—I am of the same opinion. Mr. Kelly does not dissent from what is stated by my Lord Chief Baron. But he says, here was a written contract that plts. would not go against the surety until after notice of the principal's being in arrear for more than the four weeks. That is the only question that he raises, and the only question that he could raise. I do not think more could have been said in favour of it than Mr. Kelly has said. I am of opinion there is nothing in the limited terms of the society's rules. It is a statement of the duties of the officer, who is to inform the surety if default is made in payment for more than four weeks, but it is not obligatory on him to do so as between the plts. and the surety.

CHANNELL, B.—I am of the same opinion. I do not dispute the doctrine in *Pooley v. Harradine*, that the defts., though apparently on the face of the bond the principal debtors, may show themselves by evidence *dehors* the contract to be only sureties, and may avail themselves of any equitable defence which a surety may be entitled to set up. There is no attempt here on defts.' part to set up any binding arrangement between the creditor and the principal debtor, which is *dehors* the contract, but only an attempt to show that the contract entered into with the sureties was a contract that entitled them to say that they were only to be sued after notice given to them, according to the rules, of the principal being more than four weeks in arrear, and I do not think that such was the contract.

FIGOTT, B.—I am of the same opinion.

*Rule discharged.*

Defts.' attorney, R. H. Wilkins, 19, King's Arms-yard.

### COURT OF COMMON PLEAS.

Reported by W. MAYD and LUXLEY SMITH, Esqrs.,  
Barristers-at-Law.

June 18 and July 4, 1864.

READ v. EDWARDS.

*Game—Action for damages done to by deft.'s dog—Scienter.*

*The deft. kept a dog which was in the habit of hunting on its own account, and had done so in the plt.'s wood, where he preserved game, of which fact the deft. had due notice: but notwithstanding he took no steps to restrain the dog, and he again got into the wood and killed and disturbed the game:*

*Held, in an action by the plt. against deft. for the damage done to the game, that the action was maintainable:*

*Also, that there should be no arrest of judgment, because the averment in the declaration that the dog was accustomed to pursue game should be taken to be proved in the sense in which the action was maintainable.*

**Declaration.**—Second count:

For that on divers days and times the deft. then knowing that certain of his dogs were accustomed to hunt for and pursue game, and also then knowing that the plt. preserved and had game in the wood and plantation of the plt. hereinafter mentioned, so negligently kept the said dogs near to the said wood and plantation, that through and by reason thereof the deft.'s said dogs broke and entered the said wood and plantation of the plt. called "Hookering-wood," situate at &c., and trod down, damaged and destroyed the herbage, soil and underwood thereof, and ran about, hunted, chased, pursued, drove about and disturbed, and killed and destroyed the game, pheasants, hares and rabbits which were in the woods; by reason whereof large quantities of the said game, &c., were

greatly terrified and affrighted, and caused to leave the said wood and plantation and were injured; and by reason of the premises the plt. hath been and is seriously damaged and injured, and the plt.'s right to shoot and sport in the said wood and plantation hath been spoiled and damaged, and divers moneys heretofore expended and laid out in and about and incident to the raising, rearing, feeding, taking care of and watching the said game, &c., became and were wholly lost to the plt.; and the plt. was thereby caused to incur greater expense than he would have done in and about the watching and taking care of the said wood, game, &c.; and the plt. hath also thereby been deprived of the said game, &c., and of the enjoyment thereof, and of having such pleasure and recreation therein, which otherwise but for the premises he would have had; and also thereby the plt. hath been deprived of divers great gains and profits which otherwise and but for the premises he would have derived, and which might and would have accrued to the plt. therefrom, and from the disposal thereof.

To this count the deft. pleaded: 1. Not guilty. 3. That the dogs were not deft.'s. 4. That the wood was not plt.'s. 5. So far as related to the alleged right to shoot and sport, that the plt. had no right to shoot or have sport as alleged. 6. That deft. did not know that the said dogs were accustomed to hunt for and pursue game, nor did he know that plt. had and preserved game in the said wood.

Issue was joined on these pleas at the trial before Cockburn, C. J., when a verdict was found for the plt. on the second count with 5*l.* damages.

The following were the facts of the case:

The deft. kept dogs at his house, which was some distance from Hookering-wood, in which, as the deft. knew, the plt. preserved game and reared pheasants under hens; one of these dogs had been frequently seen by the plt.'s keepers hunting alone in this wood, and they cautioned the deft. about it, and told him he must keep it at home. The deft. did not, however, fasten the dog up, or do anything to insure its keeping at home; and in the early part of August the keepers found it with another dog, not proved to be the plt.'s, hunting in the wood, and in the act of destroying a large quantity of young pheasants, immediately around the coops in which the hens were confined. The plt. thereupon brought his action. A rule having been obtained, calling on the plt. to show cause why the verdict found for him should not be set aside, pursuant to leave reserved, on the grounds that there was no evidence of any infringement of the plt.'s right of shooting and sporting, and that the second count was framed for an infringement of the plt.'s right of shooting and sporting, and there was no evidence of any infringement of such right, or for a new trial, on the ground of misdirection in leaving to the jury the question of the deft.'s negligence, and in not telling them that the destruction of game was no ground of action; or to stay entry of final judgment on the ground that the second count disclosed no cause of action.

Hayes, Serjt. (*Metcalf* with him) now showed cause.—The count is in case for damages done by an animal that ought to have been restrained by its owner. The *scienter* is that the dog was accustomed to hunt by itself and pursue game; but if the deft. contends that it is in the nature of a dog to hunt game, it might also be contended that it was in his nature to worry sheep, but nevertheless it is clear that an action would lie for negligently keeping such dog:

*Hartley v. Harriman*, 1 B. & Ald. 620;  
*Cox v. Barbedge*, 18 C. B., N.S., 480.

Also, if a man fires a gun near the decoy of another, with intent to damage him, he would be liable to an action:

*Keeble v. Hickeringill*, 11 East, 574, n.;  
*Carrington v. Taylor*, 1b. 571.

[KEATING, J.—Though there is no property in game, is there not nevertheless a right to have it kept undisturbed?] Certainly, for the keeping of game is both lawful and profitable. It is different

in the case of a rookery, because the birds are of themselves destructive, and not good for food, and are not protected either by common or statute law. They also cited

*Hannam v. Mockett*, 2 B. & C. 934;  
*Rigg v. Earl of Lonsdale*, 1 H. & N. 923;  
*Blades v. Higgs*, 13 C. B., N. S., 844; 7 L. T. Rep. 798;  
*The case of the Swans*, 4 Co. 82;  
*Reg. v. Head*, 1 F. & F. 850;  
*Reg. v. Garnham*, 2 F. & F. 347;  
*Reg. v. Cheaper*, Den. C. C. 861;  
*Reg. v. Platt*, 4 E. & Bl. 860.

*O'Malley, Q.C. and Keane, Q.C.* appeared in support of the rule.—The *scienter*, and not the negligence, is the gist of the action. Here the *scienter* alleges that the dog was accustomed, not to kill game, but to hunt and pursue, and it has never been held that a dog must not be kept because it is his nature to hunt:

*Mayson v. Keeler*, 1 Lord Raym. 606;  
*May v. Burdett*, 9 Q. B. 101.

Trespass will not lie for anything which a dog may do without the will of its master:

*Brown v. Giles*, 1 C. & P. 118;  
*Mitten v. Fandrye*, Poph. 161;  
*Rez v. Huggins*, 2 Lord Raym. 1574.

The plt. must also show, in order to prove his declaration, that he had a complete property in it; but this being live game, he could not have such property.

*Cur. adr. vult.*

*July 4.*—WILLES, J.—In this case the declaration stated that the plt. was possessed of land on which he had pheasants and other game, and the deft. was the owner of a dog which was accustomed to chase and pursue game, and that this mischievous disposition of the dog was known to the deft., its owner, who nevertheless was negligent in keeping him, and let him loose, and that the dog entered the plt.'s land and injured and destroyed the game thereon. That was the averment in the declaration, and at the trial, before the Lord Chief Justice of England, it was proved that the dog had a habit, not merely of chasing and pursuing game in a sense in which all or most dogs have that propensity, but that this dog had the habit of going out and hunting game on his own account, and in that sense the jury found the declaration proved as to the alleged mischievous disposition of the dog; and it was also proved that the deft. the owner, notwithstanding, let the dog loose, and consequently, that he did get into the plt.'s land and injured a considerable quantity of game, including some young pheasants that were under hens. The Lord Chief Justice directed the jury to find for the plt., if that was their view of the facts, and they did so find for the plt.; but leave was reserved to move this court to enter the verdict for the deft. Mr. O'Malley obtained a rule to that effect, or, in the alternative, to arrest the judgment upon the ground that no such action was maintainable. The case was argued before my brothers Williams, Byles, Keating and myself. We took time to consider because of the novelty of the case; and I now proceed to deliver the judgment of the court. We discharge the rule to enter a nonsuit or a verdict for the deft., because the declaration was proved, and proved in a sense in which, according to our judgment, there was a cause of action. Had the case turned upon the question, whether the owner of a dog is answerable in trespass for every unauthorised entry of the animal into the land of another, which was the case adduced of the owner of an ox, we should have been slow to answer the question in the affirmative; but we are aware of no authority for the existence of this more extended liability: and there are reasons, upon which we need not now enter,

for distinction in this respect between oxen and dogs or cats, on account of the difficulty and impossibility of keeping the latter under absolute restraint, and the slightness of the damage which they ordinarily do in their wanderings; and the latter class of animals by the common usage of mankind are allowed a greater degree of liberty. In the present case, however, we must remember that it was proved at the trial that the dog which did the damage was of a peculiarly mischievous disposition, being accustomed to chase and destroy game on its own account, and that this vice was known to its owner the deft., and that he notwithstanding allowed it to be at large in the neighbourhood of the plt.'s wood, in which he knew that game was kept; so that the entry of the dog into the wood and the destruction of the game were the natural and immediate result of the dog's peculiarity, which the owner knew of and did not restrain or prevent. We think that it is no answer to the action, because the law, as at present established by *Lord Exeter's* case in this court, and in the Ex. Ch., recognises in the proprietor of land a right of qualified property in game whilst it is upon the land. With respect to the rule to arrest the judgment, we are of opinion that that part of the rule ought to be discharged, because, after verdict, we think the averment in the declaration that the dog was accustomed to pursue and injure game ought to be taken to have been proved in the sense in which the action would have been maintainable. It is a satisfaction to know that there was good proof in our judgment of a cause of action in the present case. Applying the ordinary rule to this portion of the rule to arrest the judgment, and reading the declaration in the sense in which I am inclined to think it ought to be read, the rule to arrest the judgment ought to be discharged, for the reasons I have mentioned.

*Rule discharged.*

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,  
 Barristers-at-Law.

*Wednesday, Nov. 9, 1864.*

REG. on the prosecution of the CHURCHWARDENS AND  
 OVERSEERS of WENNINGTON v. ROBERT DARE.

*Poor-rates — Parochial Assessment Act — Deductions from gross estimated rental in respect of general sewers rate, &c.*

*In assessing property to the poor rate, deductions should be made from the gross estimated rental in respect of (if liable to such expenses), first, the general sewers tax; secondly, the rate for the maintenance and cleansing of the sewers and works connected therewith; thirdly, the sum annually expended in the repairs of sluices or floodgates upon the property; and fourthly, the sum annually expended in the maintenance and repairs of a sea wall.*

This was a case stated by the Essex Quarter Sessions upon an appeal against a poor-rate for the parish of Wennington, upon which the sessions confirmed the rate. The case stated as follows:—

The app. is the owner and occupier of a mansion house, and about 480 acres of land in the said parish of Wennington, and of this quantity 400 acres, or thereabouts, are situate within the limits of the Level of Wennington. The aforesaid parish of Wennington comprises in its whole extent about 1270 acres of land, of which quantity not quite 860 acres are situate within the limits of the said level of Wennington. A commission of sewers is legally existing under and by virtue of the statute 23 Hen. 8, c. 5, and the several other



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statutes relating to sewers in the said county of Essex, called the Rainham Commission, within the jurisdiction of which (among others) is the said level of Wennington. The said 400 acres of land situate in the said parish, and within the level of Wennington, of which the app. is such owner and occupier as aforesaid, are duly taxed by the court of the aforesaid commission of sewers at an annual sum, amounting in the average to 50*l.*, for the general sewers tax, under the powers and authority of the Act 4 & 5 Vict. c. 45, and the app. duly pays such tax. The app. is also duly taxed and assessed by the court of the said commission of sewers under the authority of the statutes in that behalf, in a sum amounting in the average to 15*l.* yearly for the maintenance and cleansing of the sewers and works in the said level of Wennington, from which his said lands in the said level receive benefit and avoid damage, and this rate also the app. has always paid. There are under the jurisdiction of the said commissioners within the said level, and on the said lands of the app. a sluice or floodgate and gate by which the said lands only of the app. are benefited, and works are necessary to maintain the said lands in a state to command their rent. The aforesaid sluice or floodgate and gate are repaired and cleaned under the superintendence of the marsh bailiff, at an annual average expense of 10*l.*, which is borne by the app. The lands situate within the said level of Wennington abut on the river Thames, and are protected from being inundated and covered by the waters thereof by a sea wall fronting the said river, the whole length of which wall is 1 mile 6 furlongs and 23 poles. At a court of sewer held under the said commission, on the 16th April 1861, the jurors then duly empanelled on their oath presented (as the facts are), that the several persons named and mentioned in the second schedule thereunder written or thereto annexed, which was to be deemed and taken as part of that presentment, and their ancestors and predecessors, as being owners of the respective quantities of land within the said level, and the jurisdiction aforesaid, set opposite such their respective names and description on the same schedule, had from time immemorial been used and accustomed to repair and of right ought to have repaired and the said several persons still of right ought to repair at their own respective costs and charges, when and as often as requisite, in respect of their said lands and their respective estates therein, and by reason of their being such owners thereof, the several and respective quantities of walling within the said level, and at the respective parts or places mentioned or specified and set forth in the said last-mentioned schedule. And that the several persons so named and mentioned in the said last-mentioned schedule were then the owners of the particular lands therein also mentioned opposite to such their respective names and descriptions, and as such owners and in respect of such lands and their estates therein respectively, ought by reason of the immemorial custom and usage aforesaid to support, maintain and repair the said walling at their own respective costs and charges, in the proportions mentioned and set forth in the same schedule opposite such names and descriptions respectively, and at the respective parts or places therein also in that behalf mentioned and described. In the second schedule annexed to the said presentment the app. is mentioned to be liable to repair 4 furlongs 38 poles of the said walling as owner of 88 acres 3 roods and 30 perches of land situate within the said level, and also another length of 1 furlong 15 poles of the same walling as owner of 67 acres and 9 perches also situate within the said level. The said 88 acres 3 roods 30 perches and 67 acres and 9 perches respectively from part of the said 400 acres within

the said level, of which the said app. is such owner and occupier as aforesaid, and the app. in fact maintains and repairs the said 4 furlongs 38 poles and 1 furlong 15 poles of walling, and the expense of the maintenance and repair thereof amounts on an average to 40*l.* yearly. The owners of the other lands mentioned in the said schedule, comprising altogether about 400 acres only out of the entire lands situate within the said level, repair the remainder of the sea wall according to their respective liabilities. The app. was rated in the poor-rate appealed against, and which was made in accordance with the valuation list approved by the committee acting under the Union Assessment Committee Act 1862 (25 & 26 Vict. c. 103), as under. [Here the form of the rate was set out.]

In assessing and rating the app. to the said rate no deduction or allowance whatever was made for or in respect either of the general sewers tax or the said rate for maintaining and cleansing of said sewers, nor for or in respect of the respective amounts expended by the app. for the repairing and cleansing of the said sluice and floodgate and gate, or for the maintenance and repairing of the said sea wall; and it is admitted that, if such deductions had been made, the assessment in other respects would be proper and just. The app. contended before the assessment committee, that he was entitled to a deduction in respect of all the said sums, but they refused to make any allowance in respect of any of them. The appeal to the sessions was then brought, and the questions raised thereby were whether the app. was entitled to have a deduction made from the gross rateable value of his aforesaid property in respect of any or either, and which, of the said several sums.

The questions for the opinion of the court are:

1. Whether, in the aforesaid rate, the app. is entitled to a deduction from gross estimated rental of his said property in respect of the general sewers tax.

2. Whether, in the aforesaid rate, the app. is entitled to a similar deduction in respect of the amount at which he is rated as aforesaid for the maintenance or cleansing of the sewers and works in the said level.

3. Whether, in the aforesaid rate, the app. is entitled to similar deduction in respect of the sum annually expended by him in the maintenance and repairs of the said sluice or floodgate and gate upon his said lands.

4. Whether, in the aforesaid rate, the app. is entitled to a similar deduction in respect of the sum annually expended by him in the maintenance and repairs of the said sea wall.

If the court should think the app. is entitled to a deduction on all or any one or more of the said items, then the order of sessions is to be quashed with costs, and the rate appealed against is to be amended in conformity with the judgment of the court. If the court should be of opinion that the app. is not so entitled in respect of any of the aforesaid matters, then the order of sessions is to be confirmed with costs.

By the 6 & 7 Will. 4, c. 96, s. 1 (the Parochial Assessment Act), it is enacted that,

No rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent.

Lush, Q. C. and Murphy now appeared for the resp. in support of the order of sessions, and contended that the deductions claimed by the app.



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were not to be made in assessing the property, for that they were not such as came within the meaning of the Parochial Assessment Act; that the general sewers rate falls upon the landlord, and not upon the tenant, and is a landlord's, and not a tenant's tax (*Palmer v. Earith*, 14 M. & W. 428); and that none of the four heads of deduction ought to be allowed:

*Reg. v. The Inhabitants of Vange*, 3 Q. B. 242;

*Baker v. Greenhill*, 3 Q. B. 148;

that it is nothing more than a rentcharge, which falls upon the landlord.

*Mellish*, Q.C. and *Philbrick*, for the app., argued that he was entitled to the deduction contended for, since the sewers rate was imposed with reference to expenses necessary to maintain the premises in a state to command the rent, and so came within the words of the Parochial Assessment Act: (*Reg. v. Adams*, 4 B. & Ad. 61.) They referred also to the 23 Hen. 8, c. 5 (the Statute of Sewers), and the 4 & 5 Vict. c. 45, s. 1.

*COCKBURN*, C. J.—I am of opinion that our judgment should be for the app. The question is whether, for assessing this property, in ascertaining its rateable value a deduction should be made in respect of the sewers rate? It may be put in two ways for the app. The Parochial Assessment Act says, that the premises are to be assessed "at the rent at which they might reasonably be expected to be let from year to year, free of all the usual tenant's rates and taxes and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent." Now it may be said in behalf of the app., that these sewerage rates are tenant's rates, and that they come within the words of the section, "other expenses, if any, necessary to maintain them in a state to command such rent." Now, whether or not these latter words refer only to expenses incurred by the individual proprietor himself, or will include also expenses put upon him by Act of Parliament, is a nice question which it is not necessary to determine, for I think there is authority for holding that these are tenant's taxes. The 3rd section of the Statute of Sewers (23 Hen. 8, c. 5) enacts that the commissioners are to tax, assess, charge, distrain, and furnish after the quantity of their lands, tenements and rents by the number of acres and perches, after the rate of every person's portion, tenure, or profit; and by the 8th section it is enacted that if any person being assessed or taxed to any lot or charge for any lands, tenements, or hereditaments do not pay the said lot and charge according to the ordinance of the commissioners, they may decree and ordain the same lands, tenements and hereditaments from the owners to any person for payment of the same. I apprehend therefore that they are to assess every person according to his estate. Now what is the condition of the imaginary tenant under the Parochial Assessment Act? That Act supposes a person a tenant from year to year, and he is liable to assessment to the sewers rate according to the quantity of his property, and I find nothing to show that the reversioner is to reimburse the tenant. There is nothing expressed to that effect, or to indicate that the tenant is to come for the tax to his landlord. It seems to me that this is a tenant's tax, and being such it is a tax which a tenant from year to year would have to pay, and accordingly is one which is to be deducted in calculating the rateable value of the premises. This applies to the first two heads. There is certainly a greater difficulty with reference to the other two heads; but upon consideration I think that these come within the words "other expenses necessary to maintain them in a state to

command such rent." They are expenses necessary to the maintenance of the property to command the rent; they are certainly expenses not incurred by the owner himself, but are incurred in pursuance of a general scheme.

*MELLOR*, J.—I had certainly some doubts in the course of the progress of the case arising from the way in which the facts were stated, but upon the whole I agree with my Lord that these are tenant's deductions which he would calculate upon when taking the premises.

*SHEE*, J.—It appears that the app. has been charged upon 400 acres, with respect to which no account has been taken of a sewers rate. That brings us to the consideration of the Parochial Assessment Act, and it appears by that statute that, in order to ascertain the amount of rate payable, the tenant is to be assessed upon the net annual value, that is to say, upon the rent at which the premises might reasonably be supposed to let from year to year, free of all usual tenant's rates and taxes, &c. Now, it appears that this sewers rate is assessed upon the lands and upon the occupier of them. It seems to me that the sum at which they would be let would be the rent, subject, amongst others, to this charge. Then there are also to be deducted other expenses necessary to maintain the premises in a state to command such rent. Upon the whole, it appears to me to be impossible to ascertain the annual value of the premises without taking into consideration this charge.

*Judgment for the app.*

Attorneys for the apps., *SurrIDGE* and *Francis*, Romford.

REG. on the prosecution of the PARISH OFFICERS of BADGWORTH (resps.) v. THE MIDLAND RAILWAY COMPANY (apps.)

*Poor-rate—Railway company—Rateability—Easement—Right of running over the line of another company.*

*A railway running between G. and C. was owned by the G. W. R. Company and the M. Company, each company owning one-half in length, but each company having the right to run over the half belonging to the other. The M. Company were assessed to the poor-rate of the parish of B. in respect of its occupation of the line in such parish, such portion of the line being the property of the G. W. R. Company:*

*Held, that the M. company had only an easement, and were not occupiers; and so were not rateable.*

This was a special case, stated by consent under a judge's order, pursuant to the 12 & 13 Vict. c. 45, s. 11, in order to determine whether the Midland Railway Company are liable to be rated to the relief of the poor of the parish of Badgworth, in the county of Gloucester. The case stated that—

There is a railway between Cheltenham and Gloucester (hereinafter called "the Railway"). It is between six and seven miles long, and passes through part of the said parish of Badgworth, it is of a mixed gauge both broad and narrow, the broad gauge being used by the Great Western Railway Company, and the narrow gauge used by the Midland Railway Company, as hereinafter mentioned. The railway was originally part of the line of the Cheltenham and Great Western Union Railway Company, and it was intended that it should have been made by that company under the authority of certain provisions contained in the stat. 6 Will. 4, c. 77: (see sects. 94 to 104.) At the time when the Act passed, it was contemplated that the Cheltenham and Great Western Union Railway Company would

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communicate with the Great Western Railway, which was and is a broad gauge line.

By sect. 98 it was in substance enacted that, upon payment by the Birmingham and Gloucester Railway Company to the Cheltenham and Great Western Union Railway Company of one-half of the money expended by them in making the railway, the Cheltenham and Great Western Union Railway Company should be trustees only of the Birmingham and Gloucester Railway Company of that half of the rail lying nearest to Gloucester, and that all powers vested in the Birmingham and Gloucester Railway Company should extend to it as fully as if the Birmingham and Gloucester Railway Company had found it under the authority of their Act. By sect. 100 it was enacted that the Birmingham and Gloucester Railway Company should have the sole direction and control of the said half of the railway lying nearest to Gloucester, and should collect and receive the tolls and profits which arise or become payable in respect of it. By sect. 101, after reciting that the railway would communicate with the Birmingham and Gloucester Railway, which last-mentioned railway would communicate with the London and Birmingham Railway, and the carriages to run and to be used on the said Birmingham and Gloucester Railway would also run and be used upon the said London and Birmingham Railway, it was enacted that the said line of railway between the depôts at Cheltenham and Gloucester should be made and formed in such manner, and with rails of such shape and width, as should be conveniently adapted for the use of carriages running on the Birmingham and Gloucester Railway and the London and Birmingham Railway. Provided always, that the said Cheltenham and Great Western Union Railway Company should, if they should see fit, lay down any additional rails between the depôts aforesaid, for the distinct purpose of their own traffic, all the expenses of which rails and all extra costs, whether incurred in the purchase of land, formation of embankments, or otherwise in the construction of that part of the said railway which might be occasioned by the adoption of such additional rails, should be exclusively borne and paid by the Cheltenham and Great Western Union Railway Company.

By sect. 102 it was enacted that the Birmingham and Gloucester Railway Company should repair the half of the railway lying nearest to Gloucester, including any rails or works connected therewith, which was exclusively necessary for the Cheltenham and Great Western Union Railway, and that the last-mentioned company should in like manner repair the half of the railway lying nearest to Cheltenham, including any rails or works connected therewith which are exclusively necessary for the Birmingham and Gloucester Railway Company. It was also enacted that each company should have free access to the depôts or stations to be formed at Cheltenham or Gloucester. The Birmingham and Gloucester Railway became by Act of Parliament amalgamated with the Midland Railway Company, and the Great Western and Union Railway Company became also by Act of Parliament amalgamated with the Great Western Railway Company.

The railway between Gloucester and Cheltenham was made in accordance with the provisions of the stat. 6 Will. 4, c. 77. It was formed of a double line, each line consisting of three rails, so as to render the railway suitable both for broad and narrow gauge traffic.

The original intention of the Legislature was departed from in this, that by arrangement between the two companies the railway was made by, and in the first instance at the cost of, the Midland Railway Company, instead of by and at the cost of the Cheltenham and Great Western Union Railway

Company; but eventually by means of certain statutes, and by payment of the Great Western Railway Company to the Midland Railway Company of one-half the cost of making the railway, the original scheme was carried into effect. The railway was opened in Oct. 1847, and from that time to the present, both the Midland Railway Company and the Great Western Railway Company have used it, the Midland Railway Company having always used the rails suitable for the narrow gauge, and the Great Western having always used the rails suitable for the broad gauge, consequently out of each line or set of three rails, one rail has been used by one of the companies only, another of the rails has been used by the other company only, and the third rail has been used by both the companies.

That portion of the railway which lies within the said parish of Badgworth constitutes part of the half of the railway which lies nearest to Cheltenham, and in Sept. 1861 both the Midland Railway Company and the Great Western Railway Company were rated for the relief of the poor of the parish of Badgworth in respect thereof.

A copy of the rate so made upon each of the said companies accompanies and forms part of this case.

The Midland Railway Company contend that under the circumstances herein stated they are not liable to be rated for the relief of the poor of the parish of Badgworth, in respect of the said portion of the railway which lies within that parish, and which forms part of the half of the line which lies nearest to Cheltenham.

The Midland Railway Company has, ever since the opening of the railway in 1847, wholly and exclusively repaired and maintained the half of the line which lies nearest to Gloucester, and have paid the policemen and other officers employed upon it; no part of that half of the line lies in the parish of Badgworth.

The Great Western Railway Company have wholly and exclusively repaired and maintained the half of the line which lies nearest to Cheltenham (including the part which lies in the parish of Badgworth) and have paid the policemen and other officers employed upon it.

The traffic of the Midland Railway Company very far exceeds, and is very much more profitable than the traffic of the Great Western Railway Company over the railway.

The Great Western Railway Company have given notice to the parish of Badgworth, that they insist on being assessed in respect of their own profits only.

In April 1855 an action was brought in the Court of Q. B. by the Great Western Railway Company against the Midland Railway Company, to recover tolls in respect of the traffic of the Midland Railway Company passing over that half of the railway (between Cheltenham and Gloucester) which lies nearest to Cheltenham. The claim was resisted by the Midland Railway Company, and the Courts of Q. B. and Ex. Ch. gave judgment in their favour against that decision. The Great Western Railway Company have appealed to the H. of L. The appeal is pending.

All the Acts of Parliament relating to the railway are to be taken and considered as part of this case, and may be referred to by either party.

The question for the opinion of the court is, whether the Midland Railway Company are liable to be rated to the relief of the poor of the parish of Badgworth in respect of that portion of the railway (between Cheltenham and Gloucester) which lies within the said parish, or of their use and enjoyment thereof.

Judgment in conformity with the decision of the said court, and for such costs as the said court shall adjudge, may be entered by motion by the party in

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whose favour the same is given at the quarter sessions for the said county of Gloucester, next or next but one after such judgment shall have been given.

*Dowdeswell* and *Staveley Hill* appeared for the resps., but the Court called upon

*C. Hutton* for the apps., who argued that, under the facts stated in the case, the Midland Company were not liable to be rated, and that the rate should be wholly borne by the Great Western Railway Company.

*Dowdeswell*, in support of the rate, contended that the rate was good, and that the Midland Company are beneficial occupiers; that they are occupiers of the line:

*Res v. Bell*, 7 T. R. 598.

COCKBURN, C. J.—I think, when the facts are apprehended, the case is a very clear one. The whole question is, whether the part of the line in the parish for which the rate is made is in the occupation of the Great Western or the Midland Railway Company? Now the line itself is divided, and that part which is said to be liable to this rate is the property of the Great Western Railway Company. The Midland Company have certainly the right to run their carriages over it; but what is the difference between that right and that in so many cases where railway companies have running powers, except that here it is under the provisions of an Act of Parliament which does not profess to give such power? Really, it is nothing more than this: Here is a line divided into halves, one half belonging to one company, the other half to the other company, and then there is a provision that each company shall have a right to run over that part of the line which belongs to the other. This is nothing but an easement of one company over the line of the other. Here the soil is in the Great Western Railway Company, whilst the Midland Company has the right to run over it—what is that but an easement? It is said that the Midland Company run more trains and make more profit than the Great Western Company; but this makes no difference, they have only a right of running on the line. It has been said that we should hold this to be an occupation by the Midland, because, if we do not so hold, the Great Western will not be liable to be rated for the profits made by the Midland, and so there will be an inadequate assessment, as the Great Western cannot be assessed for the profits made by the Midland Company. But if it is established that the Great Western Company are liable, it will be an easy matter to ascertain the extent of their liability. If they do not get their fair profit from the line, it is because they have arranged for a valuable consideration in some other way. It is quite clear that the Midland Company have only an easement over the line.

CROMPTON, MELLOR, and SHEE, JJ. concurred.

*Order quashed.*

Attorneys for the resps., *Wilton and Son*, Gloucester.

Thursday, Nov. 10, 1864.

REG. v. THE INHABITANTS OF CLECKHEATON.

*Highway—Indictment for non-repair by order of justices—Costs—4 & 5 Will. 4, c. 50, ss. 94, 95.*

An order was made by justices under 4 & 5 Will. 4, c. 50, s. 95, for an indictment to be preferred for the non-repair of a "highway called Quaker-lane." Before the justices it was sought to fix the defts. with liability to repair the highway as a cart and carriage way.

*The indictment contained counts for a cart and carriage way, and also for a pack and prime way.*

At the trial the jury found that it was not a cart and carriage way, and the defts. admitted that it was a pack and prime way, and contended that it was not out of repair, and the jury found that as a pack and prime way it was not out of repair:

*Held*, that the prosecutor was not entitled to his costs under sect. 95.

*T. Campbell Foster* moved for a rule nisi for a mandamus to compel *J. B. Greenwood, Esq.* and certain other justices of the West Riding of Yorkshire, before whom an indictment for the non-repair of the highway hereinafter mentioned came on to be tried at the quarter sessions, to enter continuances for the purpose of granting the costs to the prosecutor under sect. 95 of the General Highway Act (4 & 5 Will. 4, c. 50).

The road in question being alleged to be out of repair, a summons was taken out against the surveyor of the highways of Cleckheaton under sect. 94, and came on for hearing at a special sessions. In the summons the road was described as a certain "highway called Quaker-lane, situate, &c.;" and the liability to repair being denied by the surveyor on the part of the inhabitants, the justices under sect. 95 made an order directing a bill of indictment to be preferred at the next quarter sessions against the inhabitants "for suffering and permitting the said highway called Quaker-lane to be out of repair."

Accordingly an indictment was preferred and found by the grand jury: and ultimately was tried at the last Midsummer Quarter Sessions, when a verdict was found for the defts. The indictment contained four counts. In the first two counts the road was described as a way for carts and carriages; and in the third and fourth counts as a pack and prime way. The jury found that it was not a way for carts and carriages; and that as a pack and prime way (which it was admitted to be by the defts.) it was not out of repair. The verdict was accordingly entered for the defts., and on an application by counsel for the costs of the prosecution, the Quarter Sessions refused them: (*Reg. v. Heanor*, 6 Q. B. 745.) It was now contended that the prosecutor had succeeded in establishing that this was a highway for foot passengers in respect of which the liability to repair was disputed. It must be conceded that the object of the prosecution was to establish that this was a highway for carts and carriages.

COCKBURN, C. J.—It is quite clear that the defts. only disputed their liability to repair this as a carriage and horse way, and *Reg. v. Heanor* decides that where the fact of the road being a highway is negatived by the jury, the prosecutor is not entitled to costs under sect. 95. Prosecutors cannot, by adding something in the indictment which was not in the contemplation of the justices at the time of making the order, entitle themselves to costs.

The rest of the Court concurring,

*Rule refused.*

Saturday, Nov. 12, 1864.

REG. v. PURDAY.

*Summary conviction—Appeal—Costs—Liability of prosecutor.*

Upon an appeal against a summary conviction, the quarter sessions have power to award costs against the prosecutor, although the convicting justices are the nominal resps.

Where, upon an appeal against a summary conviction, the appeal is called on, and the app. appears, but no

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*one appears for the resp., the sessions have power to quash the conviction with costs, as against the actual prosecutor.*

This was a rule to quash an order of quarter sessions of Great Yarmouth, quashing a conviction with costs against the prosecutor.

It appeared that an information was laid by a Mr. James Purday against one William Ashley, under the 5 Geo. 4, c. 83, s. 4 (the Vagrant Act), as a rogue and vagabond, for being found upon his premises for an unlawful purpose, whereupon he was convicted, and sentenced to one month's imprisonment, against which conviction he appealed, giving notice, &c., as provided for by the 14th section. At the ensuing quarter sessions for the borough of Great Yarmouth, at Midsummer last, the appeal was called on, when the app. appeared by his counsel, but no one answered for the resp. The Recorder thereupon quashed the conviction with costs against the prosecutor below. Upon afterwards inquiring who Mr. Purday was, Mr. Purday, who had been all the time in court, answered that he was there, whereupon the Recorder inquired of him why he had not taken proper means to support the conviction. To which he replied that he thought the magistrates would have done so, but that he was then ready to give the same evidence he did before the justices. (There was a conflict in the affidavits as to what really took place in court, but the bench gave credit to the foregoing statement.) The sessions then proceeded to other business, and nothing further took place upon the subject.

*Bulwer* now showed cause against the rule, and contended that the recorder was right in the course he adopted, for that the appeal having been regularly called on, and no one appearing for the resp., he was justified in quashing the conviction and in giving costs against the actual prosecutor, notwithstanding the appeal was nominally against the conviction of the justices:

*Rex v. The Justices of Hants*, 1 B. & Ad. 654;

Lord Tenterden's Judgment, 659;

*Reg. v. Smith*, 29 L. J. 216, M. C.; 2 L. T. Rep. N. S. 487;

and that as the recorder had jurisdiction that court would not inquire how he has exercised it:

*Rex v. The Justices of Carnarvon*, 4 B. & Ald. 86;

*Ex parte Hopwood*, 15 Q. B. 121;

12 & 13 Vict. c. 45, s. 5.

*Keane*, Q. C., in support of the rule, contended that, as the appeal had not been heard, the recorder had no power to give costs; also that he could not give them as against the prosecutor in the court below, the appeal being against the conviction of the justices, and the prosecutor being no party to the appeal, and being merely bound over as a witness to appear and give evidence, and need not even have any notice of appeal. He endeavoured to distinguish the present case from those of *Reg. v. The Justices of Hants* and *Reg. v. Smith*. He further argued that, as the prosecutor was actually in court when the appeal was called on, the recorder ought, in the proper exercise of his discretion, to have heard his evidence.

*Cockburn*, C. J.—I am of opinion that in this case the rule should be discharged. The first question raised is, whether the Recorder of Yarmouth, under the circumstances, could treat this appeal as one over which he had jurisdiction to quash the conviction. Now, the ordinary course of practice throws upon the resp. the necessity of showing how the conviction can be supported, and it is the duty of the quarter sessions to give effect to the appeal and quash the conviction when, by the non-attendance of the resp., it

is shown that he is not prepared to support it. There is nothing in this case to show that the judgment of the sessions was not quite regular. The appeal was called on, no one appeared for the resp., and the conviction was thereupon quashed. Then an order is made whereby the prosecutor Mr. Purday is called upon to pay the costs. That is objected to on the ground that the 5th section of the 12 & 13 Vict. c. 45 does not warrant it, that notice of appeal by the 14th section of the 5 Geo. 4, c. 85, is to be given to the justice or justices of the peace whose act or determination shall be appealed against, and that it is they and they alone who are the resp. Now that raises a question of considerable importance, inasmuch as the power to give costs is provided for by sect. 5 of the 12 & 13 Vict. c. 45, which enacts that "upon any appeal to any court of general or quarter sessions of the peace, the court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such court appear just and reasonable." Therefore, if the justices are to be considered as the parties in the appeal, Mr. Keane's argument ought to prevail. But upon authority it would appear that, although the notice of appeal is to be given to the justices, without the necessity of any being given to the prosecutor, the justices are not to be considered as parties, but it is the app. and the informant who alone are to be considered as such. It should be observed that this statute of the 12 & 13 Vict. c. 45 followed a previous statute (the 11 & 12 Vict. c. 43), which, by sect. 18, gives justices, upon a summary hearing, a power to give costs against the prosecutor or complainant. The subsequent statute then carries the power further, and enables a court of quarter sessions to give costs against the resp. If the magistrates below have the power to give costs against the informant, and upon an appeal the court of quarter sessions have not a similar power, it would be most extraordinary. I think the 5th section of the 12 & 13 Vict. c. 45, places both statutes in harmony with each other. But, independently of this, we have very high authority upon the subject. In *Rex v. The Justices of Hants* we have almost the same state of facts. In that case one Gloyne had laid an information under the Turnpike Act against a toll-collector, and thereupon he was convicted, and against such conviction he appealed; but at the quarter sessions Gloyne did not appear, whereupon the sessions quashed the conviction, and ordered Gloyne to pay the app. 10*l.* for costs. In that case, like the present, the notice of appeal was given to the justices only. Now, although in that case the prosecutor was entitled to half the penalty, the judgment of the court does not proceed upon that ground. Lord Tenterden, in his judgment, says: "The next question is, whether the justices had power to charge the prosecutor with costs? It is true the Act directs notice to be given to the justices, not to the party prosecuting or defending; but it would be a great anomaly to cause a justice who acts *bona fide* in the discharge of his judicial duty to pay costs. The question is, what is the meaning of the words, 'the party appealing or appealed against?' The party appealing here is manifestly the party convicted, and if that be so, the informer is the only person who can satisfy the words 'party appealed against.'" We have, therefore, a deliberate decision by Lord Tenterden on the very same point. The question again arose, upon this very Act of Parliament, before Hill, J., in *Reg. v. Smith*, and he came to the decision that the true construction of the 5th section of the 12 & 13 Vict. c. 45, in its application to the Vagrant Act, should be the same as that put by

Lord Tenterden in the case of *Rex v. The Justices of Hants*. I cannot certainly take the opinion of any single judge for which I entertain a more profound respect than of Mr. Justice Hill. Then the point is raised that, suppose Mr. Purday is the proper party, yet, inasmuch as no evidence was given, there was nothing to show that he was, in fact, the informer. This was altogether a question of fact for the sessions. It may very well be assumed that, notwithstanding no notice of appeal had been given to him, he would have exercised sufficient vigilance to have ascertained if any notice of appeal had in fact been given. But we have nothing to do with that; it was a matter entirely for the recorder. He had means of knowing whether or not Purday was really the prosecutor. If he had been merely a witness, and had been improperly made the prosecutor, and so the recorder had improperly exercised his jurisdiction, it would be a difficult thing to say that such an order could not be quashed. But it is useless to consider that, for in point of fact it is clear that he was the prosecutor, and it would lead to most mischievous consequences if, because no evidence is given, because the resp. does not appear, the court is not to have power to award costs. We have only to deal with the fact that Purday is the prosecutor; and, being such, he is within this section of the statute. We have nothing to do with the question as to whether it would have been discreet in the recorder to have opened the question again. The appeal was called on in its regular course, the power to award costs was within the jurisdiction of the court, and the recorder had a right to order Purday to pay them.

MELLOR and SHEE, JJ. concurred.

COCKBURN, C.J. afterwards said that Crompton, J., who had left the court after the arguments, desired him to say he concurred in the judgment.

Rule discharged.

Monday, Nov. 14, 1864.

GILES (app.) v. SINEY (resp.)

*Evidence—Previous conviction—Incorrigible rogue.*

*The 9 Geo. 4, c. 83, s. 17 (the Vagrant Act), requires convictions under it to be returned to the next general or quarter sessions, and filed and kept on record.*

*Evidence of a previous conviction, therefore, under the Act can be proved only by proof of the record thereof; and neither oral testimony nor the minute-book of the convicting justices is sufficient proof thereof.*

Case stated by justices of the borough of Newbury, Berks, under the 20 & 21 Vict. c. 43.

At a petty sessions on the 3rd May 1864, Maria Giles, the app., being in custody on a charge of misdemeanor, on which she had been committed for trial, was brought before us at the instance of the said Amey Siney, charged with being a rogue and vagabond.

The charge was made under sect. 4 of the 9 Geo. 4, c. 83.

About the beginning of the year 1863, the resp. went to consult the app., who lives in Newbury, and has the reputation of being a cunning woman, about recovering some property which she supposed her mother, who had died about nine months before, had been possessed of. The app. said she should be able to get it for her, and asked for a pound to buy some stuff to work with, but at that time was only paid 5s. The resp. went to the app.'s house for the same purpose several times in the course of the year, and paid her various sums of money, and at the last visit, which occurred on the 22nd Dec. last, paid her

6d., which the app. said was for the purpose of raising her (the resp.'s) mother, and that she wanted that 6d. to do it.

The police for the borough proved on oath that the app. had been twice before convicted before the justices of the said borough of Newbury of being a rogue and vagabond. The justices had also before them the minute-books in which the convictions were recorded.

The justices on the above evidence convicted the app., "for that she, on the 22nd Dec. last, at &c., did, by using subtle craft, deceive and impose upon one Amey Siney, &c.; she, the said Maria Giles, having been proved to have been on the 23rd Sept. 1863 adjudged to be a rogue and vagabond, and duly convicted thereof," and ordered her to be committed to the house of correction until the next quarter session for the borough of Newbury.

*Harington* for the app.—There was no legal evidence of any prior conviction. Sect. 4 enacts (*inter alia*), "Every person pretending, or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects, shall be deemed a rogue and vagabond." Sect. 5 enacts that every person committing any offence against the Act which shall subject him or her to be dealt with as a rogue and vagabond, such person having been at some former time adjudged so to be, and duly convicted thereof, shall be deemed an incorrigible rogue, and the justices may commit to the house of correction, there to remain until the next general or quarter sessions. Sect. 17 requires convictions to be transmitted to the next general or quarter sessions, and there filed and kept on record. It must be assumed now that the justices have returned the convictions to the sessions as required by sect. 17. That being so, the oral testimony of the police and the minute-books kept by the justices' clerk were inadmissible as evidence of the previous conviction. The only admissible evidence was proof of the recorded conviction: (*Reg. v. Ward*, 6 Car. & P. 366.) In *Rex v. Goodey*, 8 A. & E. 806, the minute-book of the sessions was the only record of the proceedings at sessions. In drawing up a conviction it is always stated that it remains in full force and effect. There is nothing to that effect in the minute-book kept by the justices' clerk.

No counsel appeared for the resp.

COCKBURN, C.J.—I am very sorry to say that we have no alternative but to set aside the conviction. The evidence of the previous conviction was not such as ought to have been received.

The rest of the Court concurring,

Conviction quashed.

REG. v. BLUFFIELD.

*Highways—Formation of highway district—Outstanding rate—Whose duty to collect.*

*It is the duty of outgoing surveyors of a parish to collect an outstanding highway rate when, during their term of office the parish, is incorporated into a new highway district under 25 & 26 Vict. c. 61, and a highway board and district surveyor are appointed.*

*The words "and then remaining unpaid," in sect. 43, mean remaining unpaid at the end of seven days from the appointment of the district surveyor.*

Demurrer to a return to a mandamus.

The mandamus recited that W. Bluffield and G. W. Youd were elected highway surveyors of the parish

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of Potton, Beds, on the 25th March 1862, for the year then next ensuing, and that during their year of office, on the 6th March 1863, they made a highway rate which was duly allowed by justices and published, and that an order was made by Erle, C. J., on the trial of an indictment against the inhabitants of Potton for non-repair of a highway, for the costs, 231*l.*, to be paid out of the highway rate; and that an order of quarter sessions was made on the 3rd March 1863 for dividing the county of Bedford into highway districts, under the 25 & 26 Vict. c. 61, and that the parish of Potton was within the Biggleswade highway district, and waywardens, &c. elected, and a highway board formed, and a treasurer and district surveyor appointed; that the highway-rate so made by the defts. had not been collected, and that it was required for payment of the costs of the prosecution, pursuant to the order of Erle, C. J., and that defts. had been required on behalf of the highway board of the Biggleswade district to collect the rate and pay over the same to the treasurer, and that the defts. had refused so to do. The writ then commanded the defts. to collect the rate and pay over the same to the treasurer.

Return. That the defts were elected under the 4 & 5 Will. 4, c. 50, and that before the expiration of their year of office the Biggleswade highway district was formed under the 25 & 26 Vict. c. 61, of which the parish of Potton formed part, and that a district surveyor was appointed by the highway board, and that seven days from such appointment have elapsed; that after such seven days they the defts. were no longer surveyors of the highways for the said parish of Potton, and had no power to collect the said rate.

Demurrer to the return and joinder therein.

*D. D. Keane, Q. C.*, in support of the demurrer.—At the time of the formation of the highway district there was a subsisting highway rate, which had not been collected, and the question is whether it is the duty of the old surveyors to collect it. The question depends on sect. 43 of the 25 & 26 Vict. c. 61, which defines the relative duties of outgoing surveyors and the new highway board. By clause 2 of that section "The outgoing surveyor of every parish within the district shall continue in office until seven days after the appointment of the district surveyor by the highway board of the district of such outgoing surveyor, and no longer; and he may recover any highway rate made, and then remaining unpaid, in the same manner as if this Act had not been passed; and the money so recovered shall be applied, in the first place, in reimbursing any expenses incurred by him as such surveyor, and in discharging any debts legally owing by him on account of the highways within his jurisdiction; and the surplus (if any) shall be paid by him to the treasurer of the highway board, &c. And clause 3 enacts that the highway board shall, for all the purposes of the principal Act, except that of levying highway rates, be deemed to be the successor in office of the surveyor of every parish within the district." The outgoing surveyors are, under this section, the proper parties to collect this rate.

*Sills* was then called on to support the return.—The *mandamus* on the face of it does not show any right to the interference of the court. By sect. 43, the outgoing surveyors are only to continue in office seven days after the appointment of the district surveyor, and the return shows that that period has elapsed.

*Cockburn, C. J.*—It never could have been intended that persons in arrear for highway rates should have perfect immunity unless the rate was collected within seven days after the appointment

of the district surveyor or of the new highway district. The outgoing surveyors have reserved to them the power of collecting the outstanding rate.

*Crompton, J.*—The outgoing surveyors, by sect. 43, are to collect this rate, and pay it over to the treasurer of the highway board, and then the board, by sect. 11, have the duty of paying the prosecutor these costs thrown on them.

*Shree, J.*—The words in clause 2 of sect. 43, "and then remaining unpaid," mean remaining unpaid at the end of the seven days from the appointment of the district surveyor.

*Judgment for the Crown.*

Wednesday, Nov. 16, 1864.

CALEY v. LOCAL BOARD OF HEALTH OF KINGSTON-UPON-HULL.

*Public Health Act—Levelling streets—Powers of local board.*

*Under sect. 69 of 11 & 12 Vict. c. 63 the local board of health have power only to require a street to be levelled with reference to any want of inequality or want of uniformity in the street itself. They have no power to require the level of a street to be raised or lowered so as to bring it into uniformity with the adjacent streets.*

Appeal against an order made by the stipendiary magistrate of Hull, under sect. 69 of 11 & 12 Vict. c. 63 (the Public Health Act), upon a summons, for "refusing to pay to the local board of health of the borough of Kingston-upon-Hull, 9*l.* 19*s.* 5*d.* for expenses incurred by the board in levelling and flagging the west side of Park-street, late College-street west."

The street in question began to be formed in 1841, between which date and 1852 the houses therein were built. Mr. Caley, the app., was the owner of certain premises in Park-street, and was served with notice, under sect. 69, "to level, curb and flag" the part of the street in front of his property, by making a foundation for the footway with a bed of sand two inches in thickness, to receive the flagging of six inches of strong gravel or broken chalk for the curbstone, the ground for receiving the above to be raised to the proper level with dry materials, and the footway to be paved with Yorkshire flags three inches in thickness.

The app. having neglected to do the work required, the board did it, and took out a summons to recover from him the expenses. In point of fact the footway was raised six inches in front of the app.'s property.

It appeared that Park-street was not a highway, and the app. contended that the board had no power under this section to call upon him to raise the soil of the footpath as required by the notice, but only to smooth the surface of the footpath in front of his property, and flag upon such smoothed surface. That if this were not so, the board might go on changing the level, and even calling on the owners to construct a viaduct.

The magistrate found as a fact that the level adopted by the board, having regard to the position of Park-street taken in connection with the surrounding parts, was the best that could be taken and a great boon to the public, the app. and the adjoining owners, and made an order for the payment of the expenses.

*Tindal Atkinson, Serjt. (A. Peel with him)* for the local board.—It is found in the case that this is a street which is not a highway, and the question turns on sect. 69 of the Public Health Act (11 & 12 Vict. c. 63), which enacts that, in case any present or future street, or any part thereof (not being a high-

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way), be not sewered, levelled, paved, flagged and channelled to the satisfaction of the local board, the board may by notice in writing to the owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice. The section then provides that if the notice is not complied with, the board may execute the works, and the expenses shall be paid by the owners in default. It must be conceded that what the owners and occupiers were required to do was for the purpose of raising the street to the level of the adjoining streets, there being a descent which was found very inconvenient to the public. The word "levelling" in sect. 69 is sufficient to give the local board power to do this.

*P. Thompson* was not called upon.

COCKBURN, C. J.—It being conceded, as the fact was, that the street was raised for the purpose of bringing the roadway into uniformity with the level of the adjoining street, I am of opinion that the local board exceeded the powers conferred upon them by sect. 69 of the Act. That section only means that they may require occupiers and owners of premises to do anything that may be necessary, so as to make the level of the street itself uniform. And for this purpose we must look at it as if the street stood by itself, and there is nothing which empowers them to alter the level of a street so as to bring it into uniformity with other neighbouring streets. They cannot look to the convenience of the surrounding district. It may be true that the alteration would be a convenience to the neighbourhood if this street should be of the same level as the other parts of the neighbourhood; but the section only contemplates that the whole of any given street should be of one uniform level. I should have been disposed to consider that the case might have been within the powers of the local board, if these works had been done as incidental to the channeling or sewerage of the street, but that is not so here.

CROMPTON, J.—I am of the same opinion. It might be very hard on owners and occupiers, if because an old street was inconveniently raised or lowered, the street should be altered by the local board by making a deep cutting or a high embankment, so as to level it with the adjoining streets. I do not see any words in sect. 69 which will enable a local board to raise or lower a street so as to bring it to the same level with the surrounding district.

MELLOR, J.—By the section, the powers of the local board are confined to the execution of works in relation to levelling, &c. the street itself, and not with reference to the surrounding streets.

SHEE, J. concurred.

*Judgment for the app.*

YEWDALE (app.) v. CRAVEN (resp.)

*Poor-rate—Enforcing payment—Demand by agent.*

*A demand of payment of a poor-rate by a collector, appointed by the overseers and assistant overseer for the purpose of assisting in collecting the poor-rate, was held sufficient to entitle the collector to proceed by summons before a magistrate, to enforce payment in the usual mode by distress.*

*A summons for nonpayment of poor-rate, grounded on an information by the resp., the poor-*

*rate collector of the township of Calverley-with-Farsley (Yorkshire), was issued on the 21st April last against the said app. David Yewdale, and duly served upon him and made returnable on the 28th April last.*

The complaint against the app. was heard and determined at a petty sessions of the peace for the West Riding, held at Bradford, on Thursday, the 28th April last. The resp. J. Craven, who preferred the complaint, was the only witness examined. He produced and proved the rate or assessment for the township of Calverley-with-Farsley, and proved also that the app. D. Yewdale was duly assessed therein, and that he (J. Craven) had demanded of the app. within six months preceding the date of the information the rate due from the app.

The app. did not impeach or object to the accuracy of the general assessment, or of the amount of rate alleged to be due from him.

The resp. proved that he, several months before the information was laid by him, delivered to an inmate of the app.'s dwelling-house a notice, of which a copy is subjoined, viz.:

Calverley-with-Farsley, June 18, 1864.

Mr. D. Yewdale,  
Debtor to the overseers of the poor of the township of Calverley-with-Farsley.

Then following a statement of the amount of the rate as being 1*l.* 4*s.* 10*d.*

N.B. Take notice, that all rates are due when called for, and if not paid within ten days you will be liable to be summoned for the recovery thereof.

ABRAHAM CRAVEN,  
Assistant Overseer.

The present annual overseers of the poor of the township of Calverley-with-Farsley are Isaac Hollings and John Wade, and Abraham Craven, the father of the resp., is the assistant overseer, all duly appointed. The latter is a paid officer, and part of his duties is to demand and collect the rates.

The resp. produced to the justices at the hearing the following authority:

Township of Calverley-with-Farsley.

We the undersigned, being overseers of the poor of the said township of Calverley-with-Farsley do hereby order and appoint J. Craven of Calverley to assist in collecting the poor-rate that may be due the 1st April 1864 and all subsequent rates made during the year 1864 for the said township of Calverley-with-Farsley. As witness our hands the 1st April 1864.

ISAAC HOLLINGS, } Overseers.  
JOHN WADE, }  
ABRAHAM CRAVEN, Assistant Overseer.

The attorney for the app. made the following objections, viz., that the rate had not been legally demanded; that the demand of the rate must be made by some person duly authorised to receive and give a legal discharge or receipt for it: that there is a collector of rates duly appointed by the poor-law guardians for the township of Calverley-with-Farsley; that such collector had demanded the rate of Yewdale, the app.; that such collector had no power or authority to depute another to demand the rate for him; that as no legal demand was proved, the magistrates had no power to proceed against the app. by distress-warrant, or otherwise, for enforcing the payment of the rate.

We overruled all the objections and adjudicated that the app. must pay the rate, and that in default of payment a distress-warrant would be issued, and if no distress could be had the app. to be imprisoned seven days.

The question for the opinion of the court was, whether the determination upon the facts and grounds previously stated was or was not erroneous in point of law?

*West for the resp.*—The only question is, whether the demand of payment, a demand being necessary before an order of justices to enforce payment could be obtained, was made by a properly appointed



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person. The assistant overseer is appointed by vestry, under a statute, and not by the overseers. He is therefore, when appointed, not a mere delegate, but a principal, and could therefore properly appoint an agent to collect the poor-rate.

*Made* for the app.—The collector was not properly authorised to collect the rate, and the notice left was not a sufficient demand.

COCKBURN, C. J.—The only point left for our judgment is, whether the demand was sufficient, inasmuch as it was made by the son of the assistant overseer. We think that he had a sufficient authority to demand the rate, and therefore that the decision of the justices was right.

CROMPTON, MELLOR and SHEE, JJ. concurred.

*Judgment for the resp.*

Attorneys for the app., *Terry and Watson.*

Attorney for the resp., *Lancaster.*

Saturday, Nov. 19, 1864.

BUCKLE (app.) v. WRIGHTSON (resp.)

*Towns Police Clauses Act 1847—Hackney carriages plying for hire without a licence.*

*A local Act for the town of Darlington incorporated the Towns Police Clauses Act 1847, which provides for the licensing by the local authority of hackney carriages, and imposes a penalty for plying for hire without such a licence:*

*Held, that it is no answer to an information for plying for hire without such a licence, that the hackney carriage is licensed by the Inland Revenue authorities under the 2 & 3 Will. 4, c. 120.*

This was a case stated under the 20 & 21 Vict. c. 43, upon the dismissal by justices of an information laid against the resp. for permitting the use of his cab in the town of Darlington without being licensed by the local authority.

It appeared that the town of Darlington is under the management of a local Act, which incorporates the Towns Police Clauses Act 1847 (10 & 11 Vict. c. 89), sect. 37 of which provides for the licensing to ply for hire of hackney carriages within the town, sect. 45 enacting that if the proprietor of any such carriage permits the same to be used as a hackney carriage plying for hire without having obtained a licence as aforesaid, he shall for every such offence be liable to a penalty not exceeding 40s. At the hearing before the justices it appeared that no such licence had been obtained. It was, however, urged as a defence, that the resp. had a licence from the Inland Revenue Office under the 2 & 3 Will. 4, c. 120, for his carriage as a stage carriage, and need not, therefore, obtain a licence under the local Act. The justices, taking this view of the case, dismissed the information.

*Sayer* now contended that the justices were wrong, for that the Inland Revenue licence, being intended only for purposes of revenue, could not supersede the licence under the local Act, which was intended for purposes of police.

No one appeared for the resp.

COCKBURN, C. J.—Certainly we should require something positive to show us that the provision in the Towns Police Clauses Act, which is evidently intended for police purposes, are superseded by the enactment with reference to the inland revenue. These clauses in the local Act are intended to insure proper superintendence, which is not the object contemplated by the Revenue Act. The justices ask us to remit them the case if they are wrong, and there-

fore we express our opinion that the revenue licence does not supersede the local licence.

*Case to go back to the justices with the opinion of the court.*

Tuesday, Nov. 22, 1864.

REG. v. THE INHABITANTS OF THE TOWNSHIP OF DENTON, IN THE COUNTY OF LANCASHIRE.

*Costs—Road indictment—Plea of "guilty"—Fivolous and vexatious defence—5 & 6 Will. 4, c. 50, s. 98.*

*By sect. 98 of the 5 & 6 Will. 4, c. 50 (the General Highway Act), the court before whom any indictment shall be preferred for not repairing highways may award costs to the prosecutor, to be paid by the person so indicted, if it shall appear to the said court that the defence made to such indictment was frivolous or vexatious. Where, therefore, upon such an indictment the defts. pleaded "guilty:"*

*Held, that, inasmuch as the defts. had made no defence, the court had no power to award costs.*

This was a rule calling upon the prosecutor to show cause why a writ of *certiorari* should not issue to remove into this court an order of assize made by Willes, J., upon an indictment against the defts. for a nuisance (non-repair of a highway), to which they pleaded "guilty," allowing the costs of the prosecution, amounting to 129l. 12s. 7d., and directing such costs to be paid by the said defts. to James Hepworth, the prosecutor, out of the highway rate of the said parish.

It appeared that the highway in question passes through the township of Denton and other townships, and is a turnpike-road, and that the trustees by their Act (21 Vict. c. 37) are required to apply, out of the funds coming to their hands, an annual sum of 500l. in the repair of the said road, of which sum 132l. was to be expended in the township of Denton; that this sum had always been found to be insufficient to keep the said road in repair, and that from time to time (about once a-year) the trustees made application to the justices, under the statute 4 & 5 Vict. c. 59, for orders on the several townships for contribution towards its repairs; that the township of Denton having always resisted the trustees, it was resolved to prefer an indictment against them for non-repair. Accordingly, at the Liverpool Spring Assizes 1863, an indictment was preferred and found against the defts. for non-repair. On the 5th of the following August—three days before the commencement of the assizes at which the indictment was to be tried—a letter was received by the attorney for the prosecution from the attorneys of the defts., stating that their clients, acting under the advice of counsel, would plead guilty, at the forthcoming assizes, to the indictment. The letter referred to other subjects, also in connection with the road in question; that the prosecutor had fully prepared for trial at this time; that the defts. pleaded guilty at the said assizes, before Blackburn, J., who imposed a fine of 1000l. upon the following terms, namely, "that it should not be levied until the judge who comes at the winter assizes gives leave, such judge to have full power to remit the whole or any part of the fine, &c., the object being that the township may in the interval proceed with all due diligence to repair the road, and that the judge may have a hold over them if they do not; the judge, by agreement, to have the same power over the costs that I have." That at the ensuing winter assizes held in Dec., 1863, the matter of the said indictment was re-sited until the following spring assizes which were held in March 1864, before Willes, J., when the matter coming on before him it was ordered that



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the fine of 1000*l.* should stand, and be levied upon the inhabitants, with a direction to enforce the same to the extent of 467*l.* only, exclusive of the costs and charges of executing the said writ, to be applied, &c., and it appearing to the said court and justices here that the defence made by the inhabitants of the said township of Denton to the said indictment is frivolous, and the said court and justices here having therefore awarded costs to the said James Hepworth, the prosecutor of the said indictment, to be paid by the inhabitants of the said township of Denton, and having directed the amount of such costs to be ascertained and taxed by the proper officer of the said court, and the same having accordingly been ascertained and taxed by him at the sum of 129*l.* 12*s.* 7*d.*, it is further ordered by the said court and justices here that the said sum of 129*l.* 12*s.* 7*d.*, being the amount of the said costs so ascertained and taxed as aforesaid, be paid by the inhabitants of the said township of Denton to the said James Hepworth, the prosecutor of the said indictment.

By sect. 98 of the 5 & 6 Will. 4, c. 50 (the General Highway Act), it is enacted.

That it shall and may be lawful for the court before whom any indictment shall be preferred, for not repairing highways, to award costs to the prosecutor, to be paid by the person so indicted, if it shall appear to the said court that the defence made to such indictment was frivolous or vexatious.

*Manisty*, Q. C. and *Hopwood* now appeared to show cause against the rule, and contended that the judge had under the circumstances jurisdiction to give costs, for that the word "defence" in the 98th section must be taken in the sense of the opposition which is resorted to, and not merely the technical defence set up upon the trial; and that inasmuch as the defts. gave the prosecutor no intimation of their intention to plead "guilty" until three days before the assizes at which the indictment was to be tried, they were guilty of vexatiously defending it; that the word "defence" should have the same liberal interpretation as the word "tried" in the 95th section, which in *Reg. v. The Inhabitants of Haslemere*, 3 B. & S. 813, was held to be operative where the defts. had pleaded "guilty." [COCKBURN, C. J.—My difficulty is whether this is not a *casus omissus* of the Act of Parliament? Can it be said that a party who pleads guilty has made a frivolous defence? I quite agree that the prosecutors are fairly entitled to the costs they have been put to, but how can it be said that the defts. have made a frivolous defence when they have made no defence at all?] They should have informed the prosecutor earlier, and before he had incurred his costs of preparing for trial, that they intended to offer no defence; they were really defending throughout. [COCKBURN, C. J.—Surely defending means doing something, not merely lying by.] If after the indictment is found the defts. so act as to lead the prosecutor to believe that it is to be tried out, that is defending—their conduct is a defence.

*Mellish*, Q. C. and *Milward*, contra, were not called upon.

COCKBURN, C. J.—I certainly regret very much that there is no power in such a case, where the defts. plead "guilty," for the court to give the prosecutor his costs. All that the statute says is, that where the defence is frivolous or vexatious, costs may be given. It really has been argued that doing nothing is such a defence—that is saying that nothing constitutes a defence. I think that in this case, as nothing was done by the defts., there was no defence. We cannot undertake the functions of the Legislature; and as this state of things was not provided for, the order could not legally have been made.

CROMPTON, J.—I entirely agree. When no defence is made it cannot certainly be properly said that there has been a frivolous defence.

MELLOR and SHEE, JJ. concurred.

*Rule absolute* (as affecting the clause of the order relating to the costs).

Attorneys for the prosecution, J. and J. Hibbert, Hyde.

Attorneys for the defts., Brooks, Marshall and Brooks, Ashton-under-Lyne.

Thursday, Nov. 24, 1864.

REG. v. BRIGGS.

*Quo warranto*—Relator—Sufficiency of interest of.

Where, upon a rule for a *quo warranto* information against A. for exercising the office of a town commissioner, to which he had been elected by ratepayers, the relator was (as it was alleged) not entitled to vote, yet, as he was an owner of rated property in the town:

Held, that he had sufficient interest to be a good relator.

This was a rule calling upon a Mr. Briggs to show cause why an information in the nature of a *quo warranto* should not be filed against him for exercising the office of a commissioner of the town of Harrogate. It appeared that Harrogate is managed by a body of commissioners constituted under a local Act, seven of whom are elected each year in the month of April by the ratepayers, and that at the last election Mr. Briggs had a majority over certain other candidates, but that (as it was alleged) a certain number of those who voted for him (sufficient to put him in a minority) were not duly qualified. The relator was a Mr. Carter, who, it was alleged in showing cause, was not qualified to vote, though an owner of rated property in the town.

*Kemplay* showed cause, and contended that Mr. Carter was not qualified to vote at the election, and, therefore, as having no interest in the election, could not fill the position of relator:

*Reg. v. Thirkwood*, 33 L. J. 171, Q. B.

COCKBURN, C. J.—It is not because a person has not a right to vote at an election that he has not an interest in it. His tenant is rated, and the rates therefore are taken into consideration in the rent. He is owner of property in the town, and how therefore can it be said he is not interested in the election of the governing body?

CROMPTON, J.—The object of having a relator who has an interest is, that a mere man of straw should not be put forward; but surely in such a case as this an owner of property in the town has an interest.

The rule was then argued upon its merits.

*Manisty*, Q. C., in support, was not called upon.

*Rule absolute.*

Saturday, Nov. 26, 1864.

WATSON (app.) v. MARTIN (resp.)

*Vagrant Act*—Instrument of gaming—Current coin—Conviction.

By the *Vagrant Act* (5 Geo. 4, c. 83) a person is designated as a rogue and vagabond who plays or bets in any street, road, highway, or other open and public place, at or with any table or instrument of gaming, at any game or pretended game of chance:

Held, that the current coin of the realm are not "instruments of gaming" within the meaning of the statute.

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FISHER v. HOWARD—WILSON v. THE CHURCHWARDENS OF SUNDERLAND.

[C. P.]

*Wherefore the app. was convicted under this statute for playing in a public highway with halfpence at a game called "toss."*

*Held, that the conviction was bad.*

This was a case stated by justices under the 20 & 21 Vict. c. 43 upon a conviction of the app. as a rogue and vagabond under sect. 4 of 5 Geo. 4, c. 83 (Vagrant Act), which declares to be such "every person playing or betting in any street, road, highway, or other open and public place, at or with any table or instrument of gaming, at any game or pretended game of chance."

The case stated that the app. was summoned to answer a complaint charging him, for that he the said Louis Watson, on the 29th May 1864, at Gomersal, in the West Riding of Yorkshire, did unlawfully play in a certain highway there situate with certain instruments of gaming, called halfpence, a certain game of chance, called "toss," contrary to the form of the statute in such case made and provided. On the hearing it was proved that on the day in question the app. and a number of other persons were seen by two police constables upon the highway in Gomersal, and that the app. was tossing up halfpence of the ordinary current coin of the realm, and that he and the other persons were betting upon the number of "heads" or "tails;" that the halfpence came down and that money passed between him and others on the result of such betting; that the attorney for the app. at the hearing raised the objection that halfpence were not instruments of gaming within the intention and meaning of the Vagrant Act. We convicted the app. and ordered him to be imprisoned in the House of Correction at Wakefield for the space of seven days, but we agreed to state a case for the opinion of this honourable court upon the objection whether halfpence are instruments of gaming within the intention and meaning of the Vagrant Act. If the court should be of opinion that halfpence used in the manner stated in the case are instruments of gaming, the conviction is to be confirmed, and if not, then the conviction is to be quashed.

No one appeared for the resp.

Quain appeared for the app., but he was not called upon.

CROMPTON, J.—We really cannot strain the Vagrant Act to the extent of holding that the current coin of the realm is an instrument of gaming; if so, every person who has money in his pocket might be said to have about him an instrument of gaming.

MELLOR and SHEE, JJ. concurred.

*Conviction quashed.*

FISHER (app.) v. HOWARD (resp.)

*Traveller—Who is—Refreshment-room at a railway-station—Prohibited hours.*

*A person who has taken a railway-ticket for a journey by railway at the usual time before the starting of the train, is a traveller within the meaning of the 2 & 3 Vict. c. 47, s. 42.*

*A. went to the Victoria-station, Pimlico, on a Sunday, and obtained a ticket to proceed by a train which was to leave the station at ten minutes before one o'clock p.m. At twenty minutes before one o'clock the refreshment-room at the said station was opened, and thereupon A went in and was served with some fermented liquor:*

*Held, that he was a traveller, and that no penalty was incurred.*

This was a case stated under the 20 & 21 Vict. c. 43, upon a conviction by a metropolitan police magistrate of the app., who keeps the refreshment-rooms at the Victoria-station, Pimlico, for an offence under sect. 42 of the 2 & 3 Vict. c. 47 (Metropolitan Police Act), which enacts, "That no licensed victualler or other person shall open his house within the metropolitan police district for the sale of wine, spirits, beer, or other fermented or distilled liquors, on Sundays, Christmas-day and Good Friday, before the hour of one in the afternoon, except refreshment for travellers."

It appeared from the facts that a train was to leave the Victoria-station at ten minutes to one o'clock p.m. on Sunday, the 18th Sept., and that at twenty minutes to one o'clock the refreshment-room was opened by the app., and that twenty-five persons who had taken tickets for the train entered the refreshment-room, and were supplied with fermented liquors. There was no evidence to show where they had come from, or that they were residents in the metropolis.

C. Pollock now appeared for the resp., and contended that the persons supplied with liquors were not travellers. [CROMPTON, J.—Were they not travellers when they were on their way? It is sufficient to say that they were passengers in every sense of the word. They had taken their tickets. It is not necessary that they should have been in motion.] The Legislature must be taken to have known the existence of such places as refreshment-rooms at a railway-station, and in sect. 10 of the 27 & 28 Vict. c. 64, there is an express provision relating to them. Taking a ticket is evidence of an intention to travel; but it does not constitute a person a traveller. If being on his way constitutes a traveller, a person going along the Strand from his house to the station would be one, and so entitled to knock up the publicans for refreshment.

CROMPTON, J.—It is not necessary to say how that might be; but certainly when he has taken his ticket at the railway-station he becomes a traveller. We must deal with such a case as men of common sense, and, according to the common understanding of mankind, such a person is a traveller.

MELLOR, J.—It is obvious what was the intention of the clause, and it was certainly never intended to apply to such a case as this.

SHEE, J. concurred.

*Judgment for the app.*

#### COURT OF COMMON PLEAS.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

Wednesday, Nov. 9, 1864.

WILSON v. THE CHURCHWARDENS OF SUNDERLAND.

*Church-rates—Jurisdiction of justices—"Inhabitant."*

*A local Act of Parliament providing for the levying of a church-rate, gave a right of appeal to any person aggrieved by any assessments to be made by virtue of the Act, or by any distress or seizure to be made for the same or for the money so to be collected, to the quarter sessions to be held "within three months after such distress made."*

*Held, that the appeal given was general, and not confined to cases where distresses had been actually made, and that, there being a general power of appeal, justices applied to for warrants of distress had no power to hear objections made to the validity of the rate.*

*Per Erie, C.J.—The word "inhabitant," as applied by a local Act of Parliament to a person qualified to act*

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WILSON v. THE CHURCHWARDENS OF SUNDERLAND.

[C. P.]

*as vestryman of a parish, means an occupant of premises situated in the parish, and not necessarily a person living and sleeping in the parish.*

Case stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions holden at Sunderland, in and for the county of Durham, on the 28th May 1864, an application was made to us by the churchwardens of the parish of Sunderland near the sea, hereinafter called the resps., to grant and issue out our warrant under our hands and seals, for the intent and purpose, to be caused to be levied by distress and sale of the goods of Joshua Wilson, Henry Wilson, Caleb Wilson, and Charles Wilson, hereinafter called the apps., the sum of 7*l.* 0*s.* 7½*d.*, being the amount of a rate assessed upon them, the said apps., on the 9th July 1863, by the rector and thirteen of the vestrymen of the parish of Sunderland near the sea, in vestry assembled, at a meeting duly convened, pursuant to and acting under and by virtue of the powers, authorities and provisions of an Act of Parliament passed in the fifth year of the reign of His Majesty King George the 1st (18th April 1719), intituled "An Act for making the town and township of Sunderland a distinct parish from the parish of Bishopwearmouth, in the county of Durham," a copy of which Act accompanies this case, and is to be taken as part thereof.

The apps. having been duly summoned, the same application was heard, the said parties respectively being then present, and we determined to issue our warrant to levy the said sum of 7*l.* 0*s.* 7½*d.* And whereas the said apps., being dissatisfied with our said determination as being erroneous in point of law, have, pursuant to the 2nd section of the statute 20 & 21 Vict. c. 43, duly applied to us in writing to state and sign a case setting forth the facts and the grounds of such our determination for the opinion of this court, and have duly entered into recognisances as required by the said statute in that behalf, now, therefore, we, the said justices, in compliance with the said application and the provisions of the last-mentioned statute, do hereby state and sign the following

## CASE.

Upon hearing the said application, the said rate or assessment was produced and proved before us, and the same is intituled and signed, and as far as concerns the said apps. is as follows:—"An assessment upon the yearly value of all houses, lands, tenements, hereditaments and estates whatever, and upon the value of the stock-in-trade and personal estates within the parish of Sunderland near the sea, in the county of Durham, for keeping in repair the church of the said parish, defraying the yearly expenses of the churchwardens respecting the same, for paying the rector his stipend, the parish clerk's salary, and for other the purposes mentioned in the Act of Parliament passed in or about the year 1719, intituled 'An Act for making the town and township of Sunderland a distinct parish from the parish of Bishopwearmouth, in the county of Durham.'"

[The case then set out an extract from the rate-book containing the assessments of the apps. and the description of the property in respect of which they were rated. It also set out the names of the rector and thirteen vestrymen by whom, on the 9th July 1863, the rate was made and ordered to be collected, and the allowance of the rate, on the 18th July 1863, by four justices of the peace for the county of Durham.]

It was also proved before us that the apps. are Quakers, and that they are the occupiers of the houses, warehouses and hereditaments in the said parish mentioned in the said rate, and set opposite their names therein, where they carried on their

trade and business, and were possessed of the stock-in-trade therein.

It was also proved that the parties making and signing the said rate were the rector and thirteen of the twenty-four vestrymen, and were members of the said vestry, chosen and acting under the said local Act, and were the whole of the members of such vestry present at a meeting duly convened: that the said rate had been demanded of the apps.; and that they had made default in payment thereof.

It was also proved on the cross-examination of the collector that at the time of their election and thenceforth up to the making of the said rate, nine out of the thirteen vestrymen who signed the said rate, although ratepayers, occupying houses and shops in the said parish, and carrying on their trades and businesses there, resided and slept in their private dwelling-houses in the adjoining township of Bishopwearmouth.

It also appeared by the said rate that stock-in-trade was rated therein, but that ships (many of the persons assessed being shipowners) were not expressed as rated therein, and also that the occupiers of 836 properties occupied in small tenements under the yearly value of 6*l.* each, and for which the landlords under the Small Tenements Act, 13 & 14 Vict. c. 99, were rated to the poor-rate of the said parish instead of the occupiers thereof, were not included in the said rate produced before us, nor were the landlords or occupiers thereof assessed for the same therein, and as to these it was proved by the collector of the said rate that the occupiers of these tenements were many of them paupers receiving parish relief, and that very few, if any of them, in his opinion, were able to pay the said rate, and that it had not been customary to include the said tenements in the said rate.

The parish of Sunderland is one of the parishes comprised within the boundaries of the borough of Sunderland, the mayor, aldermen and burgesses of which form the local board of health, and it was admitted that since the passing of the Municipal Corporation Act (5 & 6 Will. 4. c. 74) no scavenger has been appointed for the said parish of Sunderland under the said local Act of 1719.

On the case being called upon, and previous to any evidence being taken, it was alleged by the professional advisers of the apps., that they disputed the validity of the said rate. It was also contended on behalf of the apps., that the said Sunderland local Act of 1719 had, so far as it applied to the recovery of the rate, been repealed by the statute 5 & 6 Will. 4, c. 74, and that we had therefore no power to issue our warrant of distress. It was also contended on the part of the apps., that the said rate was invalid, because nine of the thirteen persons who had made and signed the same were not properly elected vestrymen under the said local Act of 1719, inasmuch as they were not, nor was any one of them, resident and sleeping within the said parish.

It was also contended on behalf of the apps., that the said rate was invalid, because of the omission of the said small tenements therefrom, and by reason that ships, as forming stock-in-trade, are not included in the said rate under the designation "ships."

It was contended on behalf of the resps.:

First, that the said Sunderland local Act 1719 was not repealed by the said Act of the 5 & 6 Will. 4, as alleged by the apps.

Secondly, that we the justices had no jurisdiction on this application to inquire into or decide on the legal constitution of the said vestry or qualification of the said vestrymen, nor on the validity of the said rate.

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Thirdly, that even if we the said justices had jurisdiction to decide on the legal constitution of the said vestry, or the qualification of the said vestrymen, that by the said Sunderland local Act of 1719, it was not required that the vestrymen should be resident and sleep within the said parish, but only that they should be inhabitants of the said parish occupying rateable hereditaments therein, and paying rates, and that therefore the said nine persons so acting as vestrymen were duly qualified to act as such.

Fourthly, that if even we the said justices had jurisdiction to inquire into and decide on the validity of the said rate, the objections of the said apps. were untenable, and not sufficient to justify us the said justices in refusing to grant our said warrant.

We, the said justices, being of opinion that our jurisdiction was not ousted by the apps. disputing the validity of the rate, and that the said Sunderland local Act of 1719, and the powers therein authorising us to issue our warrant of distress, were not repealed or affected by the said statute 5 & 6 Will. 4, c. 74, but were and are still in force; that we had no jurisdiction to inquire into or decide on the constitution of the said vestry, or the qualification of the members thereof, nor into the validity of the said rate, and that the objections made by the apps. to the said rate were not sufficient to justify us in refusing to grant our said warrant, gave our determination against the said apps., and have signed our said warrant, but have suspended the issuing and delivery thereof on the goods of the said apps. until the opinion of this court be obtained.

The questions of law issuing on the above statements for the opinion of the court therefore are:

First, whether, the apps. having stated that they disputed the validity of the rate, our jurisdiction to hear the cause and grant our said warrant was or was not ousted.

Secondly, whether the said Sunderland local Act of 1719, or the power thereby given to us to issue our warrant for levying the said rate, has been repealed by the statute 5 & 6 Will. 4, c. 74.

Thirdly, if not, whether we, the said justices, on the hearing of the apps. for the said warrant, were bound to inquire into, and had jurisdiction to decide on, the legality of the constitution of the said vestry, or the qualification of the members of such vestry.

Fourthly, if we had such jurisdiction, whether it is required by the said Sunderland local Act that the vestrymen chosen thereunder should be inhabitants inhabiting and sleeping in the said parish.

The local Act mentioned in the case contained provisions for raising rates for keeping the church in repair, paying the stipends of the rector and parish clerk, and the salary of a scavenger to be appointed by the rector and vestrymen.

The vestrymen were to be "twenty-four substantial and creditable inhabitants of the parish of Sunderland," to be chosen by the inhabitants "paying scot and lot." The rector and thirteen of the vestrymen were to be a competent vestry for making rates and carrying out the Act. On default of payment of rates, four justices of the peace for the county of Durham were authorised to grant a warrant of distress.

The appeal clause was as follows:

And if any person shall find him or herself aggrieved by any assessments to be made by virtue of this Act, or by any distress or seizure to be made for the same, or for the money so to be collected, in such case he or she may appeal to the justices of the peace to be assembled at any general quarter sessions of the peace to be held for the said county of Durham, within three months after such distress made, who are hereby empowered to hear and finally determine the same.

A. Wills appeared for the apps.—The justices have no jurisdiction at all in cases where Quakers

have been rated, or the validity of the rate is disputed; but if they had any jurisdiction at all in this case, they were bound to go into the merits of the case. The principle laid down by the Court of Q. B. in the cases of *Reg. v. The Justices of Kingston*, E. B. & E. 256, and *Ex parte May*, 2 B. & S. 426, is, that where an appeal to the quarter sessions is given, the justices to whom application is made for a distress-warrant have no power to go into the merits of the case. But the power of appeal given here is an illusory one; it only exists after a distress has been submitted to. [BYLES, J.—The distress mentioned in the appeal clause is merely the *terminus a quo*; the three months are to be counted.] The justices were bound to go into the merits. The rate was made by thirteen vestrymen, five only of whom were really inhabitants of the parish—that is to say, living and sleeping in the parish. He referred to

5 & 6 Will. 4, c. 74;

58 Geo. 3, c. 127;

*Blackett v. Blizard*, 9 B. & C. 861;

2 Stephen's Laws of the Clergy, 1327;

1 Burn's Ecc. Law (9th ed. by Phillimore), 415 k;

58 Geo. 3, c. 69 (Sturges Bourne's Act);

Richardson's Dict. "Inhabitant."

Lush, Q. B. (*Prideaux* with him).—The jurisdiction of the justices was ministerial only, to issue the distress. As to the objection to the vestrymen, from the time of the Statute of Bridges the word "inhabitant" has been taken to mean "occupier," and is not necessarily an occupier living and sleeping on the premises:

*Reg. v. Hall*, 1 B. & C. 186, per Abbott, C. J.;

*Reg. v. Barwick*, 7 T. Rep. 73;

Note to Sturges Bourne's Act, in Welsby's edit. of the Statutes.

ERLE, C. J.—The apps. first of all dispute the jurisdiction of the justices on the ground that they are Quakers, and therefore that the jurisdiction of the justices has been taken away by statute. But we think that the statute relating to church-rates generally does not apply to rates levied under this local Act, over which the Ecclesiastical Courts have no control. The next objection is, that the rate was not properly made because the vestrymen making it, or the majority of them, did not sleep within the parish of Sunderland. If that was a valid objection to the rate, it could have been raised by appeal against the rate. It is said that an appeal is only given by the local Act in cases where distress-warrants have been issued, and it is said to be unreasonable that persons should have to submit to a distress before being able to appeal. If this be so, it is, comparatively speaking, a small inconvenience; but the reasonable construction of the Act is, that a person rated has a right to appeal as soon as the assessment is made, the time within which the appeal must be made being limited only in cases where a distress-warrant has been issued. There was a clear right of appeal either before or after distress. In the next place, if the justices could go into the consideration of the construction of the vestry, which I do not think they could, must an inhabitant of the parish be necessarily a person sleeping within it? From the time of the Statute of Bridges, passed many centuries ago, the word "inhabitant," in statutes relating to levying rates, has been construed to mean an occupier of land within the rateable district. I know of no instance of limitation to occupiers of a parish sleeping in it. The one exception is, in cases relating to settlement of the poor, where the refinements which took place led to most inconvenient results. I should be strongly inclined, if I had to decide this case on the meaning of the word "inhabitant," to decide it in favour of the resps., but it is not essential to do so. I think that judgment should be for the resps.

BYLES, J.—I do not dissent from what has been said by my Lord as to the meaning of "inhabitant." It is an elastic word, varying according to the meaning of the Act of Parliament in which it occurs. But, according to the cases in the Q.B., where the statute gives an appeal, magistrates cannot enter into objections to the rate; and here an appeal is given. If the magistrates could have gone into this question, where should we stop? It was a question of the qualification of the elected vestrymen. Equally well might questions arise respecting the qualifications of the numerous electors. It would become difficult, under such circumstances, to levy any rate.

KRATING, J.—I give no opinion respecting the meaning of the word "inhabitant," for it is unnecessary to do so, though I do not dissent from what has been said by my Lord. I concur that judgment should be for the resp.

*Judgment for the resp.*

Attorney for apps., J. W. Hicken.

Attorneys for resp., Maples and Teesdale, for Wright, of Sunderland.

#### EDDISON AND OTHERS v. BROOKES.

##### *Inclosure—Local Act—Rateability for expenses of Act.*

*A local inclosure Act empowered commissioners, amongst other things, to allot lands to the vicar "or other persons entitled to tithes," and to the vicar in respect of glebe lands, as an equivalent and compensation for their claims, and to divide the remainder among persons interested in the lands. It directed the commissioners, before making any allotments, to mark out for sale a portion of the lands, and sell the same for the purpose of paying the expenses of carrying out the Act, and in case the amount raised by the sale should be insufficient, to make up the deficiency by a rate to be made "upon the several persons interested in the lands to be inclosed, except the said vicar and persons entitled to tithes." It directed also that the allotments, except the allotments to the "vicar and other persons in lieu of tithes," should be fenced by the persons to whom they were allotted, and that the allotments to the "vicar and other persons in lieu of tithes" should be fenced at the expense of the inclosure expenses fund:*

*Held, that as the word "other" was omitted in the clause excepting the vicar and persons entitled to tithes from being rated to the additional rate, and as the framework of the Act seemed to show that the omission was intentional, the vicar was exempt absolutely from rateability in respect of the land allotted to him for glebe as well as for the land allotted to him for tithes, and that the exemption was not intended to be in respect of lands granted in lieu of tithes only.*

Special case, without pleadings, stated for the opinion of the court, under the provisions of the C. L. P. A. 1852, s. 46.

The p'ts. were the Commissioners of the Nottingham inclosure, and the def't. was the vicar of St. Mary, Nottingham. The writ was issued to recover 487l. 7s. the amount of two rates levied by the commissioners upon the vicar in respect of glebe land, with interest thereon.

The question arose under a local Act of 8 & 9 Vict. c. vii., intituled "An Act for inclosing lands in the parish of St. Mary, in the town and county of the town of Nottingham," with which the General Inclosure Act of 41 Geo. 3, c. 109, was incorporated.

The case set out sects. 6 and 14 of the public Act, and sects. 86 and 87 of the local Act, respectively, in which claims were to be made,

and shares to be allotted; and sects. 86 and 89 of the local Act, which provide for the payment of the expenses of the inclosure in the following manner:

##### Sec't. 86:

For defraying the costs of carrying the local Act into execution the commissioners shall, at such period as they think proper (before any allotments are set out to the persons entitled to rights of common, to the lord of the manor, persons entitled to tithes, and to the owners and proprietors of the lands to be inclosed) mark and allot for sale such portion of the lands as they shall judge sufficient in value to defray the expenses of obtaining and executing the powers of the Act, and shall from time to time sell such lands as therein mentioned.

##### Sec't. 89:

If at any time it shall appear to the commissioners, either before or after the execution of their award, that the money to arise by such sales shall not be sufficient to defray the expenses aforesaid, the deficiency shall be made up and raised from time to time by a rate, to be made and levied upon the several persons interested in the lands to be inclosed (except the said vicar and persons entitled to tithes, and the mayor, aldermen and burgesses in respect of the lands for places of public recreation, &c.), in such shares and proportions, within such time, and to be paid to such persons as the commissioners shall from time to time direct.

Sects. 90, 93, 94 of the local Act provide for the recovery by the commissioners of the sums so payable for expenses, and enable tenants for life and other persons under disabilities, or their trustees, to charge the allotments with such sums.

By the local Act it is recited in the preamble that Henry Smith, Samuel Fox and other persons therein named claimed to be owners or proprietors of, or otherwise interested in, some of the lands to be inclosed, and other persons also claimed as therein mentioned; and then reciting that Earl Manvers was, or claimed to be, entitled to corn tithes arising or accruing from the lands to be inclosed; and the Rev. J. W. Brooks, the now def't., as the vicar of the parish of St. Mary, was, or claimed to be, entitled to the vicarial tithes arising or issuing out of such lands or some part thereof; and that William Watson and others claimed, as devisees under the will of Micah Gedling, to be entitled to the tithes or tenths of hay arising out of certain parts of the lands to be inclosed; and the charitable trustees of the said town, as trustees of the free grammar school of the said town, were, or claimed to be, entitled to the tithes or tenths of hay arising or issuing out of certain other portions of the said lands.

By the local Act it is further provided that the commissioners are to allot parts of the lands to be inclosed as follows:—

By sect. 53, for the purposes of public recreation.

By sect. 54, for a public cemetery.

By sect. 55, for the lord of the manor.

By sect. 56,

The commissioners shall allot and award unto the vicar of the said parish of St. Mary and unto the said Lord Manvers, William Watson and others, devisees in trust under the will of Micah Gedling, and the charitable trustees of the town of Nottingham, trustees of the free grammar-school, or other the persons who may be entitled to corn tithes, vicarial tithes, or tithes or tenths of hay or other tithes, and to the said vicar in respect of glebe lands and rights of common belonging to such vicar, such parcels of the lands to be inclosed as in the judgment of the commissioners shall be a full equivalent and compensation to such persons severally and respectively for their several and respective claims, when substantiated to the satisfaction of the commissioners, in, over, or upon the lands to be inclosed.

By sect. 57 the commissioners are to allot part of the lands to be enclosed to the freemen of Nottingham and to the Fofstead owners and inhabitant householders.

And by sect. 66, after the said several allotments have been made, the commissioners shall divide, allot, and award the remainder of the lands to be inclosed into and amongst the several owners and proprietors thereof, and persons who shall be entitled to any estate, right, or interest therein, in such shares and proportions as the commissioners shall adjudge and

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determine to be proportionate to the value of their respective rights and interests therein.

The local Act, sect. 69, enacts,

The several allotments to be made in pursuance of this Act (except the allotments to the mayor, aldermen and burgesses, for places of public recreation, &c., and the allotments to the vicar and other persons in lieu of tithes), shall be inclosed, ditched and fenced at the expense of the respective persons to whom the same shall be allotted, in such manner and within such times as the commissioners shall by their award, or any writing under their hands, direct; and the fences to be made shall for ever afterwards be repaired and maintained by such persons as the commissioners shall by their award direct.

## Sect. 70:

The allotments to be made to the vicar and other persons in lieu of tithes shall be well and sufficiently inclosed and fenced on all such parts and sides as shall not be directed to be fenced by any other proprietor, or as shall not adjoin any inclosed land, or be bounded by any sufficient watercourse or other sufficient fence; and the expenses attending the inclosing and fencing the same shall be discharged out of the inclosure expenses fund; and all such inclosures and fences, when made, shall for ever thereafter be kept in repair by the said vicar, or by the persons for the time being entitled in possession of the said allotments.

The lands to be inclosed consisted of about 1200 acres. A small portion consisted of two pieces of waste land upon which it was alleged the inhabitant householders and freemen only had a right of pasturage. All the remainder of the lands consisted of lands of freehold tenure belonging to different proprietors, owners of land in fee-simple, but subject to a right of pasturage thereon for a limited number of cattle during certain periods of the year, and this right of pasturage existed only in the freemen and the occupiers of a few old houses called Foftsteads. The owners of the lands had no right of common over the lands, but owned the land subject to the easement of pasturage as aforesaid; and, on the other hand, the persons entitled to the right of pasturage owned no portion of the lands to be inclosed.

The landowners let the lands for beneficial rents, they being entitled to the land during the valuable part of the year, getting the crops, the commoners only getting the aftermath. The landowners were very numerous, and amongst them was the vicar of St. Mary, as the owner of glebe lands. Such glebe lands were in every respect under the same conditions as the lands of other landowners.

Amongst the claims delivered to the commissioners were claims by numerous landowners specifying the quality and situation of the land claimed for, and the estate therein of the person making the claim.

Earl Manvers made a claim for corn tithes; William Watson and others, devisees of Micah Gedling, claimed for hay tithes; and such devisees also made a claim for lands belonging to them as landowners.

The charitable trustees claimed for hay tithes, and such charitable trustees also made a claim for lands belonging to them as landowners. And all such claims, as well for tithes as for landowners, were duly substantiated to the satisfaction of the commissioners.

Amongst the claims was the following, made by the vicar of St. Mary:

I claim to be entitled, as vicar of the church of St. Mary, to the several pieces of land described in the annexed terrier lying in the open and commonable fields of the parish of St. Mary, and to all rights and interests therein, subject, nevertheless, to certain common rights during part or parts of each year. I further claim, as such vicar, to be entitled to all tithes of milk, calves, lamb, wool, agistment, turnips, green peas, tares, and green crops of every description, potatoes, pigs, eggs, poultry, and all other tithes excepting only the tithes of corn, grain and hay, arising or accruing due as well upon the said open and commonable lands as upon all other the lands of the said parish, excepting only certain portions thereof which have already been exonerated from tithes.

[The case then set out the terrier.]

At the hearing before the commissioners Lord Manvers substantiated his claim for corn tithes. William Watson and others, devisees of Gedling

deceased, and the charitable trustees of the free grammar-school, severally substantiated their claims for hay tithes, and the vicar of St. Mary also substantiated his claim for tithes.

Allotments of land were severally made by the commissioners to Lord Manvers, to Gedling's devisees, to the charitable trustees, and to the vicar of St. Mary, in lieu of such tithes, and to the full value thereof as adjudged by the commissioners.

In addition to such allotments for tithes, distinct and separate allotments were also made to said Gedling's devisees and to the said charitable trustees in respect of the lands claimed by them.

Distinct allotments amounting to 18a. 3r. 37½p. were also made to the vicar of St. Mary in respect of and in lieu of the lands claimed by him as glebe lands, and such allotments were made according to the same conditions and upon identical terms as far as regards value and in every other respect as the lands of other landowners. Such allotment of 18a. 3r. 37½p. was in addition to the allotment made to the vicar in lieu of tithes.

The effect of the inclosure and of the allotments awarded by the commissioners was to convert the lands claimed, from mere agricultural lands used chiefly for pasture subject to common right as above and capable of no other use, into freehold lands free from restrictions and incumbrances, applicable for building or any other purpose, and raising their value to a very large amount, and the land allotted to the vicar took these advantages in common with lands allotted to the different landowners.

The commissioners have paid out of the inclosure funds the costs of fencing such allotments so made to Earl Manvers, Gedling's devisees, the charitable trustees, and the vicar of St. Mary, in lieu of tithes, but have not paid the cost of fencing the other allotments made to the said persons as landowners, or the allotments made to the vicar in respect of the glebe lands.

In carrying the local Act into execution, the commissioners marked out and allotted for sale certain portions of lands, and sold the same as directed by the statute, and applied the proceeds in carrying the Act into execution, but the moneys arising from such sales not being sufficient to defray the expenses of executing the Act, the commissioners have duly made certain rates under sect. 89 of the local Act upon the several persons interested in the land to be inclosed, and in such rates the commissioners have rated the vicar in respect of his glebe lands claimed by him, and have also rated Watson and others, Gedling's devisees, and the charitable trustees in respect of the lands severally claimed by them, but the commissioners, have not rated the Earl Manvers, Gedling's devisees, the charitable trustees, or the vicar of St. Mary, being the several persons entitled to tithes in respect of the allotments made to them respectively in lieu of tithes.

The vicar of St. Mary contends that he is not liable to be rated in respect of the lands allotted to him in lieu of the glebe lands claimed by him. The commissioners contend that he is liable to be rated in respect of his glebe land.

The question for the opinion of the court is, whether the vicar is liable to be rated in respect of the lands allotted to him on account and in lieu of the lands claimed by him as glebe lands. If the court should be of opinion that the vicar is liable to be so rated, then judgment is to be entered for the plts. for 487L 7s. 0d. and costs of suit. If the court should be of a contrary opinion judgment is to be entered for the deft. with costs of suit.

Boden, Q. C. appeared for the plts. and argued that the exception from rates contained in sect. 89 of the

local Act applied only to lands allotted to the deft. in lieu of tithes.

*Mellish, Q. C. (A. Wills with him), for the defts.,* contended there was no limitation express or implied of the vicar's exemption from rateability, and that it applied to all allotments made to him as vicar.

*ERLE, C. J.*—I think that the vicar is not liable to be rated in respect of his allotment for glebe lands to the general expenses of the Inclosure Act. The Inclosure Act gave the commissioners power under sect. 86 to mark out before making any allotment such portion of the lands as they should judge sufficient in value to defray the expenses of obtaining and executing the powers of the Act, and to sell the same from time to time. Sect. 89 gave them power to make an additional rate if the land so marked out should not prove sufficient; and the commissioners are to make the additional rate on all persons interested in the lands to be inclosed, "except the said vicar and persons entitled to tithes, and the mayor, aldermen and burgesses in respect of the lands for places of public recreation." Mr. Boden contends that this means "except the vicar so far as he is interested in the lands in respect of his tithes." Mr. Mellish contends that it means "except the vicar" absolutely. I think that the vicar is excepted absolutely. By sect. 56 the vicar is placed in the first class of allottees. Several classes of allottees are named, and then come what I may call the residuary allottees. Some of the prior classes are to receive compensation for a great variety of existing interests, and the vicar is one of them. He is to receive compensation for his glebe lands, and also for his tithes, in company with such persons as have an interest in the tithes. Then come the allotments to freemen, also for existing interests, and to certain householders. Then comes sect. 66, empowering the commissioners, after these prior claims shall have been disposed of, to divide the residue among the persons having rights and interests in the lands. Sect. 86 provides that the commissioners shall sell a portion of the lands before making any allotment. The vicar has not any interest in the quantity of land which the commissioners shall sell, for he only has as much of the land as is equivalent to his tithe and glebe, and therefore the fund from which the payment of expenses was to come was, in the contemplation of the Act, to be irrespective of the vicar and his allotment. Then comes sect. 89, providing for an additional rate if required. It seems to me to stand to reason that those persons who have not paid enough under the first provision should pay more to make up the deficiency. It is certain also that sect. 89, without looking to the general framework of the Act, may be well read in favour of this view. Mr. Boden reads it, "except the vicar and other persons entitled to tithes," and when the word "other" is inserted, it always means that the persons included come in the same class as the persons previously mentioned. But when the statute has intended this it has said so in unmistakable terms. Sects. 69 and 70 make it perfectly clear that the allotments to the vicar and other persons in lieu of tithes, are to be fenced at the public expense, and the allotment to the vicar in respect of glebe at the vicar's expense. They speak of the "vicar and other persons entitled to allotment in lieu of tithes" as one class; whereas sect. 59 is absolute in its exception of the vicar, leaving out the word "other," which is strong evidence that the Legislature intended to make a distinction in this section between the vicar and the other persons entitled to allotments in lieu of tithes. Judgment ought, I think, for these reasons to be for the deft.

*BYLES, J.*—I am of the same opinion, though I

confess that, when the argument began, my impression was otherwise. On due consideration, I think that it is clear that the literal construction is the true one, and as to the literal construction there can be no doubt. The proportion to be paid by any person of the expenses of the Act is not a charge on the land, but on the person in respect of the land. If the vicar were liable to it, it might be levied by action, or by a proceeding in the nature of an *eject*, and the whole revenue of the vicar might be sequestrated, for he would have no power to charge the living.

*KEATING, J.*—Looking at the general scope and object of the Act, and the way in which sect. 56 deals with the vicar, I think that he was intended to be exempted in sect. 89. It seems that the vicar has, in fact, been dealt with by the commissioners like other landowners, and has received his allotment for glebe out of the residue of the lands. But, looking at sect. 56, it is clear that the Legislature intended that he should be fully compensated in respect of his tithes and glebe in the first instance. Concurring with the interpretations of the other sections given by the Lord Chief Justice, I also think that judgment ought to be given for the deft.

*Judgment for the deft.*

Attorneys for the plts., *Taylor, Hoare and Taylor.*

Attorneys for the deft., *Benbow, Tucker and Sellwell.*

Nov. 9, 11 and 18, 1864.

TAYLOR (app.) v. HUMPHREYS (resp.)

*Public-house—Sale of beer, &c., during prohibited hours on Sunday—11 & 12 Vict. c. 49—Travellers—Who are?*

*The app. kept a public-house about two miles from Birmingham. On a certain Sunday morning a policeman entered the house between the hours of eleven and twelve and found thirty-two persons in the rooms, passages, and at the bar, some of whom were drinking and some smoking. An information having been laid against the app. under the 11 & 12 Vict. c. 49, it was proved before the magistrates that two of the persons found in the house had left their own homes at Birmingham that morning, and having taken a walk of between seven and eight miles had stopped at the app.'s for refreshment on their way home. With regard to the others it was assumed that they resided at Birmingham.*

*The magistrates having decided that the persons in the house were not travellers within the 4th section of the Act, convicted the app.:*

*Held, "on appeal from this decision, that a person was a "traveller" within the meaning of the Act, who went out from home from any motive of business or pleasure except the desire of excessive drinking, and by reason thereof required refreshment; and that it was for the justices to say (placing reliance on their local knowledge) whether the app. believed with reason that his guests were travellers taking refreshment as such, or were making a pretence to that character for the purpose of profaning Sunday and passing it in drinking.*

*This was an appeal from a conviction by justices. The following is the case as stated for the opinion of this court.*

*It was proved by the evidence of Thomas Place, a police constable, that at twenty minutes past eleven in the forenoon of the day mentioned in the information he went to the deft.'s house, and finding the door closed, but unfastened, opened it and walked in, and found thirty-two men and women were in the house, of whom some were seated in the tap-*



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room, others standing in the passage leading from the front door, and in which the bar window is situated. Some were drinking, or had ale before them, and some of the men were smoking. The deft.'s daughter was engaged in drawing beer for the company.

The deft. told Place they were all strangers, upon which Place replied, "I suppose you call them travellers." He said, "Yes, they are travellers." Several got up and said they came from Birmingham.

They were strangers to witness, and had the appearance of Birmingham artisans, and it was assumed or admitted that they came from Birmingham. Their conduct was orderly. The deft.'s house is situated a little more than  $2\frac{1}{2}$  miles from the centre of the town, and the borough extends within about  $1\frac{1}{2}$  miles, and is built upon and up to the boundary from which rows of houses or detached villas stretch to the village of Moseley.

Two of the customers on the occasion were called as witnesses, and proved that they were inhabitants of Birmingham, and had walked from the town through lanes and fields that morning, thereby extending their walk, the one to seven the other to eight miles before reaching the deft.'s house, where they had ale and bread and cheese on their way home; they stated that they did not leave home with the intention of calling at deft.'s house. It was also proved by them that they were asked if they were travellers before being supplied, and that they said they were. These witnesses were at that time within about two miles of their residence, and the few whose addresses were ascertained appeared to be inhabitants of that part of Birmingham nearest Moseley, and within a mile and a half or two miles of it; of course some might have come a further distance.

For the defts. it was contended, first, that there was not sufficient evidence of opening; as no distinct opening had been proved, the justices were of opinion that the fact of persons being in the house, especially in the entrance passage and at the bar, although the policeman had not actually seen the door opened, was sufficient to enable them to draw an inference that the house had been opened, and considering also that the witnesses for the defence proved admission had been obtained without difficulty, were of opinion that the evidence was sufficient on this point.

It was then contended that the company were travellers; that they lived in another parish; and that on their representing themselves to be travellers the landlord was bound to supply them.

(On the whole case the justices were of opinion that, for all that appeared to the contrary, the company assembled had come from Birmingham, many of them a distance of less than two miles; that although the fact of a man being a traveller was not actually a question of distance, he must be on a journey or a wayfarer; but first, in the case of such as they assumed had only come from the near end of Birmingham, proceeding on foot a distance of less than two miles did not constitute a journey; and next, as to the others, who were shown to have taken a longer walk, and to be at so short a distance from their homes, that they had ceased to be travellers in the same degree as if the same individuals had arrived in Birmingham and had applied for refreshments at a tavern in the same street as their own residences. They were of opinion that the fact of the public-house not being in the same parish as the residences of the customers was unimportant; that under the circumstances the persons were not travellers; and that the inquiry made at the entrance, if the customers, could not be considered *bona fide*; and they fined the deft. the sum of forty shillings and costs.

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*Hayes, Serjt. for the apps.*—The persons admitted into the house were artisans of Birmingham, walking out into the country on Sunday morning and needing refreshment by reason of that walk; they applied to the app. for the same, and I contend that the app. was justified in providing them with what they required. They were "travellers" within the meaning of the Act, as the proper definition of the word is, any person who fares abroad either from a desire of the enjoyment of country sights and scenes, or from any other motive of business or pleasure except the desire of excessive drinking, and that any supply of the refreshment needed by reason of such faring abroad might be construed to be refreshment for a traveller. He cited

*Atkinson v. Sellers* 28 L. J. 12, M. C.; 32 L. J. 178; *Taylor v. Humphreys*, 30 L. J. 242, M. C.; 4 L. T. Rep. N. S. 514.

*Keane for the resp.*—These persons were not travellers within the true intent of the statute, and persons who choose to walk out merely for the sake of a walk cannot be called so; if they could, there would be no reason why any person residing in London should not start from his own house on a Sunday morning, walk a mile or so, and then turn back and call at the first public house he may chance to come to and require the landlord to open his house to him. Then it is for the app. to disprove the charge and show that the magistrates were wrong; and, although evidence has been brought forward as to two of the persons found in the house, nothing has been proved as to the remaining twenty-eight, and I submit that with regard to them there has been no evidence to show that they were travellers, and therefore they must be taken not to come within the exception. He referred to

*Tennant v. Cumberland*, 23 J. P. 15.

*Cur. adv. vult.*

Nov. 18.—*ERLE, C. J.*—In this case the question is, whether the evidence supported the information; and the answer depends on the meaning of the word traveller in the statute. It has been contended for the apps. that, as the persons admitted into the house were artisans of Birmingham, walking out in the country on Sunday morning, and needing refreshment by reason of that walk, therefore, they are travellers, taking refreshment within the words of the Act; that the inhabitants of Birmingham and other similar towns may well desire to emerge from a crowded region covered with brick and smoke, and are legally and morally right in gratifying that desire by taking a walk into the country during the hours best suited for a sight of the sun, on the only day on which labourers are free—in other words, on Sunday morning; that the prohibition against supplying any fermented liquors, or indeed any sustenance whatever, on Sunday, till half-past twelve o'clock, imposed on all throughout Great Britain who have any licence whatever to sell cider or beer, or wine, or spirits, attaches to a very large portion of the class who gain their livelihood by supplying food for strangers and the homeless, and that the wants of the persons maintaining themselves in the area between the Lands End and the North of Scotland are very various, and, considering the variety of habits incidental to living in town and country, sea and land, mountain and marsh, north and south, surface and mine; and as this prohibition is subject to an exception, that exception was probably intended to be capable of extensive application in proportion to the prohibition, as the intention of the Legislature in the prohibition was to promote the better observance of the Lord's-day in general, and in particular by excluding those who yield too



much to the attraction of the public-house, by excluding those from their accustomed haunts, to bring them to places of worship, and so to the paths of piety and virtue; that this intention of the Legislature might also be in part promoted by permitting resort to the beauties of nature at proper seasons, and allowing wholesome refreshment needful for the comfortable enjoyment thereof; and that their intention would probably be in part defeated by confinement in noisome air and deprivation of wholesome sustenance when needed; and that therefore the word "travellers" ought to be construed, as all those who fare abroad, either from a desire of the enjoyment of country sights and scenes, or from any other motive of business or pleasure, except the desire for excessive drinking, and that any supply of the refreshment needed by reason of such faring abroad might be construed to be refreshment to the traveller. He further contended that, as the exception of refreshment to a traveller is contained in the clause creating the prohibition, the burden of proving that the prohibition has been infringed, and that the case is not within the exemption, is cast on the informer (see *Gill v. Scrivens*, 7 T. R. 27; *Rex v. Pratten*, 6 T. R. 559); and also that, if the publican believed and had reason to believe when he supplied the drink that he was supplying refreshment to a traveller, he ought not to be convicted. This argument of my brother Hayes for the app. is, we think, well founded, and that the statute ought to be construed on the principles that he has contended for. We think that a person would be a traveller within the exception, if he came abroad from any of the motives above suggested as legitimate, and by reason thereof needed refreshment; but if he came abroad merely because he desired to go to a public-house and obtain drink he would not. The circumstances under which a guest is admitted and supplied would be matter for discretion in deciding whether the publican had reason to believe, or did believe, that he was a traveller within this description, either when he admitted him, or when he afterwards supplied him; such as, whether he was a stranger or a neighbour, whether he delayed longer, or took more than was consistent with the need of refreshment; the distance also would be relevant; but no rule can be laid down for a defined distance, as that which may be short for the vigorous may be long for the weakly. The cases decided on the matter support the app.'s argument. In *Atkinson v. Sellers*, the magistrates convicted because the deft. had taken a drive for a few miles on a Sunday afternoon, they being of opinion that business was necessarily included in the travelling; but the Court quashed the conviction. Cockburn, C. J. says, that a man cannot be said to be a traveller who goes to a place merely for the purpose of taking refreshment; but if he goes to an inn for refreshment in the course of a journey, whether of business or pleasure, he is entitled to demand it, and the innkeeper is justified in supplying him. Crowder, J. says, the only real distinction is between a man living in the neighbourhood or at a distance; whether he is travelling for pleasure or business cannot make any difference. In *Taylor v. Humphreys*, the magistrates convicted because the party walked out on Sunday afternoon four miles for pleasure; the Court quashed the conviction on the ground that a man might be a traveller though he was walking for pleasure, and had not exceeded the distance above mentioned, and they adopted the reason given by the Chief Justice in the last-mentioned case. The context of the statute supports the app.'s argument. Sect. 1 prohibits every licensed victualler and every beerhouse keeper in Great Britain from opening his house for the sale of, or from selling, any fermented or

distilled liquors on Sunday before 12.30, except as refreshment for travellers. Sect. 3 prohibits every licensed victualler, and every public beerhouse keeper, and any person licensed or authorised to sell any fermented or distilled liquors, and any person claiming to sell wine by retail by reason of being free of the Vintners' Company, or any other right or privilege, from opening his house for the sale of any article whatever during the prohibited hours, except as refreshment for travellers. Sect. 4 prohibits every person from opening any house or place of public resort for the sale of fermented liquors or distilled liquors, or from selling such liquors during the prohibited hours, except as refreshment for travellers. Sect. 5 empowers constables to enter any house or place of public resort for the sale of such liquors at any time. Sect. 6 makes every person offending against the statute liable to a penalty not exceeding 5*l.* for each offence, and declares that every separate sale shall be a distinct offence. These provisions are very stringent. For example, this app. might have been fined 160*l.*, that is 5*l.* for each guest. They do not bear upon the rich who have refreshment at their command; but they coerce the poorer classes throughout the island: salutary when they check the disorderly, pernicious when they molest the discreet. We consider that by construing the exception in the wider sense, we save from vexatious restriction many who have a right to be trusted with self-control, and at the same time leave the prohibition in force as far as the interests of real piety are concerned. The result is, the case will be sent back. We place great reliance on the local knowledge of the magistrates. They can tell whether the app. believed, with reason, that his guests were travellers taking refreshment according to the description above given, or making a pretence to that character for the purpose of profaning Sunday and meeting to drink. Probably it will not be worth while to proceed further against the app. upon the present facts, because, unless he raises the question again by his future conduct, the information will not have been without effect. If he does raise the question again, then the principles here explained may probably guide to a decision in accordance with our view of the law.

*Judgment for the app.*

Monday, Nov. 13, 1864.

THE VESTRY OF CHELSEA (apps.) v. KING (resp.)

*Metropolis Local Management Act 1862—25 & 26 Vict. c. 102, s. 73; 57 Geo. 3, c. 29, ss. 67, 68—Nuisances.*

*The Act of 57 Geo. 3, c. xlix. (local and personal), for the better paving, improving and regulating the streets of the metropolis, and "removing and preventing" nuisances and obstructions therein, by sect. 68, enacts that penalties shall be inflicted on persons keeping swine within forty yards of a street. This Act extended to the district comprised within the wealthy bills of mortality. The Metropolis Management Amendment Act 1862 extended the powers of improving and regulating streets and for the "suppression" of nuisances, contained in this Act, to the metropolis as defined in the Metropolis Management Acts:*

*Held, that the powers for the "prevention" of nuisances, including that of imposing penalties for keeping swine, contained in the former Act, were not extended by the latter Act to the larger area.*

Case stated by a police magistrate of the metropolis, under 20 & 21 Vict. c. 43:

James King, the resp., was summoned to appear before me, Henry Selfe Selfe, Esq., one of the ma-

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THE VESTRY OF CHELSEA v. KING.

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gistrates of the police courts of the metropolis, sitting at the Westminster Police Court, upon a complaint made by Charles Sahee, on behalf of the vestry of St. Luke's, Chelsea, the apps., for unlawfully keeping swine in a yard within forty yards of a street called Symons-street, in the parish of Chelsea, within the metropolis, contrary to the statutes 57 Geo. 3, c. xxix., s. 68, and 25 & 26 Vict. c. 102, s. 73.

It was proved that the resp. kept certain swine in a yard called Brook's-yard, within forty yards of Symons-street.

It was not proved that they were so kept as to be in any way a nuisance, or injurious to health.

The statute 57 Geo. 3, c. xxix. does not apply to the parish of Chelsea, or to the place where the swine are kept, unless it applies to it by virtue of the statute 25 & 26 Vict. c. 102, s. 73.

The apps. contended that the whole of the 68th section of the statute 57 Geo. 3, c. xxix. was extended to the metropolis by the statute 25 & 26 Vict. c. 102, s. 73; that its provisions were imperative, and therefore that I was bound in point of law to convict the resp.

I doubted whether (the swine in question not being a nuisance nor straying in the street) the case came within the 73rd section of 25 & 26 Vict., c. 102, which extends to the metropolis only so much of 57 Geo. 3, c. xxix. as relates to the powers of improving and regulating the streets, and for the suppression of nuisances (see especially sect. 67 of the last-mentioned Act). And having regard to the provisions of the Police Act, 2 & 3 Vict. c. 47, s. 60, clause 5; and to the Nuisances Removal Act, 18 & 19 Vict. c. 121, s. 8, I dismissed the complaint on the ground that I was not bound in point of law to convict the resp.

The apps. being dissatisfied with my decision, and conceiving it to be erroneous in point of law, I request the judgment of the Court of C. P. whether I was bound in point of law to convict the resp.

(Signed) H. S. SELFE.

14th July 1864.

The following were the app.'s points: That the provisions of the 68th section of the 57 Geo. 3, c. xxix. are all of them powers of improving and regulating streets and for the suppression of nuisances. That the 68th section was in force at the time of passing the 25 & 26 Vict. c. 102. That the 68th section is not inconsistent with the Metropolis Management Amendment Acts. That the 68th section applies to the metropolis as defined by the Metropolis Management Acts, and therefore to the parish of Chelsea by force of the 73rd section of the Metropolis Management Act 1852. That the provisions of the 68th section relating to the keeping of swine are powers for improving and regulating streets. That the said provisions are given for the suppression of nuisances in the streets of the metropolis, that is, in the words of the title of the 57 Geo. 3, c. xxix. for removing and preventing them. That the other provisions mentioned in the case do not apply to prevent the nuisance or effect the object contemplated by the 68th section of the 57 Geo. 3, c. xxix.

The 68th section of 57 Geo. 3, c. xxix. (commonly called Michael Angelo Taylor's Act) is as follows:

And be it further enacted that no person or persons whomsoever at any time or times hereafter shall breed, feed, or keep any kind or species of swine in any house, building, yard, garden, or other hereditament, situate and being in or within forty yards of any street or public place in any parochial or other district within the jurisdiction of this Act, nor shall suffer any kind or species of swine belonging to him or them to stray or go about in any street or public place in any parochial or other district within the jurisdiction of this Act. And that any person or persons who shall so offend shall forfeit and pay for every such offence the sum of forty shillings, and shall also forfeit the said swine and every of them unto the commissioners or trustees, or other persons having the control of the pavements in any such parochial or other district; and that it shall and may be lawful for the

said commissioners or trustees, or other persons directed and appointed by them, or their surveyor or surveyors, inspector or inspectors, or any other officer, or person or persons directed and appointed by them, and for any constables and headboroughs, at all times hereafter all such swine to seize, take, drive, and carry away and sell for the best price that can be reasonably had; and the money thereby produced, after deducting all the costs and charges of and incidental to such seizure, removal, and sale, to pay to the treasurer or treasurers of the said commissioners or trustees, or other persons, or to such other person or persons as the said commissioners or trustees, or other persons as aforesaid, shall from time to time direct and appoint.

And the 73rd section of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102) enacts that,

The powers of improving and regulating streets, and for the suppression of nuisances, contained in the Act 57 Geo. 3, c. xxix. (local and personal), intituled "An Act for better paving, improving and regulating the streets of the Metropolis and removing and preventing nuisances and obstructions therein," shall so far as the same is in force, and is not inconsistent with the provisions of the recited Acts and this Act, extend and apply to the metropolis, as defined in the firstly-recited Act and in this Act, including any unpaved streets, and notwithstanding any exceptions therein contained.

Keane, Q.C. appeared for the apps., and referred to

20 & 21 Vict. c. 48;  
25 & 26 Vict. c. 102, s. 73;  
57 Geo. 3, c. 29, ss. 67, 68;  
2 & 3 Vict. c. 17, s. 60, par. 5.

No counsel appeared for the resp.

ERLE, C. J.—I think that this appeal must be dismissed. The 68th section of 57 Geo. 3, c. xxix. contains provisions that no person shall keep any kind of swine within forty yards of a street or public place under a penalty of forty shillings and the forfeiture of the swine. The Act extended to all places within the weekly bills of mortality of those days, and contains a great quantity of regulations for better paving, improving and regulating the streets of the metropolis and "removing and preventing" nuisances and obstructions therein. Afterwards came the Metropolis Management Amendment Act, 25 & 26 Vict. c. 102, which extends to a much larger area and takes in many districts which are in their nature rural, as well as districts which are densely populated. It embraces Woolwich, Fulham, Hampstead and other distant places. Over this large area the Metropolitan Board of Works have very extensive powers for the removal of actual existing nuisances. Is the power of removing a pig and inflicting a penalty, given by sect. 68 of the older Act, extended to the districts subject to the local board by sect. 73 of the subsequent Act, containing the following words: "The powers of improving and regulating streets, and for the suppression of nuisances, contained in the Act of 57 Geo. 3, c. xxix., intituled, &c., shall extend and apply to the metropolis"—so that a magistrate is bound to convict? I think not. The powers contained in 57 Geo. 3, c. xxix, might have been transferred *in toto*, and nothing would have been easier for the draughtsman of the later Act than to say so in general terms; but he has not done so, and has taken only a part of those powers. The words in the title of Michael Angelo Taylor's Act are, "removing and preventing nuisances." The words in the transferring Act are, "for the suppression of nuisances." It is clear that the Legislature did not intend to transfer all the powers of the old Act. The existence of a pig might be contemplated as permissible in the more extended area. Looking at the definition of the word "street" in the Metropolis Management Act, the most secluded footpath in a rural part of any district would be within the prohibition. Chelsea is, it is true, densely populated; but if we were to decide that Chelsea was within the statute, we must do the same with comparatively scantily populated districts. The power of suppressing nuisances is transferred to the Metropolitan Board; and this, I

think, refers to the *modus operandi*, as far as I have looked through the statutes. The law would therefore stand that, within the ambit of the bills of mortality, keeping a pig within forty yards of a street is prohibited; but between that ambit and that of the Metropolitan Management Acts it does not expose the owner to forfeiture and to a penalty, unless it amounts to an actual nuisance.

BYLES, J.—I concur in every word that has been said by Erle, C. J. I have but one observation to make, and that is, that the rule that in construing a written document the surrounding circumstances are to be looked at applies equally to Acts of Parliament and to private writings. The moment that it appears that this statute applies to a large rural district, it becomes necessary to see if we are compelled to adopt the reading of the statute contended for by the counsel for the apps. We must not strain the Act. The Act of Michael Angelo Taylor contains two sets of powers, one for the "suppression" the other for the "prevention" of nuisances. The Act of 25 & 26 Vict. c. 102 transfers in terms to the metropolitan Board that for the "suppression" of nuisances which I conceive applies to existing nuisances, such as straying swine and others. The beneficial construction of the Act is also the true and literal one.

KEATING, J.—By 57 Geo. 3, c. xxix. the keeping of swine within forty yards of a street was made an offence, and also various other specified nuisances were made offences. The authorities, under the Local Government Act, had the largest powers in reference to existing nuisances in the metropolis, but not the power of preventing nuisances by punishing persons for such an act as keeping swine within forty yards of a street. That being so, the Local Management Amendment Act 1862 was passed. I have had great doubts if the Legislature did not intend to transfer the powers prohibiting the keeping of swine. I cannot say that these doubts have been all removed, but I am not sufficiently pressed by them to dissent from the judgment of the court.

*Judgment for the resps.*

#### DOGGETT v. CATTERNS.

*Gaming—Suppression of Betting Houses Act (16 & 17 Vict. c. 119), ss. 1, 5.*

*The deft., a betting agent and bookmaker, was in the habit of standing under certain trees in Hyde-park, and there making bets on horse races and receiving deposits. The plt., having made a bet with him and paid his deposit, brought an action for the return of the same;*

*Held that the deft. had brought himself within the meaning of the Act (16 & 17 Vict. c. 119), quite as much as if he had carried on his betting transactions in a room or booth, and that the plt. was therefore, under sect. 5 of the above Act, entitled to recover back his deposit in an action for money had received.*

In this case the declaration was for money had and received, and on accounts stated to which the deft. pleaded never indebted, set off; and, thirdly that the money alleged to have been received was money deposited by the plt. with the deft. under a contract or agreement by way of wagering and gaming, and illegally betting on horses running at races, and the account stated, as alleged in the declaration, was made and stated of and concerning the said money deposited as herein alleged, and not otherwise.

The action was tried before the Under-sheriff of Middlesex, on the 30th June last, when a verdict was found for the deft.

The deft. was a list keeper, or racing agent, and was in the habit of frequenting a certain spot under some trees in Hyde-park. On the 20th Oct. 1863, which was the day of the Lincoln races, he was in the park, and a crowd of persons round him; he had a betting-book in his hand, containing a list of the horses, and was betting on races, and offering odds against horses.

The plt. was also there, and took six to one from the deft. about Fly Trap winning the Witham Handicap at Lincoln, which was to be run for on that day; the plt. at the time depositing 5*l.* 10*s.* with the deft. This was at half-past twelve, and it appeared from the evidence that Fly Trap had been scratched a few hours before the bet was made, and the plt. accordingly, a day or two afterwards, demanded the return of his deposit, which the deft. refused to make, stating, at the time, that as Fly Trap had not won the race he had won the bet.

The rule at Tattersall's and the Jockey Club is, that money would be returned under such circumstances; but it was shown that there was a rule, which rule was stuck in the deft.'s book, and of which the plt. was cognisant, "that all bets stand on the day of the race, whether scratched or not."

Yeatman having obtained a rule calling on the deft. to show cause why the verdict found for him should not be set aside and entered for the plt. pursuant to leave reserved, upon the ground that there was no risk, the horse being struck out of his engagement; and, secondly, that the Betting Act (6 & 17 Vict. c. 119), ss. 1 and 5, entitled the plt. to recover back the 5*l.* 10*s.* in an action for money had and received,

Talfourd Salter now showed cause, and contended that what was contemplated by the Legislature was to prevent the opening of betting-houses or offices, and the receiving money in advance by the owners of such houses or by persons acting on their behalf; and that this case would not come within the meaning of the Act, although a booth put up in a park might, as "such person" as is mentioned in the 5th section must be connected with the management or use of a house, office, room, or other place, which was not the case here.

Yeatman, in support of the rule, was not called on.

ERLE, C. J.—I am of opinion that this rule should be made absolute. The evidence is that the deft. was in the habit of betting, generally with those persons who chose to take the risk; and to resort to a place frequented by him for the purpose of making bets, namely, near a certain tree in Hyde-park. The deft. had seen him at that spot daily, betting on horse races, and on this occasion paid him a deposit of 5*l.* 10*s.*, which was to be returned to him sixfold, on a certain contingency, viz. if a particular horse won a certain race at Lincoln. That was a deposit on a contingency, and by 16 & 17 Vict. c. 119, s. 5, money deposited on a bet with persons coming within the meaning of this Act may be recovered back. Now the words of that statute are, I think, wide enough to extend to this place. The deft. used this spot in Hyde-park, having his betting-book with him, and received deposits from persons resorting to him, and so brought himself within the meaning of the statute. Mr. Salter has contended that the "other place" mentioned in the first section of the Act must be *ejusdem generis* with the words "house, room, office," which precede it, and that the place therefore must be something in the nature of a structure; but he at the same time admitted that a booth would come within the meaning of the Act. I think, however, that the mischief is the same whether the place resorted to is under the shelter

[Ex.]

YOUNG v. EDWARDS.

[Ex.]

of a tree or canvas, or under a roof, and that the words in the statute are wide enough to include the present case. Then Mr. Salter says that the preamble to the Act, which points out the mischief to be remedied, narrows the construction I am putting on it. The words in the preamble are, "whereas a kind of gaming has of late sprung up, tending to the injury and demoralisation of certain improvident persons, being places called betting-houses and offices." No doubt the demoralisation caused by the betting-houses was the mischief which the Legislature sought to prevent, and I think it was intended, if places other than betting-houses were resorted to, to draw the line wide enough to include places of this description, and that this was the reason why they used the words, "no house, office, room, or other place." Mr. Salter contends that we shall check the rights of parties to lay bets, which are to a certain extent recognised by 8 & 9 Vict. c. 109, for he says, by this construction we shall bring all persons who bet within the peril of the penalty. I think, however, that the Act was meant to apply to persons using a place for betting as a habit, and to protect the young against professional persons doing so, and to prohibit the habitual gamester from carrying on his occupation, and does not affect the legality of an isolated bet made in the street or elsewhere. I am clear that the statute was made to meet this case, and that the rule must be made absolute.

KEATING, J.—I am of the same opinion, and think that the words of the statute are wide enough to meet this case. Mr. Salter admits that this was a transaction which would, if it had taken place in a house, have come within the meaning of the statute. In this case the person has resorted to the shelter of a tree in Hyde-park; is he or is he not a person contemplated by the Legislature. I think we may say that he is, and that the spot chosen by him for making his bets comes within the statute. I agree that this decision does not affect bets made in the street, or isolated transactions of that nature. If the parties had merely gone to Hyde-park and met there by chance, and then made a bet, there would be good grounds for Mr. Salter's argument; but the evidence shows that such was not the case, but that the deft. habitually resorted to this place for betting purposes. Under these circumstances the rule must be made absolute to enter the verdict for the plt.

*Rule absolute.*

### COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

*Monday, May 2, 1864.*

YOUNG (app.) v. EDWARDS, Surveyor of the Corporation of Stockton-on-Tees (resp.)

*Local Improvement Act—Validity of bye-law—Conviction by justices for infringement of—Local Government Act 1858 (21 & 22 Vict. c. 98, s. 84).*

*A local board of health, by one of its bye-laws, imposed continuing pecuniary penalties upon any person who should "construct any works, or, or omit to do, any act, or to comply with any requirement of the board, or should make any alteration in any works after completion, or any deviation from or alteration in any plan approved by the board, whether in new or existing buildings, contrary to the provisions therein contained, or do any act, matter, or thing contrary to the bye-laws made under the authority of sect. 84 of the Local Government Act 1858 (21 & 22 Vict. c. 98), or omit, neglect, or fail to perform and execute any of the works, matters, or things required by such bye-laws, or in any manner transgress the same bye-laws or any of*

*them;" and the board by the same bye-law were empowered to remove, alter, pull down, or otherwise deal with such works as the case might require :*

*Held, that a conviction by justices, imposing a pecuniary penalty on the app. under the above bye-law, was bad ; such bye-law being ultra vires, and beyond the authority conferred on the local board by the Local Government Act 1858 (21 & 22 Vict. c. 98), s. 84.*

Special case by justices of the borough of Stockton-on-Tees (under 20 & 21 Vict. c. 43, s. 43), which stated in substance as follows :

At a petty sessions of the borough on the 27th July 1863, a complaint was made by resp., the borough surveyor, against the app., under the bye-laws made in pursuance of the Stockton Extension and Improvement Act 1852, and the various Acts incorporated therewith, for having within six months then last past unlawfully proceeded to the construction of certain works on a certain piece of ground there (describing it) without having, previously to the commencement of such works, deposited the plans or given the notices required by the bye-laws made in pursuance of the before-mentioned Acts.

The bye-laws considered to have been infringed were the 21st and 26th.

By the 21st, every person intending to erect any new building is required to give sixteen clear days' notice to the local board of such intention by writing, and at the same time to leave at the office of the local surveyor detailed plans and sections of every floor of such intended new building drawn to a scale prescribed therein, and otherwise as therein is specified.

Bye-law 26 was as follows :

The local board shall, by their order approve or disapprove of the proposed new works or buildings within the times severally specified herein for the deposit of notices thereof, but if the owner, or person intending to construct any new street, or erect any new buildings, fail to give the notices herein required, or proceed to the execution of any of the works before the expiration of such notices without the approval of the local board; or, if any such owner or person shall construct, or cause to be constructed, any works, or do any act, or omit to do any act, or to comply with any requirement of the local board, or shall make any alteration in any works after they have been completed, or make any deviation from or alteration in any works after they have been completed, or make any deviation from or alteration in any plan which has been submitted to and approved by the local board, whether in new or existing buildings, contrary to the provisions herein contained, or do any act, matter, or thing contrary to the bye-laws made under the authority of the 34th section of the Local Government Act 1858, or omit, neglect, or fail to do, perform and execute any of the works, matters, or things required by such bye-laws, or any of them, or in any manner transgress the same bye-laws, or any of them, he shall be liable for each offence to a penalty of not exceeding 6l., and he shall pay a further sum not exceeding 40s. for each and every day during which such work shall continue to remain contrary to the said provisions, and the local board may, if they shall think fit, cause such work to be removed, altered, pulled down, or otherwise dealt with as the case may require, and the expenses incurred by them in so doing shall be repaid by the offender, and be recoverable from him in a summary manner as provided by the Public Health Act 1848.

On the hearing of the complaint it was proved, and the justices found as a fact, that the app., on or before March 27, 1863, deposited plans and notices, which were rejected on that day by the local board of health; that on or before April 24, 1863, he deposited amended plans and another notice, which were rejected on that day; and that on or before May 8, 1863, and more than sixteen clear days before any buildings were commenced, he again deposited the plan, to which, as he alleged, was attached the old notice dated 20th April, but the notice attached to the plan produced before the justices was a notice written the day before the hearing, and substituted by the app. for the notice of April 20, which had been destroyed.

The local board of health rejected the said plan on May 8, 1863, on the ground that the buildings as

shown thereon would project beyond the adjoining houses, and that it was desirable that the line of houses in the street as at present laid down should be preserved; and the app. commenced building a house and other erections without depositing any other plans or notices, and without the sanction of the board. The board by their order disapproved of the proposed new works within the times severally specified in the bye-laws for the deposit of notices thereof, and the justices found, as a fact, that app. had proceeded to the construction of certain works without having previously thereto deposited the plans and given the notices required by the said bye-laws.

It was objected on app.'s part that no penalty could be inflicted on him, inasmuch as a bye-law similar to a certain extent to this 26th bye-law which contained the penalty, had been held to be bad, so far as concerned the power therein contained for removing, altering, pulling down, or otherwise dealing with works, and that bye-law 26 was equally bad, and that a bye-law bad in part was bad as to the whole; but the justices, without deciding whether the 26th bye-law was or not bad in part, decided that they had power under it to inflict a penalty, and they thereupon convicted the app. of the offence charged against him, and adjudged him to pay a fine of 10s. and 2l. 15s. for costs, accordingly.

One of the questions of law for the opinion of the court was, whether the 26th bye-law was bad, either wholly or in part, and, consequently, whether the justices were justified in inflicting any penalty by virtue thereof?

On the case coming on for hearing on 20th Jan. last, the Court of Ex. ordered it to be remitted to the justices to be amended by stating the grounds upon which the plans deposited were rejected by the local board. The justices accordingly on the 16th Feb. amended the case by stating the grounds of rejection as above mentioned.

*Manisty, Q.C.* (with him *Prideaux*) for the app.—By sect. 34 of the Local Government Act 1858 (21 & 22 Vict. c. 98), local boards are empowered to make bye-laws with respect to the four following matters, viz.: first, the level, width and construction of new streets; secondly, the structure of walls of new buildings; thirdly, the sufficiency of the space about buildings with regard to ventilation; fourthly, the drainage of buildings, &c.; and they may provide for the observance of the same by necessary provisions as to giving notice, depositing plans, &c., and as to the power of the board to remove, alter, or pull down any work begun or done in contravention of such bye-laws. The question here was, whether bye-law 26 was a valid bye-law. The app. had deposited and given the requisite plans, sections and notices three several times, in compliance with bye-law 21, and three times had they been rejected without any ground being assigned for such rejection. This was an attempt on the part of a local board, similar to that made in *Brown v. The Local Board of Health of Holyhead*, 7 L. T. Rep. N. S. 332; 32 L. J. 25, Ex.; 1 H. & C. 601, to take a person's land from him without paying for it; but this court decided there that land taken must be paid for. Bye-law 33 in that case, which was very similar to the 26th bye-law here, was held to be *ultra vires* and bad, and it is submitted that this bye-law is also bad. But if it be good, app. has not contravened it.

*Mellish, Q.C.* (with him *Davison*), contra, for resp.—The local board proceeded and now rely on sect. 28 of the Local Government Act Amendment Act (24 & 25 Vict. c. 61), which prohibits any house or building forming part of any street within the district of any local board being brought forward beyond the front wall of the house or building on

either side thereof, without the previous sanction of such local board. It was because the app.'s plans contravened that section, and projected beyond the street line, that they were rejected, and not because they did not comply with the bye-law. App. then proceeded to build, and the board say he was wrong because no plans were deposited. App. is liable to a penalty under the bye-laws by virtue of sect. 34 of 21 & 22 Vict. c. 98, although none is inflicted by sect. 28 of the subsequent Amendment Act. The real question is, whether this last-mentioned section has been infringed by app.'s building beyond the street line. [BRAMWELL, B.—What we have to decide in truth is, whether the 26th bye-law is good.] The real decision in the *Holyhead* case, which has been cited contra, was that the bye-law did not refer to an old building. Moreover, a bye-law may be good in part, and bad in part; and this bye-law is good so far as relates to new buildings. [BRAMWELL, B.—Is this bye-law which gives the board a general power of disapproval without assigning any reason, a good bye-law under an Act of Parliament which says the board may make bye-laws, with power to enforce the observance of them in respect to four particular matters? Under this bye-law the board may enforce anything. MARTIN, B.—The substantial question is, have the justices any jurisdiction?] These are not the bye-laws of this particular board only, but the general bye-laws issued by authority by all local boards. The bye-law may be good and the conviction bad.

*Manisty* in reply.—The case contains no mention of the 24 & 25 Vict. c. 61, and the conviction was not under that Act, but under this bye-law.

POLLOCK, C. B.—We are all of opinion that the conviction is bad, the bye-law being *ultra vires*, and beyond the authority conferred on the board by the Local Government Act 1858.

MARTIN, BRAMWELL and PIGOTT, BB. concurred.

*Judgment for the app.; conviction quashed with costs.*

Attorneys for app., *Hollings, Sharp and Ullithorpe*, 1. Field-court, Gray's-inn, agents for *Dodds and Trotter*, Stockton-on-Tees.

Attorney for resp., *Perkins*, 13, Great James-street, Bedford-row, agents for *H. G. Faber*, Stockton-on-Tees.

The case of *Webster* (app.) v. *Edwards* (resp.) was a similar case, and followed the above decision.

### CROWN CASES RESERVED.

Reported by J. THOMSON, Esq., Barrister-at-Law.

Saturday, Nov. 12, 1864.

(Before POLLOCK, C. B., WILLES, J., CHANNELL, B., BYLES, and SHEE, JJ.)

REG. v. TUBERFIELD.

*Constable—Assault—Erection of duty—Evidence as to character of party being arrested.*

Upon an indictment for assaulting a constable in the execution of his duty, it appeared that the assault was committed whilst the constable was attempting to arrest the accused upon suspicion of having stolen some larch trees (under the value of 1l.) which the accused was carrying. To show that the constable was justified in suspecting the accused, the counsel for the prosecution asked the constable, in his examination in chief, "What did you know had been the prisoner's previous character?" The constable replied, "I knew him to be a very bad character," and was proceeding to mention previous convictions, when he was stopped on the

*ground that parol evidence of such convictions was inadmissible, but in answer to a question from the counsel for the prosecution, he said he had seen the accused in the Court of Quarter Sessions, and before the magistrates on one occasion :*

*Held, that, although the constable might be examined in chief as to the general character of the accused, he could not be asked in chief as to the grounds of his suspicion, and therefore that the question and answer as to the grounds of the constable's suspicion were improperly admitted.*

Case stated for the opinion of this court at the General Quarter Sessions of the peace for the county of Gloucester holden on the 28th June 1864.

Thomas Tuberfield was tried before me on an indictment which in the first count charged him with unlawfully and maliciously wounding Nehemiah Philpott: in the second count with inflicting on Nehemiah Philpott grievous bodily harm: in the third count with assaulting and beating, wounding and ill-treating Nehemiah Philpott and occasioning bodily harm to him: in the fourth count with assaulting and beating Nehemiah Philpott, a peace officer, to wit, a constable, in the due execution of his office: a fifth count charged a common assault.

In opening the case the counsel for the prosecution stated that the prisoner assaulted the constable Philpott in resisting an attempt to arrest him on a reasonable suspicion that a felony had been committed by the prisoner. From the evidence it appeared that on the 5th May the constable Philpott being on duty and standing at a public-house saw the prisoner and another man go up to the house, the prisoner carrying a bundle of larch trees which appeared to have been just pulled up; the constable looked at the bundle and asked where the trees came from. The prisoner replied in very coarse words and did not answer the question. The constable told the prisoner he thought he had stolen them. To this the prisoner made no reply, but took up the bundle and went along the road. The constable followed and overtook him and told him he should detain him until he made some inquiries about the trees. The prisoner refused to go with the constable to the police-station. The constable then took hold of the prisoner by the collar and told him he should detain him and take him to the station. Resisting this and another attempt to arrest him, the prisoner assaulted and beat the constable, inflicting a very severe wound on his head.

Evidence was given showing that the larch trees had been stolen from a plantation in the neighbourhood and were worth fourpence apiece. The number of trees was eight.

In the examination in chief of the constable Philpott, the counsel for the prosecution asked this question, "What did you know had been the prisoner's previous character?" To this question the prisoner's counsel objected and urged that, except in a few cases specially provided for by statute, the law does not permit a prisoner's previous character to be given in evidence against him. The counsel for the prosecution argued that the prisoner's previous character applied so directly to the issue whether the constable had reasonable ground to suspect that a felony had been committed by the prisoner as to make evidence of it admissible. I permitted the question to be put. The answer was, "I knew the prisoner to be a very bad character." The constable was proceeding to mention previous convictions, when he was stopped on the ground that parol evidence of previous convictions could not be received. In answer to questions from the counsel for the prosecution the constable said: "Before the 5th May I had seen him (the prisoner) in this court and before the magistrates on one occasion." Cross-examined on this point he said, "I saw him in the other court at

the last quarter sessions; I gave evidence against him; he was acquitted."

At the close of the case for the prosecution the prisoner's counsel submitted that, as there was nothing to justify the constable's suspicions but his knowledge of the prisoner's character and the possession of the larches freshly uprooted, and as the larches were of less value than one pound, the constable could not have had reasonable ground to suspect that a felony had been committed by the prisoner, and that there was no case to go to the jury. Anticipating this objection the counsel for the prosecution had in opening the case suggested that the larches might have been severed by some person and afterwards stolen by the prisoner. He had also drawn my attention to the 32nd, 33rd, and 36th sections of the Larceny Act of 1861, 24 & 25 Vict. c. 96; and the 20th and 21st sections of the Act relating to malicious injuries to property, 24 & 25 Vict. c. 97, and suggested that, for aught that appeared to the constable at the time of the attempt to arrest the prisoner, the eight larches might have been property, or part of property, in respect of which some one or more of the felonies described in those sections had been committed by the prisoner. It did not appear at the trial whether, at the time of the arrest, the constable knew the value of the trees. The counsel for the prosecution also argued, that even if the constable was not justified in arresting the prisoner, greater violence was used than was necessary to resist the attempt to arrest him. I thought there was a case for the consideration of the jury, and in summing up I submitted to them in writing two questions:

The first question was, "Do you think that the constable had reasonable ground for suspecting that a felony had been committed by the prisoner?" The answer of the jury to this question was "Yes."

The second question was, "Do you think that the prisoner used more violence than necessary to resist an unlawful attempt to arrest him?" To this question the answer of the jury was "No."

The jury then, under my direction, returned a verdict of "guilty," and I resipited the judgment and remanded the prisoner to the gaol, in order that the opinion of the Justices of either Bench and the Barons of the Exchequer might be taken on two questions:

1. Was evidence of the constable's knowledge, at the time of the attempt to arrest the prisoner, of the prisoner's character properly admitted?

2. Was there evidence sufficient to be left to the jury that the constable had reasonable ground for suspecting that a felony had been committed by the prisoner?

JAMES FRANCES, Chairman.

*Sawyer* for the prisoner.—The conviction cannot be sustained. It was contended for the prosecution that the police-constable had reasonable grounds for believing that a felony had been committed, because he knew the prisoner to be a bad character; and further it was said that the trees might have been severed from the soil by somebody else, and that the prisoner might have obtained possession afterwards, and so been guilty of a larceny. Neither of these positions is tenable. To constitute a stealing within the 24 & 25 Vict. c. 96, s. 32, the trees must exceed the value of 1*l*, but here they are much below that value. Neither does the case fall within sects. 33 or 36. Again, to make the case a felony under sect. 20 of the 24 & 25 Vict. c. 97 (Malicious Injury to Property Act), the injury done must exceed the value of 1*l*. No felony was committed, and the jury have found that the prisoner did not use more violence than necessary to resist an unlawful attempt to arrest him. Assuming the policeman to have been in the execution of his duty

in arresting the prisoner, the conviction cannot be supported, because the evidence of the prisoner's character given by the constable was inadmissible. The effect of it was to damage and prejudice the defence of the prisoner. The 24 & 25 Vict. c. 96, s. 116, carefully guards against the charge of a previous conviction being stated to the jury until the prisoner has been found guilty of the offence charged in the indictment. This is the general course of proceeding, not to allow a prisoner's defence to be prejudiced by any evidence of the prisoner's previous character: (Best on Presumptions, 211; 1 Phil. on Evid. 499.) The prisoner's bad character formed no ingredient in this case. If a policeman is allowed to say generally, "I know the man to be a bad character," that so prejudices the defence that the prisoner's counsel is forced to call on him to state the grounds. No definite meaning can attach to the general imputation of bad character. It may mean a man is a drunkard, or that he has deserted his wife, or anything else that is morally wrong.

*Gilmore Evans* for the prosecution.—The evidence objected to was admissible. The question was not as to the innocence or guilt of the prisoner, but whether the constable had reasonable or probable cause to suspect the prisoner of having stolen the larch trees. The case of an action for malicious prosecution is analogous, and in such a case the deft. may lay before the jury all the circumstances which actuated him, that the jury may judge whether he was acting maliciously or not. Here the policeman had a right to say what he knew of the case and of the man. Every circumstance was material, and the grounds of his suspicion were necessarily stated. The cases of

*Williams v. Cross*, 2 Car. & K. 422;

*Hogg v. Ward*, 27 L. J. 443, Ex.;

*Hawles v. Marks*, 30 L. J. 389, Ex.; 4 L. T. Rep. N. S. 805.

*Allen v. Wright*, 8 Car. & P. 522;

show the degree of particularity admissible. The value of the evidence is not the question: (Hawk. P. C. bk. 2, cap. 12, s. 8.) If a policeman is not allowed to consider the previous character of a person whom he arrests in the execution of his duty, the consequences will be very serious; and, if he is, why may he not state them?

**POLLOCK, C.B.**—We are all of opinion that this question ought not to have been put to the policeman. The question is, "What did you know had been the prisoner's previous character?" The answer of the constable is, "I knew the prisoner to be a very bad character." The question is not limited to what the witness knew of the prisoner, but what he knew of the prisoner's character. The witness was entitled to say that he entertained reasonable grounds for suspecting him of having stolen the trees, but that did not justify him in going into those grounds. It was open to the other side to go into them. In the first instance we think that the question ought not to have been put, and certainly the answer of the policeman as to the grounds of suspicion ought not to have been given. The object of the law in precluding such evidence is to prevent any evidence coming out so as to prejudice the prisoner in his defence. We think, therefore, this conviction cannot be sustained.

*Conviction quashed.*

## REG. v. MUTTERS.

### Nuisance—Working quarries—Evidence.

*An indictment charged the deft. with working quarries of stone near to public streets and dwelling-houses, and unlawfully and injuriously throwing and discharging pieces of rock and stones into and upon the streets and dwelling-houses, whereby the streets were rendered unsafe for passengers and the dwelling-houses, and the inhabitants were injured, &c. Other counts of the indictment charged the deft. with negligence in the working of quarries. On the 6th May the deft. caused a number of stones and pieces of rock to be thrown from a quarry by blasting it; and it was proved by one witness that a piece was thereby cast into her bedroom in a house in a street near the quarry; by another, that a piece, ten inches by seven or eight inches, was thrown into his garden; by another, that a piece struck his horse in the street; and by two witnesses, that many stones fell into the adjacent streets.*

*On a case reserved as to whether, upon these facts, the deft. could properly be convicted upon the indictment:*

*Held, that he was rightly convicted.*

Case reserved at the Devon Quarter Sessions, for the opinion of this court.

Henry Mutters was indicted and tried, for that, First count:

That at Torquay on the 6th May last, he did near to draw public streets, being the Queen's common highway, and the near certain dwelling-houses, work, manage and use certain quarries of stone, and did unlawfully and injuriously cast, throw and discharge divers large pieces of rock, and divers other large stones in, into, through and upon the said dwelling-houses, and in and upon the said highway, and did unlawfully and injuriously suffer and permit the said stones and rocks to remain on the said highways for several hours, whereby the said dwelling-houses were greatly injured, and the inhabitants put into great fear and danger, and whereby the said highways were rendered unsafe for passengers, and were, by the continuance and remaining of the said pieces of rock and stones, obstructed.

Second count:

That he did so negligently, carelessly, &c., manage, work, and use certain quarries of stone, as to cause divers large pieces of stone to be thrown and discharged upon, into and through certain dwelling-houses, whereby the said dwelling-houses were injured, and the lives and properties of Her Majesty's subjects put in peril and endangered.

Third count:

That he did, near certain streets and highways, so negligently manage, work and use certain quarries of stone as to cause divers large pieces of stone to be thrown and discharged in and upon the said streets and highways, and did suffer the said pieces of stone to remain upon the said highways for several hours, whereby, by the throwing and discharging of the said pieces of stone on the said highways, the passage of Her Majesty's subjects was rendered unsafe and dangerous, and the said highways were by the said pieces of stone lying thereon, obstructed.

The deft. was convicted, and the judgment on the conviction postponed in order to obtain the opinion of the Criminal Court of Appeal on the following facts. He was discharged on recognisances to appear and receive judgment when called upon.

The prosecutors were the Local Board of Health in Torquay. The following witnesses were examined.

George Hayes said:—I am a tailor living at No. 1, Alma-terrace, on the Warren-hill, in Torquay. I awoke about a quarter to eight o'clock on the morning of the 6th May; I saw something falling down, it was a stone about twenty pounds weight.

Jemima Book said:—I was in my bedroom in Alma-terrace, on the morning of the 6th May. One stone came into my bedroom; I was in bed. The stone came three or four inches from the bed.

Walter Myers said:—I live at No. 1, Alma-terrace. On the morning of the 6th May I had a horse and cart in the Rock-road. I heard some stones fall; there were more stones than one; some pitched against the wall. There is a good bit of traffic. There are schools there to which children go. One stone struck my horse's foot.

George Douch said:—I live in Swan-street on the Warren-



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hill in Torquay. On the morning of the 6th May, a large stone, part of the rock, some ten inches by six or eight, fell on Mrs. Staff's wall and pitched in my garden. There was a shower of stones, small ones. I heard a report of blasting just at that time.

Edward Appleton said:—I am surveyor to the local board of health at Torquay. The plan produced (and which is the plan annexed to this case) is a correct plan. Swan-street, shown on the plan, is an old street. The house where Mr. Douch, the last witness lives, is an old house. The Rock-road shown on the plan is in part dedicated to the public. St. Luke's schools have been built more than ten years. Mr. Cary is the owner of the road. On the 6th May, I received information which led me to go to a quarry on the Warren-hill, shown on the plan, about nine o'clock in the morning. I saw the prisoner there; I told him that mischief had been done in the roads below, by stones from the quarry by the blasting. He said he had fired the hole. He pointed out where the hole was; it was about fifteen feet above the Warren-road, and about ninety or one hundred feet above Swan-street. I did not see any faggots or planking. He told me that the hole was three feet four inches in depth, and that he had put in eleven inches of powder. The depth was not an improper depth. The proper charge would have been five inches to throw the rock without scattering it. I find that five inches is quite enough; eleven inches is a great deal too much. I think if powder had been used at all, it should have been used in very small quantities. Some of the houses in the Rock-road, which are in that part of the road shown in the plan, under the position of the hole which was fired, were built before that part of the hill was quarried, and the road was used for public traffic before that.

The deft., who was undefended, called no witnesses.

The jury were directed that, if they were of opinion that in working the quarry, stones were thrown out upon the houses and the roads, and that the use of the houses or the traffic of the roads was rendered unsafe to such a degree that persons inhabiting the houses or using the roads of ordinary courage might reasonably apprehend injury or danger, that was a nuisance, and that if the deft. had committed the act by which the stones were thrown out upon the houses and roads, they might find him guilty; and they were directed to find whether in the manner of working the quarry the deft. had been guilty of negligence. The jury found the deft. guilty, and said they were of opinion that he had worked the quarry negligently.

The question for the opinion of the Court is, whether, upon the facts proved, the deft. could be properly convicted upon this indictment.

B. ANDREWS, Chairman.

M. Bere, for the prosecution, was not called on.

No counsel appeared for the prisoner.

By the COURT.—There was abundant evidence for the jury.

Conviction affirmed.

#### REG. v. JAMES ROBERTSON.

*Demanding money with menaces—Threat of policeman wrongfully to lock a man up—24 & 25 Vict. c. 96, s. 45.*

*A policeman, late at night, met the prosecutor, who had just parted from a female in a street, to whom he had been talking, and told him that he had been talking to a prostitute, and that he must go with him to the Bridewell, and that the prosecutor was under a penalty of 1l. for talking to a prostitute in the street, and that if the prosecutor would give him 5s. he might go about his business. The prosecutor eventually gave the policeman 4s. 6d.; but while the policeman was demanding the other sixpence, an inspector came by, when he desisted, and prosecutor complained to the inspector:*

*Held, sufficient evidence to sustain a conviction against the policeman for demanding money with menaces under 24 & 25 Vict. c. 96, s. 45. It is no answer to an indictment under this statute that all the money demanded has been obtained, and so a larceny committed.*

Case reserved for the opinion of this court by

the Assistant Barrister at the Liverpool Quarter Sessions.

At the Court of Quarter Sessions of the peace, holden in and for the borough of Liverpool, on the 18th July 1864, James Robertson was tried before me upon an indictment preferred and found against him under the 45th section of 24 & 25 Vict. c. 96, which indictment charged that the said "James Robertson with menaces did feloniously demand of one Joseph Speck certain money, to wit, the sum of 5s. of him the said Joseph Speck, with intent the said money from the said Joseph Speck feloniously to steal."

It was proved, at the trial before me, that at the time of the committing of the offence the prisoner was a policeman in the police force of the borough of Liverpool, and was on duty in the said borough, and was wearing his uniform and armet. The evidence of the prosecutor Joseph Speck was as follows:

I am a groom in the service of Dr. Vose. I had been spending Saturday evening with a friend, and at a quarter to one o'clock on Sunday morning, 19th June, was going home along Hope-street alone. A female came up and asked me the way to Oxford-street. I directed her, and talked to her for two or three seconds. I took no liberty with her, and she left me and passed on. The prisoner came round the corner, and shook hands with me before he spoke. I mistook him for another officer whom I knew. I said it was getting very late, and I wanted to go home, and turned to leave him, when he said, "You have been talking to a prostitute." I said, "I do not know who she is, or what she is." He said "You must go with me to Hotham-street Bridewell." He said I had the care of three horses, and if he would go with me to my master's and leave the keys, I would go anywhere with him. He said I was under a penalty of 1l. and costs for talking to a prostitute in the streets, and that if I would give him 5s. I might go about my business. He pulled out a book to take my name. He asked my name, and said he would write it down. He did not write it down. He took the book out before he mentioned the 5s. I pulled out a half-crown and two-shilling piece, and he placed it in his right hand pocket. I then saw a man coming, and I went across the street and prisoner followed. The man was drunk. The prisoner asked him where was his hat, and what officer had been after him, and said he would take us both; but he let the man go, saying, "You may go about your business;" and, to me, "I'll stick to you." When the man went, I heard an inspector's signal-stick. Prisoner then pulled out the money and said, "This is only a two-shilling piece; I must have the other sixpence." I said I had no other change, only two-shilling pieces. He then pulled out two halfpennies to give me change. I would not take it, and I did not give him the sixpence. The inspector then came up and passed, the prisoner saying, "All right, sir." I followed the inspector and made a complaint. I and the inspector went to find Superintendent Sibbald, and found him at Steel-street Bridewell, and when there the prisoner was brought in. Sibbald told him that he was in charge for extorting 4s. 6d. He said, "If I have the money, it is about me." Sibbald said, "You will have to be searched." He put his hand in each trower's pocket and pulled out two halfpennies, a two-shilling piece and key. I gave him the money because he put it as a charge. I expected he was going to take me to Bridewell.

Upon cross-examination by the prisoner's counsel, the prosecutor said:

I believed I could have been fined 1l. for speaking to a woman, and was quite sober. I only answered the girl's questions. He did not charge me with more. I did not throw down the money, and tell him to take it. I did not say, "You must have it, and shall have it." I did not refuse to give my name and address.

It was further proved by the evidence of an inspector of the Liverpool borough police force, that a complaint was made to him of the conduct of the prisoner by the witness Joseph Speck, at the place where, and immediately after the time when the said offence was alleged to have been committed, and that a two shilling piece and a half-a-crown were found upon the prisoner, and that at the time the half-crown was found upon him, and before it was so found the prisoner denied having any such coin or money in his possession.

1. It was submitted by the counsel for the prisoner, that the case proved was not within the statute and indictment, because the money was obtained and the offence completed.

2. That this was not a menace within the mean-



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ing of the statute, because the money was obtained by a threat to accuse of a non-existing offence.

I overruled these objections and the jury convicted the prisoner.

I postponed passing sentence, and remanded the prisoner back to the Liverpool borough gaol, and reserved the above points for the decision and opinion of the Court of Criminal Appeal.

LEOFRIC TEMPLE, Assistant-Barrister.

*Little for the prisoner.*—It is submitted that there was no proof of any "menace" within the meaning of sect. 45 of 24 & 25 Vict. c. 96. A menace to accuse of a crime is not within the section. [WILLES, J.—Here the prosecutor was menaced with imprisonment unless he gave the policeman 5s.] This is similar to *Rex v. Knewland and Wood*, 2 Leech C. C. 721, where a young woman was invited into a mock-auction room and against her will compelled to bid for articles which were immediately knocked down to her, and on not paying for them she was threatened to be taken to Bow-street, and from thence to Newgate and be imprisoned till she paid for them, and after these threats a sham constable was introduced, who said that unless she gave him a shilling she must go with him, upon which she did give him a shilling as a means of obtaining her liberty, to avoid being taken to prison, and not from fear of any other personal violence. In that case the woman paid the sum demanded, because she was afraid of being taken to prison. [CHANNELL, B.—This is a statutory offence. The decision in that case was, that the facts did not support an indictment for robbery at common law.] There must be an intent to steal to bring the case within sect. 45, but here according to the decisions there could be no intent to steal. The threat to amount to a menace within the Act must be such that if the money had been obtained the offence would amount to larceny. The menace must be such as would alarm a reasonable person :

*Rex v. Southerton*, 6 East, 126;

*Reg. v. Walton*, 9 Cox C. C. 268; 1 L. & C. 288.

Wilde, B., in delivering the judgment of the court, *Reg. v. Walton*, says: "There are many demands for money or property, accompanied by menaces or threats, which are obviously not criminal, nor intended to be made so. Thus, in a case of disputed title to personal property, a man may threaten his opponent with personal violence if he does not relinquish the subject of dispute, and he would not be within the intention of this statute. Where, then, is the proper limit to the operation of this section? It is to be found in the words 'with intent to steal.'" In this case there could be no intent to steal, because the facts do not amount to stealing. Secondly, if any offence was committed, it was an actual stealing. [CHANNELL, B.—There is an express decision on that point, *Reg. v. Norton*, 8 C. & P. 671, which decides that any indictment for obtaining money by menaces under such circumstances is good.]

A. Peel, for the prosecution, was not called upon to argue.

POLLOCK, C.B.—We are all of opinion that this conviction was quite right. The points taken by the prisoner's counsel are, first, that this is not a case within sect. 45 of 24 & 25 Vict. c. 96, because the money was obtained, and the offence of stealing complete. That is not correct, because part only of the 5s. demanded was obtained; and even if the whole had been obtained, the case cited by my brother Channell shows that would have made no difference. Secondly, it was said that this was at a menace within the meaning of the statute. We think there is no ground for that objection. If no policeman states that he is acting under authority, and that it is his intention to exercise

the authority which he professes to have unless money is given to him, that is a menace within the statute. An action at law would give no redress for the injury to which the prosecutor was exposed. The threat is within the plain words of the Act.

Conviction affirmed.

REG. v. JOHNSON AND ANDERSON.

*Indictment—Pleading—Description of property.*

*In an indictment for attempting to steal goods and chattels in a dwelling-house, it is not necessary to specify the goods.*

Case reserved for the opinion of this court by the Recorder of Brighton, Sussex.

At the General Quarter Sessions of the peace for the borough of Brighton, holden on the 18th July 1864, Ephraim Johnson and Walter Anderson were arraigned before me upon the following indictment:

Borough of Brighton to wit—The jurors for our lady the Queen, upon their oath present that Ephraim Johnson and Walter Anderson, on the twenty-seventh day of April, in the year of our Lord one thousand eight hundred and sixty-four, the goods and chattels of Thomas Roe, in the dwelling-house of the said Thomas Roe, situate in the borough of Brighton, in the county of Sussex, did attempt feloniously to steal, take, and carry away against the peace of our Lady the Queen, her crown and dignity.

The prisoners severally pleaded not guilty.

Before the case for the prosecution was commenced, the prisoners' counsel applied to me to quash the indictment, upon the ground that, upon the face of it it, was bad for uncertainty, in not charging the defendants with attempting to steal some particular article or articles, the property of the prosecutor.

I declined to stop the case upon this objection, but consented to reserve the point for the consideration of this court.

The trial proceeded, and both the prisoners were convicted.

The question upon which the opinion of your Lordships is respectfully requested is, whether the indictment before verdict is good? If this court be of opinion that it is not, the conviction is to be quashed.

The prisoners are in custody awaiting sentence.

JOHN LOCKE.

Lumley Smith, for the prosecution, was not called on. No counsel appeared for the prisoner.

POLLOCK, C.B.—We are all of opinion that the conviction is right. Where an indictment charges an actual stealing in a dwelling-house the goods must be specified; but where an attempt to steal only is charged, it is not necessary to specify the goods in the house.

Conviction affirmed.

## ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Friday, Nov. 11, 1864.

SPILLER v. MAUDE.

*Friendly society—Sole surviving member.*

*Where the rules of a friendly society made no provision for its dissolution or extinction, or for the application of the funds of the society in either of those events, the sole surviving member of the society, and the only party who could claim any interest in its property, was*

*Held entitled to the income of the funds only for her life, with liberty to any party who might then be interested to apply to the court, when, also, notice was to be given to the Attorney-General.*

The plt. in this suit was the sole surviving member of the York Theatrical Fund Society, which was

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instituted in 1815 for the benefit of old and infirm actors, by twenty-eight members of the York company of actors and actresses. The defts. were the legal personal representatives of the last surviving trustee of the society. The bill prayed a declaration that the plt. was absolutely entitled to all the funds of the society.

The facts of the case were shortly these :

The society was not originally registered under the Friendly Societies Act, but in 1832 the rules of it were amended at a general meeting, certified by the Registrar of Friendly Societies, and duly confirmed by the justices under the provisions of the 10 Geo. 4, c. 56. By the amended rules the funds of the society were vested in three trustees, but were to be under the management of a committee of five persons appointed at the annual general meeting of the society, and of a treasurer and secretary. Members were elected by the committee, those alone being qualified for election who had been for one year actually performing on the stage in the York company. The funds of the society were to be raised, in the first instance, by fixed contributions from members, and from annual benefits. The treasurer was also to collect moneys from the voluntary contribution of strangers to the society. Members who were in arrear with their subscriptions were to be excluded from all the property of the society, and all benefit in the fund. The committee had a discretionary power of providing medicines and advice for sick members in indigent circumstances, of relieving orphan children of members, and of contributing towards the funeral expenses of poor members. The capital of the fund was not to be broken into, and if the interest was deficient to meet the annuities payable out of it, they were to be proportionately reduced.

The only rules that it is material to this report particularly to state were the following :

Rule 14. The interest only of the principal moneys for the time being held by the trustees, shall be applied towards the current expenses and general purposes of the society.

Rule 19. Every member becoming incapacitated by age, sickness, or accident from exercising his or her profession as an actor or actress, and who shall not possess an independent income of more than 50*l.* per annum, shall be entitled to the annual sum of 30*l.*; and if any such member shall possess an independent income of less annual amount than 50*l.*, they shall be entitled to such annual sum as together with their own income will make up the sum of 50*l.* per annum.

Rule 22. That all money arising from contributions and fines, &c., shall be applied to the purposes in these rules stated; and in defraying the necessary expenses attending the management of the affairs of the society.

The rules contained no provision for the dissolution or extinction of the society, or for the application of the funds in either of those events. In 1825 the three trustees had made a declaration of trust in favour of the society. In 1835 one of the trustees died, and a new trustee was appointed in his place, who was the surviving trustee.

In 1835 there were only six members of the society, and they then proposed to divide the funds, which at that time consisted of 1300*l.* New Three-and-a-Half per Cent. Annuities, equally between them. That proposal, however, was not carried out. Since 1835 there had been no new subscription to the fund, and no new members had been enrolled. Five of those six members had died, and the plt. was the survivor. She had been duly receiving an annuity from the fund till 1862, when she was paid the whole income of it. In 1864 a claim was made by a child of a deceased member; but the child was proved not to be in indigent circumstances, and it was in evidence that there were no orphan children who could claim any interest in the property of the society; in fact, the plt. was the only person who could make any demand with respect to it. There were no accounts; but on the back of an old play-bill was a list of donations, amounting to about 300*l.*, contributed by strangers to the society. It also

appeared from the play-bill that an appeal was then made for charitable aid for the society, on the ground that, by the rules of it, the capital of its funds was never to be broken into, and the income was then insufficient for the purposes of the society. It was also notified that the society was to be managed in the same way as such societies in London.

The plt. by her bill claimed to be entitled to the whole of the fund absolutely, and prayed payment of it to her accordingly. The defts. declined to transfer it without the direction of the court, and by their answer submitted, whether the Attorney-General ought not to be a party to the suit?

A. G. Marten appeared for the plt., and contended that this was an ordinary friendly society; that, on the death of any member, his interest in it ceased; and that, all the members being joint tenants, the survivor took the whole of its property. He cited

10 Geo. 4, c. 56, s. 26;  
13 & 14 Vict. c. 115, s. 34;  
18 & 19 Vict. c. 63, s. 13;  
*Anna*, 3 Atk. 276.

C. Hall for the defts.

The MASTER of the ROLLS.—I cannot order the payment of this fund to the plt. in this suit. It seems clear to my mind that about 300*l.* of it arose from the contributions of persons who were strangers to it. Those contributions must have been made with a charitable object, and to augment the fund as a charity. If it can be ascertained how much of the fund now in existence arises from these sources, I think that so much should be applied *cy pres*. I am inclined to think that, if any one is absolutely entitled to the fund, the representatives of deceased members may claim a share in it. For the present, however, the fund should be brought into court. I will direct the income of it to be paid to the plt. for her life, with liberty to any parties who may then be entitled, to apply to the court. Notice should then be given to the Attorney-General. If the plt. is entitled to any share in the capital of the fund, she may dispose of it by will. The costs of all parties must be paid out of the fund.

Solicitors for plt., *Bell, Brodrick and Bell*.  
Solicitor for defts., *T. W. Nelson*.

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. BAUNDERS, Esqrs.,  
Barristers-at-Law.

Saturday, Nov. 5, 1864.

REG. v. JUSTICES OF SALOP.

Assistant-overseer—Notice of vestry to appoint —  
Salary—Duties.

In the notice of a vestry meeting to appoint an assistant overseer in pursuance of 59 Geo. 3, c. 12, s. 7, it is not necessary to state that he is to be a salaried officer.

Where a resolution of vestry merely states that E. R. was elected to be assistant-overseer of the parish at 15*l.* per year, and the warrant of justices recited that the vestry appointed him to perform all the duties of overseer of the poor, and then authorised and empowered him to perform the said duties :

Held, that this was a sufficient appointment, and that the resolution, by implication, meant him to be overseer in all respects, and to perform all the duties of an overseer.

Rule nisi for a certiorari to remove a warrant under the hands of justices of Salop, appointing Edwin Roberts to be assistant-overseer of the poor of the

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parish of Cainham, in the county of Salop. The affidavits in support of the rule stated that notice was given by the overseer of Cainham as follows:

Notice.—The parishioners of the parish of Cainham are requested to meet at the church on Thursday next, at eleven o'clock in the forenoon, to appoint an assistant-overseer for the parish of Cainham, and sundry other business.

Cainham, April 9, 1864.

SAMUEL SMALL, Overseer.

There are two chapels in the parish, and the notice was fixed on the door of the parish church of Cainham, and upon the door of one only of the chapels. In pursuance of the notice, a meeting was held at the parish church on the 14th April, at which certain parishioners, but not a majority of them, attended, and at which meeting Edwin Roberts was nominated and elected to be assistant-overseer of the poor of the parish. The following resolutions were then passed in relation thereto:

Cainham Church, 14th April 1864.

At a meeting held this day it was resolved, that an assistant-overseer be employed, by a majority of two persons. Nominated by Mr. Giles and seconded by Mr. Bolton, that Edwin Roberts be appointed, at a salary of 15*l.* per year, and carried by a majority of two. (Signed by eight persons.)

Subsequently to the meeting an application was made to two justices of the county of Salop to appoint the said Edwin Roberts assistant-overseer of the parish. And at a petty sessions assembled on the 25th April, the Rev. Charles Adams, vicar of the parish, appeared and objected that the appointment was unnecessary, and also that the notice concerning the meeting to appoint the assistant-overseer was not affixed or placed on the door of both the chapels. And further, that the notice did not specify the amount of salary to be paid to the person to be so appointed; and also because it was not stated in the resolution of the meeting what were the duties to be executed and performed by him.

A warrant was afterwards made under the hands of two justices as follows:

County of Salop, to wit.—Whereas the inhabitants of the parish of Cainham, in the county of Salop, in vestry assembled in the said parish on the 14th April last, did nominate and elect Edwin Roberts to be assistant-overseer of the poor of the said parish, and did determine and specify that he should execute and perform all the duties of the office of an overseer of the poor of the said parish, and did fix the yearly sum of 15*l.* as and for the yearly salary of the said Edwin Roberts for the execution of the said office: Now we, two of Her Majesty's justices for the said county, in pursuance of the statute in such case made and provided, do hereby appoint the said Edwin Roberts to be an assistant-overseer of the poor of the parish. And we do hereby authorise and empower him to execute and perform the said duties, and to receive the said salary, so as aforesaid fixed by the said inhabitants in their said vestry. Given, &c.,

THOMAS L. ROBERTS. (L.S.)  
CHARLES POWELL. (L.S.)

The affidavits, in answer, stated that there were only two dissenting chapels in the parish, and that at the meeting of the vestry the duties of the assistant-overseer were well understood by all parties to be the usual duties.

Abbott showed cause.—It was unnecessary to post the notice of the meeting on the doors of the dissenting chapels. All that was required in this case was to post a notice on the door of the parish church, which was done.

Dowdswell said, that he should abandon that objection.

Abbott.—The next objection is, that the notice of the meeting was bad, because it did not state that the assistant-overseer was to be a paid officer; and, further, that the resolution of the vestry was bad because it did not define what the duties of the assistant-overseer were to be. It was not necessary to state these things. The 59 Geo. 3, c. 12, s. 7, empowers the inhabitants in vestry to nominate and elect an assistant-overseer, and to determine and specify the duties to be by him executed and performed, and to fix such salary as the vestry may determine, and

two justices are empowered by warrant to appoint any person so nominated, &c., and every person so appointed is empowered to execute "all such of the duties of the office of overseer as shall in the warrant be expressed as fully as the same may be executed by an ordinary overseer." The notice was sufficient; "to appoint an assistant-overseer" raises the question of salary, which is incidental: (*Blunt v. Harwood*, 8 A. & E. 610.) As to the specification of the duties in the notice. [MELLOR, J.—The parishioners should attend the vestry if they want to know what the duties of the assistant-overseer are to be.] It must be taken from the notice and resolution that the assistant-overseer was to be appointed to perform all the duties of an ordinary overseer, there being no limitation expressed: (*Skingley v. Surridge*, 11 M. & W. 503; 11 L. J. 122, M. C., which is in point.)

Dowdswell in support of the rule.—The notice of meeting, and the resolution of the vestry, are defective for not specifying the salary and the duties. The 59 Geo. 3, c. 12, is imperative, and requires the vestry to determine and specify the duties and to fix the yearly salary, which was not done.

CROMPTON, J.—As to the only objection now relied on, I think that when the parishioners were summoned to appoint an assistant-overseer, they must have understood that the salary and duties would form part of the consideration of the meeting. And as to the other part of the case, the case of *Skingley v. Surridge* is quite in point, and is entitled to great weight, for it might have been carried to a court of error. That Court decided that, though a resolution like this one does not in express terms, yet it does by necessary implication, determine and specify the duties to be performed, and that it means that he was to be assistant-overseer in all respects, and perform all the duties of an overseer. The rule must therefore be discharged.

MELLOR and SHEE, JJ. concurred.

Rule discharged.

Wednesday, Nov. 16, 1864.

SHEPHERD AND ANOTHER (apps.) v. THE POSTMASTER GENERAL (resp.)

*Criminal law—Jurisdiction—Arrest for felony—Abandonment of charge of felony and preferring one of misdemeanor—Malicious injury to property.*

The apps. were apprehended and charged at petty sessions with a felony under 24 & 25 Vict. c. 97, s. 10, for setting fire to letters in a pillar-box. They were remanded and admitted to bail to appear at a subsequent sessions. At the subsequent sessions the charge of felony was abandoned, and one for a misdemeanor, under sect. 52, for wilful damage to personal property with intent, &c., substituted. No objection to this was made on the part of the apps., but the hearing of the misdemeanor was proceeded with, and the witnesses cross-examined by the apps.' advocate, who, at the close of the evidence, objected that, as no information on oath had been taken on the misdemeanor, as required by sect. 62, and the apps. were not found committing the offence, the magistrates had no jurisdiction to convict. The objection was overruled and the apps. summarily convicted:

Held, that the conviction was right.

Case stated under the 20 & 21 Vict. c. 43, in obedience to an order of this court.

On the 9th Jan. 1864, it was discovered that the letter-bag of and in the pillar letter-box, situate at Dresden, in the parish of Trentham, in the county of Stafford, together with several letters which had

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been posted and deposited therein, had been burned, and certain pieces of phosphorus matches were found therein, and thereupon information was given to the police authorities by one Austin Becke, the postmaster of Longton, in the said county, and the app. Henry Shepherd was afterwards, and on the same day, apprehended and brought before me, the undersigned William Kenwright Harvey, charged with setting fire to the letters in the pillar-box at Dresden, and upon the evidence then given the said app. Henry Shepherd was remanded in custody to answer the said offence until the 13th Jan. Subsequently, on the 9th Jan., the app. John Turner was apprehended, and charged with setting fire to the letters in the pillar-box at Dresden, and bailed to appear at a petty sessions to be held at Longton, on the 13th Jan., to answer for the said offence.

At the said petty session holden at Longton on the said 13th Jan. 1864, the said app. Henry Shepherd was brought in custody, and the said app., John Turner, being surrendered by his bail, appeared to answer the charge so made against them, and thereupon one John Adams Stevenson appearing as attorney in support of the said charge, and George Hulme Hawley, as attorney on behalf of the said Henry Shepherd, and certain witnesses having been examined by the said respective attorneys, application was made by the said J. A. Stevenson, on behalf of the said A. Becke, to remand the said apps. for one week that the said A. Becke might obtain the directions of the Postmaster-General as to the precise charge to be preferred against the apps. upon the evidence as aforesaid, and the apps. were accordingly remanded upon bail to appear on the 20th Jan. to further answer the said charge. And at the petty sessions holden at Longton, on the said 20th Jan. 1864, the said apps. surrendered and appeared to further answer the said charge, and the said respective attorneys also appeared, and thereupon the said J. A. Stevenson stated that he should proceed against the said apps. under the 52nd section of the stat. 24 & 25 Vict. c. 97, for having wilfully and maliciously committed damage, injury, and spoil to and upon the said pillar letter-box, and upon the letters and property being therein; and the said respective attorneys, on behalf of the said apps., were asked by the said J. A. Stevenson whether they would plead guilty to such charge, or whether further evidence should be offered in support of the same; and the said respective attorneys for the said apps. having retired from the court to consult together thereupon, after a lengthened absence returned into court and informed the said J. A. Stevenson that he must go on and prove his case, but this was in the nature of a private communication between the said attorneys; and certain other witnesses were then called and examined in support of the said charge, and were cross-examined by the respective attorneys on behalf of the said apps.; and after the examination and cross-examination of the said witnesses were finished, and the case on behalf of the said prosecutor was closed, the said respective attorneys, on behalf of the said apps., objected that, inasmuch as no information on oath had been taken, as required by the 62nd section of the said Act, 24 & 25 Vict. c. 97, and the apps. were not found committing the offence, they were not legally in custody, and therefore the said justices had no jurisdiction to convict the apps. of the said offence then charged against them; but it appearing to the justices that the said apps. were lawfully apprehended and taken into custody upon a charge, made on oath, of having committed an offence upon and with respect to the said pillar letter-box, and the letters and property therein, within the meaning of the 10th section of the said Act, 24 & 25 Vict. c. 97, the justices overruled the objection, and the said

respective attorneys, without waiving their objections, and without prejudice thereto, proceeded to address them on the merits of the said case, on behalf of the said apps.; and having called no witnesses in denial of or in answer to the said charge, the justices convicted the said apps. under the 52nd section of the said Act, and committed each of them, the said apps., to the house of correction at Stafford, to be imprisoned and kept to hard labour for the space of one calendar month for the said offence. It was found as a fact that the apps. were, upon the merits, guilty of the charge and offence of which they were so convicted as aforesaid.

The question of law for the opinion of this court is, whether the apps. were, under the before-mentioned circumstances, legally and properly convicted of the said offence.

The following sections of 24 & 25 Vict. c. 97 were referred to in the course of the argument.:

#### Sec. 10:

Whoever shall unlawfully and maliciously place or throw into any building any gunpowder or other explosive substance, with intent to destroy or damage any building, or goods, or chattels, shall be guilty of felony and be liable to be kept in penal servitude for any term not exceeding fourteen and not less than three years, or to be imprisoned for any term not exceeding two years.

#### Sec. 52:

Whoever shall wilfully or maliciously commit any damage upon any real or personal property whatsoever, for which no punishment is hereinbefore provided, shall on conviction thereof before a justice of the peace at the discretion of the justice be imprisoned in the common goal for any term not exceeding two months, or else shall pay a fine not exceeding 5 and a reasonable compensation for the damage done.

#### Sec. 61

Enacts that any person found committing any offence against the statute, whether the same be punishable on indictment or summary conviction, may be apprehended without a warrant

#### Sec. 62

Provides that where any person shall be "charged on the oath of a credible witness before any justice of the peace," with any offence under the Act punishable by summary conviction, the justice may summon the person charged to appear at a time and place to be named in such summons, and in default of appearance may either hear the case or issue his warrant, or the justice before whom the charge is made may issue such warrant if he thinks fit without any previous summons.

*The Solicitor-General (Poulton with him) for the resps.*—The charge of felony under sect. 10 could not be sustained, as it was difficult to establish that a pillar letter-box was a building within the meaning of that section. But the offence came clearly within sect. 52, and accordingly that was the charge proceeded with before the magistrates, who determined it and sentenced the apps. to one month's imprisonment. The apps. did not object until the case for the complainant had been closed, and it was then too late. It was not material then that there had been no information and summons under sect. 52, for the parties were present and allowed the case to be proved before they raised any objection to its being proceeded with. But, in point of fact, there was an information on oath as to the facts of the case, although at first the nature of the offence was mistaken. The conviction was therefore valid:

*Paley on Convictions*, 80;

*Wilkinson v. Dutton*, 32 L. J. 152, M. C.; 8 L. T. Rep. N. S. 276.

*Harington for the apps.*—The apps. were apprehended for an indictable offence, and the jurisdiction of the magistrates was only preliminary, to commit for trial, and they had no power to alter the charge so as to give themselves jurisdiction to convict summarily. [Cockburn, C.J. referred to *Ex parte Thompson*, 3 L. T. Rep. N. S. 294, where the evidence amounted to a rape and the justices convicted for an assault, and this court refused to interfere.] The apps. were before the court on a

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charge of felony, but they were convicted of another offence. This was wrong:

*Martin v. Pidgeon*, 28 L. J. 179, M. C.;

*Reg. v. Brickall*, 33 L. J. 156, M. C.; 10 L. T. Rep. N. S. 385.

'There should have been an information to ground the conviction: (*Sanders' case*, 1 Wms. Saun. 262.) [MELLOR, J.—Here there was an information; the statute does not require an information in writing.] The procedure is different in cases of felony and on summary convictions. If an information is not essential, then the 11 & 12 Vict. c. 42, s. 17, was unnecessary.

COCKBURN, C. J.—I am of opinion that the conviction was right. The case was fairly heard. All that the apps. could have asked for was, that an information should be issued upon the alteration of the charge, and even if they had demanded that, it would only have amounted to this, that on the new charge the same evidence would have been taken over again. This was substantially done. At first it was supposed the apps. had committed a felony under sect. 10, but upon investigation before the justices it turned out to be only a misdemeanor under sect. 52. The facts alleged in proof of the latter charge were the same as those alleged in support of the other charge. No doubt, in strictness, the apps. might have demanded to be called on to answer to the charge that was proceeded with, and that the evidence should be gone through again on the charge of misdemeanor. But they waive all right to have that done by their conduct in allowing the charge of misdemeanor to be proceeded with. I therefore think the apps. were legally convicted.

CROMPTON, J.—I am of the same opinion. The objection to the conviction is really that there was no information and no summons as required by sect. 62 of 24 & 25 Vict. c. 97. An information and summons are not necessary in all cases, for, under sect. 61, if a man is found in the act of committing an offence against the statute he may be apprehended at once. Here the defts. were in custody upon a charge of felony, and being so, a new charge for the misdemeanor was preferred against them. If they had applied, it may be that the magistrates would have adjourned the case. But no such request was made; on the contrary, their advisers chose to go on with the new charge and cross-examine the witnesses. Then they object that their clients were not properly in custody, there not having been any information or summons to ground the charge of misdemeanor. I think that we may assume that a proper minute was made of the charge at the time, and that would be a sufficient information or complaint; and the want of a summons would be cured by the defts. being present. I therefore think that the conviction ought to stand.

MELLOR, J.—I am of the same opinion. Although the apps. may have been irregularly taken into custody as for a felony, that did not prevent the magistrates proceeding with the case of misdemeanor if the apps. did not object.

SHEE, J. concurred.

*Conviction affirmed.*

Attorney for the resps., the Solicitor to the Post-office.

Attorney for the apps., Litchfield.

Nov. 16 and 19, 1864.

REG. v. THE MAYOR, &C., OF ABERAVON.

*Municipal corporation—Grant of charter on petition—Inhabitant householders—1 Vict. c. 78, s. 49.*

*A petition was presented to the Crown for the grant of a charter of incorporation by a majority of the inhabitant householders of a borough, but subsequently a second petition was presented against such grant, signed by many who signed the first petition, such persons having apparently changed their opinions; and whether the majority was in favour of the grant or not at the time of the presenting of the second petition, was a matter of doubt. The Crown sent down a commissioner to the borough to ascertain the facts relative to the petitioners. He made his report, and the Crown granted the charter:*

*Held, that the right of the Crown to grant the charter attached on the presentation of the first petition, signed by a majority; and that the Crown having granted the charter, it was no ground for repealing it, that before the grant the subsequent petition was presented, also signed by a majority, some who signed the first petition having changed their minds and signed the second also.*

*Scire facias* to repeal a charter of incorporation granted by Her Majesty to the borough of Aberavon, in the county of Glamorgan, pursuant to the 7 Will. 4 & 1 Vict. c. 78, s. 49, on the ground that the inhabitant householders of the borough did not petition for the charter.

Plea, that the inhabitant householders did so petition. Issue was joined thereon.

At the trial before Cockburn, C. J., at the sittings at Westminster after last Hilary Term, a verdict was taken for the Crown subject to a special case.

The borough of Aberavon is a borough by prescription under the name of the Portreeve, Aldermen and Burgesses of the borough of Avon, otherwise Aberavon, and is not included in either of the schedules (A and B) of the Municipal Corporations Act, 5 & 6 Will. 4, c. 76.

The Crown, upon a petition of the inhabitants, granted a charter of incorporation to the borough under 1 Vict. c. 78, s. 49, which enacts,

That if the inhabitant householders of any town or borough in England or Wales shall petition His Majesty to grant to them a charter of incorporation, it shall be lawful for His Majesty by any such charter, if he shall think fit, by the advice of his Privy Council, to grant the same to extend to the inhabitants of any such town or borough within the district to be set forth in such charter, all the powers and provisions of the said Act for regulating corporations (5 & 6 Will. 4, c. 76), whether such town or borough be or be not a corporate town or borough, or be or be not a separate named in either of the schedules to the said Act.

The mode in which the petition originated was this:—In June 1859, at a public meeting held in Aberavon, summoned by handbills and by the town crier, in Welsh and English, a resolution was unanimously adopted in favour of the presentation of a petition for incorporation, but the chairman and the persons who proposed and seconded the resolution were not inhabitant householders, and the majority of persons present were only owners and occupiers.

On the 20th Sept. 1859, a petition for incorporation was presented as from the inhabitants of the borough, and on the 19th Oct. 1859, a counter petition was presented also by inhabitants of the borough. The Lords of the Privy Council appointed a commissioner to hold an inquiry at Aberavon as to the number of inhabitant householders who had signed the respective petitions for and against incorporation, and as to their several assessments, and the circumstances under which the charter was prayed for and opposed. It was contended before him that "compound householders," i. e., such as occupied

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houses in respect of which the owners only are assessed under the Small Tenements Act, 13 & 14 Vict. c. 99, were not inhabitant householders within 1 Vict. c. 78, s. 49, and with reference to this contention, he analysed the numbers with these results:

The first petition (after striking off 123 names which appeared in both petitions) was signed by seventy-five ratepaying householders and ninety-three compound householders, in all 168.

The second petition (after a similar deduction) was signed by sixty-two ratepayers and 150 compound householders, in all 212.

The whole number of inhabitant householders including compound householders was 501. Adding to the 168 the 123 struck off, there was on the first petition an absolute majority (viz., 291 out of 501) in favour of the charter, supposing compound householders were to be included.

If only ratepayers were to be included, then there was on the petitions as revised a majority of thirteen in favour of the charter. It did not appear how many of the 123 struck off were ratepayers, but whatever their number, if they were to be added to both sides they would not alter the majority; and further, since the numbers left on the petitions as revised, together with the 123 struck off, made up the whole number of inhabitant householders of both kinds, it was also plain that there was on the first petition, whether adding to the seventy-five left so many of the 123 (if any) as were ratepayers, or, taking the 75 alone (if none of the 123 were ratepayers), an absolute majority in favour of the charter.

The report found various other facts with respect to the causes of the opposition, the relative assessment of the opposed parties, and the state and circumstances of the town and its neighbourhood, and after considering the report and obtaining the opinion of the then Attorney and Solicitor-General to the effect that "compound householders" were not inhabitant householders within the meaning of 1 Vict. c. 78, s. 49, the Lords of the Privy Council advised Her Majesty to grant a charter of incorporation. The charter was accordingly granted bearing date the 2nd July 1861, and the town has since been governed by a mayor, aldermen, councillors and other officers duly elected, according to 5 & 6 Will. 4, c. 76.

The court was to be at liberty to draw inferences of fact, and the question for their opinion was, whether the verdict on the issue joined is to be entered for the Crown or for the defts.

*Lush, Q.C.* (*Prentice* with him) for the prosecutors.—The term "inhabitant householders" in sect. 49 is not to be restricted to householders paying rates. A compound householder is within the term, and entitled to vote, although the owner pays the rates. Where it was intended that the word inhabitant householder was to be so restricted, express words are inserted to that effect, as in 5 & 6 Will. 4, c. 76, s. 9, to which the 1 Vict. c. 78 is supplemental. If compound householders may vote, then there was on the second petition a majority against the charter, and the petition was one on which the Crown had no power to grant a charter.

*Bovill, Q.C.* (*Giffard* with him) for the defts.—Whether the petition was a petition of the inhabitant householders was a question of fact for the jury:

*Rutter v. Chapman*, 8 M. & W. 1;

*Reg. v. Boucher*, 8 Q. B. 641.

On the petition for the charter as it stands without striking off the 123, and without reckoning compound householders, there was a majority, and on the presentation of that petition the power to grant

a charter attached at once. The subsequent proceedings did not affect the power to grant the charter, but were taken merely to satisfy the advisers of the Crown as to the propriety of granting a charter.

*Nov. 19.*—*Bovill, Q.C.* was further heard herein.

*Lush, Q.C.* in reply.

*COCKBURN, C. J.*—If it is a fact that the first petition was signed by a sufficient number of inhabitants, the Crown could act upon it, although it may, for its own satisfaction, have sought further information. The fact that there was a sufficient petition cannot be altered. If afterwards the inhabitants chose to change their minds, that fact may have influenced the advisers of the Crown not to act upon the petition, but it could not affect the right of the Crown to act upon it. The charter then having been granted, proceedings by *sci. fa.* are instituted for the purpose of calling its validity into question, and the only issue raised is, whether there was a petition of a majority of the inhabitant householders, and the only question therefore is, whether there was such a petition of the majority. Now, it appears that there was in fact such a petition, but that a month afterwards a certain number of the petitioners change their minds, and petition against the grant of a charter. But the question is, whether at first there was a majority? What the Crown subsequently does is only for the purpose of its own satisfaction. It need not have taken any subsequent steps whatever; the fact that there was a petition of a majority of the inhabitant householders was all that was requisite to empower the Crown to grant the charter.

*CROMPTON, J.*—In this case we are in the position of a jury to ascertain a fact. This is a proceeding by *sci. fa.* to repeal a charter which is said to have been granted upon no sufficient petition, and issue is taken upon that allegation. The question, therefore, is, whether there was a sufficient petition or not. We must see whether or not, when the first petition was presented, it fairly represented the opinion of the majority? Now I do not think that the discretion of the Crown can in any way be questioned, if it had the right to grant the charter. The facts seem to be, that there was a meeting of the inhabitants relative to the application for the charter, at which there was no opposition; then a petition went up, signed by the requisite number; but it appears that afterwards a number of persons changed their minds, and it may be that, deducting them, it might be a question whether or not there was a majority in favour of the charter; but there was a clear majority in the first instance. I am quite satisfied that the first petition was a sufficient one, and therefore all that was afterwards done was immaterial. Taking all the circumstances into consideration, it seems to me that the commission that was afterwards sent to the town was merely to satisfy the discretion of the Crown. The only real question is, did the power to grant the charter once attach to the Crown? I take it that it did.

*MELLOR, J.*—I am of the same opinion. The question is, what was the state of things which existed at the time the petition was presented? since all that afterwards took place was merely in the discretion of the Crown. I take it that the first petition did really represent the wishes of the town, and that the charter was properly granted.

*Judgment for the defts.*

Monday, Nov. 28, 1864.

BAILIE (resp.) v. THE GREAT WESTERN RAILWAY COMPANY (apps.)

*Weights and measures—Unjust weighing machine—*  
5 & 6 Will. 4, c. 63, s. 28.

*A weighing machine that has an index hand which gives an inaccurate result is unjust within the meaning of the 5 & 6 Will. 4, c. 63, s. 28, although the machine may in fact weigh correctly.*

*A weighing machine was used at a railway-station for weighing passengers' luggage; it worked by a spring, and had a dial plate and index finger from zero to 560, by which the weight was ascertained; the machine had been injured and out of order for a fortnight before the day of the complaint, and the index finger stood at 4lbs. instead of "zero," whereby, unless the 4lbs. were allowed for, there would be a loss of that weight to the customer; the porter, however, whose duty it was to weigh, made that allowance, whereby the customers were charged for the correct weight:*

*Held, that the said machine was unjust within the meaning of the above section.*

This was a case stated under the 20 & 21 Vict. c. 43 upon a conviction of the apps. under the 5 & 6 Will. 4, c. 63, s. 28, for having, on the 5th Oct. 1863, at Aynhoe, in the county of Northampton, unlawfully in their possession at their station there situate, and where goods are weighed for conveyance or carriage, a certain weighing machine which was then found to be incorrect and unjust. The apps. were convicted and fined. The case stated as follows:

Upon the hearing of the complaint it appeared that the machine in question was that in use on the platform at Aynhoe station, for weighing parcels and passengers' excess luggage, all of which were weighed thereby; that 6d. was the lowest price charged, and that, for example, from Aynhoe to London for 14lbs. was 10d. with an increase of 3d. for weights above 14lbs. and under 21lbs.; that the machine worked by a spring and had a dial-plate and index-finger with figures from zero to 560lbs. by which the weight was ascertained; that the machine had been injured and out of order for a fortnight before the day of complaint, and that the index-finger stood at 4lbs. instead of "zero," whereby, unless the 4lbs. were allowed for, there would be a loss of that weight to the customer or passenger in every case, but it was asserted by the station-master that this allowance had been directed to be made by the porter who was in the habit of weighing goods; if, however, a porter who was not aware of such orders and did not notice the defect were to weigh the goods the result would be wrong. The station-master proved that he did not rectify or adjust the machine to remedy the defect, and said that it could not be so rectified at the station, and that he had no means of doing it, but that the machines were inspected by the manufacturer every three months; that the manufacturer, who contracted with the company, was to inspect the machines and keep them in order, and to attend at any time when he had notice that a machine was out of order, was called and admitted the machine was out of order, and said it could be adjusted by means of a pin, which method he explained. It was also proved that no notice to the manufacturer to adjust the machine had been given until after the complaint had been made by the resp. The apps. contended that it was the duty of the resp., before proceeding to examine the machine, to have taken steps to adjust in the method spoken of, or, at any rate, to start from the weight of 4lbs., indicated by the finger, and deduct such amount from the apparent weight, and that the machine, with such precautions, was not

incorrect or otherwise unjust within the meaning of the statute. The resp. contended that the facts above stated justified a conviction, the machine being admittedly in fact incorrect and, without the allowance being made in the case, unjust, and that the argument of the apps. might be used in support of an ordinary scale ascertained to be faulty, and the same allowance made, or in case of a weight proved to be light, and which the weigher corrected by allowing the deficiency. Also, that upon the facts no rectification could be effected by the persons who were using the machine for the purpose of weighing, or by the resp. at his visit, and that for all purposes the machine was in gear and fit to be used but for the four pounds shown against the customer as before mentioned, which required mental correction. The question for the opinion of the court is, whether upon the above facts the apps. were liable to be convicted under the terms of the section named? If the court should be of opinion that they were so liable, the conviction to stand; if otherwise, to be quashed.

By sect. 28 of the 5 & 6 Will. 4, c. 63 (the Weights and Measures Act), it is enacted,

That it shall be lawful . . . for any inspector . . . to enter any shop, store, warehouse, stall, yard, or place whatsoever within his jurisdiction wherein goods shall be exposed for sale, or shall be weighed for conveyance or carriage, and there to examine all weights, measures, steelyards, or other weighing machines, and to compare and try the same with the copies of the imperial standard weights and measures required or authorised to be provided under this Act; and if, upon such examination, it shall appear that the said weights or measures are light, or otherwise unjust, the same shall be liable to be seized and forfeited, and the person or persons in whose possession the same shall be found shall, on conviction, forfeit a sum not exceeding 5*l.*; and any person who shall have in his or her possession a steelyard or other weighing machine which shall on such examination be found incorrect or otherwise unjust, or who shall neglect or refuse to produce for such examination when thereto required all weights, measures, steelyards or other weighing machines, steelyards, or other weighing machines which shall be in his or her possession, or shall otherwise obstruct or hinder such examination, shall be liable to a like penalty.

Case now appeared in support of the conviction, and argued that the conviction was right, for that whatever may have been the intent of the company, or however accidental may have been the condition of the weighing machine, it was in fact unjust in the results to which it pointed.

Hayes, Serjt. (Digby with him) argued that the penalty under the statute had not been incurred, inasmuch as the machine weighed correctly, though the index hand was out of order, the public not being in any way prejudiced, since the full allowance was always made in the calculation of the weight; that, in fact, the hand of the machine merely required adjusting, which could easily have been effected by any person who knew the method of using the apparatus. [CROMPTON, J.—It is like the case of false scales or weights, in which the party might say, "Oh, never mind, I can make an allowance"—such a state of things might lead to great frauds.] It must be the incorrectness which defrauds. [SHERR, J.—The company should see continually that the machine is correct.] It may get out of order by an accident at any moment. [MELLOR, J.—If the inaccuracy were merely accidental it might be another question, but here the error was well known, and yet the machine was permitted to be used.] It is not like a false scale; the machine weighs correctly, and is not unjust. [MELLOR, J.—It is not meant that the machine has been used fraudulently, but only that it indicates a false quantity. The public have a right to be served by a correct machine.] The penalty is for having in possession. The porter did allow in weighing for the 4lbs. incorrectly indicated:

*The London and North-Western Railway Company v. Richards*, 2 B. & Sm. 826.



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CROMPTON, J.—I think that this conviction must be confirmed. My brother Hayes seems to think that there must be an intention to do wrong, but I am not of that opinion. I should say that such a machine as this is like a watch, which is incorrect if it does not show the right time. Now, here the machine registers 4lbs. against the customer—that is a wrong result; there may be no fraud in it, but these provisions are intended for the security of the public, and it is the having of unjust weights in possession, not the using of them, that is the offence. It is true that this machine might be made correct, but that may be applied to every case of false weights, since it may be set right. It would however never do, when the inspector came, to say, "I told my man to make it correct." The Act means, you shall not have it in your power to do an injustice, and it is no answer to say that "I set it right by calculation." This case differs from the one cited of the *London and North-Western Railway Company v. Richards*. In that case the machine was one which from its very nature required adjusting before it was used, and it was held that it ought to have been adjusted before it was examined. It was a case of a machine so variable in its nature that it was necessary to adjust it each time it was used, and so far was like an astronomical instrument which has to be adjusted each time it is used. That is not the case here. The injury which had put the machine out of order had happened some time before (a fortnight), and yet it was continued in use. It was not a machine requiring adjusting before use, but it was one which had become incorrect by means of an injury which had happened to it, which was well known to the officers of the company, who still went on using it, making, as they said, an allowance for the inaccuracy.

MELLOR, J.—I am of the same opinion. My brother Crompton has properly distinguished between this case and the case of *The London and North-Western Railway Company v. Richards*. The intention of the statute is, that without regard to the intentions of the parties they shall not use incorrect machines. This was a case where they had to make an allowance of four pounds in order to arrive at a correct weight. That is a state of things which the statute intended to prevent. No one supposes that the company intended to make any improper use of the inaccuracy, but still they allowed the incorrect machine to be used.

SHEE, J.—I am of the same opinion. The case cited, for the reasons already pointed out, is in point. There the machine was really not out of order, it merely required adjusting before being used.

Conviction affirmed.

Monday, Nov. 28, 1864.

REEVE (app.) v. WOOD (resp.)

*Husband and wife—Evidence—Competency of wife against husband—Desertion.*

A wife is not an admissible witness against her husband in support of a charge of desertion of wife and children preferred by the parish under the Vagrant Act, 5 Geo. c. 83.

Case stated by justices at the instance of the informant pursuant to the 20 & 21 Vict. c. 43.

At a petty sessions of the peace for the city of Worcester on the 18th July 1864, before us the undersigned, two of Her Majesty's justices of the peace acting in and for the said city, Charles Wood appeared charged in and by an information laid by Thomas Sutton Reeve in pursuance of an order of the board of guardians of the Worcester Union in the said city, for that he the said C. Wood, at the

parish of St. Helen in the said city of Worcester, on the 23rd June last past, being then and there a person able wholly or in part by work or other means so to do, did wilfully neglect and refuse to maintain his lawful wife Mary Ann Wood and their three children, viz., Agnes, Emily and Walter, by reason of which neglect and refusal she the said M. A. Wood and her said three children did on the year and day aforesaid become chargeable to the common fund of the said Worcester Union, contrary to the statute in such cases made and provided, and the said charge having been duly heard by us, we dismissed the said information on the grounds hereinafter stated.

At the hearing of the said information, in order to prove the offence, and more particularly the marriage and the neglect and ability to maintain, as alleged, it was sought to examine the wife of the deft. upon oath, and she was tendered as a witness for that purpose by the attorney for the informant. The deft. thereupon objected that the evidence of his wife was not admissible against him on the ground that the offence with which he was charged was of a criminal nature. It was argued on the part of the informant that, although the deft. was charged under the Vagrant Act (5 Geo. 4, c. 83), with an offence punishable with imprisonment, still it was strictly a proceeding in its nature civil, and also that the case should be treated as a personal wrong to the wife; and the almost certain impossibility to prove in detail all the facts necessary to constitute the offence, without such evidence, was forcibly dwelt upon as a further reason why it should be admitted. The case of *Sweeney v. Spooner*, 6 L. T. Rep. N. S. 388, was referred to; it did not appear to contain any express decision upon the point in question.

We, the said justices, were of opinion that the offence commenced and consisted in the chargeability to the union; that the punishment is provided for that offence, and not for an alleged wrong to the wife, and therefore that the evidence of the wife could not be received against her husband, and that the said objections made by the husband must prevail; and we allowed the same accordingly and did discharge the said deft.

Therefore it is submitted for the judgment of us the said Court of Q. B. as to whether we the said justices were correct in point of law in our said decision, or as to what further should be done in the premises.

JNO. W. LEA, (L. S.)  
EDWARD EVANS. (L. S.)

*H. Matthews* for the app.—The wife's evidence was admissible. It is conceded that this is a criminal proceeding, and that the 14 & 15 Vict. c. 99, does not apply. In this case an injury is done to the wife by the desertion, and she falls within the principle by which she is made competent in cases of personal injury to her by her husband. In the case of abduction, the woman is competent to prove the offence against the man, though he afterwards become her husband. In 1 Phil. on Evid. 82 (10th edit.), it is said that it is the practice to admit the evidence of the wife in cases of desertion, and so it is in the metropolitan police-courts. [*West, amicus curie*, stated that in the West Riding of Yorkshire the wife's evidence was excluded.]

*R. v. Wakefield*, 2 Lew. C. C. 279;  
*R. v. Locker*, 5 Rsp. 107;  
*R. v. Serjeant*, 1 Ry. & Moo. 352;  
*R. v. Yere*, 1 Jebb & Symes (Irish Rep.), 563;  
*R. v. Pierson*, 1 Andrews, 310.

No counsel appeared for the resp.

CROMPTON, J.—I think in this case that the magistrates decided rightly. In very early times an exception was made to the general rule that a



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wife was not admissible as a witness against her husband in the case of personal wrongs of the wife. That arose partly on account of the mischief that would result if evidence could not be got in such cases where great brutality may have existed, partly from necessity, and because the wife was the real party prosecuting, and ought to be heard. I do not think, however, that the present case is within that exception. The case of the abduction of a woman is distinguishable, and has been considered as in the nature of a personal injury. In the present case there is nothing that can be called an injury to the person of the wife; it is only a crime against the parish, and it is the fact of her becoming chargeable to the parish that makes the husband liable. It does not fall within the rule of necessity, for there are many other persons by whom the case may be made out without her evidence. I was very much struck when I read in Phillips on Evidence that it had been the universal practice to receive the evidence of the wife in cases of vagrancy. But from what Mr. West has informed the court, my own idea that it was not generally allowed in the West Riding of Yorkshire has been confirmed. We are, therefore, entirely relieved from the force of the statement in Mr. Phillips's book.

BLACKBURN, J.—I am of the same opinion. The general rule is that a wife is not admissible as a witness for or against her husband except in civil cases. But in criminal matters, from an early period, beginning with *Lord Audley's* case, there was an exception to the rule, which went on the principle that where the offence charged touches the person of the wife, and she must be cognisant of it, and may be the only person who is cognisant of it, there the wife is an admissible witness against her husband. That applies to all cases where there is personal violence inflicted by the husband on the wife. In the case of an abduction of a woman, who afterwards becomes the wife of the person abducting, there is the carrying off, which, although no personal injury has been sustained, may well be considered as within the principle, for she must be cognisant of it, and may be the only witness who can fix the offence on the man. The present case is not within that principle.

MELLOR, J.—I am of the same opinion. There is no personal wrong done to the wife in this case in the sense of any of the decided cases.

*Judgment for the resp.*

Tuesday, Nov. 29, 1864.

THOMAS (app.) v. JONES (resp.)

*The Salmon Fishery Act 1861 (24 & 25 Vict. c. 109)—“Fixed engine”—What is, within sect. 11.*

*The 24 & 25 Vict. c. 109, s. 11, imposes a penalty upon any one who uses a fixed engine of any description for catching salmon in any inland or tidal waters. The app. was convicted under the above section for using a net (for catching salmon), which extended to near the centre of the river, and to which was attached a stone at one end, the other end being kept up by corks, with lead to keep it down in the river, and which, when a salmon touches it, entangles the fish, the stone giving way:*

*Held, that such a net so used was not a fixed engine within the meaning of the above section.*

This was a case stated under the 20 & 21 Vict. c. 43, upon a conviction of the app. by certain justices of Cardiganshire, upon an information under sect. 11 of the 24 & 25 Vict. c. 109 (an Act to amend laws relating to fisheries of salmon in England),

upon a charge that he “used certain fixed engines, to wit, certain nets, temporarily fixed to the soil, for the purpose of catching salmon in a part of the tidal waters of the river Tivy.”

The 11th section enacts that,

No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters . . . under a penalty of not exceeding 10*l.* for each day of so placing.

The evidence was as follows:

I saw the deft setting three nets on the Cardigan side of the Tivy. The nets were about twelve yards apart, and extended to near the centre of the river. The nets were fixed to a stone at one end, at the other end they were kept up by corks, with lead to keep them down in the river. There was a large stone attached to the net which kept it quite firm. The net is six yards in length and one yard sixteen inches in depth. The river was three or four feet in depth. I cannot say whether the nets reached the bottom. I have seen salmon entangled in nets like these. The stone was on the bank of the river. It might weigh 12*lbs.* I will swear it was 5 or 6*lbs.* When a salmon reaches the net the stone gives way and the salmon is entangled and the net gathers together. The nets are placed in such a position that, when a salmon touches the net, it moves and the salmon gets entangled and dies. The nets do not remain the same length when in the water. They contract very much. The water was still where the nets were. They are always placed in quiet water, and not in a current. When the salmon is in the net it is rolled up like a rabbit in a net. I do not know whether such a net would catch salmon without a stone. It requires a weight to hold the net and keep it extended.

Giffard appeared in support of the conviction and contended that the net used as described in the evidence set out in the case was a fixed engine within the object and meaning of the Act, for that the stone operated as an anchor, and the net so used effectually prevented the salmon from ascending the river.

Keane, Q.C. and Bowen, for the app., were not called upon.

CROMPTON, J.—I have a difficulty in seeing how this net can be called a fixed engine, when, according to the evidence, the moment a salmon strikes it, it rolls up and gathers round the fish, and so becomes useless for any further fishing until it is re-set. It resembles, it is said, a purse-net for catching rabbits, which breaks away directly the rabbit is in it, wrapping round and catching him. The weights are only used for the purpose of keeping the net extended, and if they can make the net a fixed engine, it is difficult to see how any net ordinarily leaded, and used by the hand really could be exempt. It has been argued that by multiplying these nets in the river the ascent of the fish might be entirely prevented; but there is nothing in this Act which says that if several nets are used so as to produce the effect of a fixed engine, that is unlawful. Indeed, it is quite plain that very much more mischief might be produced by nets being drawn down the river between boats in frequent succession, and which might scare or capture all the fish they met, but which it is admitted the Act does not prohibit, than by these nets, which only avail for a single capture. Upon the facts, therefore, I am of opinion that the conviction should be quashed.

MELLOR and SHEE, JJ. concurred.

*Conviction quashed.*

C. P.]

ORAM v. COLE—BLAIN v. PILKINGTON.

[C. P.]

## COURT OF COMMON PLEAS.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,  
Barristers-at-law.

## REGISTRATION APPEALS.

Friday, Nov. 18, 1864.

ORAM v. COLE.

*Notice of objection—Specification as to the list in which objector's name to be found—6 Vict. c. 18, sched. B., No. 11.*

*In the borough of Devonport there were two lists of voters, which were posted up in the usual places. One was headed, "List of persons entitled to vote for the borough of Devonport in respect of property occupied within the parish of Stoke Damerel." The other, "List of persons entitled to vote for the borough of Devonport in respect of property within the township of East Stonehouse."*

*The resp. signed his notice of objection as follows:—"E. W. Cole, 69, Durnford-street, on the list of voters for the borough of Devonport and township of East Stonehouse."*

*It having been objected that this notice was bad, on the ground that it did not appear on what list the objector's name was to be found, and that there was, in fact, no such list as that described in the notice of objection:*

*Held, that the notice was a good one.*

This was a consolidated appeal from the decision of the revising barrister for the borough of Devonport, who stated the following case for the opinion of the court.

William Cole duly objected to the name of John Adams being retained on the list of voters for the said borough. The notices of objection were duly served both upon the overseers and the voter, and were in the following form:

To Mr. John Adams.

33, Union-street, East Stonehouse.

I hereby give you notice that I object to your name being retained on the list of persons entitled to vote in the election of members for the borough of Devonport and township of East Stonehouse.

Dated this 24th Aug. 1864.

EDWARD WILLIAM COLE,

of 69, Durnford-street, on the list of voters for the borough of Devonport and township of East Stonehouse.

It was objected to these notices, that it did not appear from them on what list the objector's name was to be found, and, moreover, that there was in fact no such list as that described in the notice of objection.

The borough of Devonport consists of the parish of Stoke Damerel and the parish or township of East Stonehouse; each of these parishes has distinct churchwardens and overseers, distinct places of worship, and separate lists of voters are stuck up at the several places of worship by the respective overseers and churchwardens of each parish or township.

The list stuck up by the churchwardens and overseers of Stoke Damerel is headed "List of persons entitled to vote for the borough of Devonport, in respect of property occupied within the parish of Stoke Damerel."

The list stuck up by the churchwardens and overseers for the parish or township of East Stonehouse is headed, "List of persons entitled to vote for the borough of Devonport in respect of property occupied within the township of East Stonehouse."

On this list the name of the said Edward William Cole appeared, with the place of residence, as stated in the notice of objection.

There is no other Durnford-street in the borough of Devonport than the Durnford-street in which the

said Edward William Cole lives, and that is within the township of East Stonehouse.

If the court shall be of opinion that such notices of objection were insufficient, then the name of the said John Adams, and also the names of the several other persons mentioned in the schedule hereunto annexed, are to be restored to the list of voters from which the same have been expunged, and the register of voters is to be amended accordingly.

But if the court shall be of opinion that such notice of objection is sufficient, the register of voters is to remain unaltered.

Karslake, Q.C. appeared for the app., and contended that the notice did not show upon which list the objector's name was to be found, and that it described him as being on a list which did not exist. He cited

*Eidsforth v. Farrer*, 4 C. B. 9;

*Crother v. Bradney*, 9 L. T. Rep. N. S. 444; 15 C. B., N. S., 536.

Montagu Smith, Q.C. and Philbrick, for the resp., were not called on.

ERLE, C.J.—I am of opinion that the revising barrister was right. Schedule 11 of the 6 Vict. c. 18, requires the objector to state the place of his abode, and that he is on the list of voters for the parish of —. Here there are more lists than one, and it has been decided that the objector must define which of the lists the party objected to is to examine. I think the objector in this case has defined the list unambiguously enough to enable the party objected to to ascertain whether the objector was a person qualified to object. He says, "I am on the list of persons entitled to vote in the election of members for the borough of Devonport and township of East Stonehouse." I construe that to mean that he is entitled to vote for the members for the borough of Devonport and township of East Stonehouse. The list stuck up uses the words, "entitled to vote for the borough of Devonport in respect of property in Stoke Damerel, and in respect of property in the township of East Stonehouse." The objector has referred him to the list of voters for the borough of Devonport, that list relating to the township of East Stonehouse. I confess that I cannot see what more the objector could have done than he has.

BYLES and KEATING, JJ. concurred.

BLAIN v. PILKINGTON.

*Right of revising barrister having concurrent jurisdiction with another barrister to reopen and decide upon a case already determined by his colleague.*

*An objection having been duly made to A.'s name being retained on the list of voters for a division of a county, the case in due course came on before the revising barrister, when A., not being present to support his claim, was struck off the list.*

*On a subsequent day, A. came before the other barrister (there being two for the division), and having given good reason for his absence, prayed that his case should be reheard. This the barrister consented to, and having heard the case (the objector not being present), restored his name to the list:*

*Held, that the barrister was wrong in acting as he did, as his colleague having heard and finally determined the case, it was not competent for him to reopen it.*

This was an appeal from the decision of one of the revising barristers appointed to revise the lists of parliamentary voters for the southern division of Lancashire, upon certain points of law arising out of the following facts:

At a court held by adjournment in Bury on the 13th Oct. 1864, before me, appointed to revise the lists of voters in the election of Members of Parliament for the southern division of Lancashire, the Rev. Thomas Corser, incumbent of Stand, in the township of Pilkington, applied to have his name restored on the list for that township.

The name had been removed from the Pilkington register in due course of proceeding by my colleague, one of the other revising barristers for the same division of the county, at a previous sitting of the court in Bury, in consequence of its having been duly objected to, and of the absence of the applicant or any one on his behalf when the name in its order was called. At the time in question the applicant had been in attendance on his bishop in performance of his duties as rural dean of Bury, but with due precaution he had provided a fit and proper person to attend the revising barrister's court on his behalf and support his right to remain on the register.

Upon this application being made objection was taken that I had no power to entertain it.

But I was of opinion, First, that although the list in question had been gone through and duly initialled and signed by my colleague, yet, as it was still in my hands, my power to do in open court all things proper for perfecting the list in accordance with the intention and purpose of the statutes in that case provided still remained. Secondly, that the marks of erasure upon the name and qualification of the applicant in the list, accompanied by the initials of my colleague in the margin, were to me sufficient evidence that a valid notice of objection in this particular instance had been duly proved in open court, and that it was competent for me without further proof of such notice to investigate the right of the applicant to be upon the register. Thirdly, that such investigation, after being initialled by proof of such notice, is a proceeding in the hands of the revising barrister solely, and is not invalidated by the absence of the object or his agent, or if present, by any refusal on their part to assist.

Being further of opinion that the applicant through no default of himself had been removed from the register, I did, in the exercise of my discretion, entertain the application, and upon investigation of his right, being satisfied that he was entitled to be on the register, I restored his name.

If the court should be of opinion that I had power to do so, the name is to remain on the register; but if otherwise, it is to be erased.

Keane, Q. C. appeared for the app.

The resp. was not represented by counsel.

ERLE, C. J.—I think that the revising barrister was wrong. The trial of the question raised between the objector and the voter is the trial of a matter *in foro contentioso*, and on this occasion the objector was there at the time, but the party objected to was not; the judge, having proper authority, proceeded with the case and disposed of it in favour of the objector. Then, as I understand the case, on the following day the party objected to came before the barrister and satisfied him that his absence was a justifiable absence as between man and man, and prayed what in effect would be a new trial as between him and the objector, and the barrister accordingly held a new trial. I give judgment against the resp. on the ground, that what was done was in favour of the party objected to, and therefore against the objector, who does not appear to have been present. I give this judgment upon that ground. I should, however, wish to say that I am desirous to the last degree to sanction in all tribunals power to correct clerical errors in matters of form where there is anything to amend, but yet I cannot but see a material distinction between amending a clerical

error and rehearing a case which has been finally heard and determined on another day. Here the barrister says, "I will have in effect a new trial." That may be; but I still have greater doubts whether, where there were two concurrent barristers appointed for one district, with power to act jointly and severally, if one takes a case and hears it, and finally determines it, it is open for the other barrister to consider the case again and come to a contrary conclusion. I am clearly of opinion, as it does not appear that the objector was present with his proofs or had an opportunity of being heard, that it was not a trial that can be supported. And in my opinion, therefore, our judgment must be for the app.

BYLES, J.—I am of the same opinion.

KEATING, J.—I am of the same opinion.

*Judgment for app.*

#### STEELE v. BOSWORTH.

*Election law—Inmates of hospital—Equitable estate—Right to vote—2 Will. 4, c. 45, s. 18.*

*In 1762 certain lands were conveyed to trustees in trust to suffer and permit the rector or rectors of certain parishes to take the rents and profits of the same, and with them to keep a hospital, which had been founded in 1692, in repair and to provide its inmates with beds and bedding, household goods, and all necessary utensils and medicines and medical attendance, and to pay them a sum of money weekly, and various other uses at specified times.*

*The inmates of the hospital were to be nominated by the founder or his heirs, and were liable to be removed by them for immorality or other misbehaviour. The inmates have each a separate room and a key to the same, and there is a dining-hall common to all, and at the present time they each receive 9s. 2d. per week. Nothing was said as to the appropriation of the surplus rents or profits. No instance has been known of an inmate having been removed for misconduct:*

*Held, that the claimant (an inmate), although he had the right to demand money from the trustees who collected the rents and profits, had no such equitable estate in the lands which the trustees held as to entitle him to a vote for the county.*

This was an appeal from the decision of the revising barrister for the northern division of the county of Leicester.

At a court held at Bottesford, J. A. Bosworth duly objected to the name of George Steele being retained on the list of voters for the parish of Bottesford.

The name stood on the register as follows:

Steele, George	Bottesford	Freehold interest in land	Hospital Loc.
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It was proved in evidence that George Steele was an inmate of Bottesford hospital for men in the same parish, founded by the Earl of Rutland in or about the year 1692, which from time to time was augmented until the year 1762, when certain lands and tenements in Bottesford, Muston, Abketty, Hotwell and Long Clowson were reconveyed to certain trustees therein named, and which conveyance, after reciting that the rents of premises comprised in certain indentures therein recited had for some time been found sufficient for the support of fourteen poor people, and the said duke being desirous to extend the said charity to the maintenance of two other poor persons, had directed two more to be added to the twelve poor people already provided for out of the revenues of the said hospital, and declared that the said trustees should stand

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possessed of the said lands and tenements upon the following trusts, that is to say:

In trust that they the said trustees and survivors or survivor of them should permit and suffer the rectors of the rectories of Bottesford and Harley respectively for ever to receive and take the rents and profits of all and singular the said messuages, lands and premises thereby respectively granted, bargained and sold, as often as the same should become due and payable, to the intent and purpose that they the said rectors and their successors, or the rector for the time being of Bottesford and Harley aforesaid respectively for ever, should and would, by and out of the said rents and profits, pay and distribute to the fourteen poor men who then were, or thereafter should be legally and rightly admitted into and placed in the said hospital (that is to say), to each and every of them, once in every month, the sum of 10s. 8d. of current British money, and also the sum of 6d. to each and every of the said poor men, four several times in the year, namely, Easter, Whitsuntide, Bottesford feast, and Christmas, for pie-money, and also the sum of 10d. to each and every of the said poor men in December every year, in lieu of capon-money, and also in February and August, yearly, to every of the said poor men, 6d. a time for buying them salt; and also to every of them the said poor men the sum of 10d. in September, yearly, for the finding them with candles; and also the sum of 1s. 6d. every month for the fire-maker of the said poor men's fires; and also the sum of 30s. for each and every of the said poor men in April, yearly, for the providing every of them a suit of clothes, and to each and every of them a good cloth gown and making at Easter, every other second year; and also the sum of 6s. 8d. a man, to the landress, for washing each poor man's clothes, at Lady-day and Michaelmas yearly, by even and equal portions; and also out of the said rents to find and provide for each of the said poor men 20 cwt. of hard coals, to be laid in yearly, in the month of May; and also then, and from time to time, and at all times thereafter, to find and provide all necessary and reasonable beds and bedding, household goods and other necessary utensils for the use and benefit of the said poor men, but at the discretion of the said trustees, parties to these presents, and should maintain, repair and keep the said hospital or almshouse, with all necessary amendments and reparations, and also provide physic and attendance for the sick; and in case the said trustees, or their successors, or the rectors for the time being of Bottesford and Harley aforesaid should neglect or refuse to act or concern themselves in the said trust, pursuant to, and to be guided by, the directions aforesaid, then and in such case it was thereby declared and agreed by and between all the said parties to these presents, and the said John Duke of Rutland (party thereto) did authorise and empower the said trustees, or any three of them, by any writing under their hands respectively, and also any subsequent grantees of the said premises, to nominate and appoint three or more honest and discreet persons to act and be concerned in the said trust, in such manner as the rectors aforesaid, or any of them, might or were to do, by virtue of these presents and of the powers aforesaid. And it was thereby declared and agreed by and between all the said parties to these presents, and the said John Duke of Rutland (party thereto) did declare that the said sole power of nominating or appointing for any person or persons whatsoever to be placed and admitted in the said hospital should be and remain in the said duke and his heirs male for ever; and in case of failure of such heirs male then the lord or lords of the manor of Bottesford at the time of such failure, and their successors, lord or lords for the time being, shall have the right of nomination and placing of poor persons in such manner as the said duke then had, and his heirs might have; and it was further declared that in case any of the said poor men, after such their nomination or admission into the said hospital, should in any way abuse the said charity by their immoralities, profaneness, or lewdness, or other misbehaviour, then it should and might be lawful for, and be in the power of the said then present duke (party thereto), or his heirs, or for failure of such, for the Lords of Bottesford and their successors for the time being, to remove and displace such person or persons, so as he or they should not have the benefit or advantage of the said charity, and to nominate and appoint any other person or persons in the place and stead of such person or persons so to be removed. And in the said conveyance is contained a declaration that the said trustees should demise or lease all or any part of the said premises for a term not exceeding twenty-one years, so as upon every such lease there be reserved the full and improved rent without any fine to be paid.

It was further proved that the said George Steele was paid by the trustees of the hospital the sum of 9s. 2d. per week; that the appointment of the hospital men by the Duke of Rutland for the time being was by word of mouth or by letter to his agent, who reduced such appointment to writing, and forwarded it to the parties so appointed; that there was in the said hospital a common hall where the hospital men had their meals; that each man had a separate room with a pantry, and that all the apartments were numbered; that the entrance to the said hospital is by one outer door into a passage,

at the end of which is a second door, and all the inner doors of the said apartments open into the said passage; that a matron is appointed by the said trustees, who has apartments allotted to her, and who receives a salary of 20l. per annum, and whose duties consist in the general superintendence, in cleaning the apartments, and in cooking and working for the said hospital men; that the said hospital men pay no rates or taxes, and never repair the apartments; that they enjoy the use of an orchard and garden adjoining the hospital, and are supplied from the funds of the trust with coal, medicine, medical attendance, and all necessaries (except meat and provisions), they also receive a cloak apiece once in two years; that they have uninterrupted enjoyment of their apartments, together with a key, and with a power of ingress and egress at any time; but that after nine o'clock at night the matron, by arrangement among the hospital men, locks the outer door and hangs up the key in the passage; that no instance has ever been known of a hospital man being removed, although a power to remove is contained in the deed for immorality, &c., nor has any instance been known of any of the poor men having sublet their apartments; that, as the rents of the said lands and tenements mentioned in the said deed of conveyance increased, such increased rents were distributed among the hospital men from time to time, and so far back as the year 1778 each man has been in receipt of upwards of 10l. per annum, and each man is now in actual receipt of 9s. 2d. per week, exclusive of coals and gown.

Upon proof of the above facts the revising barrister held:

First, that although the weekly payments to each of the hospital men amounted to more than 10l. per annum, as the power of appointment and removal expressed on the deed appeared to him to be discretionary with the Duke of Rutland for the time being, that the said George Steele had not such an equitable freehold interest in the land as to entitle him, under the provisions of 2 Will. 4, c. 45, s. 18, to have his name retained upon the register of voters for the said parish of Bottesford, in the said division of the said county.

Secondly, that even if that were not so, the said George Steele was simply a member of an eleemosynary institution, and as such was not entitled to have his name retained upon the said register.

There were thirteen other names upon the existing register for the said parish, and two on the list of new claimants, whose right to be retained or otherwise depends upon the decision of the court in the case of the said George Steele.

The revising barrister expunged the names of the said thirteen persons on the old register, and disallowed the two new claims.

If the court should be of opinion that the revising barrister was wrong, then the name of the said George Steele, together with the names of the said other persons, are to be restored to the register, and the two new claims are to be allowed.

Mellish, Q.C. appeared for the app., and Hayes, Serjt. for the resp. They cited,

*Davis v. Waddington*, 7 M. & Gr. 37;  
*Simpson v. Wilkinson*, 7 M. & Gr. 50;  
*Heartley v. Banks*, 5 C. B., N. S., 40;  
*Freeman v. Gainsford*, 11 C. B., N. S., 68; 5 L. T. Rep. N. S. 611;  
*Ashmore v. Lees*, 2 C. B. 31;  
*Attorney-General v. Drapers' Company*, 2 Beav. 508.

Nor. 18.—ERLE, C. J.—I am of opinion that the revising barrister was right. The claimant claimed as for a freehold interest in land in the parish of Bottesford, and it appears that there was a hospital, that had been founded in 1692, but that in 1762 the lands in respect of which the

claim was made were reconveyed to certain trustees therein named, and those trustees were to hold it in trust to allow the rectors of two parishes to receive the rents and profits and appropriate out of those rents and profits divers payments in the different channels specified in the deed. It is altogether a legal trust, vested in trustees, to allow the rectors of these two parishes to appropriate the profits in certain charitable ways, and the deed is entirely silent as to the appropriation of the surplus. I am perfectly clear it is not appropriated to the inmates of this hospital. It may be that it should be appropriated in some manner that the trustees might consider it their duty to adopt. This claim is for a freehold interest; and I am of opinion that the claimants have no equitable estate in the land. They have a right to receive certain payments out of the land, which payments they have to get from the trustees. When a person files a bill in equity, it means a bill in equity to enforce a legal estate, not a bill to appropriate to himself certain payments which he may consider himself to be entitled to. I cannot see, on looking at the deed, the least sign of an equitable estate. The claim in *Freeman v. Gainsford* was a claim of a freehold interest in respect of a hospital; the judgment of the court was, that he did not take any equitable freehold in the chamber in which he lived, though he may have had some right to receive profits out of the hospital. In a part of my judgment I said: "It seems to me that he is elected as a mere object of charity, and that when the founder assigns him rooms for his residence he does not confer on him any estate which he could enforce by bill in equity. It is an estate the party must have to qualify him to vote." And my brother Williams says: "The occupier of a residence as part of the benefits of a charitable institution is not entitled to an estate of freehold therein unless the founder has expressly assigned it to him, directly or indirectly, during his life." They are to take these profits during their lives, and says Williams, J.: "It does not follow that the particular room is to be assigned to each of them as owner for his life. It seems to me to be clear that he has not the right to be owner at all. If he had, although the purposes of the charity might require him to be removed to another set of rooms, he might set the governor at defiance. It is quite manifest that no such state of things as that could have been intended." I take it to be perfectly clear that these persons having the right to ask for money from the trustees who collect the rents and profits cannot be said to have an equitable estate in the lands which the trustees hold.

BYLES, J.—I am of the same opinion. In order to entitle the claimant here to vote, he must be seised of an estate of freehold; it is not necessary it should be a legal estate; it is quite sufficient that it is an equitable estate. Now, in the first place, this is not the case of a trust, that is, to receive the money in trust for a *cestui que trust*; nor is it to allow him to take the money. The trustees are first of all to receive the rents and profits, and to distribute them in a particular manner among these inmates. It is conceded by Mr. Mellish that the claimant must avail himself of the surplus in order to make out an equitable estate of sufficient value. Now, without giving any opinion as to whether the trustees take the surplus in trust or not, let us assume that they do; how are they to dispose of it? There is no provision for that being done. I conceive that they are not to dispose of it in any prescribed manner, but with such a discretion as the Court of Ch. would sanction. For these reasons, though I had some doubt at one period of the discussion, I now entertain no doubt. I think the claimant has not an equitable estate; and I think the authority of the

last case, and particularly the judgments of my Lord and my brother Williams in *Freeman v. Gainsford*, support our determination of this case.

KEATING, J.—I am of the same opinion. I think it is clear from this case that the claimant is entitled to a payment to be made to him, no doubt by the trustees who take the rents of the land: the equitable right is to the money payment; but on the facts stated he takes no equitable estate in the land.

*Judgment for the resp.*

Attorneys for resp., *Hollings, Sharpe, and Ullithorne.*

Wednesday, Nov. 23, 1864.

BENESH v. BOOTH.

*Notice of objection sent by post—Duplicates—6 Vict. c. 18, s. 100.*

*By sect. 100 of 6 Vict. c. 18, a person desirous of sending a notice of objection by post must deliver the same duly directed, open and in duplicate, to the postmaster of any post-office where money-orders are received or paid, and the postmaster must compare the notice and the duplicate, and, on being satisfied that they are alike in their address and their contents, must forward one of them to its address by post, and return the other to the party bringing the same, duly stamped with the stamp of the said office.*

*The objector delivered his duplicate notices of objection to the app.'s vote to the postmaster, who, having compared them, put his stamp on. The duplicate notice returned to the objector had the word "copy" at the head of it, but the one left in the hands of the postmaster to be posted had not. The app. contended before the revising barrister that the notice sent to him was invalid, inasmuch that, as it had not the word "copy" on it, it was not a duplicate of the one returned to the objector, and therefore was not such a notice as was required by the Act. The barrister decided that the notice was good, and the Court*

*Held, that his decision was correct.*

This was an appeal against the decision of the revising barrister appointed to revise the lists of voters for the city of London. Thomas Woodzell Booth, on the list of voters of the Livery of the Company of Distillers, objected to the name of Maurice Benesh being retained on the list of voters for the parish of St. Botolph Without, Aldersgate. The objector being called upon to prove that he had given the notices of objection respectively required by the Registration Act, he duly proved the requisite notice given to the overseers, as to which therefore no question arises in this case; and the party who posted the notice directed by the Act to be served on the party objected to, produced the notice duly stamped with the stamp of the London post-office, of which the following is an exact transcript:

(Corr.)

To Maurice Benesh.

I hereby give you notice that I object to your name being retained on the list of persons entitled to vote in the election of members for the city of London.—Dated this sixteenth day of August one thousand eight hundred and sixty-four.

THOMAS WOODZELL BOOTH,  
12A, Manor-place, Walworth, S.

(On the list of voters of the Livery of the Company of Distillers.)

It was admitted that the word "copy" on the notice produced before the barrister was on the said notice before it was taken to and stamped at the post-office; and that the words "Thomas Woodzell Booth," subscribed thereto, were in the proper handwriting of the objector. An objection was thereupon made before the barrister to the reception of any parol evidence to explain the state of the notice retained by the postmaster to be forwarded, and the address thereon; but he admitted the party posting.

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the said notice to supply such explanation, and he proved satisfactorily that the word "copy" was not on the notice retained by the post-office to be forwarded to its address.

The barrister held that it had been duly proved that the objector had given the notices of objection as required by the Registration Act, and called upon the party objected to, to prove that he was entitled to have his name inserted in the list of voters in respect of the qualification described in the list, and on his failure to do so he was expunged from the list.

The app. contended before the barrister: First, that parol testimony was inadmissible to prove the contents of the notice retained to be forwarded by the postmaster, the same being a judicial instrument required by the statute to be in writing, and which in this case, by the express words of the 100th section of the Registration Act, must explain and prove and be complete in itself. Secondly, that while the Registration Act allows a certain latitude in the forms of notices for claims in counties, and also of notices of objection to overseers in cities and boroughs, provided the words employed be "to the like effect" of the statutory form, it admits of no such deviation in the case of borough notices to be served on parties objected to; and, therefore, the notice now in question was not according to the forms numbered (11) in the schedule B, in which the word copy does not appear. Thirdly, that a statutory judicial written instrument must be held in law to be what on the face of it it purports to be, and that, inasmuch as the notice produced purported to be a "copy," it could not be adduced by its author as the original notice required by the Act. That the word "copy" was not surplusage, because it was a term which assigns a distinctive and specific negative character to the document to which it is affixed, amounting in fact to a protest on the part of its utterer that, as against him, such document is not to be allowed to have the effect and authority of an original—not to have the effect, in short, in the present instance, of proving that the objector gave the notice required by the Act without evidence of which the party objected to would not be *in foro*, or entitled to the costs of a groundless objection. That the notice was not the less a "copy" because the words "Thomas Woodzell Booth" were in the actual handwriting of the objector, inasmuch as it was competent for himself or an amanuensis to make copies of his own notices. Fourthly, that, if the notice left with the postmaster to be forwarded to its address did not bear the word "copy," it was not a duplicate of the notice produced before the barrister, and would not therefore be the notice required by the Act.

The app. raised several other objections to the like effect.

If the court should be of opinion that due notice of objection was not given to the parties objected to, their names are to be re-inserted on the lists.

*Hannen* (with him *Underdown*) for the app.—The question is, whether the objector gave such notice as the statute requires. If the evidence to show that the word "copy" was not upon the notice actually sent ought not to have been received, then the notice that was sent must be taken to have purported to be a copy, and not an original, and would not be a good notice. Or, if the evidence was rightly received, then these two documents did not correspond *verbatim et literatim* as the Legislature intended they should:

*Toms v. Cumming*, 1 Lush. 200;

*Birch v. Edwards*, 5 C. B. 45; 2 Lush. 37.

*Fawcett*, for the resp., was not called upon.

*Estle, C.J.*—The statute requires the notice to

be sent to the party objected to, and makes a provision for sending it by the post where the objector chooses to avail himself of that means, and then there must be a duplicate original kept by the objector and a duplicate original sent to the party objected to, and I think, if he headed one of them "duplicate" and not the other, the rest of the notice being the same in all essentials, and the address being alike, that would be a compliance with the statute. In common parlance the large majority of mankind, where there are two duplicate originals that require to be dealt with, call one of them a copy of the other. I am sure I have witnessed innumerable cases where the party who has to serve a notice and keep a duplicate of it does that. It is a rule of law that all notices are originals, and therefore the notice that is kept by the party serving is the duplicate original. I believe I never remember a notice server who did not say, "I served a copy of this notice on the other party," and the lawyer says, "Do not call it a copy, call it a duplicate." This party calling the duplicate original in the heading a "copy" has not in the smallest degree affected the validity of the instrument.

*KEATING, J.*—I am also of opinion that this is a good notice, and the word "copy" has not at all vitiated it. The case *Mr. Hannen* has referred to of *Birch v. Edwards* is one in which the court held that the variance was very material, because what the court really decided there was, that the external address was part of the notice; the moment you decided on that, the one having the external address and the other not having it, then immediately an essential variance was established. It seems to me here the word "copy" has not in the slightest degree effected any essential variance. The external address might be very essential, and *Wilde, C.J.* says, in terms, the postmaster could only act upon the information given to him by the external address. It may be, no doubt, not only material but very material. It seems to me this case does not come at all within that case, and that the revising barrister was quite right.

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*Right to vote—Actual form of rentcharge—Statute of Uses—27 Hen. 8, c. 10.*

*A rentcharge was originally created by deeds of lease and release, dated the 9th and 10th June 1839.*

*By indenture of the 3rd Nov. 1862, it was conveyed to S. H., his heirs and assigns for ever. By indenture of the 29th Jan. 1864, between S. H., J. H. and the five sons of S. H., the rentcharge was granted to J. H. and his heirs, to the use of the five sons of S. H., their heirs and assigns for ever as tenants in common.*

*The first payment under this indenture became due in June 1864, and the app., who was one of the five sons of S. H., received his share in July:*

*Held, that the app., under the Statute of Uses, had been in actual possession of a share in a rentcharge for six calendar months prior to the 31st July, and therefore that he was entitled to vote.*

This was a consolidated appeal from the decision of the revising barrister for the southern division of the county of Lancaster, on the following case.

Frederick Clayton objected to the name of Arthur Heelis being retained on the list of voters for the township of Pendleton, in respect of the following qualification:

Township of Pendleton, 1864.

Southern division of Lancaster, to wit.—The list of persons claiming to be entitled to vote in the election of knights of the

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shire for the southern division of the county of Lancaster, in respect of property situate in whole or in part within the township of Pendleton :

Heelis, Arthur	Walton-bank, Eccleston-road, Pendleton	An undivided sixth part or share of a perpetual chief or fee farm rent of 50 <i>l.</i> per annum.
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The said rentcharge of 50*l.* was created by indentures of lease and release, dated respectively the 9th and 10th June 1839, whereby certain land in Pendleton was granted, bargained, sold and released by John Robinson and Stephen Heelis to John Spencer and his heirs, to the use, intent and purpose that the said John Robinson and his assigns during his life, and after the determination of that estate by any means in his lifetime, then that the said Stephen Heelis and his heirs during the natural life of and in trust for the said John Robinson, and subject to the aforesaid limitations, then that John Robinson, his heirs and assigns, should and might yearly and every year for ever thereafter have, receive and take from and out of the land thereby released, and the buildings to be erected thereon, one clear yearly rent or sum of 50*l.* by half-yearly payments, on the 24th June and 25th Dec. ; and to further uses limiting to John Robinson, his heirs and assigns, or to Stephen Heelis and his heirs, as the case might be, powers of distress and of entry and perception of profits for securing the said yearly rent, and subject to the said yearly rent of 50*l.*, and powers and remedies for the recovery thereof, to uses to bar dower, remainder to the use of John Spencer, his heirs and assigns for ever.

All the estate and interest in the said land so vested in John Spencer became, prior to the year 1862, and still is, vested in William Thomas Blacklock and his heirs in fee.

By an indenture, and dated the 3rd Nov. 1862, the said John Robinson granted and released the said rentcharge of 50*l.* and all his estate therein, with the said powers and remedies for securing the same, unto and to the use of the said Stephen Heelis, his heirs and assigns for ever.

By indenture duly executed, and dated the 27th Jan. 1864, and made between the said Stephen Heelis of the first part; John Heelis, a son of the said Stephen Heelis, of the second part; and the said Stephen Heelis and John Heelis, and Thomas Heelis, Arthur Heelis, James Heelis and Edward Heelis, four other sons of the said Stephen Heelis, of the third part; the said Stephen Heelis, in consideration of the natural love and affection which he had and bore for his sons, the other parties to the deed, and for a nominal pecuniary consideration, granted and assured unto the said John Heelis and his heirs the said rent of 50*l.*, with the powers and remedies for the recovery thereof, and all his estate and interest therein, to hold unto the said John Heelis and his heirs to the use of the said Stephen Heelis, John Heelis, Thomas Heelis, Arthur Heelis, James Heelis and Edward Heelis respectively, and their respective heirs and assigns, equally in undivided sixth shares, as tenants in common and not as joint tenants.

The said rentcharge has always been duly paid to the parties entitled.

The half-year's rent which became due on the 24th June 1864, being the first which became due after the execution of the said indenture of the 27th Jan. 1864, was, on the 8th July following, paid by the said William Thomas Blacklock to the said John Heelis, for and on behalf of himself and the five other parties entitled thereto under the last-mentioned deed, to whom he paid over their respective shares at various times between the 8th and the 30th July. No portion of the said rentcharge was paid after the execution of the said

indenture of the 27th Jan. 1864 until the 24th June 1864, when the half-year's payment was made as aforesaid.

The land so conveyed in 1839, together with a house and other buildings subsequently erected thereon, are the premises described in the fourth column of the said list of persons claiming to be entitled to vote.

The said Arthur Heelis named in the said indenture of the 27th Jan. 1864 is the claimant Arthur Heelis named in the said list.

When the claim of Arthur Heelis came before me it was objected that he had not been in actual possession or in receipt of the rent for his own use for six calendar months next previous to the last day of July 1864. On the other hand the claimant contended that the said rentcharge having been originally created, not by grant but by a conveyance to uses, he (the claimant) having on the 27th Jan. 1864 become by virtue of the indenture of that date an assign of the said John Robinson, he was by the 4th and 5th sections of the Statute of Uses to be adjudged and deemed to be in possession and seisin of the share of the said rentcharge in such like estate as he had in use of the same, and that so being in such possession and seisin he was in the actual possession and receipt thereof for six calendar months next previous to the last day of July 1864 within the meaning of the 2 Will. 4, c. 45, s. 26. I considered that the seisin and possession mentioned in the sections of the Statute of Uses is explained and qualified by the subsequent words in the latter section, viz., as if a grant or other lawful conveyance had been made and executed to them by such as were or shall be seised to the use or intent of any such rent, and that only as if a grant of the said share of the said rent had on the said 27th Jan. 1864 been made by William Thomas Blacklock to the claimant; and that if such grant had then been made, nevertheless, until the actual receipt of part of his said share of the said rent, the claimant would not have been in the actual possession or receipt thereof within the meaning of the 2 Will. 4, c. 45, s. 26. I therefore disallowed the claim of the said Arthur Heelis, and erased his name from the list of voters.

If the Court of C. P. shall be of opinion that upon the facts stated the claimant was, by virtue of the said seisin to uses of the said William Thomas Blacklock, or otherwise, to be deemed in point of law to have been in the actual possession or receipt of the said share of the said rent for six calendar months next previous to the last day of July 1864, then his name is to be restored to the list of voters; but if the said court shall, upon the said facts, be of opinion that claimant was not in point of law to be so deemed in the actual possession or receipt of the said share of the said rent, then his name is not to be restored to the said list. The like claims were made by James Heelis, John Heelis and Thomas Heelis, whose names appear in the same list of claimants.

*Joshua Williams* (of the Chancery Bar) for the apps.—A rentcharge was created in 1839. By indenture of 27th Jan. 1864, this rentcharge was granted to John Heelis, to the use of the five sons of Stephen Heelis. The app. was one of these five sons. The revising barrister decided that no rent having been paid till July 1864, the app. had not been in "actual possession" of the rentcharge for six months previous to the last day of July 1864, and was therefore not entitled to be registered for that year. At the hearing the argument turned on the meaning of sects. 4 and 6 of the Statute of Uses, 27 H. 8, c. 10. All parties seem to have gone astray as to the application of that statute to the present



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case. I do not rely on ss. 4 and 5, but on sect. 1. (a) The 26th section of the Reform Act enacts that, "no person shall be registered in any year in respect of his estate or interest in any lands or tenements, as freeholder, &c., unless he shall have been in actual possession thereof, or in the receipt of the rents and profits thereof, for his own use for six calendar months at least next previous to the last day of July in such year. The words "in the receipt of the rents and profits thereof" are inapplicable to a rentcharge, which cannot be let. There can be no receipt of the rent and profits of the rent. The only words that have any bearing are "unless in actual possession," and your Lordships have to decide on the meaning of these words. We have to show that we have been in actual possession. I say that by the deed of the 29th Jan. 1864 the app. is placed in actual possession. There are only two kinds of possession, seisin by law and seisin in deed by actual possession. My argument is, that we have an actual seisin in deed by virtue of the 1st section of the Statute of Uses. A rentcharge may be created either by conveyance at common law or under the Statute of Uses, but when once created it becomes an incorporeal hereditament, and may be dealt with as such. If grant had been made at common law we should not have been in actual possession until the receipt of rent or a sum paid to give actual possession:

*Murray v. Thorniley*, 2 C. B. 217;

*Hayden v. Overseers of Tiverton*, 1 Lut. 510.

He also quoted as authorities the following:

Lord Bacon's Reading on the Statute of Uses, vol.

13, p. 342 (Basil Montague's edit.);

Comyn's Digest, "Uses," 1;

3 Cruise Digest, 274;

Coke on Littleton, 315 a, n. 1 (Butler's note);

Burton's Real Property, 1116.

*Keane*, Q.C. for the resp.—The result of the argument of the other side is, that if you have never received rent you might have a vote. There has been no authority for this position cited: I mean no decision of the judges. [ERLE, C.J.—In a case of, I think, *Smith v. Jersey*, 2 B. & B. 599, in the H. of L., Lord Eldon says that the practice of conveyancers is entitled to very great authority.] The Reform Act requires "actual possession;" the Statute of Uses employs the words "lawful possession." The former words were as well known to the Legislature in Henry the Eighth's time as now. *Bevill's case*, 4 Coke Rep. 10 b; Sugden Gilbert on Uses, p. 193 (86), shows that sects. 4 and 5 are the only sections applicable to the creation of a rentcharge, when a person is to stand seised of any lands to the use that some other person may receive a rent thereout. The object of the statute was, that the person to whose use the estate was granted should be in the same position as a grantee at common law. The words of sect. 5 are, "deemed to be in possession and seisin of the same rent as if a sufficient grant or other lawful conveyance had been made and executed to them." Now, *Murray v. Thorniley* and *Hayden v. Overseers of Tiverton* show that if this had been a conveyance at common law there would have been no actual possession until the payment of rent.

*Williams* in reply.—Sects. 4 and 5 of the statute have no application. They had discharged their duty when the rentcharge was created by the deed of 1839.

(a) Sect. 1 enacts that the person that has the use of lands, tenements, rents, &c., shall from thenceforth stand and be seized, deemed and adjudged in lawful seisin, estate and possession. Sects. 4 and 5 enact that where certain persons stand seised of land, &c., to the use that some other person shall have a yearly rent out of them, then that the same person that has such use "shall be deemed to be in possession and seisin of the same rent as if a sufficient grant or other lawful conveyance had been made and executed to them."

ERLE, C. J.—I am of opinion that the revising barrister was wrong, and that the claimant is entitled to vote. The claimant claimed to have been in the actual possession of a share in a rentcharge for six calendar months before the 31st July, and it appears that, more than six months before that time, the rentcharge was granted to John Heelis and his heirs, to the use of the claimant and others as tenants in common. A rentcharge had been created by the owners of the fee-simple of land in 1839, that rentcharge coming by divers mesne conveyances to the party who in 1864 conveyed it to the claimant. No payment was made, and nothing received under the rentcharge; and if the conveyance had been at common law, without the aid of the Statute of Uses, it is clear, from the cases cited by Mr. Williams, that there would have been no actual possession. This conveyance is a conveyance operating by the Statute of Uses, and that statute, in sect. 1, says that, where there is a conveyance to one party to the use of another person, "all and every such person and persons that have or hereafter shall have any such use, confidence, or trust in fee-simple, or fee-tail, either for a term of life, or for years, or otherwise, shall from henceforth stand and be seised, deemed and adjudged in lawful seisin, estate and possession of and in the same." The statute of Will. 4 requires that the party shall be in actual possession, and the Statute of Uses enacts that when a person is seised to the use of another the *cestui que use* shall be deemed to be in possession. I am of opinion that the word "possession" is a technical word, and that the Legislature in the times of Hen. VIII. and Will. IV. attached the same meaning to the words possession and actual possession, and that the Statute of Uses has given him the actual possession which the statute of Will. 4 required. It is said that the interposing of one name would appear as an evasion of the statute, which requires actual possession; but I attach no importance to that, as there are two cases to show that it must be actual possession; but at the same time, anything like actual seisin of the rent would, to my mind, afford less facility of proof than the production of a conveyance operating by virtue of the Statute of Uses, which, ever since the reign of Hen. VIII., has received great attention, coupled with actual practice every day down to the present hour. So much upon the statute. Then upon the authorities which Mr. Williams has brought forward—authorities, I should say, entitled to very great respect; in which the most important propositions very often occupy only four or five lines, but are of not the less force because they are concise. Then Bacon's reading upon the Statute of Uses is entitled to very considerable weight. Lord Chief Baron Comyn has been held in high opinion in the profession. He says, "By 27 Hen. 8, c. 10, the *cestui que use* is immediately seised and in actual possession." Then we turn to Coke upon Lyttleton, and Butler's note (315 a, note 1), where the whole of the learning of Tindal, C.J., in *Murray v. Thorniley*, is to be found, for it appears to me to be involved in the passage from Coke upon Lyttleton and Butler's note, pointing out the distinction between a conveyance of rent at common law and a conveyance by virtue of the Statute of Uses; where the latter is the case there is actual possession from the time of the conveyance. Then, I take notice of Cruise's Digest and Burton on Real Property, and I think I have authority for so doing. I speak without reference, but I am sure that in the case of *Smith v. Jersey*, Lord Eldon says that the practice of conveyancers must be taken notice of by those who have to administer the law, and to give effect to the intentions of the parties to an instrument. I think that Lord



Eldon laid down a very salutary principle. Those who have been entrusted with that branch of the law have been remarkable for ability and learning, and also for the logical way of contending for these principles when in court, and I am happy to think that the mantle of some of the old conveyancers has come down to the present day, and that we have had the benefit of it in the argument of this case.

KEATING, J.—I am of the same opinion. I think that the revising barrister was wrong, but I am bound to add, that if I had to decide the point as he had, without the benefit of the argument that we have listened to, I think the great probability is that I should have decided in the same way. But that argument has distinguished a conveyance of a rentcharge at common law and a conveyance under the statute. The statute now in question requires actual possession for six months; and the courts have decided that a grant of a rentcharge at common law would not give that actual possession which the Reform Act requires. The judgment of the court in the case before Tindal, C.J. was founded upon many authorities which might not be supposed to amount to actual decisions, but which are entitled to great weight. Tindal, C.J. quotes the extract from Lyttleton (par. 235): "And so it is, if a man grant by his deed a yearly rent issuing out of his land to another, &c., if the grantor thereafter pay to the grantee a penny or a halfpenny, in name of seisin of the rent, then if after the next day of payment the rent be denied the grantee may have an assize, or else not," &c. And then Lord Coke, carrying out his own statement that there might be great virtue in an *et cetera*, explains what it means, "that," he says, "by this *et cetera* is implied that the grant and delivery of the deed is no seisin of the rent; and that a seisin in law, which the grantee hath by the grant, is not sufficient to maintain an assize or any other real action, but there must be an actual seisin." Mr. Williams admits that actual possession, as required by the Reform Act, must be such as would have enabled him to maintain assize. From Cro. Eliz. 46, deriving some authority, at all events, from its being adopted by Comyn, we find that by the 27 Hen. 8 a *cestui que use* is immediately seised and in actual possession, and therefore that he shall have an assize or trespass before entry against a stranger. That, therefore, brings this case precisely within the grounds on which the case of *Murray v. Thorniley* was decided in this court, and establishes completely the distinction between the conveyance of a rentcharge at common law and the conveyance by the statute. Upon these grounds I also, agreeing entirely with the observations made by my Lord, am of opinion that the revising barrister took an erroneous view of this case; but, I think, a view which he might be well excused for taking when he had not the advantage of hearing the argument we have heard.

*Judgment for app.*

Nov. 23 and 24, 1864.

TEPPER v. NICHOLLS.

*Freeholders—Right of shareholders in Putney-bridge.*

*Where land is vested in commissioners for public purposes they have not power to convey away any part of such land; therefore, where the Commissioners of Putney conveyed the lands, which had been conveyed to them for the purposes of building the bridge, to trustees to divide the profits of the said lands and the tolls of the bridge among the shareholders:*

*Held, that, as the Commissioners had no power to give, and the shareholders no power to take, the lands, the*

*latter had not acquired such an equitable freehold estate in them as would entitle them to vote.*

This was a consolidated appeal against the decision of the revising barrister appointed to revise the list of voters for the eastern division of Surrey. David Nicholls duly objected to the names of Jabez Tepper and twenty-four other persons being retained on the Putney list of voters for the eastern division. In support of the right of the parties to have their names retained the following documents were put in:

In or about the year 1724 the Act 12 Geo. 1, c. 36, was passed, entitled "An Act for building a bridge across the river Thames from the town of Fulham, in the county of Middlesex, to the town of Putney, in the county of Surrey."

By sect. 1 of that Act certain persons were constituted and appointed commissioners and trustees for designing, directing, ordering and building such bridge, and for maintaining, preserving and supporting the same when built; and they were empowered, at any time after the 24th June 1726, to design, assign and lay out how and in what manner the said bridge should be made and built from the town of Fulham to the town of Putney aforesaid, and the ways and passages to and from the same, and to preserve and keep in repair such ways and passages from time to time, and to make contracts and do all matters and things for carrying on and effecting the purposes aforesaid, and to cause the same to be done and perfected accordingly.

And to the intent that the navigation of the said river Thames might receive no prejudice, by sect. 3 it was enacted,

That, when the said bridge was built across the said river, there should remain free and open passage for the water to pass and repass through the arches or passages under the said bridge of 700 feet at the least within the then present banks of the said river.

By sect. 5, bodies corporate and others who were seised of ground in Putney or Fulham which might be required for the purpose of making convenient approaches to the said bridge, were enabled to convey to the said commissioners and trustees, or to any nine or more of them, or their successors as they should appoint, any such ground for the purposes of that Act.

By sect. 7 it is enacted,

That it shall be lawful to and for His Majesty, his heirs and successors, by letters patent under the great seal of Great Britain, to incorporate all and every the commissioners and trustees appointed by this Act, or who shall be appointed pursuant thereto, to be commissioners and trustees for putting this Act in execution, or such of them as shall be then living, and such others as His Majesty, his heirs or executors, shall think fit, to be one body politic and corporate in deed and in name, and they and their successors to have perpetual succession and a common seal, and such seal from time to time to break, change, make new, or alter, as shall be found most expedient; and that they and their successors shall be able and capable in law to have, purchase, receive, enjoy, possess and retain to them and their successors messuages, lands, rents, tenements and hereditaments, of what kind, nature, or quality soever, and also to sell, grant, demise, alien, or dispose of the same or any part thereof, at their free wills and pleasures, to sue and implead, be sued or impleaded, answer and be answered in courts of record or elsewhere, and to choose their successors and officers from time to time, and to do and execute all and singular other matters and things that to them shall or may appertain to do, with such powers and clauses as shall be necessary or requisite for erecting, building, or preserving and supporting the said bridge and the ways and passages thereto, from time to time.

The said commissioners and trustees were never incorporated in pursuance of this Act.

By sect. 8, it is enacted,

That it shall not be lawful to or for this corporation or company, which shall or may be established by virtue of, or pursuant to this Act, as such corporation or company, to borrow, or take up, or give security for any sum or sums of money payable in less than six months, or to discount any bills of exchange or other bills, or notes whatsoever, or to keep any books or cash of or for any person or persons, bodies politic or corporate whatsoever, other than and except only the proper books, moneys and cash of the said company or corporation.

[C. P.]

TEPPER v. NICHOLLS.

[C. P.]

By sect. 10 it is enacted,

That a certain pontage or toll shall be paid before any passage over the said bridge shall be permitted, and that the said pontage or toll shall be vested in the said commissioners, to be by them applied, in accordance with the provisions of the said Act, towards the expenses of making and maintaining the said bridge, ways and passages, and purchasing the necessary ground for the same.

By sect. 13,

The commissioners, or any eleven or more of them, are empowered, when incorporated, by indenture or writing under their common seal to convey and assure the toll by that Act granted, or any part thereof, as a security for any sum or sums of money by them to be borrowed for the purposes of the Act, to grant any annuities for one, two, or three lives, or for twenty-one years, or a less term, such annuities to be charged upon and payable out of the tolls, estates and revenues belonging to such corporation.

And by sect. 14 it is enacted that such annuities shall be personal estate.

By sect. 16,

It is enacted that it shall be lawful for the said commissioners and their successors, and for such intended company or corporation and their agents or officers, from time to time to remove any shelves in the said river of Thames, and make the same river deeper.

By sect. 17,

That all stones, bricks, plants, piles and other materials which shall be made use of for or towards building or making the said bridge, or in or about the same, or for maintaining, repairing, or supporting the same, or for making the said river deeper as aforesaid, shall always be deemed to belong and appertain to the commissioners and corporation aforesaid.

And by sect. 18,

That if the said bridge should at any time become damaged, it shall be lawful for the said commissioners or corporation to set up ferries across the said river near to the said bridge, and to take certain rates and duties for passages by such ferries over the same.

By sect 19,

It shall not be lawful to erect or build the said bridge, or any part thereof, before or until full and ample satisfaction be made for all such loss or damage as shall or may be sustained or suffered by any of the owners, proprietors, leasees, or others having any property or interest in the present horse or foot ferries between Putney and Fulham aforesaid.

By sect. 22,

That nothing in this Act contained shall extend or be construed to extend to prejudice or take away any right, property, or jurisdiction of the Mayor, commonalty, or citizens of the city of London, to, in and upon the river of Thames aforesaid, other than and except to remove any shelf or shelves, or to deepen or widen the said river, where the said bridge shall be built, and to do every other matter or thing, as shall or may be necessary for the erecting and maintaining the said bridge.

By 1 Geo. 2, c. 18, for explaining and amending the Act referred to, it is by sect. 1 enacted as follows:

The commissioners and trustees appointed by the said recited Act, and those appointed by this Act, or any nine or more of them, and the commissioners and trustees when incorporated in pursuance of the said former Act, shall have and they have hereby full power and authority to contract and agree with any person or persons whatsoever, as well commissioners and trustees as others, to erect and build a bridge across the said river of Thames from the said town of Fulham to the said town of Putney, and to repair, maintain and support the same when built in such manner as by the said commissioners and trustees or corporation aforesaid shall be judged proper; and the said commissioners and trustees or corporation aforesaid, or any nine of them, said commissioners or trustees, before such incorporation, have hereby power and authority to grant any annuity or annuities in fee out of the profits, incomes, revenues, or tolls of the said bridge in such manner as they may by the said former Act grant any other annuity or annuities, all which annuities in fee simple to be granted pursuant to this Act shall be registered, and shall be divisible and assignable as the other annuities are by the said former Act, and such annuities in fee shall be deemed personal estates and shall go as such.

And for the more effectually enabling the said commissioners and trustees and corporation aforesaid, as speedily as may be, to complete and perfect the said works, by sect. 3 it is enacted,

That it shall and may be lawful to and for the said commissioners and trustees, or any nine or more of them, before incorporated, and also lawful for such corporation, when created, at any time or times to convey and assign over in perpetuity or otherwise all or any tolls, revenues, profits, or incomes of or

belonging to the said bridge or ferries, or which shall in anywise arise, accrue, or belong to the same, unto such person or persons as will undertake, contract and agree to erect and build the said bridge, and to preserve and keep up the same in good and sufficient repair, and shall give sufficient security to do so to the satisfaction of the said commissioners and trustees and corporation aforesaid, anything herein or in the said former Act to the contrary notwithstanding.

By sect. 5,

It shall not be lawful for the said commissioners and trustees and corporation to erect or build the said bridge, or any part thereof, before or until ample satisfaction be made for all prejudice, loss, or damage as shall or might be sustained or suffered by any of the proprietors of the horse ferries between the said towns of Putney and Fulham, unless the said proprietors of the said ferries, by writing under their respective hands and seals, should consent and agree with the said commissioners and trustees, or any nine or more of them, or the said corporation, to permit the said commissioners, trustees, or corporation to build the same before such satisfaction should be made, and in case such consent of the said proprietors should be had and obtained in manner aforesaid, that then the said bridge, when built, and all tolls, revenues, profits and incomes belonging or to belong to the same, should be and were thereby made chargeable, and charged in the first place with all such sums of money as were by the said former Act to be paid to the respective owners, proprietors and persons interested in the present ferries between Fulham and Putney aforesaid, and that upon payment thereof respectively, or tender and refusal, all ownership, properties and interests of, in, or to the horse and foot ferries between Putney and Fulham shall be, and are hereby appointed, extinguished and determined, and the said ferries and passage over the river shall be and are hereby appointed, extinguished and determined, and the said ferries and passage over the river of Thames there, and the ground and soil adjacent and belonging to the said respective ferries, shall be and are, by the authority of this Act, transferred to and absolutely vested in the said commissioners and trustees and corporation aforesaid, and their successors and assigns for ever.

All such moneys and payments for the said horse ferries have long since been duly paid and made.

The ferries referred to in the said Acts on the Putney side of the river were held and were parcel of the manor of Wimbledon, and on the Fulham side were held and were parcel of the manor of Fulham, and previously to the 21st March 1728 Daniel Pettward and William Skelton had been respectively admitted to, and each of them then held in fee, by copy of the court-rolls of the respective manors, one undivided moiety of the ferries on both the Putney and Fulham sides of the river; and on that day the commissioners paid to them the sum of 8000*l.* in full satisfaction for all damage which they, or either of them, should sustain by occasion of building the bridge; the rights and interests of all other parties in the said ferries having been previously satisfied by the commissioners.

On the 19th Nov. 1828 a contract was duly entered into by the commissioners with thirty persons, who had subscribed 1000*l.* each for building the bridge, and making the purchases and payments required by the said Acts, by which those thirty persons contracted to build and maintain the bridge, and the ways and passages thereto, and make the said purchases and payments; and in pursuance thereof the said thirty persons did build the said bridge, and make the said payments and purchases.

By indenture of bargain and sale, bearing date the 11th Nov. 1729, duly enrolled in Chancery, made between the commissioners of the first part, the said thirty persons therein named and described as being all the contractors and subscribers for building the said bridge of the second part, and certain other persons as trustees of the third part, after reciting the various sections of the above-mentioned Acts, and further reciting the said contract of the 19th Nov. 1728, and that the said thirty persons had paid all moneys they had agreed to pay, and built the said bridge, the commissioners granted, bargained, sold, assigned and set over unto the said persons, parties thereto of the third part, their heirs and assigns for ever, the said bridge and all the materials wherewith the same was erected and built and all tolls, revenues, profits and incomes of or

belonging to the said bridge so built, from the town of Fulham to the town of Putney, or the ferries thereafter to be set up and erected as occasion might be, according to the provision in that behalf made by the said recited Acts, or either of them, or which should in any wise arise and accrue or belong to the same, with all such ground and soil adjoining and belonging to the then late or then present horse-ferries and passage over the said river between Fulham and Putney as had been, was, or should be vested in the said commissioners, and all benefits and advantages, powers, privileges and authorities, and every other matter or thing whatsoever vested in or granted to the said commissioners which they were empowered or capable to assign and convey over, by virtue of the said Acts or either of them, to hold the same unto and to the use of the said trustees, parties hereto of the third part, their heirs and assigns for ever, upon trust to permit and suffer the said thirty persons therein named of the second part, their heirs and assigns, to receive and take the said tolls, revenues, profits and income, and to have the sole management and direction thereof, upon condition that they should thereout pay certain sums of money and expenses specified in the said deed, which condition has been performed, and after payment of such sums of money should every year thereafter divide all the then rest and residue of the moneys to be raised by the said tolls, revenues, profits and income of the said bridge, ferries and other the premises (if any) unto and amongst the said thirty subscribers and proprietors for the time being and their respective heirs and assigns, rateably and proportionably according to the several sums of money by them subscribed for the purposes aforesaid, and to their several and respective rights, shares and interests of, in and to the same, to have, take and enjoy the same as tenants in common, and not as joint tenants. And by the said deed it was provided that in case the tolls, revenues, profits and incomes of the said bridge or ferries should at any time or times thereafter fall short, and not be sufficient to answer and make good all such sums of money as should be requisite for putting and keeping the said bridge, together with all the ways and passages to and from the same, in good repair within a reasonable time to be allowed for making such repairs, or should not be sufficient for the payment of all the matters and things thereinbefore particularly mentioned, and the charges of the trustees in the execution of the trusts, then all such sums of money as should so fall short or be wanting for the said purposes should from time to time be paid and borne by the said thirty subscribers, the parties thereto of the second part, their heirs and assigns, rateably and proportionably, and according to the several sums of money subscribed by them respectively towards the purposes aforesaid, and to their several rights, shares and interests therein.

On the 16th June 1730, by grant of that date, the Archbishop of Canterbury granted to the proprietors of Putney-bridge 200 superficial feet of land, part of the churchyard of Putney, for the purpose of making the passage to and from the said bridge more commodious, and the same was used for that purpose, and now forms part of the approach to the bridge. There is no other land in the county of Surrey vested in, belonging to, or claimed by the said proprietors, except what is comprised in the before-stated deed of the 11th Nov. 1729, and the last-mentioned grant, and no evidence was adduced before the barrister as to the annual value of the said land.

On the 26th Aug. 1736, by deed of that date, the persons therein equitably entitled to the tolls, revenues, profits and income of the bridge under the

indenture of the 11th Nov. 1729, covenanted with each other that certain orders and directions given for the arrangement of the affairs of the bridge should stand good until altered at some quarterly general meeting of persons from time to time becoming so equitably entitled, by a majority of such persons present at such meeting.

The interest of the present shareholders in the bridge is identical with the interest vested in the said thirty persons or proprietors under the said deed of the 11th Nov. 1729, and under the grant of the 16th June 1730, and has always been conveyed and transmitted as and dealt with as freehold estate, and the shareholders in the said bridge are about eighty in number. The proprietors meet once a-year, and elect a committee of six out of their own body to manage the affairs.

The said persons objected to are respectively the holders of a share or part of a share of such interest as aforesaid, and the sufficiency of the annual money value of such share or part of a share is not now in dispute. The bridge is built partly on piles driven into the bed of the river, and at either end upon brick foundations, which stand respectively upon that part of the banks between high and low water-mark whence formerly the ferries used to ply from side to side, and in part upon land which formerly was ground and soil adjacent and belonging to the said ferries.

There are toll-houses at each end of the bridge at which tolls are collected, and each of them is a structure of brick and stands upon the brick foundations of the bridge referred to in the preceding paragraph thereof.

For the said persons objected to it was contended that they had respectively under or by virtue of the said Acts of Parliament and deeds of the 11th Nov. 1729 and 16th June 1730, hereinbefore stated, such equitable freehold estates in the said bridge tolls and other property comprised in the said Acts and deeds as entitled them respectively to be on the list of voters for the said eastern division of the said county; and for the said David Nicholls, the objector, it was contended that they had not respectively such equitable freehold estates as would entitle them to vote for the said division of the said county; and also that the shareholders were a company; and that the individual shareholders being only entitled to a share of the receipts and profits were not entitled to be on the said list of voters.

The barrister decided in favour of the objector, that the said several persons objected to had not respectively such equitable freehold estates as entitled them respectively to be on the said list of voters.

If that decision was wrong the names are to be restored.

*Karslake* (with him *Beresford*) for the app.—Each shareholder in the bridge has such an equitable freehold estate as entitles him to a vote, for, First, the original commissioners, when they had carried out the undertaking in accordance with their Acts, acquired such an interest in the soil as would have given them a right to vote. They had a right to purchase the ferry, and to hold land, and in 1725 they did purchase the ferries and the soil adjacent. Secondly, having such an interest, they had a power to assign it. Thirdly, they did actually assign it to trustees for the benefit of the shareholders:

*Rogers Election*, 23;

*Baxter v. Brown*, 7 M. & G. 198;

*Bennett v. Blain*, 15 C. B., N. S., 518; 9 L. T. Rep. N. S. 506.

*Raymond* for the resp.—The real question is, are these shareholders entitled to vote for their share in the aggregate of this property, whatever it is? I submit, first, the commissioners had no interest in land. The bed and soil of the river are *prima facie*

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in the Crown. The 17th section of the Act is conclusive, that no interest in bed or soil of the river should pass. The courts have held that they will not suppose that more is conveyed than is actually necessary for the purpose of the Act: (*Badger v. South Yorkshire*, Ell. & Ell. 347.) [ERLE, C. J.—I never remember a permanent structure having been held an easement.] This is not the common case of a building or land. It was a navigable river:

*Lancaster v. Eve*, 5 C. B., N. S., 517;

*Wood v. Hewitt*, 8 Q. B. 913.

It is not necessary that the ferries should have any land. Secondly, supposing there was an interest in land in the commissioners, they had no power of conveying it. The 3rd section of the second Act gives them their power of conveying; anything done beyond their power is invalid. Thirdly, there is no equitable interest in land in each shareholder. The interest is vested in the company:

*Bennett v. Blain*, 15 C. B., N. S., 518; 9 L. T. Rep. N. S. 506.

Nov. 24.—ERLE, C. J.—In this case, which was a claim on behalf of a shareholder in Putney-bridge, the question was whether he had an equitable freehold interest. The statute has conveyed the bridge and the land to the commissioners, and the commissioners in 1729 conveyed the bridge to trustees on behalf of the shareholders, and if the commissioners had power to part with the property, I have no doubt the shareholders have become entitled to the bridge, and to the land that belongs to the bridge. But I take it to be perfectly clear law that the land is vested in the commissioners by the Act of Parliament for public purposes, and the commissioners have not, unless there be something in the statute to that effect, the power to convey away part of the land vested in them for public purposes, and the statute appears to me to confirm that view, because the second of these statutes enables, specifically, the commissioners to convey the tolls to the shareholders, and if the statute instead of that had intended they should have power to convey the fee-simple of the land to the shareholders, it would have used an expression enabling them to convey the tolls as distinguished from the fee-simple of the land. But it appears to me to be a negation of that right. I think the commissioners have no power to convey the freehold to the shareholders, or to the trustees in trust for the shareholders. Then, if they had conveyed it in 1729 or purported to convey it by means of a deed of conveyance, if the law prohibited that conveyance, the shareholders, taking it with a knowledge of the title under the Act of Parliament, acquired nothing more than could lawfully be conveyed, and the commissioners parted with nothing more than could be lawfully parted with. We think that the commissioners having no power to give, and the shareholders having no power to take, the fee-simple, the latter have not acquired a title, but there has been a holding under the Act of Parliament. The commissioners are entitled to have the right over the land, and the shareholders are entitled to the tolls; therefore there is no qualification. That is all we affirm.

*Judgment for resp.*

Saturday, Nov. 26, 1864.

GAYDON v. BANKROFT.

Borough—Right of freemen to vote—2 Will. 4, c. 45, s. 32.

*By sect. 32 of 2 Will. 4, c. 45, it is enacted that no person shall be entitled to vote as a freeman in respect of birth, unless his right be originally derived from or through some person who was a freeman, or entitled to*

*be a freeman, previously to the 1st March 1831, or from or through some person who since that time should have become, or should hereafter become, a freeman in respect of servitude.*

*S. was admitted a freeman, by right of birth of his father, on the 31st July 1856; his father was admitted on the 2nd May 1831, having only come of age on the 4th April of that year; and the grandfather was admitted on the 14th Oct. 1810:*

*Held, that the proviso was intended to give a continuous lineal right to persons claiming freedom by birth, where they claimed the right originally from or through a person who was a freeman before the date of the same; and as the app. claimed through his father, who was a freeman before the date of the claim, he was entitled to have his name on the register.*

This was a consolidated appeal from the decision of the revising barrister appointed to revise the list of voters for the borough of Barnstaple. On the 19th Sept. 1864, William Saunders was inserted in the list of freemen entitled to vote for the said borough, thus:

William Saunders	Holland-street, Barnstaple.
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His name was duly objected to by T. J. P. Tucker, and the facts were as follows:

In the borough of Barnstaple there is a body of freemen; the sons of these freemen are entitled, on proving their father's marriage, that they were born of that marriage, and that they have attained the age of twenty-one years, to be admitted as freemen of this borough, but they can claim from or through no other relative than their father, and in no other way than that described. The said William Saunders was duly admitted as a freeman (by right of his father) to the borough on the 31st July 1856. His father was admitted also by right of birth on the 2nd May 1831, having only come of age on the 4th April in that year. The grandfather was admitted by right of birth on the 14th Oct. 1810. On this state of facts it was contended on the part of the objector that as the said William Saunders derived his right to be admitted as a freeman of the said borough through his father, from and through whom alone he could claim, and as it was necessary by the 32nd section of the Reform Act that the father, to give him the right claimed (viz., to be on the list of freemen voting for the borough), should have been admitted a freeman, or have been entitled to be admitted as a freeman, previously to the 1st March 1831, and that as he (the father) was not admitted till the 1st May 1831, nor entitled to be admitted till he came of age on the 4th April in that year, his right to be placed on the list of freemen voting for that borough could not be sustained.

On the other side it was contended, in support of the vote, that, although the father could not have been admitted as a freeman till he came of age, yet he had an inchoate right to be so admitted previously to the 1st of March 1831, which was perfected on his coming of age, and that this was sufficient to satisfy the provisos of the 32nd section of the Reform Act, and to sustain the vote.

The barrister held that the said William Saunders originally derived his right from or through his father, and that there was no one from or through whom he thus derived his right who was a freeman or entitled to be a freeman previously to the 1st March 1831, and that the vote could not be sustained, and I struck his name out of the list.

Cooke, Q.C. (*Bourke* with him) appeared for the app., and contended that, although the father could not be admitted until he came of age, he nevertheless had a right to be so admitted previously to

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[C. P.]

the 1st of March 1861, and therefore that the son could claim through him.

*Dowdeswell*, for the resp., contended, that as the app. claimed through his father, his father must have been admitted or have had a right to have been admitted prior to the 31st March 1831, and as he was not admitted until April 1831, his son could not claim through him.

The following cases were referred to in the course of the argument:

*Gale v. Chubb*, 4 C. B. 41;

*Croucher v. Brown*, 1 Lut. 388;

*Elliott on Registration*, 2nd edit., 214, note a;

Municipal Corporation Act, 5 & 6 Will. 4, c. 76, ss. 4, 5.

ERLE, C. J.—In this case I think the revising barrister was wrong. The question is whether the right of voting as a freeman reserved by sect. 32 of the Reform Act was preserved for one descent only, or preserved continuously to lineal descendants of freemen before a certain day? I think the Legislature intended to preserve it continuously. The beginning of sect. 32 is a general enactment; it says, "Every person who would have been entitled to vote either as a burgess or as a liveryman, shall have his right continued, provided he be duly registered." Then comes the proviso that no person who shall have been elected, made or admitted a burgess or freeman since the 1st March 1831, otherwise than in respect of birth or servitude; and no person who shall be hereafter elected, made or admitted by birth or freedom, otherwise than in respect of birth or servitude, shall be entitled to vote in any such election. The result is, it reserves for the future freedom by birth or servitude. Then comes the proviso on which the question turns: "No person shall be entitled as a freeman in respect of birth, unless the right be originally derived from or through some person who was a freeman or entitled to be admitted a freeman previously to the 1st of March 1831." Now, I stop there; as to freedom by birth, it is a limitation upon the general enactment of the previous part of the section under which the claimant would be entitled. I think the present claimant derives his right originally from or through some person who was a freeman or entitled to be admitted a freeman before the 1st March 1831—namely, from his grandfather: his grandfather was a freeman admitted before the 1st March 1831, and his father became entitled in April 1831, but was not entitled before. I think this proviso was intended to give a continuous lineal right to persons claiming freedom by birth, where they claimed the right originally from or through a person who was a freeman before the date of the claim. I do not think the Legislature intended it should be continued for one generation only, and I am confirmed in that view because the Legislature has preserved freedom by servitude, and it has enacted that in respect of a person claiming by descent from a freeman in respect of servitude, "that that right is to be continued to so and so in perpetuity." The statute enacts that "no person shall be entitled as a burgess or freeman in respect of birth, unless his right be originally derived from or through some person who was a burgess or freeman previously to the 1st March 1831, or from or through some person who, since that time, shall have become, or shall hereafter become, a burgess or freeman in respect of servitude." Therefore a right may be acquired by servitude in all future time till the Legislature shall again interfere. I think it was very improbable the Legislature intended merely to give it to one descent. The words contemplate, to my mind, lineal succession. The revising barrister has found that, in the borough of Barnstaple, the freemen are entitled, on proving their father's right; and that

they can claim from or through no other relative than their father. I take that, construed with reference to this statute, which says "continued," to mean freemen claiming by birth; and then there is no doubt that a freeman claiming by birth, but of lineal descent from a former freeman, must always intend lineally claiming through his father, and the parties in Barnstaple have never yet had the right. The father, however, was in truth a freeman before 1831. In my opinion the statute contemplated the lineal succession in perpetuity, and is not to be read that no freeman can claim by birth unless the father was admitted before 1831. I do not think that is the meaning of the Legislature. I think the practice in Barnstaple to trace to the father is to be reconciled with this interpretation in the way I mention. He claims as a freeman by birth, because lineally descended. He must trace through the father in all cases.

BYTES, J.—I am of the same opinion, and although I have paid every attention and respect to Mr. Dowdeswell's argument, I am unable to entertain any doubt at all that the revising barrister was wrong here. The facts, when put in order, are very simple. In this borough, freemen by birth, leaving all other qualifications out of the question, have voted; in 1810, the grandfather of the claimant was admitted, and he claimed to be, and was admitted as a freeman by birth; he dies, and leaves a son, who is of age in April 1831; the son is admitted, and then the son dies, and the grandson, the present claimant, claims to be admitted. It is not only proved, but it is admitted by Mr. Dowdeswell, that the father must have been admitted, and he is within the preserving or creating words of the 32nd section; the right is preserved unless the proviso takes it away. It seems to me he does satisfy the proviso, for he does claim through and from some person who was a burgess or freeman of the borough before the passing of the Act of Parliament. I entirely assent to all that my Lord has said, that the words "from or through," and the word "continually," are strong to support that construction. On the other hand, we are without any reason, that I can see, asked to say that the words "some person" mean father. I can see no reason for that construction, and no instance has been pointed out in which the Legislature do not either preserve the franchise for life, or preserve it in perpetuity, or abolish it altogether: no instance in which they have preserved it for one generation after the existing persons who enjoy it.

KEATING, J.—I am of the same opinion. The question raised by this case for our consideration, by the revising barrister, is, whether a freeman by birth is entitled to vote whose grandfather was actually a freeman previously to the 31st March 1831, but, his father being under age at the time, was not entitled to be admitted until after that date. Now, it seems to me, on looking at the whole scope of the Act, and those sections with reference to the franchise to be exercised by freemen by birth, that the intention of the Legislature in passing the 32nd section and the proviso, was not to exclude a person who could claim originally through his grandfather, such grandfather being a freeman before the 31st March 1831.

*Judgment for app.*

[Ex.]

SAUNDERS v. SLACK.

[Ex.]

## COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs. Barristers-at-Law.

Tuesday, June 7, 1864.

SAUNDERS (Executor, &amp;c.) v. SLACK.

*Local Improvement Act—Action against clerk to commissioners under—Exemption of clerk from personal liability—Judgment against the clerk—Execution against goods of commissioners—Mandamus.*

By a local and personal Act (2 & 3 Vict. c. 63) the commissioners thereby appointed for improving the town of Bradford, Wilts, were empowered to sue and be sued in the name of their clerk, who was expressly exempted from personal liability in respect of any such action, and they were also empowered to appoint a clerk and other officers, and it was enacted that they should and might, out of the moneys to arise by virtue of the Act, pay such officers such salaries as the said commissioners should think reasonable.

An action was brought by the executors of a former clerk to the commissioners against deft., the present clerk, for arrears of salary due to the deceased, in which judgment was entered up against the deft. and a *fi. fa.* issued, under which the sheriff seized the fire-engines and other goods of the commissioners vested in them by the said Act for public purposes, and a rule *nisi* having been obtained to set aside the judgment and *fi. fa.*, on the ground that execution could not be had against different persons from the party sued, and that a *mandamus* to compel the commissioners to pay the debt out of the rates, &c. was the proper remedy:

The Court (Pollock, C.B., Martin, Bramwell and Channell, BB.) discharged the rule, on the ground that if the commissioners were right they had other means of redress, as by action of trespass, &c., but that, if the rule were made absolute, there were no means of reviewing the decision of the court.

A rule calling on plt. to show cause why the judgment signed in this cause, the writ of *fi. fa.* issued thereon, and all subsequent proceedings, should not be set aside with costs. The action was originally brought by plt. and another as executors of one John Bush, a deceased attorney, for arrears of salary due to him as clerk to the Improvement Commissioners of the town of Bradford, in Wiltshire. The action was brought against the then clerk to the commissioners, a gentleman named Martin, under sect. 16 of the local Act 1839, for paving, lighting, watching and improving the town of Bradford, in the county of Wilts (2 & 3 Vict. c. 63), empowering the commissioners to sue and be sued in their clerk's name. It was tried at the Wiltshire spring assizes 1863, before Shee, J., when a verdict was found for plt. for the amount of salary claimed and costs, which verdict was afterwards reduced by the Ex. on a rule, obtained by deft. for that purpose, to 70*l.* and costs: (see *Bush and another v. Martin*, 8 L. T. Rep. N. S. 509.) The co-plt. and Martin, the original deft., having died after verdict, and before judgment signed, and the present deft. Slack having been appointed clerk to the commissioners in Martin's place, suggestions of those circumstances were duly entered on the roll and judgment signed against the deft. on 21st Dec. 1863, for plt. to recover 70*l.* and also 12*l.* 3*s.* 4*d.* for costs of suit. Upon this judgment a *fi. fa.* was issued at plt.'s suit, and certain goods, the property of the commissioners, and vested in them by the local Act, namely, a water-cart, two fire-engines, and sundry heaps of stones or road materials, were seized thereunder by the sheriff of Wilts, but the stones were subsequently given up in compliance with the recommendation to that effect of Pigott, B., before whom the matter came at chambers on summons, but who did not decide the matter, but referred it to the court at the request of both parties.

*Coleridge, Q.C.* (for deft.) accordingly, in Easter Term, moved for a rule *nisi* to the effect above mentioned, and contended that a *mandamus* to the commissioners, to raise the money out of the rates, was the proper remedy of plt. Pollock, C.B. thought the rule ought not to be granted, inasmuch as it was one which, his Lordship said, he should decline to make absolute, thinking the court ought not to decide a matter on motion when there was a course for obtaining the more satisfactory decision even of a court of error, if necessary. The rule *nisi* was, however, granted by the other members of the court, Martin, Bramwell and Pigott, BB., although their Lordships intimated their strong opinion that it would be discharged on cause being shown.

The following are the material sections of the local Act referred to in the argument:

By sect. 13 the commissioners were empowered to appoint a clerk, treasurer and other officers, &c., and

Shall and may, out of the moneys to arise and be collected by virtue of this Act, allow and pay to such officers such salaries and allowances as the said commissioners shall think reasonable.

By sect. 16 it was enacted in effect that

The commissioners may sue and be sued in the name of their clerk for the time being, and no action brought, &c., by or against the said commissioners shall abate or discontinue by the death, suspension, or removal of such clerk, &c.; but such clerk shall be deemed plt. or deft. in any action or suit, provided that in all cases in which the clerk should be plt. or deft. on the record in any action in which, in effect, the commissioners should be suing or sued in his name, he might and should nevertheless (if not otherwise interested) be a competent witness for or against the commissioners, and should always be reimbursed, out of the moneys to arise by the Act, all damage he should be put to by reason of his being so made plt. or deft., and should not be personally answerable or liable for the payment of the same.

*M. Smith, Q. C.* and *Lopes*, for plt., now (June 7) showed cause, and submitted that the *fi. fa.* was regular. This was not the case of a person sued as a trustee. These commissioners were sued in the name of their clerk, who was like fictitious parties in an old ejectment. In substance and effect they, and not their clerk, were the real defts. (sect. 16). The words of that section were, "by or against the commissioners." It was monstrous to say that when an action had proceeded regularly to judgment signed, execution was not to be issued, but that plt. was to resort to the Q. B. for the extraordinary powers of a *mandamus*. [MARTIN, B.—I was under the impression when the rule was moved that this had been decided.] There was a case in the Q. B. (*Reg. v. Victoria Park Company*, 1 Q. B. 288), later than the cases cited by *Coleridge* in moving, and those cases may be distinguished. First, *Wormwell v. Hailstone*, 6 Bing. 668, only decided that execution could not issue against the clerk to turnpike trustees personally; there, too, the goods of the trustees were expressly saved from liability, and a *fortiori* would the clerk's be. That case was the converse of the present one, and an authority in favour of plt. In *Kendall v. King*, 17 C. B. 483, better reported in 25 L. J. 132, C. B., the justices were merely a committee of visiting justices, and had no property, and the language of the judges must be taken with reference to that fact, the *ratio decidendi* being the absence of funds. In *Rex v. St. Katharine's Dock Company*, 4 B. & Ad. 360, the action, which was against the company's treasurer, whose goods were expressly exempted, by the Act of incorporation, from liability to execution, was referred, and *mandamus* was held to lie to the treasurer and directors of the company to pay the sum awarded to the plt. There, on his award, plt. was entitled to summary process or attachment on the goods, but the action was against the treasurer, who was not personally liable. The proceedings in actions against poor-

Ex.]

Re THE LOCAL BOARD OF HEALTH OF TRANMERE v. KELLETT.

[BAIL.

law unions and local boards of health were analogous and in point. This local Act was a public Act, and made part of the record, and the *fi. fa.* was to take the goods of the commissioners, the real defts., who were sued in the name of their clerk, the nominal deft. In the more recent case in the Q. B., *Reg. v. The Victoria Park Company*, 1 Q. B. 288, in which the action was against the treasurer, who by the Act was made not personally liable, judgment was entered up against the company, who had no assets, and the Court refused a *mandamus* to compel the company to pay the sum recovered, although the *St. Katharine's Dock* case was cited, as it had been here to-day, in favour of the application.

The COURT here called on the other side to support their rule.

*H. Bullar* (with him *Coleridge*, Q. C.), contra, for deft.—The question was of great importance, these Acts governing every large borough in the kingdom. The deft.'s demand was for a stale debt, and one question was, whether a retrospective rate could be made for the purpose of paying these debts. This Act was virtually a Turnpike Act. The road materials having been given up, the question remained as to the right to seize the fire-engines. It was submitted they could not be seized. [POLLOCK, C. B.—How do you propose that the judgment-debt should be paid?] By *mandamus* to the treasurer, as in the *St. Katharine's Dock* case. The debt was for the salary of an officer under the Act, and it was clear from the words of sect. 13 of the Act, that the officers were only to be paid out of the rates. The words of that section, "and shall and may, out of such moneys, &c., allow and pay such salaries, &c." [MARTIN, B.—This is a judgment-debt, and we have nothing to do with how the debt originated. BRAMWELL, B.—I doubt extremely whether the Act means more than that it is a purpose to which you may apply the rates.] The engines seized were, by sect. 19, referred to contra, vested in the commissioners for public purposes, *e.g.* for extinguishing fires, and not for the purpose of liquidating debts. [BRAMWELL, B.—You would say all the property which they hold is held for the purposes of their trust, and so nothing is seizable?] That was the true construction. This debt was payable out of the rates; a view strongly supported by sect. 13 and by sect. 19, which rendered any person wrongfully taking the commissioners' goods liable to an action. [BRAMWELL, B.—The question recurs, were these goods wrongfully taken? It has been decided that a railway cannot be taken under an *elegit*, on the ground of public convenience.] Turnpike Acts were analogous to this Act, yet what would be the result if, in actions on their bonds, plts. could seize the road materials? [*M. Smith*.—The mortgages in those cases were on the tolls.] But they might have gotten judgment and so seized the road. Sect. 60 of the General Turnpike Act (3 Geo. 4. c. 126) was like sect. 19 here. There was no sound distinction between the present case and *Wormwell v. Hailstone*. What was said by Williams, J., in *Kendall v. King* (*ubi sup.*), was entitled to great respect, and had hitherto been the opinion of the profession, namely, that a judgment recovered in such a case as the present was not to be enforced otherwise than by *mandamus* or bill in equity. It was without precedent to issue execution against a different person from the party sued. As a legitimate consequence of plts.' argument, if the commissioners were the real defts., and *fi. fa.* could be executed, why might not even a *ca. sa.* issue against their bodies? [BRAMWELL, B. referred to *Pallister v. Mayor of Gravesend*, 19 L. J., N. S., 358, C. P.; 9 C. B. 774.]

POLLOCK, C. B.—It is impossible not to feel the

force of a great deal of that which Mr. Bullar urged before us in his argument on behalf of the commissioners; but this point still recurs—namely, that if the defts. (the commissioners) are right they have other means of redress, as by an action of trespass, &c.; but, on the other hand, if we stay the proceedings under this judgment and *fi. fa.* there are no means of reviewing our decision at all. We think, therefore, that this rule should be discharged.

MARTIN, BRAMWELL, and CHANNELL, BB., concurred.

*Rule discharged.*

Attorneys for plt., *Kingsford and Dorman*, 22, Essex-street, Strand, W.C., agents for *Spackman*, Bradford, Wilts.

Attorneys for deft., *Whittakers and Woodbert*, 12, Lincoln's-inn-fields, W.C., agents for *Slack and Simmons*, Bath.

### BAIL COURT.

Reported by T. H. JAMES, Esq., Barrister-at-Law.

Tuesday, Nov. 22, 1864.

(Before SHEE, J.)

Re THE LOCAL BOARD OF HEALTH OF TRANMERE v. KELLETT.

*Arbitration—Time for making award—Umpire—Public Health Act 1848—Enlargement of time—C. L. P. A. 1854 (17 & 18 Vict. c. 125).*

*An award under the Public Health Act 1848 must be made within three months after the appointment of the arbitrators; therefore, where an umpire published his award after the expiration of this period, without enlarging the time:*

*Held, that the award was bad:*

*Held, also, that the court had no power afterwards to enlarge the time.*

This was a rule to set aside an award, upon the ground that it had not been made within the time prescribed by law. The award was made under the provisions of the Public Health Act 1848 (11 & 12 Vict. c. 63), sects. 125 and 126 of which enact that if the arbitrator fails to make his award within twenty-one days after his appointment, or if he enlarges the time or does not make the award within three months, the matter is to be referred to another arbitrator. If there be more than one arbitrator they must appoint an umpire, and if they neglect to do so for seven days, the Court of Quarter Sessions are to appoint an umpire, and if the arbitrators fail to make their award within twenty-one days, or within three months in case of enlargement, the matters are to be referred to the umpire; but the time is not to be extended beyond three months.

The arbitrators in this case were appointed on the 15th Jan. 1864, and before they proceeded with the reference on the 3rd Feb., appointed an umpire. They enlarged their time to the 18th April. Having failed to make their award on that day, the duty then devolved on the umpire, who made his award on the 2nd May, and did not enlarge the time.

*Field*, Q.C. showed cause.—The application is too late. The local board had notice of the award in May, and no formal publication is necessary. The application should have been made before the last day of the term following the publication. Terms in this statute are to be construed like those in the Lands Clauses Consolidation Act: (*Sheratt v. North Staffordshire Railway Company*, 2 Phil. 475.) If the period is to be three months from the date of the



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instrument, arbitrators might exclude the umpire altogether:

11 & 12 Vict. c. 63, s. 128;  
*Re Bradshaw*, 12 Q. B. 562.

The deft. has waived the objection, by having agreed to pay the money as soon as the costs were ascertained.

*F. Russell* in support of the rule.—The time must be calculated from the appointment. The limitation of the time for making the award was to prevent delay in making awards. The umpire should have left his power alive:

*Daddington v. Bagthorpe*, 7 Dowl. 640.

*Field, Q. C.* having obtained a cross-rule to show cause why the time for making the award by the arbitrators should not be enlarged,

*Russell* showed cause.—The application is unprecedented: (*Ward v. Secretary of War for India*, 11 W. R. 88.) Sect. 15 of the C. L. P. A. 1854 (17 & 18 Vict. c. 125) refers only to arbitration by consent and compulsory references. There are two classes of arbitration, viz.: first, those entered into in the course of a suit or cause; secondly, where the submission contains a clause to make the award a rule of court. Sects. 5, 6 and 7 of the C. L. P. A. 1854 do not apply:

*Morris v. Morris*, 25 L. J. 261, Q. B.

*Field, Q. C.* in support of the rule.—The right to an enlargement of the time depends upon the C. L. P. A. 1854. The words of that statute are "any case of arbitration."

*SHEE, J.*—As to the first rule, I am of opinion that it must be made absolute. The Act of Parliament places an umpire in precisely the same position as a single arbitrator. [Read sects. 123 and 125.] Now, unless there is something in the Act plainly inconsistent with the ordinary meaning of these clauses, it is the duty of the court to give effect to the enactment, and hold that, inasmuch as a single arbitrator must make his award within twenty-one days after his appointment, or the date to which the time is enlarged, the umpire must also make his within the same period. It was contended that, as regards the umpire, the time would run from the date when his authority commenced, and at first I was under the impression that such was the construction to be put upon the Act. But in the case in the Court of C. P. I find it decided that an umpire has power to enlarge the time before the difference is notified to him. If that be the true construction, it reconciles all the sections of this Act of Parliament, because the umpire might at any time within the twenty-one days have enlarged the time. That not having been done, and it being the plain intention of the Act that the arbitrator should proceed with expedition, I am of opinion that the time for making the award had lapsed. As to the rule obtained by Mr. Field, I am of opinion that it ought to be discharged. The sections of the C. L. P. A. 1854 do not apply to a case like this. It is a strong circumstance that no such application has ever been made before. It seems to be the intention of the Public Health Act that the arbitration should proceed without delay, and express words would be required to annul that plain meaning.

*First rule absolute; second rule discharged.*

Wednesday, Nov. 23, 1864.

(Before BLACKBURN, J.)

REG. v. JUSTICES OF ESSEX.

*Diversion of pathway—Inclosure Act (8 & 9 Vict. c. 118)—Notice affixed to church door—Evidence—Presumption—Time for hearing appeal.*

*An appellant, under 8 & 9 Vict. c. 118, was called upon to prove, upon objection taken at quarter sessions, the date of the notice affixed by the valuer upon the church door under sect. 62; proof was given of the date of the notices affixed at each end of the way:*

*Held, that it must be presumed that the date of the notice on the church door corresponded with this:*

*Held, also, that, provided notice of appeal be given within the four months under sect. 64, the appeal itself need not be heard within that period.*

*Garth (Taylor with him)* showed cause against a rule that a *mandamus* should issue to certain justices of Essex, commanding them to enter continuances to the next sessions, and to hear an appeal.

The appeal was under the 8 & 9 Vict. c. 118, s. 62, which provides that before any public road or way shall be discontinued, diverted, stopped up, or altered by the valuer acting in the matter of any inclosure, the valuer shall cause to be affixed at each end of such road or way a notice to the effect that the same is intended to be discontinued, stopped up, diverted, or altered, as the case may be, from and after a day to be mentioned in such notice, and the valuer shall also cause the same notice to be given by advertisement for four successive weeks, and also on the church door on the four Sundays of the said four successive weeks; and after the said several notices shall have been so given, such road or way shall from and after the day in such notice mentioned be deemed to be discontinued, stopped up, diverted, or altered, as the case may be, subject, however, to such appeal as is hereinafter mentioned.

Sect. 63 enacts:

That it shall be lawful for any persons, within four months after the first Sunday on which such notice shall have been given on the church door of the intention that such road or way should be discontinued, stopped up, diverted, or altered, as the case may be, to make his complaint thereof by appeal to the justices of the peace at the quarter sessions for the county, riding, division, or other jurisdiction in which such road or way, or the greater part thereof, shall be situate, upon giving to the valuer fourteen days' notice in writing of such appeal, together with a statement in writing of the grounds thereof; but it shall not be lawful for the app. to be heard in support of such appeal unless such notice and statement shall have been given as aforesaid, nor on any hearing of appeal to go into evidence of any other grounds of appeal than those set forth in such statement as aforesaid.

The facts were, that notice had been given by the valuer acting under the Barking Common Allotment Act of intention to stop up a pathway and bridleway across Claybury-park, and the justices had refused to hear an appeal against it under the above-recited Act.

The appeal had been lodged with the clerk of the peace, and came on for hearing on the 29th June last.

The counsel for the app. was called upon by the other side to prove the service of the notice and grounds of appeal, which was done by putting in the two notices, dated respectively March 24 and June 13.

It was then further insisted that the counsel for the app. were bound to prove that the notice of appeal was served within four months of the Sunday on which the notice had been affixed by the valuer on the church door, and that therefore he must prove the date of the last-mentioned notice. To this it was objected that it was sufficient if proof were given of service of the notice of appeal four



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teen days before the quarter sessions, and that the *onus probandi* that such notice was more than four months after the affixing of the original notice was cast upon the other side.

The Court holding otherwise, and that this fact must be proved affirmatively by the app. as a condition precedent to his having any *locus standi*, a witness was called who proved that he had seen a notice, signed by the valuer, and affixed at both ends of the way in question; he had made a copy of this, which was produced, and it proved to be identical with the notice given by the valuer, which was dated 22nd Feb. 1864. It was then contended that sufficient presumptive proof had been given of the date of the notice affixed to the church door; this, by the provisions of the Act, was to be the same as that affixed at both ends of the way, and as the date of the former had been affirmatively proved, it must be presumed that the latter was at any rate not prior to it.

The Court, however, held that no such presumption existed.

A witness was then called, who proved that he saw a notice in March last on the church door, and which related to the stoppage of the way. He afterwards read it at his own house, and now proved that it was dated the 22nd Feb. 1864, and that it related to the stoppage of the way across Claybury-park. In cross-examination, however, it transpired that although he had the notice in his house, he had left it behind him, and the Court, on objection taken, ruled that he could not, under the circumstances, give evidence of its contents.

Finally, it was held that, as the counsel for the app. could not prove affirmatively the date of the affixing the notice to the church door, the appeal must be dismissed, which was accordingly done.

Cause was now shown.—First, proof of the date of the notice affixed on the church door is necessary under sect. 63; and although the date of those affixed on both ends of the way was proved, that is not sufficient, and the evidence of the second witness was inadmissible. [BLACKBURN, J.—It must be presumed, upon the principle *omnia presumuntur rite esse acta*, that the dates of the two notices correspond, until the contrary be shown.] Secondly, the notice was posted on the wrong door. It was a district church. [BLACKBURN, J.—That objection was not taken before the justices, and therefore you can make nothing of it now.] Thirdly, by sect. 63 the appeal must be made within four months after the first Sunday on which, &c. Therefore, if the case were sent back, the appeal could not now be heard, as more than four months have elapsed since the 22nd Feb. 1864. [BLACKBURN, J.—It is not necessary that the appeal should be heard within the four months, if notice of it is given within that period.]

Lusk, Q. C. (*Murphy* with him), who appeared on the other side, here cited, as to the time limited for appealing, the judgment of Bayley, J., in *Reg. v. Middlessex*, 6 M. & S. 282;

For the resps. were cited,

*Reg. v. Kesteven*, 3 Q. B. 810;

*Reg. v. Freeman of Leicester*, 15 Q. B. 671.

The Court (without calling upon the counsel for the app.) held, upon the authority of *Reg. v. Middlessex*, that the magistrates were wrong, and that the rule must be made absolute.

*Rule absolute.*

Thursday, Nov. 24, 1864.

(Before BLACKBURN and SHEP, JJ.)

REG. v. THE OVERSEERS OF SUTTON, IN LANCASHIRE.

*Time for taking poll for adoption of Small Tenements Act (13 & 14 Vict. c. 99).*

*A vestry meeting was convened for the purpose of considering the question of the adoption of the Small Tenements Act (13 & 14 Vict. c. 99), and after a show of hands a poll was demanded, and the time agreed upon, viz., upon two consecutive days between twelve and four, and six and eight o'clock in the evening. The voting was slack on the first day; but on the second, so great a rush was made that, out of the whole number of 1100 ratepayers, 300 or 400 were unable to vote:*

*Held, that the time appointed was, under the circumstances, reasonable, and that there would have been time for all to vote, had they used due diligence.*

*Quere, has the chairman, under those circumstances, power to extend the time for a polling beyond the time fixed in his notice.*

This was a rule calling upon the churchwardens and overseers of the parish of Sutton in Lancashire to show cause why a *mandamus* should not issue, commanding them to convene a vestry to take into consideration the adoption of the 13 & 14 Vict. c. 99, for the better assessing and collecting the rates in respect of small tenements.

The question of the adoption of this Act had been taken into consideration at a vestry meeting held on the 17th March 1863, duly convened, when the show of hands was against the adoption of the Act, whereupon a poll was demanded, and the time for taking it determined upon by the majority of those present. The chairman on the following day gave notice that the poll would take place at the times so determined upon, viz., the 23rd and 24th March, between the hours of twelve and four in the morning and six and eight of the evening on both days. The assessments of the parish numbered 1700, but the ratepayers did not much exceed 1100, and of these 446 only voted, and there was a majority of twenty-six in favour of the adoption of the Act.

The voting was very irregular, seventeen persons only voting during the first hour in the first day, and seventy only during the same hour on the second day; but in the evening of the first day, the chairman gave notice that he would take the votes after eight o'clock, in consequence of the pressure of voters, but eventually this was not done. On the evening of the second day so great was the crowd, that 300 or 400 were unable to reach the voting-room, and their votes were not taken.

From the affidavits it appeared that the bulk of the ratepayers were working-men, though it was possible that they might have voted in the daytime.

Pickering, Q.C. (*Heath* with him) now showed cause.—The remedy for any owner who is rated and who objects to the rate is not by *mandamus*; he should appeal against the rate, and insist that the occupier, and not he, should be rated. [BLACKBURN, J.—It cannot be laid down as a general proposition, that a *mandamus* will never lie in parish matters, simply because every ratepayer may be harassed by appeals.] (*Reg. v. Stoke Newington*, 5 A. & E. 584.) [BLACKBURN, J.—Judging from the analogy of parliamentary elections, six hours a day for two days is a reasonable time.]

Petersdorff, Serjt. (*T. Jones* with him) supported the rule.—The time for taking the poll was not sufficient, and the chairman acted improperly in first of all giving notice that he would take the votes after eight o'clock, by which many had been misled.

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Most of the ratepayers were workpeople who could vote only after six o'clock. Moreover there should have been more than one poll-clerk, by which much time would have been saved. [BLACKBURN, J.—The chairman who appointed the time was justified in assuming that a percentage only of those entitled would vote.] There is authority for saying that in cases of disturbances the time for election may be prolonged. [BLACKBURN, J.—Had the chairman power to adjourn?] (*Reg. v. Winchester*, 7 East, 573.) It was only probable that many voters would hold back, this therefore should have been provided for. [BLACKBURN, J.—Yet the voting on the first day had been at the rate of only seventeen per hour.]

BLACKBURN, J. then delivered judgment.—I am of opinion that this rule must be discharged. It was obtained on several grounds; but the two points insisted on are, first, that the time allowed for taking the votes was improper; and secondly, alleged misconduct on the part of the chairman. As to the first point, I take it that the time allowed must be such that all the voters may be reasonably able to give their votes. If the chairman fixes such a time he reasonably does his duty. In that case, all who come with due diligence may vote; but if some choose to hold back till it is too late, it is their own fault, and it cannot be said that an election is void because some have chosen to act in that way. The true principle is, that if the chairman has appointed a reasonable time and place, so that all using due diligence may record their votes, he has done his duty. It does not appear here how former polls have been taken; but we have this, that the number of ratepayers is about 1100, and we know that the whole number does not usually vote. It is clear, then, that the twelve hours during the two days was sufficient. It cannot be doubted that it was sufficient. It appears that the voting was slack on the first day, but when it appeared on the second day that there was a majority, there was a rush; but no reason, as it seems to me, is given to show that they might not have voted before. I do not say whether the chairman was right or wrong in saying that he would take the votes of those in the building after eight; but before we can exercise our discretion by granting this rule, we must see that he was bound to do so. I very much doubt whether the chairman had power to take the votes after the time which he had fixed. It is sufficient to say that there would be great risk of such a power being abused for party purposes. I think, therefore, that the grounds of fact upon which this rule was moved have failed.

SHEE, J. concurred.

*Rule discharged.*

Friday, Nov. 25, 1864.

(Before SHEE, J.)

REG. v. THE CORONER OF DOVER.

*Inquisition—Adjournment of court—Signature of coroner and jury.*

A coroner, holding an inquisition, adjourned the court to a certain day, but the court was not held on that day:

*Held, that the proceedings could not be resumed, and the inquisition must be signed by the coroner and jury at a court which is properly constituted.*

This was a rule calling upon the coroner of Dover to show cause why a *certiorari* should not issue to remove an inquisition taken before him on view of the body of one Susannah Lock, on the ground that the inquisition and verdict founded thereon were *coram non judice*.

The inquest was held on the 2nd Aug. 1864, and upon the 5th the verdict was returned. The coroner then, in order to obtain time for preparing the inquisition, adjourned the inquest to the 8th Aug., and the jurors were bound over in their recognisances to attend on that day and sign the inquisition.

On the 6th, the coroner, finding that the inquisition could not be drawn up by the 8th, wrote a letter to the summoning officer, ordering him to inform the jury that the inquest was further adjourned for a few days.

No court was held on the 8th, but on the 12th the coroner and jury met and signed the inquisition.

Francis now showed cause.—No adjournment was necessary, for the verdict of the jury had been returned. The inquisition may be signed by the coroner and jury at any time: (*Burn's Justice*, tit. "Coroner.") No formal adjournment was necessary.

Henry James supported the rule.—When the inquiry has been once stopped it cannot be resumed:

Jervis on Coroners, 325.

*Cur. adv. vult.*

Nov. 30.—SHEE, J.—It is of great importance that the duties of coroners, in the holding of inquisitions *super visum corporis*, should be conducted with the observance of those forms which have been established to ensure regularity. The forms of adjournment are requisite to secure the re-attendance of the jurors after an adjournment, at the time and place appointed, and to preserve the continuity of the proceedings from the first meeting of the inquest until its completion by the signing of the inquisition. If the coroner had taken the trouble, as it was his duty to do, of holding the court on the 8th Aug., and had then again adjourned the inquest to a day certain, all would have been right; but not having done so, the final and important proceeding of adopting and signing the inquisition did not take place under the original precept, and was *coram non judice*.

*Rule absolute.*

## COURT OF ARCHES.

(CANTERBURY)

Reported by DR. SWABER, of Doctors'-commons.

July 14 and Aug. 3, 1864.

(Before the Right Hon. Dr. LUSHINGTON, D.C.L., Dean.)

FRY AND GREATA v. TREASURE (on protest to the constitution of the suit).

Church-rate — Two churchwardens — Suit by one — Protest.

A suit for church-rate was brought before the court by letters of request purporting to be at the desire of A. and B., churchwardens. A proxy of appointment of proctors, which originally ran in the names of A. and B., was presented with A.'s name scratched through in the body of the document, and signed by B. only; the proctor alleged that A. proceeded no further. A second proxy was presented, purporting to be by B., on behalf of A. and himself, but signed by B. only. C., the party sued, appeared under protest, on the ground that both churchwardens should join in the suit, and the Court upheld the protest.

This was a question of rather a peculiar nature, arising upon a church-rate suit under the following circumstances. Fry and Greata, the churchwardens of the parish of Cheddar, in the county of Somerset and diocese of Bath, commenced proceedings against Levi Treasure for payment of a church-rate. The case came

before the Arches Court in the first instance by letters of request from the Bishop of Bath and Wells. These letters, as recited in the decree by letters of request, alleged the intended promotion of a suit by Fry and Greata, the duly appointed churchwardens, &c., and at the desire of Fry and Greata requested the Dean of the Arches to issue a decree calling on the deft. to appear and answer to the said Fry and Greata. The decree, as usual, followed the letters of request. A proxy of appointment, dated the 4th March 1864, was signed by Greata alone; as originally drawn it ran in the name of Fry as well, but his name and the corresponding terms were scratched through when given in.

On 18th April, *Pritchard* returned decree by letters of request, and exhibited proxy under the hand and seal of Robert Greata, one of the parties, and alleged that Bruges Fry, the other of the parties, proceeded no further in the suit.

*Crosse* exhibited proxy under the hand and seal of Levi Treasure, the party cited, and appeared for him nevertheless under protest. The act on petition in support of the protest recited the proceedings, and alleged that any amount assessed upon the said Levi Treasure, as a church-rate, is due, if at all, to Bruges Fry and Robt. Greata, in their corporate character of churchwardens, and that in proceeding to enforce payment of any rate alleged to be due from the said Levi Treasure, the said Bruges Fry and Robt. Greata are bound by law to proceed jointly; that the said Bruges Fry is now no party to the suit, and therefore the same is not properly constituted. The answer alleged that Fry and Greata, in their corporate capacity of churchwardens of the said parish, are in respect of the said rate trustees of the same for the use of the said parish; that this suit, as at present constituted, is a proceeding in the names of the said Fry and Greata, as the promoters thereof, and that Greata is entitled to continue the said suit in their joint names, and on behalf of himself and Fry. Wherefore, *Pritchard* craved leave to withdraw his aforesaid allegation that Fry proceeded no further in the cause.

The reply denied the validity of the suit without a sufficient proxy from Bruges Fry to be duly exhibited, or by his personal appearance therein.

A further proxy of appointment, dated the 6th June 1864, was filed, in which Greata purported to authorise the proctor on behalf of himself and Fry, and in their names to appear, &c.

The question raised by the act on petition, &c., was argued by

Dr. Deane, Q.C. (Dr. Swabey with him), on behalf of the deft.—First, as to the proceedings in the particular case, the court has not original jurisdiction in this case, and is bound by the terms of the letters of request which allege the suit to be at the instance of both the churchwardens; the proxies exhibited are inconsistent with these; there is no instance of a church-rate sued for by one churchwarden, the other refusing. Secondly, can one churchwarden maintain such a suit in any circumstances? The principle is, that all who have the legal interest must join as pits. They cited

Com. Dig. tit. "Abatement" E. 8, 9, 10.

The *Queen's Advocate* (Sir R. J. Phillimore), *Milward* and *Pritchard* with him, contra.—No *mandamus* would issue to compel the other churchwarden to join; although both must be nominally parties to the suit, one may use the name of the corporation. Neither at common law nor at equity would a suit be allowed to be defeated by one trustee refusing to join; he would be indemnified and compelled to join. They cited, among other cases,

*Starkey v. Berton*, Cro. Jac. 234.

Cur. adv. vult.

Aug. 3.—Dr. LUSHINGTON gave judgment to the following effect:—This is a question arising in a suit for church-rate brought before the court by letters of request purporting to be at the instance of both the churchwardens of the parish. It does not appear which is the minister's churchwarden and which the parishioner's churchwarden, but I must take it that both churchwardens so far took part in the suit. Two proxies are before the court, one dated the 4th March, which is a most slovenly instrument; it was originally intended to be executed by both churchwardens, but Fry's name in the body of the instrument seems to have been struck out, and it is executed by Greata only. The second, dated the 6th June, purports to be by one churchwarden on behalf of himself and his fellow-warden; it is, however, not executed by Fry, and so is void as regards him. *Pritchard* alleged that he proceeded no further for Fry; there is no evidence that he was even authorised to appear for him. *Crosse* appeared for the deft. under protest. [The learned Judge then stated the substance of the protest, answer and reply, as above given.] I am at a loss to conceive how Fry ever was a party to the suit; it does not appear that he ever executed the proxy or sanctioned the proceedings. The question therefore is, whether one churchwarden, there being two, can institute the suit for both; and, secondly, whether there be any means of compelling the co-churchwarden to join. It is admitted that there is no conclusive case either way. On the one hand no precedent of a churchwarden suing alone; on the other, none that he may not sue alone. Many cases were cited; but they seem to me to have a very remote bearing, if any, on the case now before the court. In the books it is said that the churchwardens are a *quasi* corporation. I can hardly say what that means. The case bearing most nearly on the present question is that cited from Cro. Jac. 234 (*Starkey v. Berton*), which is as follows: "Prohibition.—The case was, two churchwardens sue in the spiritual court for a levy towards the reparation of their church, and had a sentence to recover and costs assessed. The one released, the other sues for the costs, and then this release was pleaded and disallowed. Whereupon he prays a prohibition, and all this matter was disclosed in the prohibition, and the deft. thereupon demurred in law, and now moved that the release by the one, being in the personality, should discharge the entire. But it was resolved by all the court to the contrary; for churchwardens have nothing but to the use of their parish, and therefore the corporation consists in the churchwardens, and the one solely cannot release nor give away the goods of the church, and the costs are of the same nature, which the one without the other cannot discharge." I have taken some pains to find other cases, but without any satisfactory result. The case cited bears some analogy to the present question; for if one churchwarden cannot release, it is difficult to understand why he should be able to institute a suit alone. I have ascertained, on the best authority, that at common law both churchwardens must join. Mr. Milward urged that means existed at common law to compel the other churchwarden to join. I am not sure of this; but at all events I do not feel that this court has any such authority. This suit, therefore, having been instituted by Mr. Greata alone, without the authority or consent of Mr. Fry, and there being no precedent for such a suit, I must pronounce for the protest, and with costs.

*Pritchard* and *Son* proctors for the plt.  
*Crosse* for the deft.

**CROWN CASES RESERVED.**

Reported by J. THOMPSON, Esq., Barrister-at-Law.

Saturday, Jan. 21, 1865.

(Before ERLE, C. J., CHANNELL, B., KEATING,  
BLACKBURN and MELLOR, JJ.)

REG. v. JOHN MUTTERS.

*Larceny by adulterer—Evidence of possession—Animus furandi.*

*The prisoner, a servant of the prosecutor, eloped with the prosecutor's wife, and was found living with the wife in a room which they had occupied for two days. Some of the husband's property was found in a box belonging to the prisoner, locked, and of which the wife had the key, but a watch belonging to him was being worn by the prisoner. The prisoner, when taken, said that the watch was the wife's, and that he had got it from her:*

*Held, that upon this evidence the jury were justified in convicting the prisoner of larceny.*

Case reserved for the opinion of this Court at the General Quarter Sessions of the Peace, held at Exeter, for the county of Devon, on the 18th Oct. 1864, before the Right Hon. the Earl of Devon, the Hon. Charles Henry Rolle Trefusis, and other justices of the county aforesaid.

John Muttons was indicted for that, on the 28th July 1864, at St. Leonard, in the county of Devon, whilst he was servant to Samuel Fluellin, he did feloniously steal thirteen spoons, two pairs of sugar tongs, one watch and two boxes, of the goods and chattels of the said Samuel Fluellin, his master.

And, in a second count, for simple larceny of the above-mentioned articles.

The following evidence was adduced:—

Samuel Fluellin.—I am a dairyman, and live at St. Leonarda. I have been married for seventeen or eighteen years. The prisoner works for me; my wife had no property of her own when she married. After our marriage my aunt gave me eight teaspoons; some other teaspoons which I had my wife bought, but it was with my money. The watch mentioned in the indictment was given to my wife by a cousin of hers before we married. Very soon after our marriage she gave it to me. I have often worn it. When I did not wear it it was hung up in the kitchen. I do not recollect my wife's ever wearing it. Before July 28th I had a large box in my house, which I misused on that day, as I also did some spoons and sugar-tongs. My wife and the prisoner were also gone.

Cross-examined.—We went to Exmouth Regatta on the 27th, and came home in a trap, my wife, the prisoner and I. We had a quarrel on the road as we came back. It was dark. I had heard the sound of kissing. I did not threaten to throw my wife out of the trap. My wife sometimes earned money by her labour, but this was part of the common stock.

Elizabeth Dunn.—I am the wife of John Dunn, and live in St. Leonarda, near to the houses of the prosecutor and of the prisoner's mother. On July 28th I saw the prisoner outside my door carrying a box with his brother. They put it into a fly, the prisoner shut the door, then came back and spoke to his mother, he got into the fly, and it drove away.

Philippa Gage.—I live near Mr. Fluellin's house, the prisoner lives with his mother opposite. On July 28th he brought a cord out of his mother's house and went into the prosecutor's. He and his brother then brought out a box. Mrs. Fluellin was running to and fro between the house of the prisoner's mother and her home up to about nine o'clock in the morning. The prosecutor ordinarily comes home to breakfast from his morning's work about half-past nine.

Leah Slade.—I keep the Commercial Coffee-house at Bath. On July 28th the prisoner and Mrs. Fluellin came to my house; they stayed two nights and occupied one bedroom. I showed them the room.

John Pearce, police-constable.—On July 30th I went to Mrs. Slade's, at Bath. I found the prisoner and Mrs. Fluellin together in a bedroom, and charged him with stealing the spoons and the other articles mentioned from the prosecutor. He said, "I've not stolen anything, what I've taken away is with her consent" (nodding to Mrs. Fluellin). She then said, "Yes, I told him to get a fly and take the boxes." I pointed to one box and said, "That is Mr. Fluellin's" (the prosecutor). She said, "Yes, that is the only thing which I have got of him." I took this watch which I now produce from the prisoner's person; I afterwards examined a box in the room which the prisoner had admitted to be his, and which, at my

request, Mrs. Fluellin opened. In it I found on the top several articles of female wearing apparel, and under these some silver spoons and some sugar-tongs; I found also a bill and a prayer-book, both with the prisoner's name upon them; he said, "I did not know the silver was there, the watch is Mrs. Fluellin's, I got it from her."

Prosecutor (recalled) identifies the spoons, sugar-tongs and watch.

For the defence:

Mary A. Fluellin.—I am the wife of the prosecutor. As we returned from the Exmouth Regatta, my husband abused me all the way to Exeter, and threatened to throw me out of the cart: I told him that I would not live with him any longer, nor sleep with him again. I did not sleep with him that night, but sat up in the house of the mother of the prisoner. The prisoner went to bed next morning (28th). I ordered him to get a fly and take away the boxes, because I was going to leave. He was not there while I was packing. He did not know of my putting in the spoons or sugar-tongs. The watch was given to me by a cousin of mine before I married. He (the prisoner) knew nothing of it.

Cross-examined.—I took money, about 7l. or 8l., from my husband's desk to pay the fares to Bath. I paid the prisoner's fare as well as my own. I was about an hour packing up my things in his box in his mother's house. The box was afterwards locked, I had the key.

The counsel for the prisoner objected that the charge against the prisoner could not be maintained, on the ground that he was acting under the control of his mistress, and that she could not be legally charged with stealing from her husband.

The Court decided that the case must go to the jury.

The Chairman charged the jury to the effect that if the prisoner and the prosecutor's wife went away with the intention of carrying on an adulterous intercourse, and if he, when so going away, was concerned in taking away the property of the prosecutor, he was guilty.

The jury convicted the prisoner.

A case was granted upon the point raised by the prisoner's counsel.

DEVON, Chairman,  
Michaelmas Sessions, 1864.

Carter for the prisoner.—It is submitted that the conviction ought to be quashed, because there was no evidence that the prisoner ever assumed any dominion over the things taken. As to the evidence that some of the things were found in the prisoner's box, the presumption arising from that was rebutted by the key being in the possession of the prisoner's wife. The way in which the case was left to the jury was calculated to mislead them. The chairman told them that if the prisoner was concerned in taking away the property of the prosecutor he was guilty; that was too obscure, for upon the evidence it appeared that the flyman and the prisoner's brother were concerned in taking away the property. The chairman should have explained to the jury that it must be a taking away with an assumption of dominion over the property. In *Reg. v. Thurborn*, 3 Cox C. C. 453, 1 Den. C. C. 387, it was laid down that there must be an appropriation with intent to take the entire dominion over the property to constitute larceny. [BLACKBURN, J.—The sessions reserve one point only for us, whether the prisoner was acting under the control of his mistress.] Coming to that part of the case, the prisoner was a lad of eighteen years of age, and his mistress a woman of about forty managing her husband's business of a dairy. She said she ordered him to get a fly and take away the boxes, and he was bound to obey her. There was nothing to show preconcert. [BLACKBURN, J.—The jury have found that he did take away his master's property.] In *Reg. v. Rosenberg*, 1 Car. & Kir. 283, it was held that an adulterer cannot be convicted of stealing the husband's goods brought by the wife alone to his lodgings, and placed by her in the rooms in which the adultery was afterwards committed, merely upon evidence of their being found there. And Parke, B. said, "If there had been any separate act of pos-

sion by him I should have reserved the point." [ERLE, C. J.—As I have many times remarked, there never was such a vague word as possession. BLACKBURN, J.—What is evidence of possession, if the prisoner's wearing the watch of the husband is not?] As laid down by Parke, B., to constitute larceny the taking must be *animo furandi*, and against the will of the owner. The definition of larceny given by Bracton, lib. 3, c. 32, p. 158, is this: "Furtum est secundum leges, contractatio rei alienæ fraudulenta cum animo furandi, invito illo domino, cujus res illa fuerit. Cum animo, dico, quia sine animo furandi non committitur." Here the watch was proved to have been handed to the prisoner by the wife. In *Reg. v. Thompson*, 1 Den. C. C. 549, the prisoner assumed dominion over the husband's property by the act of pledging some of it, while living in adultery with the wife. So in *Reg. v. Featherstone*, 6 Cox C. C. 376, 1 Dears. 369, where the prisoner was charged with stealing twenty-two sovereigns, it appeared that he knew that the wife of the prosecutor, from whom he received them, and with whom he had eloped, had taken them without the authority of the husband. [MELLOR, J.—This case was granted simply on the point raised by the prisoner's counsel. BLACKBURN, J.—The sole point is, whether the wife being concerned in the act takes it out of the category of larceny. The jury find that it does not, and there is abundant evidence to justify that finding.]

*M. Bere*, for the prosecution, was not called on.

ERLE, C. J.—Upon these facts, the taking of the box *animo adulterii* was evidence of larceny. The prisoner took his master's property, knowing it to be his master's property, and with it his master's wife, with the intention of committing adultery. The conviction must therefore be affirmed.

The other Judges concurred.

Conviction affirmed.

Saturday, Jan. 23, 1865.

(Before ERLE, C. J., CHANNELL, B., KEATING, BLACKBURN AND MELLOR, JJ.)

REG. V. MARIA GILES.

*False pretences—Existing fact—Evidence.*

An indictment charged that the prisoner did falsely pretend to A. that she, the prisoner, had power to bring back her husband to A. over hedges and ditches, &c. per quod money and clothes were obtained from A.

The evidence was that A. met a woman, and conversed with her, and in consequence of that A. went to the prisoner, and asked her to tell her a few words by the cards, to fetch her husband back. The prisoner then asked what money the prosecutrix had, and obtained from her some money, and a dress. The prisoner said, that she could bring A.'s husband back over hedges and ditches with the stuff she had to work upon:

Held, first, that the indictment charged a false pretence of an existing fact and was good:

Secondly, that the evidence was sufficient, connecting it altogether, to show that the money was parted with in consequence of the false pretence, and not antecedently to the making of it.

Case reserved for the opinion of this Court.

At the Quarter Sessions for the borough of Newbury, Maria Giles was tried before me, George Morley Dowdeswell, the Recorder, upon an indictment of the material parts of which the following is a copy:

That before the commission of the offence thereafter stated and charged, one Henry Fisher had deserted his wife Mary Ann Fisher, and that Maria Giles, in the parish of Newbury in the borough of Newbury, well knowing the premises, in

the parish aforesaid in the borough aforesaid, on the eighteenth day of April one thousand eight hundred and sixty four, unlawfully, knowingly and designedly did falsely pretend to the said Mary Ann Fisher that she the said Maria Giles then had power to bring back the said Henry Fisher to the said Mary Ann Fisher, and that she the said Maria Giles then had the power to bring back the said Henry Fisher to the said Mary Ann Fisher over hedges and ditches; and that a certain stuff, which she the said Maria Giles then had in her possession was sufficient and effectual for the purpose of bringing back the said Henry Fisher to the said Mary Ann Fisher. By means of which said false pretences the said Maria Giles did then and there unlawfully obtain from the said Mary Ann Fisher one dress of the value of one shilling and sixpence and two sixpences in money of the goods and moneys of the said Mary Ann Fisher, with intent to cheat and defraud her of the same. Whereas in truth and in fact the said Maria Giles had not then the power to bring back the said Henry Fisher to the said Mary Ann Fisher, and had not then the power to bring back the said Henry Fisher to the said Mary Ann Fisher over hedges and ditches, and had not a certain stuff in her possession sufficient and effectual for the purpose of bringing back the said Henry Fisher to the said Mary Ann Fisher, as she the said Maria Giles at the time she so falsely pretended as aforesaid then and there well knew.

Mary Ann Fisher, being sworn, stated as follows:

I am the wife of Henry Fisher, and live at East Woodhay On the eighteenth of April last I was in Bartholomew-street in Newbury, about twelve o'clock at noon. I was in trouble, my husband had run away from me; I was crying in the street. I met a woman in the street and had a conversation with her, and in consequence of that I went to the prisoner's house at the top of the town. The woman went with me, she went into the house first; she then came out and spoke to me, and then I went in; the woman then went away. I saw the prisoner in her house. I asked her to tell me a few words by the cards to fetch my husband back. She asked me how much money I had. I told her sixpence. She said that would not be of any use at all. Then I gave her another sixpence. She said her price was high, it was five shillings. After I gave her the second sixpence she asked me if I had a clock in my house. I told her I had not. She asked me if I had anything on that I could leave. I said I had a petticoat on, but that was old; and she said that would be of no use. I had two frocks on. She told me to leave the under one. I left it with her. She said her price was so high she could not do anything without the money; the stuff she had to work upon would cost her five shillings, or nearly that; she said she could bring my husband back over hedges and ditches. She said that about bringing my husband back after she got the frock. She said that she would bring my husband back before I gave her the money. Afterwards she went upstairs. She came down again, she then said I was not to be offended with what she was going to tell me, and not to take more trouble than I could help. She said my husband was gone off with another woman. I told her I did not think so. She said the woman came from the same place as I did, but that did not matter, she would bring my husband back, she could do it, and she would do it. She said she was what they called the cunning woman, and there was not another woman such as her about handy. She said she would bring my husband back with the stuff she had to work upon. She would bring him back on Wednesday if she could, and if she did not bring him back on Wednesday she would on Thursday. I told her if she brought him back on Thursday I would come and see her on Friday. She gave me three halfpence out of the sixpence and a small piece of cake. She asked me if I was going home. I said I was, and she asked me how long I should be going home. I said I should not get home till eight or nine o'clock that evening. She told me if I met with any one I was not to tell them where I had been. She said nothing about bringing any more money. She said if I brought four shillings I should have the frock again. She said she would have my husband back on the Thursday or Friday. My husband did not return. On the Monday following I went to the prisoner's house again. I saw her. I was alone. She asked me if I had heard anything of my husband. I replied I had not. She asked me where I was going. I said to Reading, to see if I could find him. She asked me if I had any more money. I said I had not. She said she had worked very hard for me all the time during the week. I parted with the money and the dress on the faith of what had passed between us on that first occasion.

Upon cross-examination by Mr. Griffiths the counsel for the prisoner, the witness stated—

I went again on the Monday. I then sold the prisoner a rabbit. She said she had worked very hard to get my husband back. I asked her first when I went into her house the first time whether she could tell me a few words by the cards to get my husband back. I never had my fortune told before. I have now got my husband back; he came back last Saturday. I found my husband at Winchester on the Wednesday after Whituntide. I went to Winchester to him. The milliners were out, and when they came home I learnt from one of them where he was.

Mr. Griffiths, for the prisoner, objected that there was no evidence to go to the jury in support of the

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indictment, and that the false pretence alleged was not a false pretence within the meaning of the statute.

Mr. Williams, the counsel for the prosecution, argued contra, and urged me to lay the facts before the jury, reserving the questions raised by Mr. Griffiths for the opinion of the Court of Criminal Appeal. This I consented to do, and Mr. Griffiths having addressed the jury for the prisoner, I left the case to the jury subject to the opinion of the Judges on the case; telling them they ought not to find a verdict of guilty if they were not satisfied that the prisoner intended to pretend to the said Mary Ann Fisher, and to induce her to believe that she, the prisoner, at that time had the power to bring her husband back, and that she did actually so pretend, knowing at the time such representation was false, and that Mrs. Fisher was induced, by means of that pretence, and on the faith of its being true, to part with the money and the garment, or either of them.

The jury having found a verdict of guilty, I postponed judgment, and admitted the prisoner to bail to appear and receive judgment.

I request the opinion of the Court whether there was any evidence to go to the jury in support of the indictment; and,

Whether the false pretence alleged was a false pretence within the meaning of the statute.

If either of these objections is valid, the verdict of guilty will be set aside and a verdict of not guilty entered.

GEORGE MOBLEY DOWDSEWELL,

Recorder of Newbury.

*Harington* for the prisoner.—The conviction cannot be sustained. First, this was not a false pretence of an existing fact, within the meaning of the statute 24 & 25 Vict. c. 96, s. 88. The false pretence charged, that the prisoner "had power to bring back the said H. Fisher to the said Mary Ann Fisher," amounts merely to a promise that the prisoner would do the act. It might mean by moral influence, or physical strength, or supernatural power. [MELLOR, J.—In that view, would not the pretence be an assertion of an existing fact? Does not the pretence mean that the prisoner held out to the prosecutrix that she had the efficient means of bringing her husband back to her?] It is not negatived that the prisoner had not power in any of these ways to bring the husband back. [BLACKBURN, J. referred to *Reg. v. Copeland*, C. & M. 516, where Maule, J. held an indictment good in which the prisoner was charged with pretending that he was entitled to maintain an action against the prosecutrix for a breach of promise of marriage, whereby the prisoner, a married man, obtained money from the prosecutrix.] In that case the prisoner pretended that he was a single man, and the threat to bring an action was good evidence that he so held himself out. In *Reg. v. Fry*, 7 Cox C. C. 394, the promise was accompanied with the false pretence that the prisoner kept a shop, which was a pretence of an existing fact. The case of *Rex v. Douglas*, 1 Moo. C. C. 463, is more like this. In that case the prisoner was charged with falsely pretending to the prosecutor, whose horses had strayed, that he would tell him where they were if the prosecutor would give him a sovereign; and a conviction was held bad. [ERLE, C. J.—That came under the class of false promises.] The Court there stated that the indictment should have alleged that the prisoner pretended that he knew where the horses were. A similar allegation is wanting in the present indictment. [KEATING, J.—The indictment charges and negatives another false pretence, that she had in her possession a certain stuff which was sufficient and effectual for the purpose of bringing her husband back.] Secondly, there was no sufficient evidence to go to the jury in

support of the indictment. The false pretence was made after the prisoner had obtained the money and clothes, and therefore the prosecutrix could not have been induced to part with her money by the false pretence. [KEATING, J.—It looks as if she had been induced to part with her money in consequence of what the woman she met had told her.] Yes, that seems to be the effect of the evidence. The case of *Reg. v. Brooks*, 1 Fos. & Fin. 502, was then cited. There the money was obtained on a distinct promise to do a future act. A subsequent false pretence cannot convert a previous promise into a false pretence. Lastly, there was no evidence that she knew that she had not the power to do what she promised. She may have believed that she had some mesmeric or spiritual influence to bring the husband back; and unless she was acting clearly fraudulently, she ought not to be convicted.

*Montagu Williams* for the prosecution.—(The Court told him to confine his argument to the point as to whether there was any sufficient evidence to support the indictment.) The prosecutrix parted with her money in consequence of what passed between her and the prisoner; and the whole of the prisoner's conduct and conversation is to be looked at, and if that be done, it is submitted that there is evidence to sustain the conviction.

*Harington*, in reply, referred to

*Rex v. Codrington*, 1 Car. & P. 661.

ERLE, C.J.—We are all of opinion that the conviction must be affirmed. The first question is, whether the indictment was good. I take it that the pretence that the prisoner had the power to bring back her husband to the prosecutrix is the material part of the indictment. Now the pretence of power, whether moral, physical, or supernatural, made with the intent to obtain money, is within the mischief of the law, and sufficient to constitute an offence within the statute. The second point is, whether there was any evidence to support the indictment. I take the law to be, that there must be a false pretence of a present or past fact, and that a promissory pretence to do some act is not within the statute. Then the question is, was this a false pretence of an existing fact that the prisoner had the power to bring the husband back when the money was obtained? It was contended by Mr. Harington that the prosecutrix ought not to succeed, because the evidence was that the prisoner said that she would bring the prosecutrix's husband back, and that thereupon the money was parted with by the prosecutrix; and that after the prisoner had got the money and clothes, she said that she could bring the husband back, and that there was therefore a promissory pretence only. It is clear that an indictable pretence must precede the obtaining of the money, so that it can be alleged that the money was obtained by means of the pretence. The exact words of that part of the evidence favour Mr. Harington's argument; but I have come to the conclusion that we ought not to sustain the objection, because, as it was put by Mr. Williams, the whole tenor of the evidence is to be regarded, and it may be upon the evidence that the prisoner intended to convey to the mind of the prosecutrix that she had not only the will but the power to bring her husband back. The whole of the evidence was to be regarded by the jury, and, in the words of the Recorder, they were to consider whether the prisoner intended to pretend to the prosecutrix and to induce her to believe that she, at that time, had the power to bring her husband back, and that she did actually so pretend, knowing at the time such representation was false, and whether the prosecutrix was induced by means of that false pre-

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tence, and on the faith of its being true, to part with the money and the garment. Looking at the whole transaction, it appears to be this: that the prosecutrix had lost her husband; and in consequence of some information given to her, she called on the prisoner, and said to her, "Can you tell me a few words by the cards to fetch my husband back?" The prisoner asked her how much money she had. [His Lordship then referred to the evidence.] The question of the prosecutrix was, by implication, "Have you the power to get my husband back, and will you exercise that power for me?" The prisoner then having ascertained the uttermost value that could be extracted from the prosecutrix, said that she could do it, and that she would do it. Upon this evidence I think that there was enough for the jury from which they had a right to infer that she intended to induce the prosecutrix to believe that she had power, at the time when the money was parted with, to bring her husband back. Mr. Harington next contended that the prisoner might have believed that she did possess such power. But, upon the facts, I think that there was evidence to go to the jury that the prisoner was a fraudulent impostor. I think, therefore, that the conviction ought to be affirmed.

CHANNELL, B., BLACKBURN and MELLOR, JJ. concurred.

KEATING, J.—I have entertained very considerable doubt during the argument, and I cannot say that my mind is free from doubt at the present moment, as to how far, on the evidence before us, the money can be said to have been obtained by the false pretences. The words were promissory words up to the time of obtaining the property; but the rest of the court being of opinion, on looking at the whole of the evidence, that there was sufficient to give a colour to those words which they otherwise would not bear, the circumstances of this case are not such as to induce me to dissent from the judgment of the court.

*Conviction affirmed.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SANDERS, Esqrs.,  
Barristers-at-Law.

Tuesday, Dec. 18, 1864.

REG. on the prosecution of the PARISH OF  
WILLOUGHBY v. DAWSON.

*Highway-rate—Exemption—Hamlet repairing its own highways—Part of one parish rated in another.*

*A hamlet in parish B. had been assessed, down to the year 1841, to the highway-rate of parish C. Since 1841, by arrangement with C., it had maintained its own highways, and had not paid highway-rate to C., and it had never paid highway-rate to B. A rate having been made upon them by B.:*

*Held, that the hamlet was not exempt from the rate of B., either on the ground that, for the purposes of the highway-rate, it was a part of the parish of C., or on the ground of repairing its own highways in the way stated.*

Case stated on appeal to the Warwickshire Quarter Sessions, against a highway-rate for the parish of Willoughby.

The app. (Dawson) was an inhabitant of the hamlet of Mawthorpe, part of the parish of Willoughby. A highway-rate having been made upon him by the overseers of that parish, he appealed against it, claiming exemption on the ground that the hamlet in which he was the occupier of land was, as to the repair of the highways, united to the

adjoining parish of Well. It was admitted that, until a recent period, and as far as living memory and evidence of reputation went, Mawthorpe had in fact always been assessed to the highway-rates of Well. No consideration, however, had been given by the parish of Willoughby to that of Well in return for the latter having undertaken the repair of the highways in Mawthorpe, but the practice of treating Mawthorpe as united with Well for highway purposes seemed to have originated from a sense of mutual convenience between the two parishes. From the year 1841 down to the making of the rate appealed against, the inhabitants of Mawthorpe (having made an arrangement with the overseers of Well) had not been rated at all under the circumstances, and had maintained its own highways.

The question for the court was, whether the app. was liable to the rate made on him.

*Boden, Q.C. for the respa.*—The hamlet of Mawthorpe for all parish purposes has been treated as part of the parish of Willoughby. It never did repair its own highways. The finding is that it has formed part of the parish of Well for highway purposes. Such an arrangement must have originated in motives of convenience:

*Rees v. St. Giles, Cambridge, 5 M. & W. 260;*

*Rees v. Ecclefield, 1 B. & Ald. 848.*

*Mellish, Q.C. for the app.*—One question will be, whether there can be such a thing as a hamlet which for the purpose of the poor-rate is part of one parish, but for the purpose of the highway-rate is part of another. If there can, Mawthorpe is part of the parish of Well, and not liable to this rate. Secondly, on the facts found, Mawthorpe may be considered as a hamlet repairing its own highways, and then it would not be liable:

*Freeman v. Read, 4 B. & S. 174.*

*Boden, Q.C. in reply.*—It is possible that the arrangement between the hamlet of Mawthorpe and the parish of Well originated in the circumstance that there were only three tenements in it nearer to that parish than to the parish of Willoughby. It was an irregular proceeding, done without the knowledge of the parish of Willoughby.

*Cur. adv. vult.*

COCKBURN, C. J.—In this case we are of opinion that our judgment should be for the respa., on the ground that the hamlet of Mawthorpe is properly assessable to the highway-rate for the parish of Willoughby. The hamlet of Mawthorpe forms part of the parish of Willoughby, and it follows that *prima facie* Mawthorpe must be taken to be liable to be assessed to the highway-rates of the parish. It lies upon the hamlet, in order to avoid this liability, to establish some special ground of exemption. The only ground of exemption put forward on the part of the app., the occupier of land within the hamlet, was, that the latter, though part of the parish of Willoughby, was, as to the repair of highways, and as to rates made for that purpose, united to the adjoining parish of Well. But it appears to us that giving full effect to the statement that, as far as living memory and evidence of reputation goes, Mawthorpe has always contributed and been assessed to the highway-rates of Well, and the highways within the hamlet have always been repaired by the latter parish, yet that these facts cannot alter the liability of Mawthorpe to be assessed to the parish of which it forms a part. No such thing is known to the law as part of one parish being united to another parish for the purpose of the repair of the highways, although in some cases it happens that a parish may be bound to repair the highways in a part of another parish, if a good and continuing cus.



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sideration for such an obligation can be shown. Here, however, no such consideration on the part of the parish of Willoughby appears, and it follows, on the authority of *Reg. v. St. Giles's, Cambridge*, 5 M. & S. 260, that if an indictment for the non-repair of a highway in the hamlet of Mawthorpe were preferred against the parish of Willoughby, the latter parish could not set up the liability of Well as a defence. It may well be that the long-continued practice of treating the hamlet as united with Well for highway purposes arose from general convenience, and was matter of arrangement between the two parishes and the hamlet. But such arrangement would be binding no longer than a common sense of convenience made all parties concur in continuing it. All parties would be remitted to their original rights and liabilities so soon as either of them thought proper to put an end to it. While however for these reasons we are satisfied that the ground taken by the apps. is untenable, the fact that the parish of Willoughby had never sought to assess Mawthorpe to the highway-rates of the parish, and from a remote period had allowed the hamlet to be assessed to the highway-rate of Well, appeared to us so striking that it occurred to us that possibly an inference should be drawn from all the facts that Mawthorpe, though forming part of the parish of Willoughby, had originally been a hamlet repairing its own highways, and must be taken to have entered into a voluntary arrangement with Well (which under such circumstances it would of course have been competent for it to do so long as both parties were agreed) that the two should be united for the repair of the highways. In this case, although the arrangement between Mawthorpe and Well would not have been binding in law, yet Mawthorpe, having the right to repair its own highways, would not have been liable to be assessed to the highway-rate of the parish. Upon consideration, however, we think that the facts are not sufficiently cogent to warrant us in arriving at this conclusion. If indeed the hamlet of Mawthorpe had always repaired its own highways, the case of *Freeman v. Read*, 4 B. & S. 174, is an authority to show that the proper inference would be that it was a hamlet repairing its highways separate from the parish of which it forms part. But it appears that till a very recent period Mawthorpe has for highway purposes been treated as united with Well, and there is no trace (except as matter of inference), that Mawthorpe has ever, until late years, and then only by arrangement with Well, maintained its own highways, and indeed, as has been before observed, the case put forward by the app. is not that Mawthorpe is a hamlet repairing its own highways, but that it is part of Well for that purpose. We think, therefore, that the proper inference to be drawn from the facts is, that the present state of things originated in an arrangement made at some remote period between the parishes. And as such an arrangement, being founded on no consideration beyond that of convenience, would not be binding longer than it was acquiesced in by all parties, we are of opinion that the parish of Willoughby is entitled to insist upon its rights to treat the hamlet as part of the parish for the repair of the highways, and to assess it accordingly. Our judgment will, therefore, be for the resps.

*Judgment for the resps.*

Attorneys for the resps., *Gray and Mounsey.*

Attorneys for the app., *Norris and Allen.*

*Wednesday, Jan. 18, 1865.*

H. B. WERE (app.) v. CLERK OF THE PEACE OF THE COUNTY OF DEVON (resp.)

*General county and police rates—Borough incorporated by Royal charter—Exemption from liability.*

*A borough was incorporated by Royal charters, and very extensive privileges were granted; but the charters did not contain any non-introumitant clauses. Up to the year 1858 no general county rates had ever been levied in the borough, but rates in the nature of county rates were made at the borough quarter sessions for the purposes of the borough. The borough justices had always tried felonies and misdemeanors at their quarter sessions. On several occasions prisoners for offences committed within the borough have been tried at the county quarter sessions. Under the Militia Act of 1854 the borough was treated as not liable to contribute to the general county rate:*

*Held, that the borough was liable to contribute to the general county and police rates, as it did not appear to be exempt from the jurisdiction of the county justices, and to have exclusive jurisdiction within the meaning of s. 51 of 15 & 16 Vict. c. 81.*

Case stated by order of Mellor, J., after notice of appeal against the basis or standard for the county rate of the county of Devon made at the Michaelmas Quarter Sessions 1860, whereby the borough of Bradninch was assessed at 19l. 4s. 6d. for the general purposes of the county, and at 28l. 16s. 3d. for the police purposes.

The borough, parish and liberty of Bradninch in the county of Devon is part of the possessions of the duchy of Cornwall. It is within and entirely surrounded by the county of Devon, and is not detached from such county by being bounded wholly or in part by another county. It is a very ancient borough, and is co-extensive with the parish, and has from time to time received charters of privileges. Charters have also been granted to the earls and dukes of Cornwall.

In 10th John (1208) a charter, of which the following is a translation, was granted by the Crown to Henry the son of the Earl Reynold:

Charter to Henry, son of the Earl.—John, by the grace of God, &c.—Know ye that we have granted, by this our charter have confirmed, to Henry, son of the Earl, that he may have one fair every year at Bradenese, to continue for four days, to wit, three days next before the day of St. Dionysius, and on the day itself of St. Dionysius; and that he may have there one market in every year weekly, on Saturday, with all liberties and free customs which the city of Exeter has, unless that fair and that market be to the nuisance of neighbouring fairs and neighbouring markets. Wherefore I will and firmly command that the aforesaid Henry and his heirs shall have and hold the aforesaid fair and market, with all their appurtenances, and with the aforesaid liberties and free customs which the city of Exeter has as aforesaid. Witness, Lord Henry, Bishop of Salisbury; Thomas Bassett Peter, the son of Herbert; Matthew, his brother; John Marshall; Thomas, the son of Adam Peter de Maulay; Adam de Stewall. Given by the hand of Henry de Wells, Archdeacon of Wells, at Newton, the 25th day of Sept., in the 10th year of our reign.

Amongst the records of the late Treasury of the Exchequer in the Public Record-office, in the custody of the Right Hon. the Master of the Rolls, pursuant to the statute 1 & 2 Vict. c. 94, to wit, in the roll indorsed "Extracts of Inquisitions made by command of our Lord the King in counties of Oxford, Berks, Buckingham, Bedford, Cambridge, Huntingdon, Devon, Cornwall, concerning the rights and liberties of our Lord the King subtracted, and the excesses of sheriffs, coroners, estreators, and all other bailiffs whatsoever of our Lord the King, in the fourth year of the reign of King Edward, son of King Henry," is contained an inquisition of which the following is a translation:

Borough of Braneys.—The jurors of the said borough say that the manor of Braneys was an escheat of our Lord King Henry, father of our Lord the King that now is by the death



of William de la Londe, because he died without heir, and the same the Lord the King gave the said manor to Richard his brother, with his wife Leneh, in free marriage, and to the heirs of the body of the said Leneh; and they say that Edmund, Earl of Cornwall, now holds the said manor, but by how many fees, and by what services, they know not; and that it is worth yearly 30*l.*, and has a gallows, a pillory and tumbrell, assize of bread and ale, estreats of writs and pleas of withernam, a warren, and other royal liberties.

Amongst the records of the late Treasury of the Exchequer in the Public Record-office, in the custody of the Right Hon. the Master of the Rolls, pursuant to the statute 1 & 2 Vict. c. 94, to wit, in the bundle of inquisitions, "temp. Edward I.," indorsed "Inquisicoes com Devon," is a document, of which the following is a translation:

Verdict concerning the manor of Braneys.

The Jurors Henry de Colbrok Illarius, the merchant William Hudebuhille, Richard Pape, William Norman, John Illart, Andrew Haman, William de Agna, Robert Hanckelore, Herbert Conside, John Olby, William Leger. How many and what manors and demesnes nothing. They say upon their oath that the manor of Braneys was an escheat of the Lord King Henry, father of our Lord Edward the King, that now is by the death of William de la Londe, because he died without an heir, and afterwards our Lord the King gave to his brother Richard, Earl of Cornwall, the said manor of Braneys, with the Lady Solynche, his wife, in free marriage, and the heirs of the said Lady Solynche the assize, and they say that Edmund, Earl of Cornwall, holds the said manor of Braneys, as heir, and ought to hold it of our Lord the King in chief, but by how many fees and by what services they know not, and they say that the manor is worth 30*l.* per year, and has a gallows and pillory, and tumbrell, and assize of bread and ale, and has estreats of writs and pleas of withernam, and a warren and other royalities. Of the other heads nothing. In witness whereof to the present verdict, the seals of the aforesaid jurors are set. Indorsed "Boro of Braneys."

The following is a translation of parts of a charter granted by His Majesty King James I., in the second year of his reign, and which is dated the 13th Nov. in that year; the whole of the said charter is copied in the appendix, and is to be taken as part of the case.

We being willing, therefore, that from henceforth for ever there may be constantly one certain and undoubted means in our said borough of and for the rule and governance of the same borough and our people inhabiting therein, and others resorting thereto, and that the said borough may for ever hereafter be and remain a borough of good peace and quiet to the fear and dread of evil doers, and to the reward and support of the good, and also that our peace and other acts of justice and good order may and shall be better kept and done there, of our especial grace and of our certain knowledge and mere motions we have willed, ordained, constituted, granted and declared, and by these presents, for us, our heirs and successors, do will, ordain, constitute, grant and declare that our borough of Braneys, otherwise Bradninch aforesaid, in our said county of Devon, may and shall be and remain from henceforth for ever a free borough of itself; and that the mayor and burgesses of the borough aforesaid, or by what other name soever they have been heretofore incorporated or not, and their successors, may and shall from henceforth for ever be one body corporate and politic, in deed, fact, and name, by the name of the mayor and burgesses of the borough of Bradneys, otherwise Bradninch, in the county of Devon.

The charter then appoints the first mayor and masters, provides for future elections, gives power to make bye-laws, &c.:

And, further, we will and by these presents for us, our heirs and successors, do grant to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, that the mayor of the borough aforesaid for the time being, and the recorder of the said borough for the time being, may and shall from henceforth for ever, and each of them, may and shall from henceforth for ever, be justices of us, our heirs and successors, to keep the peace in the same borough and parish, and the liberties and precincts thereof, and also to keep and correct and to cause to be kept and corrected the statute concerning artificers and labourers, weights and measures, within the borough and parish aforesaid, the suburbs, liberties, and precincts thereof, and that the said mayor and recorder of the said borough for the time being, and their successors, may by virtue of these our letters patent, from henceforth for ever, have and shall be able to have full power and authority to inquire concerning whatsoever trespasses, misprisions, and other minor offences, defaults, and articles done, moved, or committed within the borough and parish aforesaid, the suburbs, precincts and liberties thereof, which ought or might be inquired into before the keepers and justices of the peace in any county of our kingdom of England, by the laws and statutes of the same kingdom as justices of the peace, so, nevertheless, that they do not hereafter in any manner proceed to

the determination of any treason, murder, or felony, or any other matter touching the loss of life or limb within the borough and parish aforesaid, the liberties or precincts thereof, without the special mandate of us, our heirs and successors. And further we will, and by these presents for us, our heirs and successors, do grant to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, that the mayor and burgesses of the borough aforesaid for the time being, and their successors, may and shall have in the borough aforesaid one discreet man, and learned in the laws of England, to be elected and nominated in form hereafter expressed, who shall be and be named the recorder of the borough aforesaid.

Then follows the appointment of the first recorder by name, and a power to appoint serjeants-at-mace, a grant to have a guild merchant or market and fairs.

Wherefore we do will and firmly enjoining command, for us, our heirs and successors, that the aforesaid mayor and burgesses of the borough aforesaid and their successors, may have, hold, use and enjoy for ever all liberties, authorities, jurisdictions, franchises and acquittances aforesaid, according to the tenor and effect of these our letters patent, without the let or impeachment of us, our heirs or successors, the justices, sheriffs, bailiffs, or ministers of us, our heirs or successors whatsoever, being so unwilling that the said mayor and burgesses of the borough aforesaid, or any or either of them, or any burgesses of the borough aforesaid, shall by reason of the premises, or any of them, be thrust letted, molested, vexed, or in any manner disturbed by us, our heirs or successors, the justices, sheriffs, escheators, or other bailiffs or ministers of us, our heirs or successors whatsoever; willing, and by these presents ordering and commanding as well the treasurer, Chancellor and Barons of the Exchequer of us, our heirs and successors, and others the justices of us, our heirs and successors, as our Attorney and Solicitor-General for the time being and every of them, and all other the officers and ministers of us, our heirs and successors whatsoever, that neither they, nor any, or either of them, do prevent, or continue, or make, or cause to be prosecuted or continued, any writ of summons of *quo servando*, or any other writ or writ, or process whatsoever against the mayor and burgesses of the borough aforesaid, or any or either of them, for any cause things, matters, offences, claims, or usurpations, or any of them, by them, or any of them, done, claimed, attempted, used, had, or usurped before the day of the making of these presents; willing also that the said mayor and burgesses of the borough aforesaid, or any of them, shall not be molested or impeached by any or either of the justices, officers, or ministers aforesaid in or concerning the due use, claim, or abuse of any liberties, franchises, or jurisdiction within the borough aforesaid, the suburbs, liberties and precincts thereof, before the day of the making of these presents, or be compelled to answer for the same or any of them. We will also without fine in the Hancaper, &c. although express mention, &c. In witness whereof, &c. Witness, the King, at Westminster, the 13th day of Nov.

Up to the year 1858, no county rate had ever been levied in Bradninch, but rates in the nature of county rates were made by order of the borough in sessions for the purposes of the borough.

And the borough justices have always held their quarter sessions, and tried felons and misdemeanors in the same manner and to the same extent in all respects as the justices of the county of Devon in their sessions.

And the county magistrates have, on several occasions, at their county quarter sessions, tried prisoners for offences committed within the borough, but they have not, in any other manner, interfered for any purpose within the limits of the said borough.

The borough of Bradninch has also been treated as a borough not liable to the general county rate, under the Militia Law Amendment Act 1854 (17 & 18 Vict. c. 105), and the rateable proportion of its contribution for the militia expenses was settled by two justices on behalf of the county, and two members of the corporation of Bradninch, in the mode provided by sect. 11.

The questions for the opinion of the court were, whether Bradninch was liable to contribute to the general county rate and to the general police rate for the county.

Karslake, Q.C. (Lopes with him) in support of the rates.—First, as to the liability of the borough to the county rates. That depends on the charter of James I., which grants commissions to the mayor and recorder as justices to keep the peace, and also to inquire concerning trespasses, misprisions and

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other minor offences in the borough which might be inquired into by county justices, "provided that they do not hereafter proceed to the trial of any treason, murder, or felony, or of any matters touching life and limb." [CROMPTON, J.—Grand larceny touched life and limb, petty larceny did not.] The main consideration is, whether the county justices are excluded from exercising any jurisdiction within the borough, because, if not, the borough has no separate jurisdiction within the meaning of 15 & 16 Vict. c. 81, sect. 51, and is liable to the general county rate. Does the borough fall within the meaning of the word "county" in the 15 & 16 Vict. c. 81, s. 51 (County Rates Act), by which it is enacted that "the word 'county' shall mean and include any liberty, franchise, or other place in which rates in the nature of a county rate may be levied, *having a separate commission of the peace, and not subject to the jurisdiction of the county at large in which such liberty, franchise, or place may be, nor contributing or paying to the county rates made for such county at large.*" The words are somewhat different to those in the charter in the *East Loos* case, 6 L. T. Rep. N. S. 748; 8 B. & S. 20; but it is clear law that the county justices can only be excluded from having jurisdiction in the borough by express words to be found in the charter. It is doubtful whether the mayor and recorder have any right to hold sessions in the borough. The charter does not seem to contain any power enabling them to hold sessions and summon juries. (a) In the *East Loos* case the charter contained a non-intromittant clause, which this does not. It is submitted, therefore, that the county justices have concurrent jurisdiction with the borough justices; that the borough justices have no exclusive jurisdiction, and therefore that the general county rate may be imposed on the borough. Secondly, as to the liability to the police rate. The 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88, s. 6, empower justices to appoint police constables for the county, and to levy a police rate for liberties and detached parts of counties. The case of *Reg. v. Lachmanstoue*, 2 L. T. Rep. N. S. 215, is in point, and shows that the police rate was properly made.

*Coleridge, Q.C. (Kingdon with him)* against the rates.—First, as to the county rate. Although the charter is different to the one in the *East Loos* case, nevertheless the facts found in the case show that the borough justices have exclusive jurisdiction within the borough within the meaning of sect. 51 of 15 & 16 Vict. c. 81. [CROMPTON, J.—Is there any authority to show that the non-exercise of jurisdiction by the county justices is evidence of prescriptive exemption, or a substitute for the non-intromittant clause in charters?] There is no decided authority; but the facts in this case show that there never has been any jurisdiction exercised by the county justices. The borough had a gallows, pillory, and a tumbrell. [BLACKBURN, J.—But that does not show that the borough justices had exclusive jurisdiction.] That is one step towards it. The borough had the grant of estreats of writs and pleas of withernam. [BLACKBURN, J.—In Com. Dig. "Courts," p. 1, it is said, a grant *tenere placita* gives jurisdiction, but not exclusive of other courts, if there be no negative words.] The charter calls it a borough, and the recitals are evidence of a lost commission from the Crown. The charter shows that the borough had large powers, even to try capital offences, and then confirms them. [CROMPTON, J.—What words are there to exclude county justices from trying capital

offences in the borough? *Karslake* referred to Dickinson Q.S., c. 3, to show that county justices have, by virtue of their commissions, power to try murder.] As to the police rate, if the court are of opinion that the county rate is binding, it is conceded that the objection to the police rate cannot be sustained.

COCKBURN, C.J.—We are all agreed that we cannot draw the inference Mr. Coleridge would have us draw, and supply what is defective in the charter of James I. On the contrary, the silence of the charter leads to the opposite inference, that the exclusive jurisdiction claimed for the justices of the borough does not exist. There is, therefore, in our opinion, no separate jurisdiction in them so as to make the borough not liable to the general county and police rate.

CROMPTON and BLACKBURN, JJ. concurred.

*Rates confirmed.*

Attorney for resp., G. F. Cooke.

Attorney for app., H. B. Wers.

Monday, Jan. 23, 1865.

HOWARD v. THE QUEEN (in error).

*Indictment—Writ of error—Motion for judgment.*

*Upon a motion by the plt. in error for judgment upon an indictment for a misdemeanor, he must be personally in court.*

*The rule is nisi only. On whom to be served.*

This was a writ of error upon an indictment which contained three counts. The first count was framed upon sect. 49 of the 24 & 25 Vict. c. 100, which enacts that

Whosoever shall by false pretences, false representations, or other fraudulent means, procure any woman or girl under the age of twenty-one years to have illicit carnal connection with any man, shall be guilty of a misdemeanor; and, being convicted thereof, shall, &c.

There were two other counts. At the trial at the Central Criminal Court the deft. was convicted upon the first count only. The writ of error was brought on the ground that the count did not set out or allege what were the false pretences, false representations, or other fraudulent means. The Crown had not joined in error. Notice had been duly given to the Attorney-General of this intended motion, and he had given a certificate that such notice had been given pursuant to sect. 3 of the 16 & 17 Vict. c. 32, which enacts that

Whenever any writ of error shall be brought under the provisions of the said Act for reversing any judgment in misdemeanor and error shall be assigned thereon, no judgment of reversal shall be entered either for want of a joinder in error or otherwise, without the especial order of the court in which such writ of error shall be pending pronounced in open court; and upon a certificate signed by or on behalf of the Attorney or Solicitor-General, that notice has been given to one of them of such intended application, and in the event of there being no joinder in error, such court of error may proceed to examine the record in error, and may give such judgment thereon as the court from which error is brought ought to have done, although no joinder in error may have been filed.

*Orridge* now moved the court to pronounce judgment for the plt. in error. [BLACKBURN, J.—It would seem that it is necessary that the deft. should be in court to receive sentence in the event of the judgment of the court being against him.] He is here in court. The count upon which he has been convicted is clearly bad. [COCKBURN, C. J.—The rule should be *ni si* only, as otherwise there might be collusion between the prosecutor and the deft. The rule should be served on the officer of the court and on the prosecutor.] There may be a difficulty in serving the prosecutrix, as she is a child, and her residence may not be known. [COCKBURN, C. J.—

(a) Com. Dig. "Courts," p. 4: "If the king grants to a borough, &c., power *tenere placita*, it shall have all incidents, though not mentioned in the charter, as it shall have officers, a sergeant, bailiff, &c., to return juries, execute process, &c.:" (R. 1 Bol. 224, l. 20.)

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THE MAYOR, &amp;c. OF WEYMOUTH v. C. H. NUGENT.

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If there was an attorney conducting the prosecution he might be served. CROMPTON, J.—If there is any difficulty you can come to the court about it.]

*Rule nisi.*

Wednesday, Jan. 25, 1865.

THE MAYOR, &c. OF WEYMOUTH (apps.) v.  
C. H. NUGENT (resp.)

*Wharfage duties—Prerogative of the Crown—  
Exemption from payment.*

*The prerogatives of the Crown cannot be affected except by express legislative enactment.*

*Where, therefore, a local Act of Parliament gave a right to the corporation of W. to demand and take certain wharfage duties for (inter alia) stone brought into the harbour of W. in any ship or vessel, and certain stone was brought by a barge into the said harbour, for the use only of Her Majesty's Government works there, and delivered there to persons in the employment of such Government for the use of the said works:*

*Held, that no duties were payable in respect thereof.*

This was a case stated under the 20 & 21 Vict. c. 43, at the instance of the apps., upon a dismissal of an information.

The case stated "That at a petty session of the peace holden at the Guildhall, Weymouth, on the 23rd Aug. 1861, an information and complaint came on to be heard before us the undersigned Edward Bayley, John Taylor, and Richard Cotterell, Esqrs., three of Her Majesty's justices of the peace acting in and for the said borough, by which the apps. complained that the resp., the above-named Charles Hodges Nugent had refused to pay the sum of 2s. 6d. wharfage duties on ten tons of block stone brought into the harbour of the said borough, on the 22nd Oct. then last past. The information was laid under an Act of Parliament passed in the 6th year of the reign of George the Fourth, intituled 'An Act to amend and enlarge the powers and provisions of several Acts relating to the harbour and bridge of the borough and town of Weymouth and Melcombe Regis, in the county of Dorset.' At the hearing the apps. and resp. duly appeared. It was proved by witnesses called by the apps., that the stone described in the information was, on the 22nd Oct. 1863, brought by a barge into the harbour of Weymouth, for the use only of Her Majesty's Government works on the Nothe; that it was brought there from Portland for such use, and delivered there by the resp.'s orders to persons in the employ of the Government for the use of the said works; that the resp., as one of Her Majesty's officers, took charge of it on behalf the Government; that the sum of 2s. 6d. would be the amount of wharfage dues payable in respect of the said stone so brought into the harbour, if any were payable; that the collector, on the 29th Oct. 1863, demanded of the resp. payment thereof, and that he refused to pay it; that such demand was made of him as commanding officer of the Royal Engineers taking charge of the stone. (The case then set out the form of receipt given on the delivery of the stone.) The resp. did not cross-examine the apps.' witnesses, nor was any witness called on his behalf. It was contended on behalf of the resp., that he was not liable for the wharfage dues claimed, inasmuch as the Act of Parliament did not give the apps. any right to petty customs or wharfage dues in respect of stone brought into the harbour of the said borough for the use of Her Majesty's Government works, and that by Her Majesty's prerogative the stone was exempt from such dues in such a case, and we the said justices, being of that opinion, dismissed the information and complaint. The ques-

tion for the opinion of the court is, whether the said justices were right in dismissing the said complaint? If the court should be of opinion that our determination was wrong, we request them to remit the matter to us with their opinion thereon accordingly, or to make such other order relative to this matter as the court shall deem meet."

By the 6 Geo. 4, c. 116 (local), powers are conferred upon the corporation of Weymouth to levy and take certain petty customs and wharfage duties according as they are set out in two schedules for goods brought into the harbour of Weymouth.

The 2nd section enacts,

That from and immediately after the passing of this Act, the petty customs and wharfage duties mentioned and contained in the first schedule to this Act annexed, and the harbour dues and ballast duties mentioned and contained in the second schedule to this Act annexed shall be demanded and taken upon every ship, barge, or other vessel which shall be brought into the harbour of Weymouth and Melcombe Regis aforesaid, which said petty customs and wharfage duties, harbour dues and ballast duties shall be and the same are hereby declared to be vested in the said mayor, aldermen, bailiffs, burgesses and commonalty of the said borough and town for the time being for the purpose of repairing, improving and maintaining the harbour, wharfs, quays and piers within the borough and town of Weymouth and Melcombe Regis aforesaid.

By sect. 23 there is an exemption from toll of the bridge for horses, carriages, &c., connected with the mails, and also the horses, carriages, &c. attending Her Majesty, &c.

Sect. 29 also exempts from duty all coal imported into the said port for the use of Her Majesty's steam-packets, and actually used on board the same.

Lush, Q. C. (J. Brown with him) now appeared for the apps., and contended that the language of the Act was sufficiently comprehensive to include the Crown, and that there was no implied exception; that where the tolls are levied to make good costs incurred by individuals, or public bodies not connected with the Government of the country, there are always clauses inserted expressly exempting the Crown from liability to pay toll. He referred to

The Turnpike Act, 3 Geo. 4, c. 126;

The Harbours, Docks and Pier Clauses Act 1847

(10 Vict. c. 27), s. 28;

The Railway Clauses Consolidation Act 1845

(8 Vict. c. 20), s. 92;

The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 4.

[COCKBURN, C. J.—If the Crown had granted the dues it would undoubtedly have been itself exempt, why not equally so when the grant is by the Parliament?] If the Legislature had intended any exemption, it would have enacted it. He referred also to the express exemptions in clauses 23 and 29.

[COCKBURN, C. J.—The prerogatives of the Crown are never affected except by express enactment.]

The Solicitor-General (Dowdeswell with him) argued that the Crown not being bound unless expressly named, its prerogative cannot be affected by implication merely. That to this doctrine there is only the exception of cases where the enactment is for the general advancement of religion, the promotion of justice, or the general public good, which is not the case in the present instance. That it being admitted that the stone was to be employed by the Crown, no wharfage duty could be demanded. He argued also that the clauses themselves of the local Act altogether excluded the idea of the Crown being included. He cited

11 Co. 68;

Attorney-General v. Donaldson, 10 M. & W. 117-125;

Bac. Abr. tit. "Prerogative," 5;

Brooke's Abr. tit. "Prerogative," pl. 112;

Comyn's Dig. tit. "Prerogative," B. 1;

R. v. Cook, 6 T. R. 519;

Chitty on Prerogative;

Westoover v. Perkins, 2 Ell. & Bl. 37, Lord Campbell's judgment.

C. P.]

BAKER v LOCKE.

[C. P.]

Lush, Q.C. replied.

COCKBURN, C. J.—I am of opinion that the decision of the magistrates is right. There is a great principle or rule which, from an ancient period, has obtained, with regard to the prerogatives of the Crown: namely, that except with reference to certain matters of a public character, the Crown is not bound by statute unless specifically mentioned therein. It may be said that the *status* of immunity from toll or dues arose at a remote time, when the right to impose such was founded upon a grant from the Crown, and that the Crown, in such case, never intended to tax itself, and therefore it may well be assumed that, whether tolls and dues have been taken by grant from the Crown or by statute, the Crown never intended to include itself. But however this may be, the exemption has obtained from the earliest time, and we cannot suppose that the Legislature, in this instance, have intended to make the Crown liable without, in fact, making any direct reference to it. The rule I have mentioned applies to such a case as this, where dues are taken under a local Act of Parliament. Mr. Lush relies upon the exception in the Act as to the toll of the bridge, and upon the general rule that, where there is an express exception, cases not expressed are not to be included. We must, however, take it that the exception was merely inserted *ex abundanti cautela*. The case of *Westover v. Perkins*, which is strongly in point, justifies me in these views. The principle applicable to the two cases is identical. The prerogative of the Crown, which is clearly established from ancient times, would be materially affected by the adoption of Mr. Lush's views; and we should be acting directly contrary to the rule established by so many cases if we were to hold that the Crown is liable. The argument that it was intended by implication to bind the Crown has no validity for the reasons I have given, and there is, moreover, no evidence to show that there was any such intention.

CROMPTON, BLACKBURN and MELLOR, JJ. concurred.

*Judgment affirmed.*

### COURT OF COMMON PLEAS.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

Saturday, Nov. 19, 1864.

BAKER v. LOCKE.

*Registration appeal—Nonpayment of rate, good on the face of it, invalidates the vote—2 Will. 4, c. 45, s. 27.*

*A. refused to pay a rate which was signed by one overseer, two churchwardens and the assistant-overseer, on the ground that it was not signed by a majority of the parish officers, the assistant-overseer not being a parish officer within the meaning of the Act; and that therefore the rate was not signed by a majority of the officers:*

*Held, that the rate was presumably a valid rate on the face of it, and therefore that A. was bound to pay it, and not having done so, he had no right to a vote.*

*Quære, per Byles, J., whether a rate so signed would be valid on appeal or not.*

This was a consolidated appeal from the decision of the revising barrister for Taunton.

At a court held before the revising barrister for the borough of Taunton, at Taunton, Thomas Locke duly objected to the name of George Baker and those of nine other persons being retained on the list of voters for the borough.

The following are the facts of the case as proved before the barrister:

George Baker occupied as tenant premises within the said borough, in the parish of Taunton St. James, of sufficient value and for a sufficient time to entitle him to a vote for the said borough, under 2 Will. 4, c. 45, s. 27, subject to the following question as to his nonpayment of rates.

During the period of his occupation required by law to entitle him to a vote, a poor-rate of the said parish was made and signed by an overseer of the said parish and also by the two churchwardens and by the assistant-overseer of the said parish. The rate was duly allowed and confirmed at Taunton by two magistrates for the county of Somerset, who in the usual form appended their joint signatures to a certificate of allowance immediately following in the rate-book the signatures of the overseer, assistant-overseer and churchwardens, but in point of fact the signatures of the two magistrates were obtained on the same day in Taunton and separately.

The rate was duly published the day after it was allowed, and in the said rate George Baker was rated in respect of the premises he occupied, and on its being demanded he did not pay and has not paid the rate. The rate was not appealed against, and the time for appeal has now expired, and the rate has been generally paid. There are four overseers appointed for the said parish. The assistant overseer is appointed under 59 Geo. 3, c. 12, s. 7, and his appointment in its material parts is as follows:

Poor Law.—Assistant Overseer's Appointment.

59 Geo. 3, c. 12, s. 7; 7 & 8 Vict. c. 101, s. 61.)

County of Somerset.—Whereas the inhabitants of the parish of Taunton St. James, in the said county of Somerset, in vestry assembled in the said parish on the 8th day of April last, elected and nominated Walter Chorley Brannam, of Taunton St. James aforesaid, accountant to the assistant overseer of the poor of the said parish of Taunton St. James, and did determine that the duties to be by him executed and performed should be to assist the overseers of the poor of the said parish in the performance of all the duties incident to the office of overseer of the said parish (except the collection of rates), and that his salary for the execution of the said office should be 10*l.* yearly, to be paid quarterly.

[Then follows the clause appointing Brannam assistant-overseer.]

The assistant-overseer was also duly appointed collector of rates by the board of guardians.

It was contended on behalf of George Baker that the said rate was void on the ground that it was not signed by a majority of the parish officers, and that consequently its nonpayment by George Baker did not invalidate his right to be retained on the list of voters for the said borough. The revising barrister was of opinion that the rate had been signed by a majority of the parish officers, but that at all events, having been signed as above and allowed and published, it was, while unappealed against, a rate which must have been paid by George Baker to entitle him to a vote under the said 27th section, and he accordingly expunged his name from the list of voters. He also expunged from the same list the other nine names and consolidated the appeals. If his decision in the case of Baker was right, the list as revised by him was to remain unaltered; but if it was wrong, then the name of George Baker and the other names were to be registered in the list.

Hannen (*Underdown* with him), for the apprs., contended that this was a void rate, because it was not signed by a majority of the parish officers, as the assistant-overseer was not such officer, but only a servant of the officers, and that the nonpayment of a void rate did not disqualify a person from having a vote. He referred to

43 Eliz. c. 2, s. 1;

59 Geo. 3, c. 12, s. 7;

7 & 8 Vict. c. 101, ss. 61, 62;

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BAKER v. LOCKE.

[C. P.]

Glen on Duties of Overseers;  
*Bennett v. Edwards*, 8 B. & C. 702;  
*Fox v. Overseers of Shaston St. Peter's, Shaftesbury*,  
 2 Lutw. Reg. Cas. 97.

*Prudeau*, for the resp., contended that the rate was valid on the face of it, and therefore that the app. was bound to pay it; and as he had not done so he was disqualified from voting. He cited

*Reg. v. Watts*, 7 A. & E. 461;  
*Points v. Atwood*, 6 C. B. 38;  
*Casiter v. Adams*, 1 H. & P. 80;  
*Shingley v. Surridge*, 11 M. & W. 508.

ERLE, C. J.—I am of opinion that the revising barrister was right in the conclusion that he came to, that the claimant was not qualified by reason of the nonpayment of the rates. The Legislature has made the qualification to depend on the party having paid certain public dues, and it is found by the case that the rate to the parish had not been paid by the claimant. It further appears that the rate left unpaid by him is, on the face of it, a valid rate; it purports to be signed by four persons, two churchwardens, an overseer, and an assistant-overseer. The statute of Elizabeth has enacted that a rate to be valid shall be signed by a majority of parish officers; four would be presumably a majority, and when we inquire into the facts, four might have been a majority if there had been two overseers and two churchwardens. There are four signatures here, but the point taken by the claimant is, that he refused to pay the rate because one of the four who signed it was an assistant-overseer, and he contended that the rate ought to be signed by the overseers strictly so called, and that an assistant-overseer was not capable of signing a rate. Now, I do not intend to give what I consider a binding opinion upon the point whether this was a valid rate. It is laid down by the editor of a treatise early after the assistant-overseer's office was created, that, in the opinion of the editor of that treatise, an assistant-overseer could not join in making a rate. But if it was found on the other hand, as on the present occasion, that the assistant-overseer has, in point of fact, joined in making the rate, I must say there appears to me presumably authority for him to do so, by the 59 Geo. 3, c. 12, which gives him authority to perform all the duties of overseers except the collection of rates, unless otherwise laid down by the warrant of appointment, and we have before us here the warrant of appointment, and the vestry who appointed this man have determined that the duties to be performed by him should be those of assistant-overseer of the poor in the performance of all the duties incident to the office of overseer in the parish except the collection of rates. According to the words of the statute, and according to the words of the appointment, he is to perform all the duties incident to the office of overseer, and signing the rate is one of those duties. It is contended by Mr. Hannen, that the assistant-overseer is in reality a servant appointed to assist the overseers; that he is to obey their directions, and cannot act in the place of one of them. I do not think Mr. Hannen is well sustained in that argument. The statute says, and the Court of Q. B., in the case of *Reg. v. Watts*, has decided, that the assistant-overseer is appointed by the vestry, and is the servant of the vestry. Those are words of office. He is the assistant-overseer, and many hundreds of people would be misled if they were relied on as defining the duties of the officer. In many corporations a deputy recorder is just as much an officer as the recorder himself. He is not an officer, but has duties under the officer. Under the 7 & 8 Vict. he must obey the directions of the majority of the overseers. Still the appointment remains as before; there would be a rate valid

upon the face of it; there would be an allowance for that rate by two magistrates. I advert to the case cited by my brother Maule in *Fox v. The Overseers of Shaston St. Peter's, Shaftesbury*, 2 Lutw. 101, as in that case the magistrates had allowed a rate, and it was discussed in the Court of Q. B. in the case of *Rex v. Folly*, 1 Bott's Poor Law, pl. 86, and Maule, J., citing that case, says: "The justices of the peace are said to act ministerially only in allowing the rate, which is correct in this sense, that they have no power of judging of the intrinsic goodness or badness of the rate;" and that learned judge adds, "I apprehend the justices may act judicially, when a rate is brought for allowance, so far as to judge whether the churchwardens and overseers who offer the rate are the proper persons to make it." Now, this is presumably a valid rate, which the claimant has objected to pay, and I am clearly of opinion that, if the claimant wished to try whether it was a valid rate, he could have done so by appeal, and he would have done no harm to himself by paying it at once, whether valid or not, because the law has declared that if the rate turns out to be void the app. is to be allowed the payment on account. I think, therefore, this was presumably a valid rate, but the claimant has kept the money which Parliament requires him to pay in order to qualify him to vote and to show that he is a solvent man and to be trusted with the qualification. The app. says, "My reason for not paying the rate is, because one of the four names in the making of it is, in my judgment, a name that ought not to have been there." Without considering that point, I think it was presumably as against him a valid rate, and I should be setting a very bad example if I held that a person should be entitled to all the privileges acquired by the paying of the rate, when, in fact, he has withheld the payment of it on a ground which appears to me to be a matter of perfect indifference. The men holding rateable property must maintain the poor, and the law has declared, if he pays under a void rate, and proves afterwards that it is void, he is then entitled to have the payment allowed on account, and if we were to authorise parties to dispute the point of form about the validity of a rate, and keep back the funds required for the maintenance of the poor, we should be setting a bad example. I think, therefore, in this case that the claimant is not entitled to vote.

BYLES, J.—I am of the same opinion. The rate is perfectly good on the face of it, and it is found in the case that it has been published, and has been allowed by two magistrates. The statute that creates the office of assistant-overseer makes him appointable by the vestry, and says nothing about obedience to the orders of his fellow-overseers, but authorises him in the largest terms to exercise all such of the duties of the office of overseer of the poor as shall in the warrant of his appointment be expressed. Now, the warrant here is in the fullest terms. He is to assist in the performance of all the duties incident to the office of overseer, except in the collection of rates. It is said, first, he ought not to be trusted with the responsible power of discriminating who should be charged or distrained upon, or who should not. Looking at the statute, therefore, and the appointment of the assistant-overseer, he seems to be invested with the full power of an overseer. Mr. Hannen says that he is in the nature of a servant. It would not appear from the language of the statute that he was a servant, but rather that he was a coadjutor or fellow-officer; and that point is now past dispute, because both this court (*Points v. Atwood*) and the Court of Q. B. (*R. v. Watts*) have held that he is not, but that he is a fellow-officer of the churchwardens and overseers. That is the fair result of both those cases.

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[C. P.]

That being so, if it had stood there, if we were now going into the merits of the case on appeal, I own, without giving any distinct opinion upon it, I should doubt whether it was a bad rate. My Lord has pointed out, in the course of the argument, a case which, I confess, I was not aware of before. I have always understood as a general rule that the allowance of the magistrates was simply a ministerial act. It seems a strange thing that an Act of Parliament should require the magistrates to do what was of no use when done; but looking at the case cited from *Bott (R. v. Folly)*, there seems to be a very good reason for that, because strangers in the parish would not know who were the overseers who ought to sign; but the signature of two justices resident in the neighbourhood may satisfy them upon the point, and although it does not make the rate good if the proper persons have not signed it, yet it may make the rate so far good that it is not void so as to be questionable in an action of trespass. What Mr. Prideaux said is indisputable. A man can never be excused the payment of rates. I venture to say in this metropolis there is scarcely a rate which is not liable to a reduction in the value. Lord Ellenborough's Act gives powers to amend, and it may be quashed on appeal, and is therefore void. It seems to me impossible to say that the revising barrister has come to a wrong conclusion.

KEATING, J.—I am of the same opinion, and I entirely agree with the reasons given by my Lord and my brother Byles. Mr. Hannen relies in his view of the case upon the terms of the statute of Victoria, insisting that by that statute the assistant overseer was to obey the orders of the majority of the overseers. Now I do not know why we should in this case hold that, in signing the rate, the assistant ought not to obey the orders of the majority of the overseers. It is not stated that he did. It is not stated that he did not. I do not know how you can contend against the rate itself being a valid one, against the decision of the revising barrister. Under these circumstances, I think the decision ought to be affirmed.

Judgment for resp.

ROBERTS v. PERCEVAL.

*Registration appeal—Inmates of hospital—Equitable freehold—Decision of court upon similar facts—6 Vict. c. 18, s. 66.*

*Burleigh Hospital was founded after 38 Eliz. c. 7, s. 27, and 39 Eliz. c. 5. The building is a freehold building divided into rooms, each of which is of the annual value of 4l. Each inmate has a separate room, and keeps the key. No charter, deed, or other document relating to the foundation can be discovered. The ordinances referred to certain fees and their heirs; but none were known. By the rules, which bore date the 20th Aug. 1597, it was provided that certain persons should not be admitted, and that any one guilty of any of the specified offences should be displaced; but there was no instance on record of an inmate having ever been displaced. Part of the premises were let, and part had been sold:*

*Held, that the inmates were entitled to vote, as they were not members of a corporation, but were respectively entitled to a freehold in their rooms, and that it made no difference whether the institution was of an eleemosynary nature or not.*

*Simpson v. Wilkinson, 7 M. & G. 50, affirmed.*

*Where a decision of this court had been given upon similar facts, but the claimants were no longer alive, the revising barrister, notwithstanding s. 66 of 6 Vict. c. 18, has power to enter upon the inquiry.*

*This was an appeal from the decision of the re-*

*vising barrister for the northern division of the county of Northampton, who stated the following case for the opinion of this court:*

Thomas Wallington duly objected to the name of Abraham Bell being retained on the list of voters for the northern division of the county of Northampton. The name and description of the voter on the registry were:

Bell, Abraham	Lord Burleigh's Hospital, St. Martin's, Stamford.	Freehold tenement or room.	Abraham Bell, occupier.
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He also objected to the names of twelve other persons, whose qualifications on the lists were described in like manner, and depended on the like facts; and the appeals were therefore consolidated. The facts as to the appointment of the several claimants, and the nature and mode of enjoyment of the qualifying property, are similar to the facts as stated in *Simpson v. Wilkinson*, 7 M. & G. 51; and the facts of that case are admitted and are to be taken *mutatis mutandis* as if stated as part of this case, as is also the copy of the ordinances printed in such report.

Upon the objections being called on, it was contended on behalf of the resp., that the revising barrister had no power to enter upon the inquiry according to the 66th section of the statute 6 Vict. c. 18, s. 66, the judgment of the court having been given upon facts similar to those which are the foundation of the present claim. The whole of the claimants in the present case have been appointed since the judgment was delivered.

The revising barrister decided to go into the case, and to hear the evidence, being of opinion that the words "the case" in the said section referred only to the current register, or, at any rate, to the particular individuals affected.

If the court should be of opinion that this contention should have prevailed, the names were to be retained, without reference to the remainder of this case.

The following additional facts were then proved: That in 1846 part of the hospital premises not separately used by the then occupiers was sold to the Midland Railway Company for the purposes of a railway. That the sale was conducted by the then wardens and bedesmen as owners without the intervention of any other person. That the warden and each of the bedesmen signed the conveyance to the company, the money was paid to the warden and bedesmen, and expended by them in erecting buildings upon part of the garden attached to the hospital, which buildings are now used for a wash-house by the warden and bedesmen as they have occasion.

It was then contended by the objector that, assuming the legal origin of the foundation, if the claimants had any estate, it was only as members of a corporation aggregate, and that the additional facts above stated led to this conclusion. That they had no freehold estate. That, if they had, it was only a joint tenancy in the whole hospital, and not an exclusive and separate one in each of the rooms, and that this also appeared from the new facts. That they were in receipt of alms. And that, looking at the recent decisions, and especially *Freeman v. Gainsford*, 11 C. B., N. S., the claims were bad.

The revising barrister overruled the objections, and retained the several names on the list of voters, being of opinion that the facts were substantially unaltered, and that there was therefore nothing to disentitle the claimants to the benefit of the judgment already given by this court upon the same foundation, whatever were the reasons of such decision; and also that they did not receive alms within the meaning of 2 Will. 4, c. 45, s. 86.

*Hannen (Underdown with him), for the app., contended, first, that the revising barrister was not prevented by the decision in Simpson v. Wilkinson*

from going into the case. (He was stopped by the Court on this point.) Secondly, that the claimant had not such an equitable freehold in this room as to entitle him to a vote, inasmuch as the hospital was of an eleemosynary character, for the rooms were only occupied by the claimants as objects of the bounty of the founder, and it could not be his intention to give them the rooms for their lives; and moreover they were removable for certain acts of misconduct. He referred to

2 Will. 4, c. 45, ss. 18, 32;

39 Eliz. c. 5;

*Freeman v. Gainsford*, K. & G. 448; and

*Heartley v. Banks*, K. & G. 219.

*Field*, Q. C., for the resp., was not called on,

ERLE, C. J.—I think the revising barrister was right. In the case of *Simpson v. Wilkinson*, to which I was a party, the court were of opinion that the inmates of Burleigh's Hospital had a freehold interest in the rooms that were assigned to them, and I am of opinion now, when the same question arises again, that the inmates of the hospital have such an equitable freehold interest in the rooms assigned to them as to entitle them to a vote. The origin of the hospital is unknown, but the ordinances and the two statutes that have been referred to satisfy me that the court had a right to presume that it had a legal origin. The 39 Eliz. c. 5, refers to the 35 Eliz. c. 7, s. 27, under which the court gathered that rights could be granted to what were called at the time feoffees in trust for persons to be admitted to a hospital, and that Burleigh Hospital had been created and endowed by Lord Burleigh, by granting the lands to feoffees in trust for the members of that hospital. Now it seems to me that the interest of the parties under the endowment to feoffees in trust for the inmates of the hospital would convey to them an equitable freehold; they would have all the rights of property in the endowment that were given by the terms of the feoffment; they would have all the property in the shape of an equitable freehold just as if they were a corporation. Under the 39 Eliz. c. 5 the whole of the property would be vested in the corporation. The difference between the two results as to the qualification to vote is this, that the members of a corporation aggregate by reason of their membership are not qualified; the whole of the estate, for all the interest in the property, is in the corporation. The majority of the hospitals now are incorporated, and so there is an end of any question about the members of such hospitals having a right to vote. If there is nothing more in the case than that the lands are conveyed to feoffees in trust for the inmates of the hospital, then the legal interest would be in the feoffees and the equitable interest in the members of the hospital, and that interest would be according to the terms of the deed; and where the deed is lost, the terms of it are to be presumed from the way in which the property has been enjoyed. The way in which the property in the Burleigh Hospital has been enjoyed seems entirely consistent with the supposition I have put forward. Each member is placed in a room, and he occupies that room for life. The warden and bedesmen, as legal owners, manage the property irrespective of the separate ownership of each of its members, and nobody interferes with them. The members get what they can by letting part of the hospital; they do not occupy the granary; they act in every respect as persons having the entire interest in the hospital. The additional facts find that they executed a deed of conveyance of part of it and the proceeds were divided for their own use. Then ground for inferring that the feoffees had

merely a legal estate in trust for carrying out the intention of the donor's charity points out to me that each man took a separate freehold in his own room, and that the rest of the property belonged to the warden and bedesmen beneficially in the manner I have mentioned. There is no doubt that in the ordinances of Lord Burleigh for the time being there is a good deal of language that would imply a supervision, control and interference in some degree with the rights of the inmates of the hospital. The ordinances are, that Lord Burleigh, or certain persons, should, in case of irregularity of conduct, have the power of removal. That is a power that has never been acted upon, and if an attempt was made to act upon it, there probably would be found abundance of difficulty in the way, and I do not think that the fact of there being such a power makes the conclusion which the court came to in *Simpkins v. Wilkinson* wrong. The strength of Mr. Hannen's argument has been, that the court held, in the case of *Heartley v. Banks*, that the poor Knights of Windsor, and in *Freeman v. Gainsford*, that the inmates of Lord Shrewsbury's Hospital were persons taking shares of the profits of the estates with which these hospitals were endowed, but were not qualified. But there is a broad distinction in my mind between the present case and each of those cases; for in them there was a governing body in whom the legal estate was vested, and in whom the legal estate was necessarily to continue vested for the purpose of the trust to be performed by them, and that the profits of the endowment did not belong absolutely, without any intervening personage, beneficially to the persons who claimed to be qualified by reason thereof. The trustees were to receive the profits and then the poor Knights of Windsor were entitled to claim a portion of the money out of those profits, and so the inmates of Lord Shrewsbury's Hospital were entitled to receive a portion of the money out of those estates from the trustees without having an estate at all; and in each of those cases the trustees were bound to find a lodging for the inmates. But I see that in Lord Burleigh's case they are, when named, to be placed in a set of rooms, and in those rooms they are to continue till they die. In the other cases, as I read them, certainly in *Freeman v. Gainsford*, one of the grounds of the judgment of the court was that the inmates were to be placed in the rooms, but were not to have an estate for life in their rooms; and the Court assumed, though I cannot say it is expressly stated, that the governing body had the power to shift them from time to time from room to room; whereas in Lord Burleigh's Hospital the inmates are to have an estate for life in the rooms which were assigned to them. In Lord Burleigh's Hospital the feoffees had merely held the legal estate, the equitable estate being in the inmates. In Lord Shrewsbury's Hospital the trustees held the legal estate, and continued possessed of the equitable estate, subject to the disposing of the profits in the proper way. A great deal of ambiguity has been brought into these cases by saying that the mode of occupation would prevent a man from being qualified if he had a legal or equitable freehold, if the mode of occupation was eleemosynary. I have a great desire to avoid introducing anything that is to my mind an entirely mistaken notion as to the question whether the party is owner of the equitable freehold or not; in deciding that question it may be very material to see whether the trustees hold in trust to take the profits and dispose of them in an eleemosynary manner to the objects of the donor's bounty; and it is in deciding whether the equitable freehold is in the donees, or whether they are merely entitled to receive a portion of the charge of an eleemosynary nature, desirable to see whether it is a matter that has



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any logical application; because, if a person have an estate, whether legal or equitable, it matters not whether the motive of the donor of the estate was of a charitable nature, or whether the feelings of the parties who took the estate and enjoyed the profits under it ought to be the feelings of eleemosynary grantees. The motives of the grantor and the motives of the grantees are, in deciding whether there is an estate, absolutely irrelevant otherwise than to the extent that I have before stated. The trustees who hold the legal estate—the equitable freehold being in the inmates of the hospital—apply the proceeds in an eleemosynary way; *semble*, most probably, that they hold the legal estate as trustees, to hand over some of the money to the persons entitled to take the money or other benefits under the trust, only in an eleemosynary sense. There is nothing in the rest of the Reform Act to say that the recipient of an estate given to him from eleemosynary motives is a man not as well qualified as the owner of the largest estate in the kingdom.

KEATING, J.—I am of the same opinion. Mr. Hannen asks us to reconsider the decision in *Simpson v. Wilkinson*, upon the ground that since that decision this court, in the two cases of *Hearley v. Banks* and *Freeman v. Gainsford*, have laid down principles which would not conflict with the actual decision in that case, but which would induce the court to come to a different conclusion upon the facts; but it seems to me he has failed in showing an identity of circumstances between those cases and *Simpson v. Wilkinson*, for there is between the facts of those cases and the case of *Simpson v. Wilkinson* the important distinction that has been adverted to by my Lord, namely, that in those two cases the property was vested in persons who, as trustees, had active trusts to perform, without the objects of the bounty of the donors in either case taking that which could be said to amount to an equitable estate in any particular land; whereas, in *Simpson v. Wilkinson*, there is no such body exercising any such active trust, but the management of the property was from the beginning vested in these inmates themselves. They managed it, and let portions of it; and although it is true, as Mr. Hannen says, that an estate in mere joint tenancy might not qualify each claimant, and that they deal with the granary over the various rooms, dividing the profits amongst themselves as joint tenants, yet with the rooms themselves they deal severally and separately, and make a profit of those rooms, and when a portion of the property comes to be sold, they are the persons who sell without the intervention of a trustee or any governing body; they receive the profits of the sale, and expend those profits upon the land for their own benefit. Under these circumstances it seems to me that, as my Lord has pointed out, the inmates in the other two cases had no equitable estate in the lands, but that the facts in *Simpson v. Wilkinson* show there was an equitable estate in the lands in the inmates.

*Decision affirmed.*

Attorneys: for app., Amory, Travers and Smith; for resp., Clarke, Son and Rawlins.

Tuesday, Nov. 22, 1864.

POWELL v. GUEST.

*Election law—Borough vote—Qualification—Residence for twelve months within the borough—Imprisonment—2 Will. 4, c. 45, s. 27.*

*A person claiming to be placed upon the register of voters for a borough, as having been an occupier for twelve calendar months of premises within the borough, in the*

*manner required by sect. 27 of the Reform Act (2 Will. 4, c. 45), had been for a considerable portion of that period in a gaol not within the limits of the borough, nor within seven miles of it, having been imprisoned for committing an assault, without any option of paying a fine. His house had been occupied, and his business carried on, by his servant during his absence, and he always had the intention of returning home at the end of his imprisonment:*

*Held, that he had not resided in the borough within the meaning of the statute.*

*Seemle, if the imprisonment had been on civil process, or for nonpayment of a fine, the residence would have been sufficient.*

Case stated by the barrister appointed to revise the list of voters for the borough of Kidderminster.

At a court held before me for the revision of the lists of voters for the borough of Kidderminster, Richard Powell duly objected to the name of Thomas Guest, jun. being retained on the list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of the occupation of a house in Stourbridge-street, in the parish of Kidderminster borough, on the ground that the said Thomas Guest, jun. had not resided for six calendar months next previous to the last day of July in the present year within the said borough, or within seven miles thereof.

The qualification of the said Thomas Guest, jun. was duly proved in all other respects.

On the 27th Feb. in the present year the said Thomas Guest, jun. was convicted of an assault and committed by the magistrates of the borough of Kidderminster to Worcester gaol for six months' imprisonment without the option of paying a fine. He duly served the said term of imprisonment, and returned to Kidderminster on the 25th Aug. in the present year.

Worcester gaol is situate more than seven miles from the borough of Kidderminster or any part thereof. At the time of his conviction the said Thomas Guest, jun. resided at the above-mentioned house, and carried on there the business of a butcher and beerseller, and after his conviction, but before leaving Kidderminster, he made arrangements by which the said businesses were carried on, and the said house was occupied by his servant on his behalf during his absence, to whom he gave the key of the house, and paid him 15s. per week to conduct the said businesses. His furniture remained undisturbed in the house during his imprisonment, and immediately on the termination thereof he returned to his said house, and has continued to reside there ever since.

The said Thomas Guest, jun. is a widower, and has no family.

It was contended on behalf of the said Richard Powell, that under the circumstances stated the said Thomas Guest, jun. had not resided for six calendar months next previous to the last day of July in the present year within the said parish of Kidderminster borough, or within seven statute miles thereof, or any part thereof. I held that, under the circumstances stated, the said James Guest, jun. had resided for six calendar months previous to the said last day of July in the present year within the said parish of Kidderminster borough, and I therefore retained his name on the list of voters.

The said Richard Powell having given notice that he was desirous to appeal from my decision, I allowed his appeal.

If the court shall be of opinion that, under the circumstances stated, the said Thomas Guest, jun. had not resided for six calendar months previous to the last day of July in the present year, within the said parish of Kidderminster borough, then the name of the said Thomas Guest,



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jun. shall be expunged from the list of voters, and the register of voters shall be altered accordingly. But if the court shall be of opinion that the said Thomas Guest, jun. had resided during the time and in manner aforesaid within the said parish of Kidderminster borough, the register of voters is to remain unaltered.

Keane, Q.C. for the app.—The resp. had not resided for six months previous to the 31st July, for the imprisonment caused a break in the residence. It was not even as if the imprisonment had been for debt or nonpayment of a fine, which the resp. could have put an end to when he pleased by paying the debt or fine. As to the meaning of the word residence and the effect of imprisonment as a break of residence, he referred to

*Whithorn v. Thomas*, 7 M. & G. 1;  
*Reg. v. The Inhabitants of Salford*, 12 Q. B. 106;  
*Hartfield v. Rotherfield*, 17 Q. B. 746; s. c. nom. *Reg. v. The Overseers of Hartfield*, 21 L. J. 65, M. C.;  
*Reg. v. The Inhabitants of Potterhamworth*, E. & E. 262; s. c. 28 L. J. 56, M. C.;  
*Reg. v. The Inhabitants of Ilkley*, 12 Q. B. 111;  
*Reg. v. The Inhabitants of Seem*, 12 Q. B. 133;  
*Reg. v. The Inhabitants of Barnsley*, 12 Q. B. 193; and  
 6 Vict. c. 18 (the Registration Act), s. 79;  
 9 & 10 Vict. c. 63 (the Poor Removal Act), s. 1.

Karslake, Q.C. (*R. Bourke* with him) for the resp.—The resp. during the whole time of his imprisonment had the *animus revertendi*, and therefore it constituted no break in the residence:

*Nias v. Davis*, 4 C. B. 444;  
*Dunston v. Paterson*, 2 C. B., N. S., 495; s. c. 26 L. J. 267, C. P.;  
*Res v. Mitchell*, 10 East, 511;  
*Reg. v. The Overseers of Holbeck*, 16 Q. B. 404.

ERLE, C.J.—I think that the revising barrister was wrong, and that the claimant did not acquire a vote. The statute, as part of the qualification, requires that the claimant shall have resided for a certain period within the boundary of the borough, and the claimant upon the present occasion was in prison under a sentence for misdemeanor for a great part of the time during which the statute requires residence as the qualification. Now, did he reside during the time that he was so imprisoned? I will assume that he had a house, and that he had a wife and family, and the *animus revertendi* as soon as his imprisonment might be over, but during the time that he was imprisoned he had not the liberty to return, he had lost the liberty of returning by a wrongful act on his part leading to such a confinement as prevented his being bodily present. Now, the doctrine appears to me to be laid down very correctly in Mr. Elliott's book at p. 204 (2nd edit.): "In order to constitute residence the party must possess a sleeping apartment, but an uninterrupted abiding at the dwelling is not requisite. Absence, no matter how long, if there be the liberty of returning at any time and no abandonment of the intention to return whenever it may suit the party's pleasure or convenience, will not prevent a constructive legal residence; but if he has debarred himself of the liberty of returning to such dwelling by letting it for a period, however short, or has abandoned the intention of returning, he cannot any longer be said to have a legal residence." Now, the learned author has put it, "if he has debarred himself of the liberty of returning to such dwelling, he has not a legal residence," and he has put the two examples "by letting it," or "by abandoning his intention to return." I think that the claimant did "debar himself of the liberty of returning to such dwelling." He was voluntarily guilty of a criminal act by reason of which, according to the laws of his country, he was put in

prison. His power of moving was taken away from him, and he lost the liberty of returning to his dwelling. If we had to discuss the meaning of the word residence, we should have to advert to innumerable occasions in which the meaning of that word has shifted according to the shifting intention of the Legislature in the statutes in which the word occurs. For the purpose of bankruptcy a man may be held to reside in a prison where he can carry on his business and see his debtors and creditors, and attend to other matters of that kind. It has been held in one of the cases cited during the argument (*Nias v. Davis*), that a person imprisoned in Presteign gaol had a sufficient residence for the purpose of giving the bankruptcy commissioners power to send for him and examine him. I should say that statute would be *also statuta* from the present statute, and I also should say that in my opinion a party imprisoned for a civil debt would not have debarred himself irrevocably from having the liberty of returning to his dwelling, because, by payment of his debt, by compounding with his creditors, by obtaining protection under the Bankruptcy Act, or in various other ways, he would be able so to return. So in the case cited of a militiaman (*Reg. v. Mitchell*), his service is in some degree consistent with the power of returning home from time to time, whereas there is an absolute incapacity in the case of a person in prison on a criminal charge, without any option of paying a penalty. I think that all those cases can be well distinguished, and that in this statute the Legislature, in bestowing the qualification, proceeded partly upon residential considerations, and partly upon commercial considerations, desiring that the privilege should be exercised by a person who resided, or had commercial interests, in the district, and so was likely to have his attention turned to the interest of the district, and through that district to the interests of the nation at large. If a person is imprisoned, he is not, in my judgment, complying with the requisites of the statute. If imprisonment for five months would not take away his qualification, I do not see why an imprisonment for two years, or any other number of years, should not allow him still to be qualified. It would be eluding the intention of the Legislature, requiring that there should be residential or commercial qualification in the district and a residence there, to say that a man who has been absent in consequence of his own wilful misconduct has complied with the qualification of "residence."

BYLES, J.—I am of the same opinion. It is not necessary nor convenient to lay down any universal rule as to what is the result of the cases cited as to a legal inability to reside; that is, how far the inability created by the claimant's own criminal and voluntary act, and not by his misfortune, will break the residence. In the first place, this case is distinguishable from the case of sickness or accidental absence, which are none of them legal disabilities. This case is distinguishable from the cases of persons being innocent and remanded for acts not caused by their own criminal and voluntary acts. It is distinguishable from a case of legal process under a *capias ad satisfaciendum*, and from the case of imprisonment for nonpayment of a fine; because in both cases the payment of the debt or the fine would relieve the party from imprisonment. Extreme cases may be put on both sides, and there is as much inconvenience in those extreme cases on the one side as on the other. On the one side, it may be said that imprisonment for twenty-four hours may deprive the party of his franchise; on the other side, there is the case put by my Lord of an imprisonment for two years or more. Under those circumstances, I confess, I was hardly able at first sight to reconcile the difficulties that presented

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themselves. I agree with my Lord that the revising barrister was wrong.

KEATING, J.—I am of the same opinion. Though this case, no doubt, has been involved in considerable difficulty by considerations as to where the line should be drawn, still I am of opinion with the other members of the court, that a party who debars himself from actually residing by his own criminal act, does not constructively reside.

*Judgment for the app.*

Attorneys: for the app, *Lawrence and Markby*; for the resp., *H. Smith*.

POWELL (app.) v. JONES (resp.)

*Election law—Borough vote—Payment of rates—Composition—Appropriation of payments—2 Will. 4, c. 45, s. 27—4 & 5 Vict. c. lxxii.*

*A person occupying a house and garden in a borough, and also two adjoining houses, compounded with the overseers according to the provisions of a local Act, and was in consequence assessed to the poor-rate in respect of all the premises, at about one-half of what he would otherwise have been assessed at. He subsequently improved the house and garden, so as to raise their annual value to more than 10l., and applied to the overseers to rate him in respect thereof separately from the other houses, for the purpose, as he told them, of enabling him to get a vote. Some arrears of rates were then due, and as he did not then pay them, the overseers did not alter the rating. He subsequently paid more than enough to pay all rates due in respect of the house and garden, but not enough to cover the arrears in respect of the whole of the premises, and the overseers appropriated the payment to the arrears, nothing being said at the time of payment respecting the premises in respect of which it was made. The revising barrister allowed him a vote in respect of the house and garden:*

*Held, on appeal, that there was sufficient evidence from which the barrister might infer that it was understood between the claimant and the collector at the time of payment, that it was made for the rates due on the house and garden in respect of which the vote was claimed.*

Case stated by the barrister appointed to revise the list of voters for the borough of Kidderminster.

At a court held for the revision of the list of voters for the borough of Kidderminster, Richard Powell objected to the name of William Jones being retained on the list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of property occupied within the parish of Kidderminster borough.

The said William Jones occupied in St. John-street, within the parish of Kidderminster borough, for twelve calendar months previous to the last day of July in the present year, a house and garden of upwards of the clear yearly value of 10l.

The said William Jones was the owner of the said house and garden in his occupation, and also the two adjoining houses.

The said William Jones, some years since, under the provisions of an Act made and passed in the fourth year of the reign of her present Majesty Queen Victoria, entitled "An Act for better assessing and collecting the poor-rates in the borough of Kidderminster, in the county of Worcester," compounded with the overseers for the said borough for the poor-rates of the above houses for the term of one year, and by entering into such composition only one-half the amount was assessed on the said houses and garden for poor-rates as would have been assessed thereon if the said William Jones

had not entered into such composition. At the expiration of the year for which such composition was entered into, and down to the month of July last inclusive, the July rate being made and allowed on the 22nd day of that month, the overseers continued to assess the said house and garden on composition, although the said Wm. Jones did not enter into any composition agreement with them other than as above stated, neither did he attend any meeting of the overseers for the purpose of entering into any other composition agreement, but the demand made by the overseers, and the receipt given by the collector, stated that the rates were composition poor-rates. Subsequently to the said Wm. Jones entering into such composition as aforesaid, and previously to the 31st July 1863, he made improvements to the said house and garden by which the clear yearly value was raised to upwards of 10l.

The said Wm. Jones in Oct. 1863—but he could not state the precise day—claimed to be rated separately from the said two other houses, and to the full rate for and in respect of the house and garden in his occupation, for the purpose, as he then stated to the overseers, of "getting his vote;" but he did not at the same time pay or tender the arrears of rates then due. The overseers did not alter the rating in respect of the said house and garden in the occupation of the said Wm. Jones.

The composition rate laid in Oct. 1863 amounted for all three houses and gardens to 4s. 9d.; there were arrears of former rates brought forward of 1l. 3s. 9d. The total rates then due in respect of the three houses were 1l. 8s. 6d.

The said William Jones, subsequent to his claiming to be separately rated as aforesaid and previous to the 20th July in the present year, paid to the overseers of the said borough the sums of 10s. and 12s. 6d., making together 1l. 2s. 6d., which was more than sufficient to pay all rates due previously to the 5th Jan. last in respect of the house and garden in his own occupation, but at the time of making such payment he did not state or specify to what rate or in respect of which house he paid the said amounts, and the collector placed the amount against all the rates due, namely, 1l. 8s. 6d.

It was objected on behalf of the said Richard Powell that the name of the said Wm. Jones should be expunged from the list of persons entitled to vote in the election of a member for the borough of Kidderminster in respect of property occupied within the said parish of Kidderminster borough, inasmuch as he had not been rated in respect of such house and garden to all rates for the relief of the poor in such parish of Kidderminster borough made during the time of such his occupation as aforesaid.

Secondly, that the said William Jones had not paid the poor-rates payable from him previously to the 5th Jan. on or before the 20th July in the present year.

I held that the said William Jones was rated in respect of such house and garden to all rates for the relief of the poor in such parish of Kidderminster borough made during the time of his occupation, and that he had paid the poor-rates payable from him previously to the 5th Jan. on or before the 20th July in the present year, and accordingly retained his name on the list of voters.

The said Richard Powell having given notice that he was desirous to appeal from my decision, I allowed his appeal.

If the court shall be of opinion that, under the circumstances stated, the said William Jones was not rated in respect of such house and garden to all rates for the relief of the poor during the time aforesaid, or that he had not paid the poor-rates payable from him previously to the 5th Jan. on or before the 20th July in the present year, then the

name of the said William Jones is to be expunged from the list of voters, and the register of voters is to be altered accordingly.

But if the court shall be of opinion that, under the circumstances stated, the said William Jones was rated in respect of such house and garden, and had paid all rates payable from him previously to the 5th Jan. on or before the 20th July in the present year, the register of voters is to remain unaltered.

Keane, Q.C. appeared for the app., and contended that the claimant had not complied with the requisitions of sect. 27 of the Reform Act, 2 Will. c. 45, as he had not paid the full rates. He also referred to 17 Geo. 2, c. 38, s. 4;

*Rees v. George*, 6 A. & E. 305.

Karslake, Q. C. (*R. Bourke* with him), for the resp., was not called on.

ERLE, C. J.—It seems that the party is rated, and we should assume that the rate was a valid rate, and that, as his name has been upon the rate-book, and any objection such as those Mr. Keane has alluded to might have been set right, if we can take the rate *prima facie* to be valid we need not go into those questions which possibly might arise if it were a doubt whether the party was rated. Then, has he paid his rate? Now, there was much strength in Mr. Keane's argument, that the payment ought to be appropriated, and if not appropriated by the payer, that the receiver has a right to appropriate it. Actual express words are not essential; the thing may be done in the course of business, or by what one may call a tacit expression between the parties; and though there is very little to found an observation on in the statement of the case, it is clear to my mind that the resp. desired to be qualified; he knew that he ought to pay the arrears of rates in order to be qualified, and he did pay enough to pay off the arrears, but he did not use words to appropriate it to the arrears. I cannot say that there is a great deal as a question of fact to be discussed about the matter. It appears to have been all before the revising barrister; he has given attention to it, and he has found as a fact that the party had so paid as to redeem the qualification. I do not think that he was disentitled.

BYLES, J.—I am of the same opinion. The rate is *prima facie* good; at all events it is only reversible on appeal. With respect to the appropriation of payments, there cannot be the least doubt as to the intention of the payer. I think the receiver knew what the intention of the payer was; but whether that be so or not, there is at least evidence visously to the 5th Jan. last in respect of the house and garden in his own occupation, but at the time of making such payment he did not state or specify to what rate or in respect of which house he paid the said amounts, and the collector placed the amount against all the rates due, namely, 1*l.* 8*s.* 6*d.*

It was objected on behalf of the said Richard Powell that the name of the said Wm. Jones should be expunged from the list of persons entitled to vote in the election of a member for the borough of Kidderminster in respect of property occupied within the said parish of Kidderminster borough, inasmuch as he had not been rated in respect of such house and garden to all rates for the relief of the poor in such parish of Kidderminster borough made during the time of such his occupation as aforesaid, that he had paid. The revising barrister has found that he had, and that being so, it is impossible for us to say that he is not qualified,

KEATING, J.—I am of the same opinion. Mr. Keane very frankly admitted that if what passed when the

resp. claimed to be rated had passed when he paid the rate, there could have been no doubt that there would have been complete evidence of an appropriation. The revising barrister does not find what time elapsed between the claim and the payment, and it is quite consistent with all the facts stated that, in truth, the same impression may have been in the minds of both the payer and the receiver at the time when the payment was actually made. There was, therefore, strong evidence of appropriation; and the revising barrister was right.

*Judgment for the resp. with costs.*

Attorneys: for the app., *Lawrence and Markby*; for the resp., *H. Smith*.

#### POWELL v. BRADLEY.

*Election law—Borough vote—Qualification—Occupation of premises by a person not of full age—2 Will. 4, c. 45, s. 27—6 Vict. c. 18, s. 40.*

*A person claiming to be placed upon the register of voters for a borough, as having been an occupier for twelve calendar months of premises in the borough in the manner required by sect. 27 of the Reform Act (2 Will. 4, c. 45), need not have been of the full age of twenty-one years at the time when his occupation of the premises commenced, it being sufficient if he is of full age when he applies to be placed upon the register.*

*Per Erle, C. J.—The question which a revising barrister has to decide for himself, whenever a person claims to be placed upon the register, is this, "If an elector were now going on would the claimant be legally qualified to vote?"*

Case stated by the barrister appointed to revise the list of voters for the borough of Kidderminster. At a court held before me for the revision of the list of voters for the borough of Kidderminster, Frederick Bradley duly claimed to have his name inserted in the list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of the joint occupation of a foundry and premises at Clensmore, in the parish of Kidderminster borough. The said Richard Powell duly objected to the name of the said Frederick Bradley being inserted in such list of voters.

The said foundry and premises were in the joint occupation of Frederick Bradley and his brother Samuel Bradley for twelve calendar months next previous to the last day of July in the present year.

The said Frederick Bradley attained the age of twenty-one years in the month of March in the present year.

At the said foundry the trade or business of ironfounders was carried on under the firm of John Bradley and Company.

It was objected on behalf of the said Richard Powell that the said Frederick Bradley's name ought not to be inserted in the list of voters for the parish of Kidderminster borough inasmuch as—1. As the said Frederick Bradley was only twenty-one years of age in March in the present year, he could not have occupied as owner or tenant the said foundry and premises for twelve calendar months previous to the last day of July in the present year. 2. The said Frederick Bradley was not of full age during the whole of the twelve calendar months previously to the last day of July in the present year.

I held that the fact that the said Frederick Bradley had attained the age of twenty-one years in March last did not preclude him from occupying the said foundry and premises for twelve calendar months previous to the last day of July in the present year. And I also held that the minority of the said

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Frederick Bradley during a portion of the twelve calendar months previous to the last day of July in the present year, did not of itself constitute a disqualification to his name being retained on the list of voters, and I therefore retained his name on the list of voters.

The said Richard Powell having given notice that he was desirous to appeal from my decision, I allowed his appeal.

If the court shall be of opinion that the said Frederick Bradley's having attained the age of twenty-one years in March last did preclude him from occupying the said foundry and premises for twelve calendar months previous to the last day of July in the present year and was a disqualification, then the name of the said Frederick Bradley is to be expunged from the list of voters and the register of voters is to be altered accordingly.

But if the court shall be of opinion that the said Frederick Bradley's having attained the age of twenty-one years in March last did not preclude him from occupying the said foundry and premises for the time and in manner aforesaid; and that the minority of the said Frederick Bradley during a portion of the said twelve calendar months previous to the last day of July in the present year was not a disqualification, the register of voters is to remain unaltered.

*Kearns, Q. C.* appeared for the app. and referred to 2 Will. 4, c. 45, s. 27;

6 Vict. c. 18, s. 40.

*Dechurst v. Feilden*, 7 M. & G. 182.

*Karslake, Q. C.* (*R. Bourke* with him) appeared for the resp.

*ERLE, C.J.*—I think in this case that the revising barrister was right. The qualification given by the 2 Will. 4, c. 45, s. 27, is that "every male person of full age, and not subject to any legal incapacity," who shall occupy the proper premises, shall, if duly registered, be entitled to vote. It is by the proviso provided that "no such person shall be so registered in any year unless he shall have occupied such premises for twelve calendar months previous to the last day of July in such year." The person entitled to vote must be of full age at the time when he claims to vote. By the statute I am about to refer to, he must be equally of full age at the time when he claims to be put upon the register; but does the statute enact that he must be of full age at the time when the twelve months began to run, during which he must have occupied the property that qualifies him? I think that the statute intended no such thing; and though it has put in the words "every male person of full age, and not subject to any legal incapacity, who shall occupy within such city or borough, and as owner or tenant, any house, &c., of the yearly value of not less than 10*l*, shall, if duly registered, &c., be entitled to vote," the meaning of that is "who shall have occupied," and the proviso is, "that no such person shall be so registered in any year unless he shall have occupied such premises as aforesaid for twelve calendar months," where I think that "such person" means such person of full age, without any legal incapacity at the time of claiming his vote; and I think that this statute, 2 Will. 4, c. 45, ought to be construed together with the 6 Vict. c. 18, s. 40, and that statute makes perfectly clear the idea that was in my mind, namely, that the question for the revising barrister is the question whether, at the time when the claimant claims to be put upon the register, he would, if an election was being held, be a party qualified to vote according to the proper description. Really and truly the revising barrister was substituted for a discussion at the polling booth, *passim exempli*, whether the party was qualified or

not. The words of sect. 40 of the 6 Vict. c. 18, are that the revising barrister "shall expunge the name of every person whose qualification, as stated in any list, shall be insufficient in law to entitle such person to vote." That makes the revising barrister imagine to himself, that an election is going on and that a vote is tendered, and he must ask himself, "Is the claimant entitled according to the description here given?" That part of the section relates to qualification by property. But then you come to the objections and the striking out. The same idea is presented in respect of full age, "and in case the same (qualification) shall not be proved to the satisfaction of such barrister, or in case it shall be proved that such person was *then* (that is at the time of making up the register) incapacitated by any law or statute from voting in the election of members to serve in Parliament, such barrister shall expunge the name of every such person from the lists." I will imagine an election being held; a party comes up claiming to have his name put on the register; the revising barrister has a right to ask him, "Are you of full age?" if the party is incapacitated, he is ordered to expunge the name, and therefore it comes to this, no man shall be put upon the register until he proves his capacity to vote if an election were going on; and therefore it is clear to my mind that what the Legislature intended was, that those who are of full age at the time of an election, and have the other requisites, shall be entitled to give their votes. Upon the construction contended for on behalf of the app. in this case it would create a disability—that the party could not vote till twenty-two years old; whereas the Legislature has for a long time considered that a man is of age at twenty-one, and of full capacity for the enjoyment of all his rights.

*BYTES, J.*—I am of the same opinion. The statute 7 & 8 Will. 3, c. 25, s. 8, enacts, whatever the common law may be, that infants shall not vote, and shall not be elected. That makes the votes of infants void, and subjects elected infants who presume to sit in Parliament to very serious penalties. Now, we ought not, unless we are obliged, to extend the time of legal incapacity beyond the term of twenty-one years, reckoned at the time of voting. Of the questions which can be asked at the election, the question relating to the voter's majority is not one; and, therefore, it is absolutely necessary that he should be of full age at the time of registration. Now, we are asked, without any necessity (as it seems to me), to strain the words of the Act of Parliament, and go further and say that, on the true construction of sect. 27, he must have been of age from the commencement of the occupation which confers on him the qualification. The words are, "every person of full age, who shall occupy,"—that is, as my Lord has pointed out, "who shall have occupied for twelve months." Now, he may occupy for twelve months under two categories, either of which would fall within the Act of Parliament. He may have occupied for twelve months, being during the whole or part of the time under age, which, I apprehend, would be within the words of the Act of Parliament, and he may have occupied for twelve months, being during the whole time of full age. It seems that the contention of the counsel for the app. is this, that he must insert this additional qualification, "being of full age during the whole time of such occupation." There is no necessity to do that in order to give a sensible construction to the Act of Parliament. As I said before, the other construction seems to be the natural one, and it is not followed by the consequence of extending the period of nonage from the age of twenty-one to twenty-two.

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[C. P.]

KEATING, J.—I am of the same opinion. The only difficulty I had in this case was as to how far, if Mr. Keane's argument were not to prevail, an infant could be kept off the register who had occupied for twelve months; but the 40th section of the 6 Vict. c. 18, to which Mr. Keane referred, and which my Lord commented on, has removed any difficulty I felt upon the subject. Therefore I think the revising barrister was right.

*Judgment for the resp.*

Attorneys: for the resp., *Lawrence and Markby*; for the app., *H. Smith*.

Thursday, Jan. 12, 1865.

SMITH (app.) v. FOREMAN (resp.)

*Election law—County franchise—Qualification—Rental of 50l.—Joint occupancy—Tacking of rents of different tenements—2 Will. 4, c. 25, s. 20—6 Vict. c. 18, s. 73.*

*A person claiming a county vote occupied land at an annual rental of 40l., and occupied other land in the same county held of the same landlord, but under a different tenancy, at the annual rental of 64l. jointly with another person. He claimed to add the moiety of the latter rent to the rent for which he was solely liable, in order to gain a qualification for the county franchise as paying rent to a greater amount than 50l.:*

*Held, that neither by the Reform Act nor the Registration Act was he qualified to vote, and that nothing in those Acts authorised the tacking together of rentals for which he was solely and jointly liable, so as to make a gross rental sufficient to confer a qualification.*

At a court holden at Ashford, in the eastern division of the county of Kent, on the 30th Sept. 1864, for the revision of the list of voters for the parish of Braybourne, Henry George Allen duly objected to the name of John Rolfe being retained on the list and register of voters for the said parish.

The facts of the case are these:—

The name of John Rolfe appeared on the copy of the register of persons entitled to vote as follows: "John Rolfe, West Braybourne, occupation of house and land, West Braybourne;" and his name had stood in the register thus for several previous years. John Rolfe had during the qualifying period and for several previous years occupied solely as tenant a house and land at West Braybourne, for which he was *bonâ fide* liable to a yearly rent of 40l. He had also occupied during the qualifying period, and for several previous years as tenant jointly with his father, under the same landlord, other lands, three-fourths of which were also in West Braybourne, and about one-fourth in a neighbouring parish, also within the said eastern division, for which he and his father were *bonâ fide* liable to a rent of 64l. per annum. The hiring of these latter named lands was at a different and subsequent period from the hiring of the first-mentioned house and land, of which John was sole tenant.

I decided that, inasmuch as the occupation and holding of the joint tenant is *per tout* as well as *per mi*, and that John Rolfe was actually *bonâ fide* liable to pay to one landlord a yearly sum as rent exceeding 50l., that is to say, 40l. for his sole occupation, and 32l. at least as his *bonâ fide* share of the rent of the joint occupation, for the lands and other tenements holden and occupied by him as aforesaid, he was entitled to be retained on the same list and register of voters by virtue of the 20th section of 2 Will. 4, c. 25, which enacts that "every male person of full age who shall occupy as tenant any lands or tenements for which he shall be *bonâ fide*

liable to a yearly rent of not less than 50l. shall be entitled to vote," and I retained his name on the register and list of voters accordingly.

If the court shall be of a contrary opinion, the name of John Rolfe ought to be expunged from the said register of voters for the eastern division of Kent.

Henry G. Smith, on behalf of Henry George Allen, was the app. from this decision, and F. Foreman, on behalf of J. Rolfe, was the resp.

*R. Bourke* appeared for the app.—The two rents paid by the claimant cannot be joined together so as to make up 50l. He pays 40l. for rent within the provisions of the Reform Act, and 32l. for rent within those of the Registration Act, as he is sole tenant of lands at 40l. and joint tenant of lands at 64l. The case differs only from *Gadsby v. Barrer*, 1 Lutw. 142, inasmuch as in that case the properties were held under different landlords. In this case they are held of the same landlord. He referred to—

1 & 2 Will. 4, c. 25 (the Reform Act), s. 20;  
5 & 6 Vict. c. 18 (the Registration Act), s. 73.

*Hannen* (Underdown with him) for the resp.—No reason can be given why the Legislature should prevent a man from tacking two single holdings held under the same landlord. It has never, however, been decided. Elliot, in his book on Registration, says that revising barristers have differed in opinion on the subject. It has been decided under a local Act requiring a certain rental to give a qualification for voting that the rentals of separate tenements may be tacked:

*R. v. The Churchwardens of St. Pancras*, 1 A. & E. 20.

ERLE, C. J.—I think that the decision of the revising barrister in this case was wrong. The qualification given under the Reform Act is a rent of 50l. The claimant pays a rent of 40l. and he cannot qualify without the aid of the Registration Act, 6 Vict. c. 18, which provides for the qualification of persons occupying jointly. The words which give that qualification are precisely limited, and I do not feel myself at liberty to say that any qualification arises out of a state of things not mentioned by the words of the enactment. "where any such lands and tenements shall be jointly rented and occupied by more persons than one, each of such joint occupiers shall be entitled to be registered and vote in such election as last aforesaid in respect of the lands and tenements so jointly rented and occupied, in case the yearly rent for which they shall be *bonâ fide* liable in respect of such lands and tenements shall be of an amount which, when divided by the number of such occupiers, shall give a *bonâ fide* rent of not less than 50l. for each and every such occupier, but not otherwise." Now the claimant occupied, jointly with his father, another tenement, for which they together were liable for 64l., and the claim is to have 32l. of the jointly-rented premises added to 40l., and so to make up the 50l. But the words of the statute do not authorise the junction of these two rents. If he claims under the qualification given to the joint occupants he must show a joint occupation giving to each of the joint occupiers 50l. If they have each less than 50l. the statute says they shall not be qualified. I do not pretend to fathom the intentions of the Legislature further than the clear words of the enactment guide me. The first statute says, if you are a tenant for 50l. you may vote; the second says, if you are a joint tenant, and hold 100l. jointly with another person, then each of you may vote; but unless the joint holding is such as to give every one of the joint holders 50l. then you are not entitled. It may be that the difficulty of adding the separate rent to the apportionment

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[C. P.]

of a joint tenancy might be expected to create confusion; but I do not pretend to fathom the intentions of the Legislature. It seems that the claimant is unqualified under either of the statutes, and that the revising barrister's decision is wrong, and must be reversed.

WILLIAMS, J.—I am entirely of the same opinion. It seems to me impossible to come to any other conclusion upon the language employed in the 73rd section of the Registration Act, and upon the ordinary construction of the words used.

WILLES and KEATINGE, JJ. concurred.

*Judgment for the app.*

Attorney for the app., *H. Smith.*

Attorneys for the resp., *Amory, Travers and Smith.*

Jan. 13 and 14, 1865.

FLATCHER v. BOODLE.

*Rates—Payment by incoming tenant of proportionate part of a rate—17 Geo. 2, c. 38, s. 12—2 Will. 4, c. 45, s. 27.*

*A. entered on the occupation of some premises in a borough before the 1st Aug. 1863, and claimed in respect of the same to be registered as a 10l. householder. The outgoing tenant left part of a rate, which was made in April 1863, and extended to September, unpaid; neither did A. pay it, as it was not demanded of him; neither was his name inserted in the rate; he, however, paid the subsequent rates, which were made half-yearly:*

*Held (Williams, J. dissentiente), notwithstanding the 12th section of 17 Geo. 2, c. 38, which enacts that the incoming tenant is liable to pay a proportionate part of such rate, and the 27th of 2 Will. 4, c. 45, which enacts that no householder shall be registered unless he has paid all rates payable from him in respect of the premises for which he claims; that, as he had no notice from the parish officers to pay the proportionate part of the rate of April 1863, it was not payable from him within the meaning of the 27th section, and that he was entitled to be registered.*

This was a consolidated appeal from the revising barrister of the borough of Cheltenham.

J. Flatcher duly objected to the name of James Barrington being retained on the list of voters for the borough of Cheltenham, on the ground that a portion of the poor-rate for the qualifying year had not been paid. It was proved before the revising barrister, that the poor-rates of the parish in which the qualifying premises are situated are made half-yearly; and that one was made in April 1863, which extended to the following September, when another was made which extended to March 1864, in which month a new rate was made, which is the existing rate.

The voter went into occupation of the qualifying premises prior to Aug. 1, 1863, but paid no portion of the rate then in existence, which was not demanded of him, neither was his name inserted in that rate.

It was contended against the voter, that inasmuch as 2 Will. 4, c. 45, s. 27, requires the payment of all rates payable from the voter, he should have gone to the overseers and paid his portion of the April 1863 rate, to which he was rendered liable by 17 Geo. 2, c. 38, s. 12, and if any dispute had arisen as to the amount they could have had it settled by the justices in the manner provided by that section, and the voter having failed to adopt this course, he was disqualified, for the omission was not

remedied by any provision in the Registration Acts, as 6 & 7 Vict. c. 18, s. 75, only applies to a misnomer, or inaccurate or insufficient description.

The revising barrister held that, as the Act of Geo. 2 does not say that the incoming tenant shall pay, but only that he shall be liable to pay, and as his proportion which he is so liable to pay must before he can pay it be first ascertained either by agreement between the parties, or in case of dispute by the decision of two or more justices of the peace, and as by 6 Vict. c. 18, s. 75, a person in other respects qualified shall be considered as having paid all rates when he shall have *bonâ fide* paid all sums of money which he shall have been called upon to pay as rates, therefore an unascertained proportion which the voter had never been called upon to pay was not such a rate as had become payable from him in respect of the qualifying premises within the meaning of 2 Will. 4, c. 45, s. 27, and he overruled the objection and retained the name.

If the court should be of opinion that the revising barrister was wrong, the name of J. Barrington was to be expunged from the list. There were three other cases in which the same point was raised, which were consolidated with this case.

Sec. 12 of 17 Geo. 2, c. 38, recites that "persons frequently remove out of parishes and places without paying the rates assessed upon them, and other persons do enter and occupy their houses or tenements part of the year, by reason whereof great sums are annually lost to such parishes," and enacts,

That where any person or persons shall come into or occupy any house, land, tenement, or hereditament, or other premises, out of or from which any other person assessed shall be removed, or which at the time of making such rate was empty or unoccupied, that then every person so removing from, and every person so coming into or occupying the same, shall be liable to pay to such rate in proportion to the time that such person occupied the same respectively in the same manner and under the like penalty of distress as if such person so removing had not removed, or such person so coming in or occupying had been originally rated and assessed in such rate, which said proportion shall, in case of dispute, be ascertained by any two or more of His Majesty's justices of the peace.

Sec. 27 of 2 Will. 4, c. 45, which confers a vote upon the occupier of a house, &c., of the annual value of 10l., if duly registered, provides that

No such person shall be so registered in any year unless such person shall have been rated in respect of such premises to all rates for the relief of the poor, &c., or unless he shall have paid on or before the 20th day of July in such year all the poor's rates and assessed taxes which shall have become payable from him in respect of such premises previously to the sixth day of April then next preceding.

Sec. 75 of 6 Vict. c. 18, after reciting 2 Will. 4, c. 45, and that doubts had arisen how far any misnomer or inaccurate or insufficient description in a rate of the person occupying any such premises as in the said recited Acts are mentioned, enacts

That where any person shall have occupied such premises as in the said recited Acts are mentioned, for twelve calendar months next previous to the last day in July in any year, and such person being the person liable to be rated for such premises, shall have been *bonâ fide* called upon to pay in respect of such premises all rates made for the relief of the poor in such parish or township, during the time of such his occupation so required as aforesaid, and such person shall have *bonâ fide* paid, on or before the twentieth day of July in such year, all sums of money which he shall have been called upon to pay as rates in respect of such premises for one year previously to the sixth day of April then next preceding, such person shall be considered as having been rated and paid all rates in respect of such premises within the meaning of the said recited Act, and be entitled to be registered in respect of the same in any year; any misnomer or inaccurate description in any rate of the person so occupying or of the premises occupied notwithstanding.

Dowdeswell, for the app., contended that the statute of 17 Geo. 2, c. 38, created a liability to pay such proportion of the existing rate as the outgoing tenant had not paid from the termination of his tenancy, and that this proportion not having been

paid, it was payable by the claimant under sect. 27 of the Reform Act, and he was bound to pay it in order to be entitled to vote. If he did not know the proportion, it was easy for him to have ascertained it and then tendered the amount to the parish officer, and then, in case of dispute, he could have had the amount settled by the justices. He cited

*Bishop v. Smedley*, 2 C. B. 90;

*Ford v. Smedley*, 12 C. B. 622;

*Moss v. Lichfield*, 7 M. & G. 72.

*Campbell Forster*, for the resp., contended that no part of the existing rate was payable by the incoming tenant until a demand had been made upon him of the proportionate amount of the existing rate to which he was liable. That, on a demand being made, then the sum demanded, if not disputed, became an existing debt, "payable" by the incoming tenant. If disputed, two justices were to assess the amount to be paid, which, when "assessed," but not before, could be enforced by distress-warrant, if payment were refused. That the incoming tenant could not know what amount was his proportion of the existing rate until a demand was made; for the outgoing tenant might have paid the whole, and rates were irregular as to the periods when they were made, differed in their amount, and were due when made; they were not on the same footing as assessed taxes, for, as Maule, J. pointed out in *Ford v. Smedley*, they were ascertained in amount, and were made payable quarterly. That even if the unascertained amount which a man was liable to pay was a sum "payable from him" within the 27th section of the Reform Act, it was nevertheless cured by the 75th section of 6 Vict. c. 18.

*Dowdeswell* replied.

**BALE, C. J.**—In this case the question for the consideration of the court is, whether the claimant is disqualified from voting by reason of the non-payment of rates which have become payable from him in respect of the qualifying premises. The facts are, that the claimant came into possession before Aug. 1868, and that the custom in the parish was to make rates half-yearly. The claimant has paid all the rates during the time of his occupation of the premises, but some portion of the rate, from April to Oct. 1868, was left unpaid; and it is contended that portion had become payable from him within 2 Will. 4, c. 45, s. 27, by virtue of 17 Geo. 2, c. 38, s. 12. In this case some arrear of that rate had been left unpaid by the outgoing tenant, but, until the sitting of the revising barrister, the claimant believed that everything due from him had been paid. Mr. Dowdeswell contends that there was a liability to pay under the statute of Geo. 2, and that the rate was "payable from" the claimant by virtue of that statute; but I take the words of the 12th section of that statute to mean that the claimant was subject to be made liable to pay a proportion of the rate, and not that he was primarily liable. It was not a liability of which the claimant had a means of knowledge. The amount depended on a contingency, because the outgoing tenant might have paid the rates beyond the time that he was in occupation, and until the claimant had been called upon to make good the default of the outgoing tenant to pay the whole rate, I think that amount was not "payable" by him, and that he was not disqualified under the 27th section of the Reform Act. The words in that proviso, "payable from him," in my opinion involve the idea of a definite sum payable in *presenti*, of which he has been guilty of some default, and it was not a sum which the claimant had no possibility of ascertaining till called upon to pay it. The words in the section are "payable from him," not "in respect of what he shall have become liable to," but in respect of "what

shall have become payable," and until the contingent amount of his liability had been ascertained, he could not know what was payable from him. The proviso takes away the franchise in case the claimant has not borne his share of the public burden imposed by poor-rates and assessed taxes. But poor-rates differ totally from assessed taxes, the latter being payable at certain periods and of certain amounts, whereas the extent of the poor-rates cannot be foreseen, as they are laid according to the requirements of the parish, and in some cases a peremptory *mandamus* may be made by the Q. B. to make and pay them forthwith; they are due the instant the rate is complete. This rate, too, is variously paid; by the wealthy, at any time the collector chooses to call for it; from the poor as it can be obtained. Nobody, therefore, can tell what has been left unpaid by the outgoing tenant. It might be, if the tenant were rated at one shilling in the pound, and the rate was collected weekly, that the sum might be a halfpenny per week, and the outgoing tenant might have left an arrear of only a week or so; was the election agent to be able to disfranchise the incoming tenant, because these trifling sums had not been paid, and of which he could know nothing? It is clear to my mind that the proportionate amount of the rate never became "payable" until the amount was ascertained; and I think, therefore, that the revising barrister was right in his decision.

**WILLIAMS, J.**—I have the misfortune to differ with the rest of the court. The franchise was made subject to certain conditions, one of which was that the party claiming to vote shall have paid, before the 20th July, the poor-rates which shall have become payable from him in respect of the premises; and the question is, has the claimant fulfilled that condition? It appears to me that he has not. Under the statute of Geo. 2, the incoming tenant is liable to pay his portion of the existing rate, and the question is, what proportionate amount is payable by him? It is said that it is not payable by him, because, whether he is liable to pay any given amount depends on a variety of circumstances not ascertained, and until they are ascertained no particular amount is payable. But the statute of Geo. 2 says he is "liable to pay," and I am of opinion that he is liable to pay a sum which becomes payable within the meaning of the 27th section of the Reform Act. I think he is liable to pay the proportionate part of the rate when ascertained, and it matters not whether there may be a difficulty in ascertaining it or not; and as to no demand being made, it cannot properly be made for a thing that is already payable. He is therefore liable for the proportionate amount, whatever that amount may be. That being so, it is impossible to say that the claimant has paid all the poor-rates to which he has become liable in respect of his occupation, or that he has paid all that have become payable, inasmuch as he has not paid the proportion of the rate due from him under the statute of Geo. 2, and which I think he is liable to pay, and is payable from him under the words of that statute.

**WILLES, J.**—I am of opinion that the revising barrister was right, or at all events I cannot see any way clearly to say that he was wrong. The question no doubt is one of very considerable nicety. The incoming tenant could not know what portion of the rate was paid, and no claim was made on him by the parish officers. The revising barrister held there was a distinction between nonpayment of such a rate, and nonpayment of a rate made while the claimant was in occupation. The outgoing tenant cannot be bound to take notice of such a rate were paid, and unless one goes to the point of



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saying that he was bound to make the inquiry, how was he to know? I think the statute of Geo. 2 was not intended to regulate generally the rights of outgoing and incoming tenants, but to give the parish officers a remedy in respect of a proportion of the rate according to the time of occupation; and provision is made in the case of an outgoing tenant not paying the rate. There is a distinction between the ordinary liability to pay a rate, and the conditional liability to pay where the outgoing tenant has not done so. In construing this Act it should be borne in mind, that the register is but evidence of the right to vote, and that the liability under the statute of George is but a condition imposed upon the right; and I see no reason why the ordinary law respecting conditions should not be applied. The claimant is entitled to have the condition enforced against him, with the same strictness as a condition regarding any other right would be enforced but no more. The parish officers were like the obligees in an ordinary bond, and the claimant was like the obligor. If the condition had not been performed the ordinary principle ought to be applied, which was to give notice, and the notice ought to be given by the person who was to receive the money or the estate, otherwise there could be no forfeiture. That person here is represented by the parish officers, and until they gave notice of the rate being due, there was no default. I think therefore that this claimant is entitled to his vote.

**KASTING, J.**—I agree with my Lord and my brother Willes that the revising barrister was right. The claimant not having himself necessarily any notice of the state of things which would make the existing rate payable by him, when he entered upon his occupation, there was an obligation on some one to give him notice, and I think the parish officers ought to have done so. The statute of Geo. 2 contemplates the outgoing tenant going away and leaving the rate unpaid, and the rate so unpaid would become payable by the incoming tenant. But it seems to me to be a reasonable construction, that no demand having been made, or notice given to the claimant that a proportion of the existing rate was due, it has not been shown this was a rate "payable" by him.

*Decision affirmed.*

*Tuesday, Jan. 17, 1865.*

**FREEMAN v. GAINSFORD.**

*Claim to a vote as a 40s. freeholder in respect of a share in a music-hall—Shareholders entitled to a share in the profits.*

*The app. claimed a right to vote in respect of a share in a music-hall. The proprietors had in 1864 by deed vested the music-hall, and the power of management, in trustees, reserving to themselves a right to proportionate shares of the profits, but no direct interest in the lands or property, and one of the provisions of the deed was, that if all the proprietors should not execute it, the same should nevertheless bind all the parties who did execute the same:*

*Held, in accordance with the case of Bennett v. Blain, that the claimants had no direct interest in the land so as to entitle them to be registered, but only a share of the profits, and also that the argument that some of the proprietors had not executed was not available on account of the provision above referred to.*

*At a court held before me, the revising barrister appointed to revise the list of voters for the West Riding of the county of York, Thomas Hadfield objected to Charles Stanley as not having been entitled on the last day of July 1864 to have his*

*name retained on the list of voters for the township of Sheffield in and for the West Riding. The name stood on the copy of the register relating to the township of Sheffield as follows:*

Christian name.	Place of abode.	Nature of qualification.	Place in township.
Charles Stanley.	81, Throgmorton-street, London.	Freehold shares.	Music-hall, Surry-street.

*By a deed made on the 2nd Oct. 1828, certain persons became entitled to undivided freehold shares in the Sheffield Music-hall, and claimed to be on the register of voters, and it was admitted that the provisions of that deed were such as to qualify them to be there. A subsequent deed, dated the 13th June 1864, was prepared, a copy of which is appended to and is to be read and taken as a part of this case.*

*It was agreed that the income received by the claimant, and by each of the other four claimants after-mentioned, is in annual amount sufficient to qualify, if the court should be of opinion that he and they are in other respects qualified and entitled to remain on the register. This deed was, previous to the 31st July last, executed by but thirty-two of the proprietors of shares in the music-hall, they being proprietors of 110 out of the whole 184 shares. There are twenty-five other proprietors by whom it was not then executed; by some small number of whom it has since been executed. The present claimant and the four other claimants after-named had, however, all executed this deed previous to 31st July last, as also had all the new trustees.*

*It was contended, for the claimant, that the second deed of the 13th June last had not yet come into operation so as to constitute a new body of trustees; and inasmuch as twenty-five proprietors representing the seventy-four 184th share, have not yet executed the deed, that until the whole had signed no trustees thereunder are effectually appointed and the rights of those who have not are not affected by its provisions. It was also urged that the said deed could not operate in any way until it had been executed by all the shareholders, and that the only deed before the court was the original deed of 1828.*

*It was also argued, on behalf of the claimant, that even if the effect of the deed of the 13th June was to create a body of trustees for the purposes therein named, such creation would not destroy the equitable freehold interests of the claimant and his co-proprietors in the music-hall.*

*For the resp. it was argued that the proprietors, being resident in various distant places, and inasmuch as it would, in all probability, be long before the deed of 1864 could be executed by all of them, clause 32 of that deed was inserted for the very purpose of making the deed valid and effectual as to the share of those who from time to time executed it, even although not executed by all of the proprietors; that all the present claimants had executed the deed of 1864, and that their shares were therefore liable to the operation of it; that each proprietor of an undivided 184th share was competent to execute a deed declaring trusts respecting his share, and that, on the execution of such deed, his share would be liable to such trusts; that what one could do without the concurrence of any intermediate number of proprietors, he could do without the concurrence of all, and bind his own shares as effectually as all the shares would be bound by the execution of all, and that in this instance a majority of the shareholders holding a majority of the shares, and all the new trustees had executed the deed of 1864, and they had therefore practically the power and control in their hands.*

*Under the circumstances I was of opinion that the*



claimant ought not to have been on the register, and expunged his vote. If the court should be of opinion that the said Charles Stanley and the other claimants are not disqualified under the provisions of the said deed of 13th June 1864, the register should be amended by the insertion of the names of the said Charles Stanley and the other claimants; but if the court should be of opinion that they are disqualified by that deed, then the register should remain as amended by me.

This is a consolidated appeal of five cases, which all depend on the same decision; and I hereby appoint John Freeman, a party interested and consenting, to appear for the apps., to prosecute the said appeals, and I hereby appoint Robert John Gainsford in like manner to be resp. in the said appeals.

The deed of the 13th June 1864 was made between the proprietors of the music-hall, whose names and seals were affixed of the first part, and the trustees of the second part; and which after reciting the deed of 1828 vesting the fee of the music-hall in trustees for the proprietors, and a subsequent mortgage under the powers of that deed, contained a mutual agreement between the parties thereto, that the Sheffield Music-hall, and the shares, estates and interests therein of the parties of the first part should be governed by the rules thereafter appearing numbered 1 to 33.

The following are the material rules:—

1. The parties hereto of the second part, their heirs, assigns and successors in office, shall be trustees of the Sheffield Music-hall, and shall have the several powers hereinafter appearing and distinguished by the letters A. to L. :—
  - A. To vest or cause to be vested the fee-simple and inheritance of the Sheffield Music-hall in themselves or any of their body for the time being or in such person or persons as the trustees shall think proper.
  - B. To give directions to the said Offley Shore, his heirs and assigns, or other the person or persons for the time being entitled to the fee-simple and inheritance of the said Sheffield Music-hall, and to the said Marcus Smith and James Henry Barber, or their executors, administrators and assigns, or other the person or persons for the time being entitled to the term of years mentioned in the said indenture of the 26th day of Aug. 1833 with regard to any lease, mortgage, sale, agreement, deed, conveyance, or assurance action, suit or other proceeding, matter, or thing which the trustees may think it proper that the persons receiving such directions should make, begin, do, or concur in.
  - C. To grant or cause to be granted any lease, or create any tenancy for any period not exceeding a tenancy from year to year, and subject to any provision.
  - D. With such consent as is mentioned in rule 7, to grant or cause to be granted any lease, or create any tenancy for any period exceeding a tenancy from year to year.
  - E. With such consent as aforesaid to enlarge or alter the existing buildings, and to acquire any additional land, buildings, easements or rights.
  - F. To pay off, transfer, or otherwise deal with any mortgage for the time being existing, or to make or cause to be made any new mortgage either in fee or for any term of years or otherwise for any sum or sums not exceeding the amount of such existing mortgage.
  - G. With such consent as aforesaid to make or cause to be made, any new mortgage either in fee or for any term of years or otherwise for any money exceeding 2600*l.* or other existing principal mortgage money.
  - H. With such consent as aforesaid to sell.
    - I. To execute and cause to be executed such agreements, mortgages, conveyances, deeds and assurances, as they shall think proper, and to receive or direct the payment or receipt of any money, and generally to do all acts necessary for effectually exercising the foregoing powers or any of them, and especially to confer on any mortgagee or mortgagees any powers of sale or lease or other powers, and upon any sale to make any reservations especially with regard to minerals or easements.
    - J. Generally in all matters not hereinbefore specified to deal with and manage the Sheffield Music-hall as if the trustees were the absolute beneficial owners thereof.
    - K. To receive the rents and annual profits and all income and capital monies arising from the Sheffield Music-hall or the exercise of the powers aforesaid.
    - L. To make from time to time bye-laws for regulating their proceedings as amongst themselves, and especially to name a quorum for meetings of their own body.
    - M. Out of the rents and annual profits, and money in the nature of income and not capital, the trustees shall annually, or oftener if they think proper, declare a dividend, and such dividend shall be divided amongst the proprietors, according to their respective shares in the Sheffield Music-hall. The trustees

may, from time to time, set aside such money (if any) as they shall think proper, as a reserved fund, to meet contingencies and in aid of future dividends, and such reserved fund shall rank as capital until it is otherwise appropriated. The reserved fund shall never, however, exceed 500*l.*; it may be invested by the trustees upon any securities allowed by law for trust-money, or upon mortgage of freehold, copyhold, or leasehold hereditaments, or upon the mortgages or debentures; or if preferential stocks or shares of any municipal or other corporation or company incorporated by special Act of Parliament, and the income therefrom shall rank as income from the Sheffield Music-hall.

7. The several powers hereinbefore given to the trustees, and respectively distinguished by the letters D, F, G and H, shall be exercised by the trustees with the consent of the proprietors, testified by the resolution of a special general meeting of them, or by writing under the hands of such number of the proprietors as shall represent two-thirds of the shares.

#### "FORM OF TRANSFER."

"I, \_\_\_\_\_, of \_\_\_\_\_, being the proprietor of the share No. \_\_\_\_\_ in the Sheffield Music-hall, in consideration of the sum of \_\_\_\_\_ sterling, paid to me by \_\_\_\_\_, of \_\_\_\_\_, do hereby grant the same share to the said \_\_\_\_\_, his heirs and assigns, subject to the provisions of the association-deed, dated the 13th day of June 1864, and to any rules in force in pursuance of such deed; and I, the said \_\_\_\_\_, do hereby accept the said shares, subject to such provisions and rules."

"As witness our hands and seals this \_\_\_\_\_ day of \_\_\_\_\_"

32. If all the proprietors of shares in the Sheffield Music-hall shall not execute these presents, the same shall nevertheless bind all the parties who do execute the same, and the same proportion of majorities of the parties who do so execute shall bind the whole of them as are hereinbefore appointed to bind the whole body of proprietors.

Cleasby, Q.C., for the app., contended that the deed of 1864 did not deprive the shareholders of the equitable interests which they had previously enjoyed, but merely altered the management of the affairs of the music-hall; and that the shares were actual shares in the building itself, and not merely in the profits, and consequently that the case did not come within that of *Bennett v. Blain*, 9 L. T. Rep. N. S. 506; 15 C. B., N. S., 533; and also that the deed was not operative until all the proprietors had executed it.

Hannen, for the resp., contended that as to the last point the 32nd rule was conclusive; and as to the other, that the shareholders had only a right to a share of the profits, and had no direct interest in or right to any specific portion of the property of the company, and therefore that they were not qualified to vote.

Cleasby, in reply, referred to  
*Baxter v. Brown*, 7 M. & Gr. 198.

ERLE, C. J.—I am of opinion that the decision of the revising barrister ought to be affirmed. I have looked at the provisions of this deed, and at those in the case of *Bennett v. Blain*, and it seems to me that the two deeds operate substantially to produce the same interest, and that is the interest in the profits which are made by the management of the concern. I take the principle laid down by my brother Williams in *Bennett v. Blain* to be sound in law; that under deeds like this the shareholder has no direct interest in the land, but only a right to a share of the profits. The point about the whole of the shareholders not having executed, I think, is not available for the app., because the 32nd clause has made a provision that the deed shall be binding on every one who executes it, which precludes the app. from any benefit on that point.

WILLIAMS, J.—I am also of opinion that we are bound in this case by the case of *Bennett v. Blain*; the principle on which that case was decided is quite applicable to the present, and I do not see anything that Mr. Cleasby has said that prevents its application. That principle I apprehend to be, that the trust on which the equitable claim in question is founded gives no direct right to any portion of the receipts of the music-hall, but only to a proportionate share of the profits. That is a principle that has governed a long series of cases,

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on a question of whether this sort of property is real or personal estate within the Statute of Mortmain. On that principle all the cases have been based, and it seems to me it is impossible to say that this decision is wrong.

WILLES, J.—I am of the same opinion, and I give judgment in the language of my brother Williams in *Bennett v. Blain*, where he says “a shareholder in a company of this description has no direct interest in or right to any specific portion of the property of the company, but only a right to receive a share of the profits.”

KEATING, J.—I am of the same opinion. I think there is nothing in this deed to distinguish this case in principle from the case of *Bennett v. Blain*.

*Judgment for the resp.*

Wednesday, Jan. 18, 1865.

SCOTT (app.) v. DURANT (resp.)

*Borough vote—Signature of case by resp.*

*The revising barrister for a borough held his court on the 21st Oct., when certain objections were raised by the attorneys of the resp. to the app.'s vote. The barrister adjourned the court till the 28th, when he decided in favour of the resp. on one point, and against him on the others. He was asked by the app. to grant a case, which he said he would do, and it was agreed that all objections on points of law should be waived, and that the resp. should appear to answer the appeal; it was also agreed that the case should be brought to the barrister's chambers to be settled, and that the resp.'s attorney should have an opportunity of stating the points he had raised, which had been overruled. On the 4th Nov. the attorney of the app. showed the case to the resp., but, as he was unable to show it to his attorney, and as a point raised by him had not been inserted, he refused to sign it. On the following day the barrister signed it:*

*Held, that the appeal must be struck out, as it was incomplete, and therefore not before the court.*

This was a rule calling on the app. to show cause why the case should not be struck out of the list of appeals in this court from the decisions of the revising barristers, on the grounds that there was no notice in writing given by or on behalf of the said app. before the revising barrister's court; that the revising barrister did not state the case on his decision, or read the statement, or indorse or sign it in open court, or as required by the statute, 6 Vict. c. 18, s. 42; and that the requisitions of the 44th section of the said statute were not complied with; and that no declarations were signed, and no resp. or app. appointed as required by the said last-mentioned statute; and that Durant was improperly entered as resp.

It appeared from affidavits produced that at the court of the revising barrister for the borough of New Windsor, held on the 21st Oct. last, Mr. Rogers, as attorney for Durant, the resp., raised certain objections against the names of the app. and others being retained on the register. The revising barrister said that he should take time to consider, and adjourned his court to the 28th Oct., when he gave his decision in favour of the objector on one point, and against him on the others, and struck out the names from the list. He was then asked by the parties who appeared for the apps. for a case, which he said he would grant if he could, but as it was getting near the end of the day, and a good deal of business to be done, it was agreed that all objections on points of law should be waived, and that the resp. should appear to answer the appeal

in this court; Durant at the time stating in open court that he would so appear, and that the appeals might be consolidated. This being settled, the revising barrister said that Rogers should have an opportunity of stating the objections which he had raised, and which had been overruled. It was then agreed that the parties should bring the case to the chambers of the revising barrister, which were in London, for him to settle. On the 4th Nov. nothing having been done prior to that day, Long, the solicitor to the apps., brought a draft of the case to Durant, which he took to Reading for Rogers's approval, but as he was absent from home he brought it back and returned it to Long, stating that he could not sign it, as Rogers had not seen it, and also as a point raised by him had not been inserted.

On the 5th Nov., which was the last day for doing it, the barrister signed the case, and Long on the same day gave a copy of it to Durant.

The rule having been obtained upon these facts,

Sawyer now showed cause against it.—It was agreed by the parties that the requirements in ss. 42-45, of 6 Vict. c. 18, should be dispensed with, which could be done, as they are merely directory and not imperative, and they differ from ss. 62 and 64, the latter having negative words in them which make them imperative, which the others have not: (*Autey v. Topham*, 5 M. & Gr. 1.) Then they say that the barrister has no jurisdiction to sign a case out of court, and that consent cannot give the jurisdiction; and *Knowles v. Holden*, 24 L. J. 223, Ex., will probably be relied on. But there the Court held that there was no jurisdiction, because there were negative words, and it is not like a case where there is jurisdiction at first, which is afterwards extended by the consent of the parties: (*Andrews v. Elliott*, 5 E. & Bl. 502.) Then it is said that, under sect. 43, Durant ought to have signed the case, and been resp.; but, as he did not decline to be resp. in writing, the barrister could not name any one else as resp., and therefore the signature, under sect. 44, became unnecessary. Then, by sect. 33, the barrister is to hold his court between the 15th and 31st Oct. and they therefore say that section prevents the barrister from doing anything after that date; but I contend that is a provision which only applies to the actual business, and does not apply to the mere signing of a case, and even if it did, then it would be cured by the consent I have relied on. There is the case under the Irish Act, of *Agnew v. Fowler*, 1 Ir. C. L. Rep. 462, relied on by the other side, which, however, I submit, is not good law; and, even if it was, it does not apply here, as in that case there was no consent between the parties. [KEATING, J.—In *Whithorn v. Thomas*, 7 M. & Gr. 1, I was the revising barrister, and signed the amended case in this court.] He also referred to

*Pring v. Estcourt*, 4 C. B. 71;

*Freeman v. Reed*, 30 L. J. 123, M. C.;

*R. v. Mayor of Rochester*, 7 E. & Bl. 910.

Griffiths in support of the rule.—There was no consent to the case as now stated. There was an understanding that the app.'s attorneys should state a case subject to the approval of Rogers, and then that it was to be taken to the revising barrister for signature. Then there was no written notice of the desire of the parties whose names were struck out to appeal; and the barrister did not state the facts and his decision in writing, nor read such statement in open court to the app. and then and there sign it. Then, as this is a consolidated appeal, the Act requires that the case should be stated and read in open court, and unless it is so stated and read there is no appeal. Now, the app. did not make the written declaration as required by sect. 42. There was no statement of the case by

the revising barrister; nor was the case read in open court, nor signed then and there by the barrister, nor signed by the app. at that time; nor was there such indorsement on the statement as required by the Act; neither did the barrister declare the appeals consolidated, or appoint a resp. according to sect. 44. Then, where the statute gives the subject power to appeal under certain conditions, these conditions must be complied with before the parties can appeal, and the matters required by the statute cannot be waived by consent, and even if they can, there was no consent here.

ERLE, C. J.—A great many points have been raised in this case, but we are obliged so give judgment in favour of Mr. Griffiths, on the ground that the appeal is incomplete, and therefore not before us.

WILLIAMS, WILLIS and KEATING, JJ. concurred.

*Rule absolute.*

Wednesday, Jan. 25, 1865.

STACEY (app.) v. WHITEHURST (resp.)

*Game—Trespass in pursuit—Aiding and abetting—*  
11 & 12 Vict. c. 43, s. 5.

*The resp. was charged before justices, under 11 & 12 Vict. c. 43, s. 5, with aiding and abetting A. in committing a trespass in pursuit of game. The evidence before the magistrates was, that the resp. and A. were driving along a high-road in a trap, and that A. got down and went into an adjoining field, and shot a hare which he brought back and placed in the trap. The resp. remained in the trap, which he kept standing still till A. returned with the hare. The resp. then drove the trap along the road, A. walking behind. A. was convicted of trespassing in pursuit of game:*

*Held, that there was evidence from which the justices might convict the resp. of aiding and abetting in the offence of trespassing in pursuit of game, and that the resp. might have been convicted as a principal.*

Case stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions holden at Crackton, in and for the division of Ford, in the county of Salop, on the 28th Oct. 1864, an information was preferred by Charles Stacey (hereinafter called the app.) against Thomas Teece Whitehurst (hereinafter called the resp.) under sect. 5 of the Act of 11 & 12 Vict. c. 43, charging that John Whitehurst, on the 11th Oct. 1864, at the parish of Pontesbury in the county aforesaid, did unlawfully commit a certain trespass by entering and being in the daytime of the same day upon a certain piece of land in the possession and occupation of Stephen Jones, there in search or pursuit of game, to wit, a hare, without the licence and consent of the owner of the land so trespassed upon, or of any persons having any right of killing the game upon such land, or of any other person having any right to authorise the said John Whitehurst to enter or be upon the said land for the purpose aforesaid, contrary to the form of the statute in such case made and provided; and that Thomas Teece Whitehurst, of the Mount, Shrewsbury, in the said county, was then and there present aiding and abetting the said John Whitehurst to do and commit the said offence. And upon the hearing we dismissed the said information against the said Thomas Teece Whitehurst upon the grounds hereinafter stated.

The said John Whitehurst was, before the hearing of the above information, convicted of the trespass and fined in the penalty of 2*l.* and costs.

Upon the hearing of the information it was proved on the part of the app., that on the 11th Oct. 1864, at the parish of Pontesbury, in the county of Salop, the said John Whitehurst and the resp. were

passing along the turnpike-road in a trap on their way to shoot at the Oaks Farm, belonging to their sister; and when near the Lea-cross in the said parish of Pontesbury, the trap, which was driven by the said Thomas Teece Whitehurst, was stopped, and that the said John Whitehurst got out of the trap and entered a field in the occupation of Mr. Stephen Jones with a gun and a dog, and shot a hare, which he picked up, and on returning into the turnpike-road, where the trap had stopped a minute or so, gave the hare to the resp., according to the evidence of two witnesses at the distance of 100 yards and a quarter of a mile respectively. The resp. then drove along the road, and the said John Whitehurst walked about five or six yards behind the trap to the public-house at the Lea-cross.

It was contended, on the part of the resp., that he was not an aider and abettor in the trespass, inasmuch as he was passing along the turnpike-road for a lawful purpose on his way to shoot on his sister's farm at the Oaks (which was not denied or questioned), and that he (the resp.) was not there for the purpose of aiding and abetting in the commission of the trespass, and that not having left the trap he could not be an aider and abettor; and that so soon as the said John Whitehurst returned into the said turnpike-road, the trespass had been committed and completed. And we being doubtful whether upon the evidence given before us the resp. was in law an aider and abettor, thought it right to dismiss the case as against the said resp. Thomas Teece Whitehurst.

A copy of the depositions accompanies this case, and which copy, so far as relates to the said Thomas Teece Whitehurst, is to be taken to form part of this case.

The questions of law arising on the above statement for the opinion of the court therefore are,

First, whether the said Thomas Teece Whitehurst was an aider and abettor in the commission of the trespass within the meaning of the said Act of the 11 & 12 Vict. c. 43, s. 5.

Second, whether the said dismissal is valid or otherwise. And the court is humbly solicited, according to the power vested in this court by the said statute 20 & 21 Vict. c. 43, to remit the case to us, the said justices, with the opinion of the court thereon, or to make such other order as to the court may seem fit.

*II. James, for the app., was stopped.*

*Raymond, for the resp., referred to*

11 & 12 Vict. c. 43, s. 5;

*Reg. v. Scott, 5 Q. B. 493.*

ERLE, C. J.—We think that the case should be sent back to the magistrates. The duty is not thrown on the court of drawing inferences of fact, which is the duty of the magistrates. The question of law sent up to us is, whether there is any evidence on which, according to law, they could be justified in finding the resp. guilty of the offence. I find abundant evidence on which the justices might do so, though I do not say that it was their duty to do so. From the facts before them, the magistrates came to the conclusion that the app. and John Whitehurst were engaged in the common unlawful purpose of taking the hare, so that the app. committed the offence which is comprised in aiding and abetting.

WILLIAMS, J.—The magistrates seem to have come to the conclusion that, in point of law, there was no evidence upon which they could find the resp. guilty of aiding and abetting. It is clear that there was evidence. The definition of a principal in the first degree is a person who commits an offence with his own hands. That of a principal in

[C. P.]

WHYMPER v. HARNEY.

[C. P.]

the second degree is a person who is present and aiding and abetting. The evidence is that the trap was stopped, and that the resp., by what he did, promoted the capture of the hare. On the evidence it is clear that the resp. might have been convicted as a principal. The magistrates were justified in finding him guilty of aiding and abetting.

WILLES, J.—I am of the same opinion. I agree that it would have been better if the resp. had been charged as a principal. If the statement in the information did not, if true, amount to an irresistible conclusion that John Whitehurst did trespass in the pursuit of game, I should think the information against the resp. bad; but I think that it in fact does. If the offence had been a felony, the resp. would have been an accessory, but the distinction between principal and accessory is not necessary in a misdemeanour. There are terms of art such as *felonies*, *burglaries*, *murders*, but it is sufficient to describe an offence in words which amount to an irresistible conclusion that the offence has been committed. It is simply a question if there was evidence of a trespass. The witnesses proved not merely that there was a trespass in pursuit of game, but that it was committed for the use of the resp.

KEATINGE, J.—I agree that the facts show that the resp. participated in the trespass, and was a principal. The information would have been more artificial if it had been laid under the Game Act instead of the Act of 11 & 12 Vict. c. 48.

*Judgment for the app.*

Attorneys for the resp., Tate and Jourdain.

#### WHYMPER (app.) v. HARNEY (resp.)

*Factory Acts—8 & 4 Will. 4, c. 108, s. 1—7 & 8 Vict. c. 15, s. 78—Manufacture of cotton—Crinoline.*

*A building in which steam power is used, and the manufacture of crinolines steel and crinoline skirts is carried on, the process being that steel plates are cut into strips and covered with cotton, the cotton being either wound round the steel, or plaited so as to make a case for the steel, and the steel strips when covered being sewn up in the skirts for sale, is a cotton factory within the meaning of the Factory Acts.*

Case stated by justices under 20 & 21 Vict. c. 43.

On the 14th Oct. 1864, John Jones Harney (hereinafter called the resp.) appeared in petty sessions before us to answer to a summons issued on the complaint of Frederick Hayes Whympers, sub-inspector of factories (hereinafter called the app.), charging that he, the resp., had offended against the Act made in the session of Parliament holden in the 13th and 14th years of Her present Majesty's reign, intituled "An Act to amend the Acts relating to labour in factories," forasmuch as the resp. on the 26th Aug. last past, at the parish and borough of Sheffield, did unlawfully employ a female above the age of eighteen years, named Charlotte Roxburgh, in the factory of him, the resp., after six of the clock of the evening of the said day, to wit, at thirty minutes past the same hour (and not to recover lost time as provided by the said Act). The resp. is the occupier of premises in Granville-street, in Sheffield, in which he carries on the trade of a manufacturer of crinoline steel, crinoline skirts, &c. There is a steam-engine on the premises, the power of which is employed to move and work machinery in three rooms used in cutting steel into strips, and working and preparing such strips as hereinafter described, and also in wrapping or covering the strips of steel with cotton thread as hereinafter described. There are four other rooms in the premises in which by hand sewing-machines

are used, steel strips inserted into skirts and the skirts finished for market.

The course of manufacturing crinoline steel is, that the resp. purchases of the steel manufacturers sheets of steel rolled very thin about three inches in width and about fifty feet in length, which sheets are cut by circular shears into strips of from one inch to three-sixteenths of an inch in width; these strips are then rivetted together by the ends in lengths of 1000 yards or thereabouts, and are reeled or wound into coils of about 80lbs. each. The coils are then unwound, and as the strip of steel passes along, it is exposed to the influence of heat, then to that of oil, or passed over or between chilled dies or plates of cold steel. By this operation the steel strips are hardened, and, being again heated, become properly tempered, they are then ground or polished and blued in a finished state, and are then again reeled or measured out into coils, of 36, 72 and 144 yards each. In this process women are employed. Some portions of such coils are sold or used up into skirts, without undergoing any other process than has been above described; but other portions are previously wrapped or covered with cotton thread. This cotton thread is invariably purchased by the resp. from spinners or their agents in hanks or bundles which on the resp.'s premises undergo no further manufacturing process, but by means of steam power are next wound or reeled up on bobbins of various sizes for more convenient application around or about the strips of steel. One process of such application is effected by a machine called a wrapping machine, which by steam power turns the cotton thread into single file round and round the strips of steel, as appears by the sample now produced marked "A." The other process or application of the cotton thread is effected by a machine called a plaiting machine, which by steam power effects a covering for the steel by the interlacing or plaiting of sixteen threads together around and over every part of the strips, as appears from the sample now produced marked "B." In the process of covering the steel with cotton, as above described, by steam power women are employed. The whole of the rooms and premises are within one boundary or curtilage.

On the hearing of the complaint before the justices the app. proved that he was sub-inspector of factories for the district in which Sheffield is included; that on the 26th Aug. last, in consequence of some information, he went to the works of the resp. in Granville-street between half-past six and a quarter to seven o'clock in the evening, and on going up stairs he found in a first room a number of girls and young women standing in an opening on one side of the room, which he could best describe as resembling the bar of an inn; and that the persons were in the act of delivering their work to a woman inside an apartment, where the skirts are received after they are made. Charlotte Roxburgh named in the information was at the bar delivering or passing over skirts. Then he (the app.) proceeded into a further room, and there seated on benches by the side of long tables he found a second and larger number of females occupied in making up crinoline skirts. Two male assistants of the resp. were present, and he (the app.) pointed out to them what he conceived to be the illegality of the proceedings in their being employed after six o'clock; that he (the app.) had on previous occasions been in other parts of the resp.'s premises; that there is machinery propelled by steam power, and the process in such other parts carried on is the covering of steel with cotton by machinery which twists or winds the cotton round the steel; that the piece of steel covered with cotton produced marked "A." is similar to that made on resp.'s premises; that the rooms in which the young

women were working are within the outer gate and the boundary walls of the premises where the steam power is applied; that some of the young women were employed in inserting or securing the covered steel into skirts for garments called crinoline skirts.

On cross-examination by the resp.'s attorney the app. stated that he saw no machinery in the two rooms, and the young women could have done the work they were doing just as well at their own homes. That the resp. is what is termed a crinoline manufacturer. The skirts referred to in the above evidence are composed of gores cut from pieces of calico nets or plain or coloured cloths of various kinds, and sewed together into the folds or hems of which the strips of steel are run or inserted, and so the articles are formed into the female garment or appendage called a crinoline skirt.

On the above statement of facts and evidence we, the undersigned justices, were of opinion that the resp.'s premises at Sheffield were not and could not be called and considered, in the ordinary use of words, a cotton-mill, and did not become a cotton-mill or factory within the intent of the 3 & 4 Will. 4, c. 103, by reason of the application of the steam power to machinery used therein for manufacturing steel and cotton thread and other materials into crinoline by the means and in manner hereinbefore described. We were also of opinion that on such premises and for such a purpose the process of wrapping or covering by machinery crinoline steel with cotton thread was not, within the meaning of the 7 & 8 Vict. c. 15, s. 73, a process incident in any way to the manufacture of cotton or to any fabric made thereof or mixed therewith, but was incident to the manufacture of crinoline steel in like manner as the covering or wrapping of driving or riding whips, if effected by machinery of the same character with silk twist, or strong linen thread and other materials, is not a process incident to the manufacture of silk or linen, or to any fabric made thereof, but would be a process incident to the making of whips. We therefore dismissed the summons. If the court should be of opinion that our determination is correct, the same will be confirmed; if otherwise the court will make such order as the court may direct.

*Hannen* (the *Solicitor-General* with him) for the app.—The premises of the resp. are used for the manufacture of cotton within the meaning of the Factory Acts. The 3 & 4 Will. 4, c. 103, s. 1, enacts:

That no person under eighteen years of age shall be allowed so work in the night (that is to say) between the hours of half-past eight o'clock in the evening and half-past five o'clock in the morning, except as hereinafter provided, in or about any cotton, woollen, worsted, hemp, flax, tow, linen, or silk mill or factory wherein steam or water, or any other mechanical power, is or shall be used to propel or work the machinery in such mill or factory, either in scutching, carding, roving, spinning, piecing, twisting, winding, drawing, doubling, netting, making thread, dressing, or weaving of cotton, wool, worsted, hemp, flax, tow, or silk, either separately or mixed, in any such mill or factory.

By 7 & 8 Vict. c. 15, s. 73,

The word "factory," notwithstanding any provision or exemption in the Factory Act, shall be taken to mean all buildings and premises situated within any part of the United Kingdom of Great Britain and Ireland, wherein or within the close or curtilage of which steam, water, or any other mechanical power shall be used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incident to the manufacture of cotton, wool, hair, silk, flax, hemp, jute, or tow, either separately or mixed together, or mixed with any other material or any fabric made thereof; and any room situated within the outward gate or boundary of any factory wherein children or young persons are employed in any process incident to the manufacture carried on in the factory, shall be taken to be a part of the factory, although it may not contain any machinery; and any part of such factory may be taken to be a factory within the meaning of this Act.

[The subsequent Act of 13 & 14 Vict. c. 54, under which the information is laid, regulates

the age at which women may be employed, but does not affect the question to be decided here.] It does not follow, that because the woman mentioned in the information was not proved to be engaged in working at cotton, she does not come within the Act, because the Act is for the regulation of cotton factories and applies to any person within the curtilage. The result of the two sections is, that any building will be a cotton factory if steam power is used in it in preparing cotton, or in any process incident thereto. Steam power here is used in twisting and winding the cotton for the purpose of being used in the manufacture carried on in the building. It makes no difference that steel is also employed. In *Haydon v. Taylor*, 38 L. J. 30, M. C., 9 L. T. Rep. N. S. 382, a detached set of premises in which all that was done was to wind cotton from one reel on to another, was held to be a cotton factory. The manufacturer could protect himself if he pleases under sect. 73, by having the cotton process all carried on in one room. An illustration may be drawn from

*Taylor v. Hickes*, 12 C. B., N. S., 152; 31 L. J. 212, M. C.; 6 L. T. Rep. N. S. 784.

*Quain* for the resp.—The statutes are penal, and to be construed strictly. They were intended to apply to cotton-mills: (see 3 & 4 Will. 4, c. 103, s. 2, and the penalty clause in 7 & 8 Vict. c. 15, s. 54.) A building is only a factory if it is used for the preparation of cotton, and if cotton goes through numerous stages in it. "Process incident to it" means incident to the manufacturing of the cotton. The words "mixed with other material" are only inserted to prevent persons from evading the Act by mixing it with other material, as at Bradford, where it is mixed with wool and made into what are called "mixed fabrics." [KEATING, J.—But is not plaiting cotton a process within the statute? Suppose there was a factory exclusively devoted to plaiting the cotton, which might be sold to the persons who placed it round the steel, would it not be a cotton factory? Does it make any difference that the plaiting and the winding round the steel are done on the same premises?] It depends on how the plaiting is done. *Cole v. Dickenson*, 10 L. T. Rep. N. S. 616, is an authority in favour of the resp.

*Hannen* in reply.—The Act of 3 & 4 Will. 4 actually contains the word "winding," and the process in *Haydon v. Taylor* was held to be a winding within the meaning of that Act, as well as a process within that of 7 & 8 Vict. c. 15.

ERLE, C. J.—The question in this case is, whether the premises of the resp. were shown, on the facts stated, to be a factory within the meaning of the Factory Acts. [His Lordship read the words of the sections set out above.] I am of opinion that they were shown to be a factory. Cotton is employed on them in two ways: first, for winding round steel; secondly, for making a fabric as a case for the steel, crinoline skirts being the product manufactured for sale. The fabric is composed of a plait of sixteen threads, and that is a fabric made by manufacturing cotton within the words of the statute. The case put by my brother Keating in the course of the argument is decisive of the judgment to be given here. If cotton were made up in a separate building into a material which was to be used for covering crinoline steels, no one would doubt that the building would be one used for manufacturing a cotton fabric. Cotton was used on these premises, and steam power was used; and I think that the decision of the magistrates was wrong.

WILLIAMS, J.—I am of the same opinion. Cotton thread is here woven by machinery into a fabric, and

[Ex.]

MASON AND ANOTHER v. MITCHELL.

[Ex.]

the case comes, I think, within the very words of the statute.

WILLES, J.—I am of the same opinion. A cotton fabric is certainly manufactured on the premises, and it is not the less so because it is intended to be used in combination with steel for the purpose of producing the article to be sold. I am inclined to doubt if this is a manufacture of a combination of cotton and steel. It is a manufacture of a cotton fabric which is afterwards to be combined with steel.

KEATING, J. concurred.

*Judgment for the app., the case to be remitted to the magistrates.*

Attorney for the app., *The Solicitor to the Treasury.*

Attorney for the resp., *W. Pitman.*

### COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Thursday, Jan. 26, 1865.

MASON AND ANOTHER (Administrators, &c.) v. MITCHELL.

*Husband and wife—Protection order under 20 & 21 Vict. c. 85, s. 21—Produce of "lawful industry"—Jurisdiction.*

*The protection afforded to a deserted wife by the Divorce Act (20 & 21 Vict. c. 85) is confined to the lawful earnings of her lawful industry, and does not extend to the profits acquired by her by a licentious and immoral course of life; and therefore an order of protection, obtained from a magistrate, under sect. 21 of the above Act, by a wife alleged to be deserted by her husband, will not protect her goods and property acquired by her gains and earnings as a brothel keeper.*

*Query, whether an order obtained on a false statement of desertion, when, in fact, the wife has not been deserted, is a valid order; and whether, under such circumstances, the magistrate had any jurisdiction.*

Trover and detainee by plts. as administrators of one Ann Wild, deceased, against deft. to recover the value of certain household goods and furniture. Pleas (amongst others), not possessed and leave and licence.

At the trial before Blackburn, J., at the last winter assizes at Liverpool, the following appeared to be the facts of the case as given in evidence:

The deceased, Ann Wild, was the wife of one Anthony Wild, to whom she was married in 1847. After living not too comfortably together for some ten years, the wife, who had, as her husband alleged, been in the habit of constantly getting drunk, associating with improper characters, and harbouring men at his house, left her home one day in 1857, stripping the house of the furniture; and they never afterwards lived together. From that time, up to her death in 1864, she led an immoral life; keeping a brothel and cohabiting with different men, with one of whom, named Sanderson, she had at the time of her death been cohabiting for the previous two or three years. On the 9th Nov. 1860 she applied for and obtained from the stipendiary magistrate at Manchester, on an *ex parte* statement, a protection order under sect. 21 of 20 & 21 Vict. c. 85 (the Divorce Act), on the alleged ground that her husband had deserted her on and since 7th June 1857. At the very time of obtaining this order she was supporting herself by keeping a brothel, and the money to defray the costs of getting the order was furnished by her paramour Sanderson, with whom she was then living in adultery. The order was

duly registered in compliance with the requirements of the Act on the 12th of the same month of November.

Upon her death, in July 1864, her husband went to the house where she had been living and had died, and took possession of the furniture and effects there, and gave directions to deft., an auctioneer, to sell the same by auction. The sale took place accordingly, and realised 52*l.* 7*s.* 2*d.*, the balance of which, after deducting rent, taxes and expenses of sale, was handed over by deft. to Wild, the husband. More than two months after this the plts., the brothers of the deceased wife, having taken out letters of administration to her estate, limited to estate acquired after the alleged desertion, claimed from the deft., and subsequently brought the present action against him to recover, the value of such estate.

The above facts having been proved, the jury, in reply to questions from the learned judge, said they believed the wife had not been deserted, and that the protection order was obtained by fraud; secondly, that the property of the deceased woman was acquired by unlawful means, being the gains of prostitution; whereupon, by direction of the learned judge, who ruled for the day that the order of protection was good until discharged, they found a verdict for the plts., with damages equal to the value of the goods, which, after deducting rent and expenses, &c., they assessed at 46*l.* 13*s.* 9*d.*, and leave was reserved to the deft. to move on the above points.

The following are the material sections of the statute 20 & 21 Vict. c. 85 (Divorce Act) on the construction of which the case turned:

#### Sect. 21:

A wife deserted by her husband may, at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or if resident in the country to justices in petty sessions, or in either case to the court, for an order to protect any money or property she may acquire by her own lawful industry and property which she may become possessed of after such desertion, against her husband or his creditors, or any person claiming under him, and such magistrate or justices, or court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property, acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a *feme sole*. Provided always, that every such order, if made by a police magistrate or justices at petty sessions, shall within ten days after the making thereof be entered with the registrar of the County Court within whose jurisdiction the wife is resident, and that it shall be lawful for the husband, and any creditor or other person claiming under him to apply to the court or to the magistrates or justices by whom such order was made for the discharge thereof. Provided also, that if the husband or any creditor or person claiming under the husband shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable at the suit of the wife (which she is hereby empowered to bring) to restore the specific property, also for a sum equal to double the value of the property so seized or held after such notice as aforesaid. If any such order of protection be made the wife shall, during the continuance thereof, be and be deemed to have been during such desertion of her in the like position in all respects with regard to property and earnings, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation.

#### Sect. 25:

In every case of a judicial separation the wife shall from the date of the sentence, and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve upon her, and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same, in case she shall die intestate, shall go as the same would have gone if her husband had been then dead, &c.

A rule was obtained in this term to enter a non-suit or verdict for the deft. pursuant to leave on the ground that the order, having been fraudulently obtained, was a nullity as regards the deft.; also, even if the order were valid, yet the goods, not having been the proceeds of lawful industry, were not

protected, or for a new trial on the ground that the verdict was against the evidence, against which rule,

*Quain*, for pta., showed cause. (a)—This was the first case on these points under the Act. As to the first branch of the rule, the statute, by sect. 21, declared that the wife's position under a protection order should, "during the continuance thereof, be the same as if she had obtained a decree of judicial separation;" which position was defined, by sect. 25, to be the same as "a *feme sole* with respect to property of every description acquired by or devolving upon her." The magistrate having jurisdiction, the order, when registered under the Act, was conclusive, whether there had been desertion or not. Although only a magistrate's order, and made *ex parte* (as it needs must be), it involved the question whether a decree of judicial separation, if obtained by fraud, could be questioned by this court. It was submitted it could not be. The Act pointed out the mode of getting rid of the order; and in no other way and by no other tribunal could it be set aside. Moreover, the fraud here alleged was not of the kind to invalidate the order. [CHANNELL, B.—It would seem to be more like contradictory evidence of the facts than a fraud on the court, as in the case of one party falsely personating another. POLLOCK, C.B.—The expression "obtained by fraud" imports not merely contradictory evidence, but the getting an order on evidence known at the time, by the party producing it, to be false.] Although a new point, the authority of analogous cases supported the pta.'s view; e.g., a conviction by a magistrate having jurisdiction, if not defective on its face, was conclusive as to facts therein stated: (*Brittain v. Kinaird*, 1 B. & B. 482; and notes to *Crepps v. Durden*, 1 Sm. L. C. 649, 5th edit.) [MARTIN, B.—I do not think the cases on convictions will help you. A conviction follows a hearing of both sides; but this is an *ex parte* proceeding, which is a different thing.] It was made *ex parte* by the statute which provided the mode of setting it aside, and that assimilated it to a conviction. The attribute of being conclusive evidence of the facts stated therein, and properly tending thereto, belonged to every adjudication emanating from a competent tribunal: (*Aldridge v. Haines*, 2 B. & Ad. 395; 1 Sm. L. C. 559, 5th edit.) To a plea in an action for arrest under judge's order under 1 & 2 Vict. c. 110, justifying by virtue of the order, a replication that it was obtained by fraud would be no answer; proceedings must be taken to set it aside. So a deft. could not plead that a judgment against him had been obtained by fraud: (*Moore v. Boumaker*, 7 Taunt. 97; 1 Wms. Saund. 92 b, note f.) Probates and administrations also, which were *ex parte*, were conclusive both at law and equity, until revoked, and could not be impeached by evidence even of fraud: (1 Wms. Exors. 476, 5th edit. [MARTIN, B.—If, in point of fact, the wife was not deserted, was there any jurisdiction? The magistrates finding it would not give him jurisdiction unless the fact were so. [His Lordship referred to *Thompson v. Ingham*, 14 Q. B. 710; 19 L. J., N. S., 189, Q. B.] There it was a preliminary inquiry to found jurisdiction, but here the desertion which gave jurisdiction was the very offence to be tried by the tribunal appointed by Parliament to try it; and if the finding of the fact, on which jurisdiction was founded, was not conclusive, it would not be binding as to the offence itself, which was the very, and the only, thing the magistrate had to inquire into. The cases were all collected in *Reg. v. Bolton*, 1 Q. B. 66; 10 L. J., N. S., 49, M. C. [MARTIN, B.—The

Act of Parliament is subject to the rule of the common law, that every judgment obtained by fraud is void. PIGOTT, B.—The magistrate has jurisdiction even if there should be no desertion, for he has jurisdiction to hear and inquire; then, when the order is made, it is to have the effect of a decree of judicial separation. Now, would it be competent for this court to inquire into the legality of such a decree? That was the point, and it was contended it would not be. Again, third parties dealing with the wife as a *feme sole*, would be wholly unprotected if an order, whilst unreversed, were no protection. He cited also

*Tarry v. Neuman*, 15 M. & W. 645; 15 L. J., N. S., 160, M. C. (Judgment of Pollock, C.B.);  
*Shedden v. Patrick*, 1 Maq. H. of L. Cas. 685;  
*Paley on Convictions* (5th edit. by Macmahon), 328,  
quoting *Fallers v. Fotes*, Holt, 287;  
Cases collected in notes to *Minby v. Scott*, 1 Sm. L. C. (5th edit.) 418;  
27 & 28 Vict. c. 44.

[*E. James, Q. C.* referred to *Perry v. Medlockcroft*, 10 Beav. 122. MARTIN, B.—My brother Keating has an impression that there has been a case on this very section of the Act.] None such had been found. The husband was a *quasi* party, and had a *locus standi* to appeal in the way pointed out by the statute. As to the second point, the goods, though found by the jury to be the proceeds of prostitution, were yet protected. The enacting part of sect. 21 protected her "earnings and property" generally, not limiting it to the earnings of "*lawful industry*." [POLLOCK, C.B.—The original introduction of the matter, in the earlier part of the section, being founded on "*lawful earnings*," all subsequent mention of earnings must mean "*lawful earnings*." PIGOTT, B.—Could we say that the earnings of dishonesty, e.g., picking pockets or stealing, would be protected under this section? They would not be her property, but the goods here were; for though the money might have been immorally acquired, the furniture bought therewith was not, and the money so converted could not be followed. Sect. 25 threw light on sect. 21, and covered every description of property acquired by coming to, or devolving upon her. The intention of the Legislature might also be gathered from subsequent statutes *in pari materia*: 21 & 22 Vict. c. 108, ss. 6, 7, 8, and the Scotch Act; 24 & 25 Vict. c. 84. In the corresponding section of which latter Act the word "*lawful*" was omitted.

*E. James, Q. C.* (*Holker* with him) contra for deft. in support of the rule.—The Legislature meant to protect a wife improperly deserted by her husband; to protect her *lawfully* acquired earnings from him, and to enable her to deal with third persons free from his interference. There was no pretence for saying that any property here had devolved upon her passively; it was all acquired by her active exertions. Assuming the order good in other respects, it must have reference only to "*lawfully* acquired" property. The furniture here was used for a business not only immoral but unlawful and indictable. The Legislature would not give a premium or boon to immorality. But, irrespective of fraud, the order was a nullity, being without jurisdiction. Without the requisite actually existing state of things at the time the magistrate was called on to act, the order would not bind strangers, whatever it might do as between principals. The foundation of jurisdiction here was that the applicant must be a *deserted* wife. If she were not in that category there was no jurisdiction. All the cases cited on the other side presupposed jurisdiction. Having jurisdiction the courts would not review a mistake, but leave the party to appeal. [PIGOTT, B.—You would say that if the magistrate finds the wife to be deserted, and without reasonable cause,

(a) Although the Court gave judgment on the second ground of the rule only, yet, as the question under this statute is a new one, the whole of the arguments on both points are here given.



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then the order is good, even if there were no reasonable cause; but that if he finds desertion when in fact she has not been deserted, then the order is invalid?] Yes, the "reasonable cause" was incidental only to his inquiry, and the evidence taken to satisfy his mind might be to absolve him from consequences. [He was here stopped by the Court.]

POLLOCK, C. B.—Although there may seem to be some little difficulty at first sight in construing for the first time an Act of Parliament which introduced a new principle into our legislation as regarded the relation of husband and wife, and which gave to a *feme covert* the position, rights and privileges in many respects of a *feme sole*, or of a wife who had obtained a decree of judicial separation, it is, I think, abundantly clear that the Legislature intended to confine the protection, afforded to a deserted wife by the Act of Parliament, to the legal fruits of her legal industry; and that they were expressly anxious to restrict the operation of the Act to her obviously lawful and meritorious gains, and did not intend to give, but on the contrary studiously avoided giving, any protection under a plea of desertion, to the profits which she might acquire by a licentious and immoral course of life, which would, in effect, have been holding out an incentive to a wife to desert her husband for the purpose of indulging, unchecked, her vicious and immoral propensities. On this ground, therefore, I think that the goods in question, which were found to be, and admittedly were, the proceeds of prostitution, were not protected by the order. This renders it unnecessary to consider further the other ground of the rule, or to give any judgment upon the question involved therein. The rule will be made absolute to enter a nonsuit.

CHANNELL, B.—I am entirely of the same opinion, and for the same reasons as my Lord, and I desire to confine myself to this second point, namely, that the property not being the proceeds of the wife's "lawful industry," was not protected by the order. As to the other point of jurisdiction, it is unnecessary to discuss that point further, or to give any decision upon it. It is enough that this order did not protect these goods, which were the produce of her earnings as the keeper of a brothel, and not the product of her "lawful industry."

PIGOTT, B.—I agree with my Lord Chief Baron and my brother Channell in the judgment which they have pronounced on the second point. On the first point, of the jurisdiction, I must confess that my mind was coming to a different view from that which I had entertained at first; but it is quite unnecessary to dwell further or to say more on that point. With regard to the second point, it is clear to my mind that the Legislature intended, where a wife was deserted by her husband, that the *bona fide* proceeds of her lawful and honest industry should be protected from his interference with them; and that, in giving her this protection, they made a special distinction between *any property whatever*, and that which she might acquire by her "lawful industry," and took care that the privilege of coming to the court for protection as a *feme sole* should be granted to her in respect of her *lawful* earnings only. The distinction would have been needless if it had been intended to include within the protection her property of all kinds and however obtained.

MARTIN, B. had gone to chambers before the  
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argument was concluded, and so took no part in the judgment.

*Rule absolute to enter a nonsuit.*

Attorneys for plts., Torr, Janeway and Tagart, 38, Bedford-row, agents for W. Lancaster, Bradford, Yorkshire.

Attorneys for deft., Johnson and Wetherall, 7, King's Bench-walk, Temple, agents for Storer, Manchester.

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,  
Barristers-at-Law.

Thursday, Jan. 26, 1865.

REG. v. ASKERTON.

*Highway—Indictment for non-repair—Jurisdiction of justices to make order for—5 & 6 Will. 4, c. 50, ss. 94–5.*

*Before directing an order under sect. 95 of the 5 & 6 Will. 4, c. 50, for an indictment to be preferred against a parish for non-repair of a highway, the justices should satisfy themselves from the evidence that the road in question is a highway, if the fact is disputed.*

Rule nisi to bring up an order of justices made under the Highway Act (5 & 6 Will. 4, c. 50), s. 95, directing an indictment to be preferred against the parish of Askerton, Cumberland, for the non-repair of a highway.

At the hearing of the summons, taken out under sects. 94, 95, the surveyor of the parish of Askerton denied that the road out of repair was a highway, and he said that he consequently denied the liability of the parish to repair the road in question. The other side cited the case of *Reg. v. Arnould*, 8 E. & B. 550, and 27 L. J. 92, M. C., and contended that the justices were bound to direct an indictment to be preferred; but on the other hand, *Ex parte Bartlett*, 29 L. J. 65, M. C., was quoted. The justices then proceeded to hear evidence as to the road being a highway, but another justice came in, and the discussion was renewed before him. The justices ultimately refused to hear further evidence, and made the order now brought up.

*McLeod* showed cause.—The order is good. Where the liability to repair a road is disputed by a parish, the justices are bound to direct an indictment to be preferred under sect. 95: (*Ex parte Bartlett*, and *Reg. v. Arnould*.) [BLACKBURN, J.—If a private road in a gentleman's park is out of repair, and proceedings are taken as here, can the justices under this section direct an order to be preferred against the parish?] No doubt the argument must go that length. The case of *Reg. v. Heanor*, 6 Q. B. 745, only decides that where the road is not a highway the costs cannot be levied out of the highway rate. Here there was *prima facie* evidence before the justices that this was a highway, and they had jurisdiction to make this order. In this section the word highway is used simply to mean the place or road in question, and is not descriptive of its legal character.

*Hayes*, Serjt. in support of the rule.—The justices had no jurisdiction to make the order, this not being an admitted highway. The justices at all events ought to have heard the evidence:

*Reg. v. Heanor*, 6 Q. B. 745.

COCKBURN, C. J.—The rule must be made absolute. It is not necessary to say whether, on the construction of the 5 & 6 Will. 4, c. 50, it is competent for the justices to order an indictment to be preferred against the parish on the



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denial of their liability to repair only, or whether they have any authority unless the road is an admitted highway. It is clear that it is not simply because the surveyor denies that it is a highway, and therefore the liability of the parish to repair, that the justices can order an indictment to be preferred. The justices must have some evidence before them to lead to the inference that it is a highway; but here, on the denial of the surveyor that the road was a highway, and the liability of the parish to make the order, they proceed to make an order. They stopped short of the point at which their power to make an order arose.

BLACKBURN, J.—I am of the same opinion. In any view of the statute, the justices have made an order which they were not justified in doing. Under both sects. 94 and 95 the road out of repair must be a highway. The enactment is based on that. *Reg. v. Heanor* shows that it is only where the road is a highway that an order for costs can be made. When the road is an admitted highway, and the liability to repair is denied on the part of the parish, then it is quite clear that an order is to be made. If it is alleged on the one side, and denied on the other, that the road is a highway, the justices are not at once to make the order, but they should see whether there is any evidence that it is a highway. Otherwise it would lead to the absurdity, that if a private road in a gentleman's park was alleged to be a highway, the justices would be bound to order an indictment to be preferred. In the case where it is alleged on the one side to be a highway, and resisted on the other, and the justices hear evidence, and come to the conclusion that it is not a highway, then it is clear they should not order an indictment; but if they come to a conclusion that it is a highway, then whether they ought to order an indictment is a question we are not called upon to decide now. In the present case they have proceeded without any evidence, and that is clearly wrong.

MELLOR, J.—In this case the justices have acted on a mistaken view of the law. At present I give no opinion as to what is the correct construction of the section. The justices at least should satisfy themselves, upon the evidence before them, whether the road in question is really a highway or not.

Rule absolute.

#### *Ex parte* THE INHABITANTS OF EAST STONEHOUSE.

County constabulary—Formation of districts—  
3 & 4 Vict. c. 88, ss. 27, 28.

*Under the County Constabulary Act (3 & 4 Vict. c. 88), s. 27, a single parish may be constituted a separate police district by itself.*

*It is no objection to an order of quarter sessions forming county police districts, which a court of law can entertain, that the report required by the 3 & 4 Vict. c. 88, s. 27, to be sent from the sessions to the Secretary of State, does not contain sufficient materials.*

*Arundel Rogers*, on behalf of the Rev. George Nolan, representing the inhabitant ratepayers of the parish of East Stonehouse, moved for a *certiorari* to bring up an order made at the Devonshire Quarter Sessions, under the County Constabulary Act (3 & 4 Vict. c. 88), ss. 27, 28, by which the parish of East Stonehouse was constituted one district by itself. The effect of the order was stated to be that whereas two additional constables only were appointed for the parish, the rates were increased 2000*l.* It was contended that the order of sessions was bad, and that upon the true construc-

tion of sect. 27, giving the justices power to form police districts, the words "to divide the county, or any part thereof, into police districts, consisting of such parishes and places, or parts of parishes and places, as shall appear to them most convenient," did not empower the justices to make one single parish a police district by itself. They may unite parishes or parts of parishes into a district, but not form a single parish by itself into a district. [BLACKBURN, J.—It would have cost the inhabitants just as much if the justices had added to the district an acre out of the adjoining parish, which would have made the order unobjectionable according to your argument.] The Legislature meant not to oppress one parish alone by throwing on it the increased costs. [CROMPTON, J.—The Act is against you, both in the words and spirit. The word parishes includes parish. BLACKBURN, J.—The Legislature has said that the justices may do it, subject to an appeal to the Secretary of State.] Secondly, the justices have not set out sufficient materials in the report of the proposed alteration, which, by sect. 27, they are required to send to the Secretary of State.

COCKBURN, C. J.—We have nothing to do with that. The report is no part of the order of sessions, and any informality in the report does not invalidate the order of sessions. The term "parishes," in sect. 27, includes the singular, "parish." The sessions are to exercise their discretion as to whether a parish is or is not sufficiently large to be constituted one district by itself.

CROMPTON and BLACKBURN, JJ. concurred.

MELLOR, J.—The words in sect. 27 were intended to limit the maximum of the authority of the justices, and not the minimum.

Rule refused.

Tuesday, Jan. 31, 1865.

#### REG. v. THE CORONER OF MARGATE.

*Coroner's inquest—Jurors dispersing without regular adjournment.*

*An inquest was adjourned to a given day in order that the inquisition and verdict might, in the meantime, be formally prepared for signature. Before the day arrived, the coroner wrote to the jurors not to attend on that day, nor until they received a further notice. Pursuant to a further notice, they met and signed the inquisition and verdict:*

*Held, that the inquisition and verdict were void, having been signed coram non iudice.*

Rule nisi to quash an inquisition *super visum corporis*, which had been removed into this court by *certiorari* (see ante, p. 195.)

The inquest was held at Margate, before the coroner of the Cinque Ports, on the body of Susannah Lock, who was killed in consequence of a collision on the railway at the Margate station. The jury were originally empanelled on the 2nd Aug. 1864, and the inquest was regularly adjourned and continued to the 5th Aug., when the jury delivered the following verdict:—"That the deceased met with an accident which caused her death on the 1st Aug. 1864, at the South-Eastern Railway Terminus at Margate, by a collision between a mail train and an up-station train, the former being late; and that the negligence of the guard and inspector was the proximate cause of the accident, and, consequently, of the death." This the coroner pronounced to be a verdict of manslaughter, and, with the view of having the verdict recorded in a legal form, he adjourned the inquest

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until the 8th Aug., and in the meantime instructed counsel to settle the verdict and inquisition. Finding that counsel did not send back the draft in due time, the coroner, who lived at Dover, instead of going to Margate on the 8th Aug. and resuming the inquest and further adjourning it, wrote to the jurors informing them that they need not attend on the 8th, or until they had a fresh notice. The jury were then re-assembled on the 12th Aug., and the inquisition and verdict signed by them.

Shree, J., sitting in the Bail Court, held the inquisition so signed to have been signed *coram non iudice*, and void.

Parry, Serjt. and G. Francis showed cause.—The inquisition was not vitiated by the signing being delayed until the 12th. The verdict was given on the 5th, and the signing was merely a ministerial act. [COCKBURN, C.J.—The jury are not bound by the verdict until they have signed it. Signing is not a mere ministerial act. BLACKBURN, J.—Is there any authority for saying that any part of the business of an inquest cannot be done at a court not held by regular adjournment?] In Burn's Justice, tit. "Coroner," 37, edit. 1845, it is said that the inquisition may be signed by the coroner and jury at any time before they have dispersed. [BLACKBURN, J.—That rather shows that it is best to avoid even an adjournment.] The coroner might have adjourned the inquest *sine die*, or held it in secret. [BLACKBURN, J.—That may be doubted, and he did not do it.] The following cases were then cited:

*Reg. v. West Torrington*, Burr. S. C. 293;  
*Garnett v. Ferrand*, 6 B. & C. 611.

[COCKBURN, C.J.—If some of the jurors had refused to attend on the 12th they could not have been fined because they were not properly summoned, the court having been dissolved. The inquest might have begun *de novo*. But the jury were summoned for a particular inquest, and the moment they were allowed to disperse, and the court was broken up and not adjourned, their duty and functions were gone.]

*H. James*, in support of the rule, was not called upon.

By the COURT:

Rule absolute.

Friday, Feb. 3, 1865.

KENYON (app.) v. HART (resp.)

Game—Illegal trespass in pursuit—1 & 2 Will. 4, c. 32, s. 30.

A. upon his own land shot at a pheasant which rose from his land, but the act of shooting took place while the pheasant was in the air over B.'s land. The pheasant fell dead on B.'s land, and A. went on B.'s land and picked it up.

The justices having refused to convict A. of a trespass in pursuit of game, under the 1 & 2 Will. 4, c. 32, s. 30, this Court held that they were right.

Case stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions holden at Ashford, Kent, on the 5th Nov., the resp. Stephen Hart, of the parish of Westwell, in the said county, farmer, appeared upon an information exhibited by the app. James Kenyon, of the said parish of Westwell, under-game-keeper, charging him the said resp. for that he did on the 1st Oct. 1864, at the parish of Westwell aforesaid, unlawfully commit a trespass by being in the daytime of the same day upon certain arable land in the possession and occupation of Henry Tappenden, there in search of game without the licence or consent of the owner of the land so trespassed upon, or of any other person having the right

to authorise the said Stephen Hart to enter or be upon the said land for the purpose aforesaid, contrary to the statute, &c., whereby the said Stephen Hart had forfeited a sum of money not exceeding 2l.

On the hearing of the case the app. upon his oath, stated: "I am under-keeper to Sir Richard Tufton, Bart. On the 1st Oct. last, about half-past ten in the morning, Mr. Hart (the resp.) was out shooting. He shot a cock pheasant and it fell on Mr. Tappenden's field, belonging to Sir Richard Tufton. He went and fetched the bird himself, taking his dog and gun with him. Mr. Hart was on his own land when he shot the pheasant, and it rose off Mr. Hart's land. The pheasant was dead when Mr. Hart picked it up, and it laid upon its back."

When the resp.'s counsel was addressing the court the chairman recalled the app. and asked him whether, when the resp. shot the pheasant, it was or was not in the air over the land belonging to Sir R. Tufton? The app. replied it was over Sir R. Tufton's land and fell a considerable distance within Sir Richard's boundary. The resp.'s solicitor objected to the question being put after the app. had heard the opening of the resp.'s case.

The resp.'s attorney contended on his behalf—1. That upon the app.'s evidence no trespass within the meaning of the Act 1 & 2 Will. 4, c. 32, s. 30, had been committed, as the pheasant rose off the resp.'s land and the resp. was upon his own land when he shot the bird. 2. That the 30th section of the above-mentioned Act did not apply to game when dead.

Having heard the evidence of the app. and the argument of the resp.'s attorney the justices dismissed the case, the grounds of their determination being, that as the pheasant was raised off the resp.'s land and shot by him when he (the resp.) was upon his own land, the mere act of entering the land stated in the information, for the purpose of picking up the pheasant which was then dead, as proved by the evidence, was, in our opinion, not such a trespass in pursuit of game as is contemplated by the 30th section of the 1 & 2 Will. 4, c. 32.

The question for the opinion of the court was, whether the justices were right in point of law in dismissing the case upon the grounds above stated.

Keane, Q.C. for the app.—The justices ought to have convicted the resp. It was immaterial that the pheasant arose on the resp.'s own land. It was a fact in the case that the resp. shot the pheasant when it was over a neighbour's land. That was in itself a civil trespass, and the entry upon the adjoining field to pick up the bird was an illegal trespass in pursuit or at least in search of game under 1 & 2 Will. 4, c. 32, s. 30:

*Osmond v. Meadows*, 31 L. J. 238, M. C.; L. T. Rep. N. 8. 290;

*Morden v. Porter*, 29 L. J. 213, M. C.

[BLACKBURN, J.—The 30th section must mean living game and not dead game. The pheasant was dead in this case when the resp. went to pick it up.] It may mean dead game also. The word "search" applies as well to dead as to living game. If not, poachers may easily evade this enactment.

Denman, Q.C. for the resp.—The words "search" and "pursuit of" can only apply to living game, and the section cannot be held to apply to dead game found on land. In *Osmond v. Meadows* the information was for pursuit of game; here it is for search of game.

BLACKBURN, J.—The justices were right in refusing to convict. The 30th section of the 1 & 2 Will. 4, c. 32, was evidently directed against a trespass by entering land in pursuit of living game, and cannot apply, in my opinion, to game that is dead. We

have no doubt whatever upon that point. The resp. undoubtedly entered the land of his neighbour and committed a civil trespass, but he did so in search of a pheasant which had risen from his own land, and at which he had a right to shoot, as he did, from his own land. The case would have been precisely similar if it had been a hare which had started from his land and been shot when it had got to his neighbour's land. The case of *Reg. v. Pratt*, 4 E. & B. 860, decided that, in order to be a trespass to shoot at game under this sect. 30, it must be a personal trespass. Therefore, the sole point is, whether the mere fact of going in to pick up the dead bird brings the case within the 30th section. The case of *Osbond v. Meadows*, in the Court of C. P., was not capable of being taken to a court of error, and is not, therefore, binding upon us. But it is not necessary for us to dissent from that case. Here the justices declined to treat the shooting of the bird which had been shot at from the resp.'s own ground as one act with the trespass to pick it up, and we think they were quite right. It was, so far as the trespasser was concerned, matter of surprise that the bird fell on his neighbour's land, and it was no planned thing on his part to commit any trespass in pursuit of game such as is contemplated by the 30th section.

MELLOR, J.—I am of the same opinion. I think that the justices were not bound to convict in this case. I agree that the 30th section refers to living, and not to dead game, and the 31st section confirms that construction. If this case were not distinguished from *Osbond v. Meadows*, I confess I should have liked further time to consider, although that decision would not be binding on us sitting in this court. I do not think, however, there is any real conflict between that case and our present decision.

*Judgment for the resp.*

#### COURT OF COMMON PLEAS.

Reported by W. MAYN and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

#### REGISTRATION APPEALS.

Nov. 22, 1864, and Jan. 17, 1865.

POWELL v. BORASTON.

*Election law—Borough vote—Qualification—Occupation—Building-shed—Ejusdem generis—2 Will. 4, c. 45, s. 27.*

*A building, the occupation of which will, by sect. 27 of the Reform Act (2 Will. 4, c. 45), confer a borough franchise, must be a building ejusdem generis with the other buildings mentioned in the statute, namely, houses, warehouses, counting-houses and shops.*

*The claimant of a borough vote rented and occupied a farm, the greater part of which, including the farm-buildings, was beyond the limits of the borough, but a few acres of land of more than the clear yearly value of 10l. lay within the borough. There was no building upon this portion of the farm when the claimant took possession, but subsequently a wooden shed was placed upon it, supported on four posts let into the ground. There was no floor to the shed. The sides were of boards, and so frail that a portion of them was soon broken away. It was used by the claimant for keeping agricultural implements. It was avowedly placed upon the land in order to entitle the claimant to a vote for the borough, and there was no evidence that the claimant's landlord had given his permission to its erection;*

*Held, that the shed was not a building occupied by the claimant so as to entitle him to a vote for the borough.*  
*Watson v. Cotton explained.*

At a court held before the revising barrister for the borough of Kidderminster, Richard Powell objected to the name of George Boraston being retained on the list of persons entitled to vote in the election of a member for the borough of Kidderminster in respect of property occupied in the parish of Kidderminster Foreign.

The following facts were stated on appeal:

The said George Boraston is a farmer, and for several years has rented and occupied a farm at Sutton-common, within the said parish of Kidderminster Foreign, but being partly within and partly beyond the limits of the parliamentary borough of Kidderminster.

The greater portion of the farm, including the farm-buildings, is beyond the borough limits; but a few acres of land, of more than the clear yearly value of 10l., lie within the borough.

There was no building on the land within the borough when the said George Boraston took the farm of his landlord, but in the summer of 1862 a shed was placed upon the piece of land within the borough. This shed was made entirely of wood, having boarded sides and a boarded roof, and being supported by four posts let into the ground three feet. It adjoins a public road, and most of the side boards of the shed facing the road have been broken to pieces. There is no floor to the shed. It is entered by a door, and used by the tenant for keeping agricultural implements in. It was proved before the revising barrister that the shed was erected by a builder of Kidderminster in accordance with instructions received by him from an active political agent in that borough, who had no interest either as landlord or tenant in the land upon which it was erected. But previously to its erection the permission of the said George Boraston was asked, who replied that he could not give an answer, and that his landlord must be asked. There was no evidence of the landlord having given such permission, but the said George Boraston gave instructions to the builder as to the size of the door of the shed, and told him that if he required it floored he would do it himself. It was objected on behalf of the said R. Powell that the name of the said George Boraston ought to be expunged from the said list on the following grounds:

First, that the shed erected as aforesaid was not a building within the meaning of the Reform Act.

Secondly, that, under the circumstances stated respecting its erection, there was no occupation of the said shed by the said George Boraston within the meaning of the Reform Act.

Thirdly, that the shed formed no part of the property for which the said George Boraston paid rent, and could not be said to be occupied by him with the land as tenant under the same landlord.

The revising barrister held the contrary of these objections, and decided to retain the name of the said George Boraston on the said list. If the court shall be of opinion that the decision was wrong, the name of the said George Boraston is to be expunged from such list.

Keane, Q.C. appeared for the app., and

Karslake, Q.C. and R. Bourke appeared for the resp.

In the course of the argument in this case and the following (the two cases, depending on analogous principles, were considered together) reference was made to

*Watson v. Cotton*, 5 C. B. 51;

*Whitmore v. Bedford*, 5 M. & G. 9;

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POWELL v. BORASTON.

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*R. v. Londonthorpe*, 6 T. R. 377;  
*R. v. Otley*, 1 B. & A. 161;  
*Dechurst v. Feilden*, 7 M. & G. 182;  
 2 Will. 4, c. 43, s. 27;  
*Helwell v. Eastwood*, 6 Ex. 295;  
*Heureth v. Booth*, 9 L. T. Rep. N. S. 392;  
*Martin v. Roe*, 7 E. & B. 237.

Jan. 17.—ERLE, C. J. delivered the judgment of the Court.—The resp. occupied a farm, of which a few acres, worth more than 10*l.* annually, were within the borough, and on this part of the farm there was no building at the time of the demise, nor for years after. In 1862, an electioneering agent, having no interest of any sort in the land, caused a shed, made of boards nailed to posts, to be erected, and therein the resp. had kept some agricultural implements. There was no evidence that the landlord had any knowledge on the subject. The revising barrister decided that this shed was a building within the statute, and that it was occupied by the resp. as tenant. His decision is the subject of this appeal, and we are of opinion that it should be reversed on both points. The Legislature has not defined with clearness the qualification for a vote in a borough. In a county all that is comprised under the term "land" is the principal source of qualification; but in a borough land alone does not qualify. It can only be used as an accessory to a building for the sole purpose of making up the value of 10*l.* The intention of the Legislature respecting a qualification for a borough was much considered in *Cook v. Humber*, 11 C. B. N. S., 41. It is there laid down, that "a qualification is compounded of four elements: tenement, value, occupation, and estate. There must be for tenement, a house, warehouse, counting-house, shop, or other building analogous thereto: there must be for annual value, 10*l.*; there must be occupation—that is, actual exercise of the rights of an owner in possession during the requisite time; there must be an estate in the tenement either of fee or less. If these four distinct elements are combined in the claimant, he is qualified, if otherwise, not. Now, although they must exist in combination in order to qualify, still, in inquiring into the existence of the combination, each element must be separately ascertained: first, is the claimant tenant? secondly, is he occupier? thirdly, is the tenement sufficient in value? and, fourthly, in kind?" Again, in pages 44 and 45 it is said: "The statute requires some permanent occupation of and some independent interest in the property. The permanence prevents the sudden creation of votes. The ownership or the tenancy with rating indicates some independence; in other words, the requirement of at least a tenancy excludes some occupations of less independence, such as that of servants and objects of charity. . . . As to the kind of tenement which qualifies, the statute has described two classes of buildings, namely, those used for residential, and those used for commercial purposes—house for residence, warehouse, counting-house, shop, or other analogous building for commerce." To apply these principles to the present case, we think that the so-called building is not of the class specified in the statute; that is, it is neither in the residential class, nor in the class connected with commercial industry. We also think that the claimant's occupation thereof was not in the capacity of tenant. As to the first question, whether the so-called building is sufficient to qualify, &c., we are aware of the impossibility of defining clearly what is included in the class described in the statute by the words "other buildings," and of the difficulty of affirming that a thing is not in a class when the boundary of the class is unknown. We are also aware of the immense variety of structures which are sufficient buildings, considering the locality, and the use for which they are adapted in that locality.

Still, we are of opinion, that the intention of the Legislature would be defeated, and the words indicating the class of buildings which qualify would be without any effect, if everything which could be called a building was held sufficient. It ought to be in some degree adapted both to be used by man either for residence, or for the industry to which the statute relates, and also to have the degree of durability which is included in the idea of a building. The shed in question fulfils neither of these conditions. The boards were nailed to the posts for the purpose of performing the part of a shed, according to the revising barrister, not for any purpose connected with the interest of the occupier, and were so frail as to have been destroyed in part before the required year had elapsed. The Legislature intended that "building" should give the primary qualification, and that "land" should be a secondary resort, if the building was not worth 10*l.* per annum; but land would become the primary qualification if a shed of no value added to land of the required value was held to qualify. We are aware that the question whether a building qualifies is more a question of fact than law, to be answered by the revising barrister performing the part of a jury in applying the law to the facts before him. We are also aware of the soundness of the principle laid down in *Watson v. Cotton*, 5 C. B. 51, that if the revising barrister finds the building in question to be within the statute, the court will make every presumption for the purpose of supporting his finding, and will not reverse it unless the case shows it to be erroneous. We adopt these principles as sound, but still we think that this decision is shown to be erroneous. The case of *Watson v. Cotton* has been treated by some text writers as if it had decided that a tarpaulin, supported by poles, as described in the case, was a building within the statute, and they have drawn wide inferences therefrom, and these inferences are carried to the furthest extent in Lutwyche's Reports, 58. The learned reporter, in a note there, speaking of this case, thus expresses himself: "It will not be easy in future to say what is not a building, however slight and unsubstantial the structure may be, provided there be a roof to it;" and he goes on to say, "If a building be capable of holding any articles, it may fairly be considered to be a warehouse;" and he goes on to say, "On these principles there is no reason why a donkey-shed, a fowl-house, or a pigstye, should not qualify." The report of this case, in 5 C. B. 51, does not warrant the inference thus drawn from it. It appears there, that the judges, resolving to support the finding of the barrister unless he states facts showing that he must have been in error, take his description to be incomplete, and assume that the description, if it had been complete, would have shown that the shed was a building in the ordinary sense of the word, and was properly included in the same class as warehouse. In page 52, Maule, J. says: "The barrister gives a description embracing some of the incidents of a building. He describes two sides of the structure; the rest may be of solid masonry. He does not profess to give a full description of it." Wilde, C. J. says: "It is possible to conceive sheds of a very substantial and valuable character; for instance, the sheds in the docks, which, for the most part, consist of columns of iron or stone supporting slated roofs." Then, in his judgment, Wilde, C. J. says, "The barrister having found it to be a building within the Act, I must assume that it has all the requisites to constitute a building, except the incidents he sets out." And Maule, J. says: "It is not denied that the shed in question is a building. When once it is established that the thing is a building, the only question that remains is to be decided by the uses and purposes

to which the building is or may be put. If it is or may be applied to the purposes of a building such as is mentioned in the Act, it clearly may be said to be a building within the meaning of the Act. Its being more or less substantial cannot affect the question. Nobody would for a moment doubt that a place constructed at great expense and of great solidity, closed on two sides, and used for the stowage of goods, would be a building within the Act. Assume this to be a building, and in what does that differ from this?" It thus appears to us that the judges do not hold that the shed as described is a building within the Act, but they declare it to be their duty to assume any possible facts not excluded by the case for the purpose of affirming the barrister's finding. The barrister finds it to be a building; that finding is to stand, unless the case excludes the possibility of its being a building, and the judges say that, consistently with the case, the shed may have been on two sides of solid masonry, and may have been of a very substantial and valuable character, and may have been used for the stowage of goods. We may remark that it would have been better if the case had been sent back for restatement as Mr. Gray requested. The argument of that learned counsel on behalf of the app. seems to have been considered by the court as perfectly sound in law, but it did not prevail, because the facts were assumed to exist which made it irrelevant. Mr. Gray contended that the building must be something substantial, something *ejusdem generis* with those specifically mentioned, and not a mere temporary erection for the more convenient use of the land that could be removable by the tenant, and none of the judges disputed the correctness of this view of the law. In deciding whether a building is within the Act, the revising barrister is bound to give effect to the intention of the Legislature expressed in the statute, and in so doing, to be assisted by any rule of construction laid down in any of the cases relating thereto, but his attention should never be turned from the statute which he has to apply; and though general principles of construction laid down by the judges may help to guide his decision, the specific facts of one case form a very fallacious guide in the decision on other specific facts supposed to resemble them; the specific facts of the tarpaulin on poles seem to have led to unsound conclusions. In the present case, we consider that the description of the shed is complete, and according to that description it was not of a substantial character, nor *ejusdem generis* with the buildings specifically mentioned; that is, it was neither adapted to nor intended for any purpose analogous to the purposes for which warehouses are used, and that therefore the decision holding the shed to be a building within the Act must be reversed. Secondly, if the shed is taken to be a building within the statute, then the question is raised whether it was occupied by the resp. in his capacity of tenant; and the answer is in the negative. It is clear that the shed formed no part of the premises demised at the time of the demise; and although it might become parcel of the freehold by being annexed thereto under certain conditions, and so become parcel of the demised premises during the currency of the term, the case does not show that it was made under such conditions as would vest the property in the landlord, subject to the interest of the tenant during the term. It is an incumbrance brought on the land by the licence of the tenant, and, for aught that appears, subject to be removed at the will of the incumbrancer, or on the revocation of the licence by the tenant. The building—not the land—is the substance of the qualification; the resp. cannot hold the shed as tenant, unless the landlord has the property in it as reversioner. But the landlord is not

shown to have assented to its being brought, neither is there any ground for affirming that he could object to its removal, nor does it appear that either landlord or tenant has the property in the boards, if the maker of the shed carried it away.

*Judgment for the app.*

[See the next case.]

#### POWELL v. FARMER.

*Election law—Borough vote—Qualification—Occupation—Building—Potato shed—Pigstye—Ejusdem generis—2 Will. 4, c. 45, s. 27.*

*A building, the occupation of which will confer a borough franchise, must be a building ejusdem generis with the other buildings mentioned in the statute, namely houses, warehouses, counting-houses and shops.*

*A wooden structure erected by a market gardener on land which he rented and occupied for the purposes of his trade, and described as being supported by wooden posts let into the ground and as having boarded sides, a thatched roof and a door fastened by a padlock, and as being used for storing potatoes, may be a building, the occupation of which will confer on the market gardener a borough franchise under sect. 27 of the Reform Act (2 Will. 4, c. 45).*

*Quere, if a pigstye with a thatched roof and in other respects similar to the wooden structure described above is such a building.*

Case stated by the revising barrister for the borough of Kidderminster.

At a court held before me for the revision of the list of voters for the borough of Kidderminster, on the 3rd Oct. 1864, Richard Powell objected to the name of William Farmer being retained on the list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of property occupied within the parish of Kidderminster borough. The said William Farmer is a market gardener, and for the purposes of that business had rented and occupied under the same landlord five acres of land in the parish of Kidderminster borough for more than twelve calendar months next previous to the last day of July 1864, of the clear yearly value of 20*l*.

There was no building on the land when the said William Farmer first took the same of his landlord, but previously to the 31st July 1863 the said William Farmer had erected on the land, at his own expense, a wooden structure with boarded sides and a thatched roof, and supported by wooden posts let into the ground.

The entrance to the structure was by a door fastened by a padlock, and it was used by the said Wm. Farmer for storing potatoes and other things connected with his business. The said Wm. Farmer had erected in like manner on the said land a pigstye with a thatched roof, but in other respects similar to the structure before mentioned. There was no floor made to the pigstye, but cinders were laid in the ground to keep it dry.

It was objected on behalf of the said Richard Powell, that the said Wm. Farmer's name ought to be expunged from the said list on the following grounds: First, that the structures erected by the said Wm. Farmer were not, nor was either of them a building within the meaning of the Reform Act; secondly, that inasmuch as the structures had been erected by the tenant, they formed no part of the property for which he paid rent, and could not be said to be occupied by him with the land as tenant under the same landlord.

I held that the said structures were buildings within the meaning of the Act, and that they were affixed to the freehold, and decided to retain the

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name of the said Wm. Farmer on the said list. If the court shall be of opinion that my decision was wrong, the name of the said Wm. Farmer is to be expunged from such list.

*Keane, Q.C.* for the app., *Karslake Q.C.* and *R. Bourke* for the resp.

The authorities referred to will be found in the preceding case.

*Jan. 17.*—*ERLE, C. J.* delivered the judgment of the court.—Upon this appeal two questions are raised: first, whether the shed described in the case was a building within the statute, that is, whether it had sufficient permanence, and was *ejusdem generis* with the buildings specified in the statute, that is, "house, warehouse, counting-house, shop." The revising barrister found it to be such a building, and, according to the principle laid down in *Watson v. Cotton*, we do not see sufficient in the description he has given to authorise us to reverse his decision. It is constructed of planks nailed to posts let into the ground, and used for storing potatoes, that being an article in the way of the claimant's trade of a market gardener. The second question is, whether this shed was occupied by the claimant in the capacity of tenant. As to this the facts are, that at the time of the demise there was no shed on the premises, but the claimant placed it there during his term, and used it as above mentioned. The revising barrister found that it was so occupied, and we do not see sufficient on his statement to authorise us to reverse his decision. If the shed had become the property of the landlord, it was occupied by the claimant in his capacity of tenant, although he constructed the shed and placed it there during the term. The general rule is, *quicquid plantatur solo, solo cedit*. It may be that the shed continued the property of the tenant and was subject to be removed by him at any time during the term. His right to do so might depend on his contract with his landlord, or on the nature of the construction being such as would make it removable as a trade fixture; but whatever might be the right of the tenant if further facts were added to the statement made, we act on the general presumption that things affixed to the freehold pass to the landlord, and we affirm the decision. The revising barrister has raised a further question, whether a pigstye is a building *ejusdem generis* with "house, warehouse, counting-house and shop." It is not necessary to answer this question, which is only raised in case the shed should be found insufficient; but we would add, that we are by no means prepared to assent to the revising barrister's opinion on this point without further discussion. We would further add, that the revising barrister has, in our judgment, done good service in sending this and the preceding case to us for our decision, and giving us the opportunity of explaining what we consider to be the true meaning of the court in *Watson v. Cotton*, and thereby putting some limitation upon the wide inferences drawn therefrom, contrary in some degree to the intention both of the Legislature expressed in the statute and of the judges expounding the same.

*Judgment for the resp.*

## EXCHEQUER CHAMBER.

Reported by J. THOMPSON and T. W. SAUNDERS, Esqrs.,  
Barristers-at-Law.

## ERRORS FROM THE QUEEN'S BENCH.

*Saturday, Nov. 26, 1864.*

(Before *ERLE, C. J., POLLOCK, C. B., BRAMWELL and CHANNELL, BB., BYLES and KEATING, JJ. and PIGOTT, B.*)

GRAY AND WIFE V. PULLEN AND HUBBLE.

*Negligence — Contractor and employer — Liability — Making drain under Metropolis Local Management Act — Nuisance to highway.*

*The owner of premises within the Metropolis Local Management Act was authorised under sect. 77 of the Act to make a drain from his house into one of the public sewers. He employed a contractor to do the work, and in the course of doing it a trench was cut across the public footway, which was afterwards insufficiently reinstated, and in consequence thereof the deft. sustained an injury :*

*Held (reversing the judgment of the Q. B.), that the owner of the premises as well as the contractor was liable, by reason of the statutory duty cast on the owner to reinstate the highway properly :*

*Held also, that the penalty imposed by sect. 111 of the Act was a cumulative one, and did not take away the right of action.*

For that the defts. dug and caused to be dug a deep hole and trench in, along, and across a certain public and common highway, and thereby greatly obstructed the same and rendered the same dangerous to persons lawfully using the same, by means of which premises, and of the mere carelessness and wrongful and improper conduct of the defts. in that behalf.

The cause was tried before Blackburn, J., at the sittings in London after Hilary Term 1863, and a verdict was found for the pls.; as against the deft. Hubble with 65*l.* damages, but by direction of the learned judge a verdict was found for the deft. Pullen with leave reserved to the pls. to move under the 110th and 111th sections of the 18 & 19 Vict. c. 120 to enter the verdict against him if the Court should be of opinion that those sections apply to the circumstances of this case.

The facts proved in evidence were as follows: The deft. Pullen was the owner of a house and premises situated at the corner of a certain street called Clark's-terrace, Lewisham-road, where it is crossed by Evelyn-street, having a garden attached to the said house, and extending for some distance down Evelyn-street parallel with and next adjoining the same, being only divided from it by the garden wall.

The deft. Hubble was inspector of nuisances under the district board of works for the Lewisham district, in which the house was situated, formed under the 18 & 19 Vict. c. 120, and having been applied to by the occupier of the said house in respect of a nuisance caused by the cesspool of the said house and situate in the garden belonging thereto, the deft. Hubble thereupon gave notice to the deft. Pullen, the owner, under the provisions of the said Act, and required the said deft. Pullen to cure the said nuisance, and pointing out how it could it be done by making a drain from the said cesspool, carrying it under the said garden wall, and thence across the public footpath in Evelyn-street, adjoining the said garden wall, into a pipe-drain in Evelyn-street running alongside of the said footpath, and so into a sewer in Nicholas-street vested in the said district board.

The deft. Pullen thereupon employed the deft. Hubble as a contractor to do the work in question for the sum of 20*l.*, and the same was accordingly done under the immediate inspection and direction

of the said deft. Hubble, and the earth filled in over the said drain and the work left.

A few nights afterwards, namely, on the night of the 25th April 1862, the plt. Maria Gray, whilst passing along Evelyn-street, on the public footpath next adjoining the said garden, and across which the said drain had been cut, fell violently into a hole or trench over the said drain, and sustained the injuries complained of without any negligence on her part.

It was proved that there had been heavy rains a day or two before the accident, which had caused the ground so to sink as to make the hole into which the plt. fell.

At the close of the plts.' case the learned Judge ruled that there was no evidence to go to the jury that Hubble had acted as the servant of Pullen in making the drain; but the evidence was, he had acted as a contractor for the work; that the said deft. Pullen had authority to cause the said drain to be made under the 18 & 19 Vict. c. 120, s. 77, and did not come within the scope of the 111th section of the said Act so as to be responsible for the performance of the work, and he withdrew the consideration of the case against Pullen from the jury.

And as to the deft. Hubble, the learned judge left it to the jury to say whether the filling in of the hole or trench over the said drain, and which had doubtless been caused by the said rain, had been properly done, or whether there had been any negligence with regard to the filling in of the same.

The jury found that the ramming in of the said earth was insufficient, and found a verdict against Hubble, with 65*l.* damages; and thereupon the learned judge directed a verdict to be entered for the deft. Pullen, but reserved leave to the plts. to move to enter the verdict against him also under the 110th and 111th sections, if, on the proper construction of the said Act of Parliament, he was responsible for the surface of the said drain not having been properly filled in.

A rule was accordingly moved for and refused.

The question for the opinion of the Court of Ex. Ch. is, whether, on the proper construction of the said Act, the said deft. Pullen was responsible under the 110th and 111th sections of the said Act, for the improper filling in of the earth over the said drain so made by his authority by a contractor under him under the 77th section of the said Act of Parliament.

If the Court shall be of opinion in the affirmative, then the verdict found for the deft. Pullen is to be set aside, and the verdict entered against him; otherwise the verdict found for him is to stand; and in either case there is to be judgment accordingly.

*J. Brown* (Duly with him) for the app.—It is submitted that the deft. Pullen is liable in this case. It may be conceded that Pullen is not liable at common law for the negligence of Hubble, the contractor for the work; but in this case Pullen had no right to interfere with the public highway except under the 18 & 19 Vict. c. 120, s. 77. The privilege was granted to him as owner of the house with the correlative duty of restoring the highway to its proper condition, and he could not by employing a contractor to do the work divest himself of that duty. Sect. 77 enacts that it shall be lawful for any person at his own expense to make or branch any drain into any of the sewers vested in the Metropolitan Board of Works or any vestry or district board under the Act, or authorised to be made by them under this Act, such drain being of such a size and of such conditions, and branched to such sewer in such a manner and form of communication in all respects as the vestry or board shall direct or appoint. And in case any person make or branch any drain into any of the said sewers so vested in the vestry or

board, or authorised to be made by them under this Act, of a larger size or of different conditions, or in a different manner and form of communication than shall be directed or appointed by the vestry or board, every person so offending shall for every such offence forfeit a sum not exceeding 50*l.* The duty of reinstating the highway is imposed by sects. 110 and 111. Now, although sect. 111 imposes a penalty for neglecting to reinstate the highway, &c., and sect. 204 gives half the penalty to the informer, yet that does not deprive the subject of his right of action for any damages sustained through such neglect: (*Couch v. Steel*, 3 El. & Bl. 402.) Then, does sect. 110 extend to the owner of premises wherefrom a drain is branched into a sewer, and the highway broken up in the course of work? It is submitted that it does. The case of *Hole v. The Sittingbourne and Sheerness Railway Company*, 6 H. & N. 488, applies. There the company was held liable for obstructing the navigation of a river by a defective bridge constructed by authority of an Act of Parliament, although the bridge was unfinished and in the hands of the contractor, and the defect was that from some cause the machinery would not act, and the bridge could not be opened. Pollock, C.B. said that the case did not fall within the rule applicable to those cases where a person has been held exempt because he was not the master of the servant whose negligence or improper conduct produced the mischief; that the maxim *qui facit per alium facit per se* applied; and that where a person is engaged in a work by contract, or by having obtained an Act of Parliament empowering him to do it, he cannot avoid the responsibility by employing somebody else to do the work under the contract. So in *Pickard v. Smith*, 10 C. B., N. S., 480; 4 L. T. Rep. N. S. 470, it was held that the occupier of refreshment-rooms at a railway-station with a cellar underneath, was liable for the negligence of the servants of a coal-dealer in leaving unguarded a trap-door on the railway platform by which the coals were put in the cellar. It may be stated generally, that when a person is under an obligation to do an act for the benefit of the public, he cannot discharge that obligation by employing another. Again, in *Blake v. Thirst*, 8 L. T. Rep. N. S. 251, it was held that a builder who had contracted with commissioners to make a sewer was liable for the negligence of a sub-contractor in not sufficiently guarding and lighting an excavation. [BRAMWELL, B.—Suppose the contractor had gone away and never filled in the drain at all. How would it be then?] Then the employer would clearly be bound. In the judgment of the court below, it seems to have been assumed that, sect. 111 having imposed a penalty for neglect to reinstate the highway, the right of action was taken away. That cannot be so. For these reasons, the judgment of the court below ought to be reversed.

*Henry James* for the resp.—The deft. Pullen is not liable. There is no just ground for distinguishing the case of the duty arising at common law, and the duty created by statute. In *Overtou v. Freeman*, 11 C. B. 871, the distinction was taken between a public and a private duty, but unsuccessfully. This is a case of misfeasance. The contractor is employed as having competent skill to do the work properly. If he does it improperly, the employer, it is submitted, is not liable. In *Hole v. The Sittingbourne and Sheerness Railway Company*, the accident happened from the negligence of the sub-contractor. There Wilde, B. said: "As far as I can see, the real distinction is, that where the accident happens by reason of the negligence of the servant of the contractor, so as to cause injury to a third person, that being a matter entirely collateral to that which the contractor had contracted to do, there the liability turns on the relation of master



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and servant; but where the thing contracted to be done is the thing that causes the mischief, and the mischief can only be said to arise without the direct authority of the person ordering, because the thing has been imperfectly done; in other words, where the injury arises from the imperfectly doing the thing ordered to be done, there the party giving the order becomes responsible." In the present case the accident was caused by negligence in the performance of the work contracted for, and according to the above *dictum* of Wilde, B., the deft. Pullen is not liable.

*J. Brown.*—The liability here is not founded on the doctrine of negligence, but upon a breach of duty imposed by a statute.

*Cur. adv. vult.*

*Nov. 29.*—ERLE, C. J.—In this case the plt. declared for damages to his wife from falling into a drain made in the highway by the deft. The deft. justified making the drain under the power given by the Metropolis Local Management Act to make a drain from his premises to a sewer. Upon the trial it appeared that the deft. had lawfully made the drain under that Act; that is to say, a trench across the highway, which was the cause of the damage, and had employed a contractor both to make it and to fill it up properly; and, by the negligence of the contractor, the drain was filled up improperly, and so the damage was caused. At the trial the verdict was entered against the contractor, and for the employer, on the ground that the employer was not responsible for the negligence of the contractor; and so it was decided in the court below, and this is an appeal from that judgment. The app. has contended that a duty was imposed on the deft. Pullen, as the owner of the premises who caused the drain to be made across the highway, to fill up the drain in a proper manner. Sect. 77, authorising the making of the drain, implies that the duty to fill it up was imposed; and sect. 110 commands that the person who makes it shall fill it up properly, and the app. contended that the person making that drain is responsible if the duty imposed on him by the statute is not performed, and damage is caused thereby, and that the complaint is of an omission to perform a duty imposed by statute, not of a wrongful act of commission by a contractor beyond the scope of his employment. He relied on *Hole v. The Sittingbourne Railway Company*, where the duty imposed on the defts. by statute was to make a bridge that would open, and they employed a contractor who made a bridge that did not open as the statute required, and the defts. were held liable on the ground of their omission to perform the duty imposed by statute. There the Chief Baron says, in effect, that a party who undertakes that a work shall be done is not released from liability for breach of his undertaking because he employed a contractor to do it, and the contractor's neglect caused the breach. The obligation imposed by statute is analogous to that created by an undertaking; the omission to perform it is not excused by reason that the party employed a third person as contractor to do it for him, who failed. And he distinguished the case where a contractor in the performance of his contract does a wrongful act, not according to his contract, and causes damage thereby; in that case the employer is not responsible. This distinction is also taken by Williams, J., in *Pickard v. Smith*, deciding that the employer, allowing a coal merchant to make an opening in a way for coal to be shot down, is responsible for the negligence of the coal merchant's men in omitting to close the opening, for the employer was bound to see that the opening should be properly closed, and his duty does not

arise through the omission of the agent whom the deft. had employed to do it for him. For these reasons it appears to us that the deft. Pullen is not excused from liability for the omission to fill up the drain properly, on the ground that he had employed a contractor to do that duty for him, and that the contractor was negligent and left the duty unperformed. We think the duty was implied in the grant of the power to open the drain in the highway in sect. 77, and was expressed in sect. 110; and that this statutable duty is a duty created absolutely, and is not a duty created by sect. 111, imposing a penalty to be enforced solely by enforcing the duty. The penalty imposed by sect. 111, appears to us to be a cumulative remedy. The only question left to us is, whether the verdict should be entered against the deft. Pullen, and we answer the question in the affirmative.

*Judgment reversed.*

*Nov. 28, 1864, and Feb. 3, 1865.*

(Before ERLE, C. J., POLLOCK, C. B., BYLES and KEATING, JJ., CHANNELL and PIGOTT, BB.)

REG. v. THE JUSTICES OF SUSSEX, *re* AN APPEAL BETWEEN THE PARISH OFFICERS OF THE PARISH OF COLEMORE (apps.) AND THE PARISH OFFICERS OF THE PARISH OF FUNTINGTON (resps.)

*Order of removal—Appeal—Time for giving grounds of appeal—Adjourned sessions—Discretion of justices—4 & 5 Will. 4, c. 76, ss. 69-81—11 & 12 Vict. c. 31, s. 9.*

*If, upon an appeal against an order of removal, there is, by the practice of the quarter sessions, time for giving full notice of appeal (e. g. eight days), though less than fourteen days, the apps. are bound to give their grounds of appeal together with such notice, and they have no right, on the plea of not having such fourteen days time for giving their grounds of appeal, to require the sessions to enter and respite their appeal. (The judgment of the Court of Q. B. upon this point in Reg. v. The Justices of Suffolk, 4 Ad. & Ell. 319, overruled.)*

*Apps. cannot claim, as of right, the full periods of twenty-one and fourteen days mentioned in sect. 9 of the 11 & 12 Vict. c. 31, within which to mature their appeal, and it is for the sessions, upon an application to enter and respite an appeal, to determine whether the apps. have used due diligence in preparing for trial.*

*Where the sessions of a county are, for the convenience of business, held in succession in several divisions, and by the practice of such sessions the appeals arising within each division are to be tried in the divisions in which they arise, an app. is bound to give his notice and grounds of appeal with reference to such division, and if there is time for his notices with reference to such division, he is bound to give them, although such notices would not be in time for the original commencement of the quarter sessions (overruling Rex v. The Justices of Suffolk, 16 L. J. 36, M. C.)*

*An order of removal was served on the 30th Aug., and a copy of the depositions (being applied for) was delivered on the 19th Sept. Notice of intention to commence and enter an appeal at the next quarter sessions for the county of Sussex was sent on the 1st Oct. The Sussex sessions were always held in each of two divisions of the county, namely, for the eastern division on the 15th Oct., and for the western division on the 18th Oct., and by the practice of the sessions appeals were triable in that division in which they arose. The appeal in question would have been triable in the western division. By the rules of the sessions eight days' notice of appeal were required. At the sessions in the western division, on the 18th Oct., application was made to enter and respite the appeal, on the*



ground that the apps. had not fourteen clear days before the commencement of the original sessions to give their grounds of appeal. The sessions refused to permit the appeal to be entered and respited:

*Held* (reversing the decision of the court below), that the sessions were right.

This was a writ of error upon a judgment for the prosecution in the court below upon a demurrer to a return to a *mandamus*. In its judgment, the court below gave the parties leave, in the event of the case going to a court of error, to amend both the *mandamus* and the return by the statement of additional facts, so as to raise more concisely all the questions in dispute. In pursuance of this leave, the *mandamus* and return were amended. The following are the facts there stated: (see *Reg. v. The Justices of Sussex*, 6 L. T. Rep. N. S. 422; 2 B. & S. 664; 31 L. J. 193, M. C.)

It was set out, that on the 18th Aug. 1860, certain justices of Sussex made an order for the removal of John Sandham and his six children from the parish of Funtington in that county, to the parish of Colemore, in the county of Southampton.

The order and grounds of removal were, on the 30th Aug., sent by post to the overseers of Colemore, by whom they were received on the 1st Sept. On the 17th Sept. the churchwardens and overseers of Colemore applied for copies of the depositions, which were sent on the 18th and delivered to them on the 19th Sept. On Oct. 1 the parish of Colemore gave notice of appeal to the then next Quarter Sessions for Sussex, to be holden on Oct. 15, but no grounds of appeal were then sent. At the said Quarter Sessions the parish of Colemore applied to enter and respite the appeal, which application was refused by the justices. In the following term a *mandamus* to the justices to enter and respite such appeal was obtained by the parish of Colemore, to which the justices returned that, before the holding of their Quarter Sessions, the parish of Colemore had not delivered to the parish of Funtington any grounds of appeal, as required by the statute, but had claimed to enter and respite such appeal as a matter of right, and without showing any cause or assigning any reason for such delay.

The return then proceeded thus:

And whereas there is, for the whole of the said county of Sussex, one commission of the peace only, the justices named in which have jurisdiction over the whole of such county, but act usually in the division in which they reside, and there is for the whole of such county one clerk of the peace who has his office at Lewes only, where the records of the entire county are kept, and no Act of Parliament (save and except the 2 & 3 Will. 4, c. 64, entitled "An Act to settle and describe the divisions of counties and the limits of cities and boroughs in England and Wales, in so far as respects the election of members to serve in Parliament), royal charter or other legal instrument can be found whereby or under the authority whereof the said county of Sussex has been divided into two divisions, although in the statute 48 Geo. 3, c. 107, reference, as will be seen by that statute, is made to there being such divisions; and that, for the purpose of transacting business, quarter sessions for the said county have always been holden in each of two divisions, one called the eastern, and the other the western; and that, in the notices and advertisements issued by the clerk of the peace for the said county of Sussex, relating to the holding of quarter sessions for the said county, the heading of such notices and advertisements is as follows: "Sussex Sessions. I hereby give public notice that the next General Quarter Sessions of the Peace for the county of Sussex will be holden as follows: For the eastern division, at Lewes, on, &c.; for the western division, at Horsham, on, &c." Advertisements are also issued by the clerk of the peace for the said county of Sussex, relating to the holding of quarter sessions for the said county, the heading of which is as follows: "West Sussex Session. I hereby give public notice that the next general quarter sessions of the peace for the western division of the county of Sussex will be holden, &c." And that in the rolls, records, and documents of and relating to the said court of quarter sessions, the heading or caption is as follows: "Sussex. At the general quarter sessions of the peace holden at Lewes in and for the county of Sussex or Sussex. At the general quarter

sessions of the peace, holden at Chichester, in and for the county of Sussex," and that the record of the proceedings of the sessions, held in both of the said divisions, is entered, contained, and kept in one and the same book, and that separate writs of *venire facias* directing the sheriff of the said county to summon a jury have always been issued: one for and in respect of each of the said divisions, and that for each of the said divisions a separate county treasurer has been appointed, and one of the rules and orders for the regulation of the practice of the courts of general quarter sessions of the peace of the county of Sussex, made at the sessions held at Petworth, for the western division thereof, on the 15th April 1828, and at Lewes for the eastern division thereof on the 17th of the same month, is as follows: "Appeals. It is ordered that eight clear days' notice of appeal to a poorer rate, order of removal, or other order or proceeding cognisable by these courts in the way of appeal, shall be given (save and except where a certain time is limited and prescribed by Act of Parliament for giving notice of appeal), exclusive of the day of service of such notice, and the first day of the sessions in that division of the county in which such appeal shall be brought forward, and that such notice do extend to any appeal whether entered at the same or respited from a former session." Therefore the keepers of Her Majesty's peace and justices of our Lady the Queen assigned to hear and determine divers felonies, trespasses, and other misdemeanors within and for the said county of Sussex, have declined and do decline to receive and enter the appeal of the said churchwardens and overseers of the poor of the parish of Colemore aforesaid, against the order for the removal of the said John Sandham and his six children from the said parish of Funtington to the said parish of Colemore, and to hear and determine the merits of the said appeal as commanded by Her Majesty's writ to the said keepers and justices directed in this behalf and hereto annexed.

*Huddleston, Q. C.* and *Maule* now appeared for the resps., and contended that the judgment of the court below was erroneous.

*Manisty, Q. C.* and *T. W. Saunders* appeared for the apps., and argued that the judgment was correct.

*Cur. adv. vult.*

(The facts and the cases cited are so fully referred to in the judgment of the court that it is unnecessary to repeat them here.)

*Feb. 3.*—*ERLE, C.J.*—We think that the judgment of the majority of the court below ought to be reversed, on three grounds: First, because, according to our construction of the 4 & 5 Will. 4, c. 76, s. 81, the delivery of grounds of appeal with a notice of appeal is as valid for all purposes as a delivery fourteen days at least before the sessions begin. Secondly, because, even if the grounds of appeal must be delivered fourteen clear days before the sessions begin, still the justices decide against the adjournment of this appeal according to their discretion, and *mandamus* does not lie to control the exercise of the discretion of the justices upon matters left by law to their discretion. And, thirdly, because even if the fourteen clear days are required, and the matter was not left by law to the discretion of the justices, still the rules of practice for the sessions held for the western division of the county were valid, and the app., according to those rules, might have delivered the grounds of appeal with the notice of appeal fourteen clear days before those sessions began; and so the refusal of the adjournment was right. The first two grounds of reversal may be conveniently considered together, as much that relates to the one throws light upon the other; and we begin with a statement of the dates, as the decision turns thereon. The order of removal, &c. was served on the 30th Aug. A copy of the depositions was applied for, and the copy delivered on the 19th Sept. Notice of intention to commence and enter an appeal at the next sessions was sent on the 1st Oct. The sessions for the eastern division began on the 15th Oct. The sessions for the western division, to which this appeal belonged, began on the 18th Oct. The time for notice of trial of an appeal was, by the practice of the county, eight days. The statutes which govern are the 13 & 14 Car. 2, giving an appeal against an order of removal to the next sessions; and the 9 Geo. 1,

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c. 7, commanding the sessions to adjourn when they are of opinion that reasonable notice of trial has not been given to the resp.; and the 4 & 5 Will. 4, c. 76, ss. 79 and 81, commanding a delay in the removal of the pauper of twenty-one days after service of the order of removal; and the 11 & 12 Vict. c. 31, barring an appeal unless notice shall have been given within twenty-one days, *plus* a contingent fourteen days, and after service of the order of removal. The sessions refused the adjournment, on the ground that it was practically possible for the app. to have been ready to try the appeal in fourteen days after service of the order of removal, and that his laches in not being ready did not create a right to demand an adjournment. The majority of the court below, in their judgment on the *mandamus* commanding such adjournment, appeared to have held, first, that the statutes of 4 & 5 Will. 4, c. 76, and the 11 & 12 Vict. c. 31, have authorised the apps. to take twenty-one days with a contingent addition of fourteen days from the service of the order of removal as the minimum time within which it is practically possible to give notice of appeal; and secondly, that if at the expiration of that space of time there are not fourteen clear days before the session begins, the app. has a right to demand an adjournment till the next sessions. So that the matter for present consideration is the effect of the two last-mentioned statutes upon the time allowed for appeals under the statutes of the 13 & 14 Car. 2, c. 12. The power created by that statute is the power under which the app. derives his right to appeal, and that statute governs the rights of the parties now before the court. We propose to consider the effect of that statute, and of those which have followed it in the order of time upon the present case. The 13 & 14 Car. 2, c. 12, s. 2, giving power to appeal to the next sessions, is imperfect both in leaving "next" undefined, and also leaving uncertain the time and manner of commencing an appeal and bringing it to trial. As the next sessions, in the literal sense, was at times an impossible sessions—for example, if the order of removal was served on the ninetieth day of the quarter, and the sessions began on the following day, as in *Rex v. East Riding*, Doug. 192—the supplement wanted was a reference to the sessions which should commence next after an interval (say of eight days or the like) from the service of the order of removal, &c.; (see *Rex v. Devon*, 8 B. & C. 640; and *Rex v. Southampton*, 8 B. & C. 641, for instances where the interval before the next sessions was so short as to justify the app. in passing them over.) As to the other imperfection, relating to the commencing an appeal and bringing it on for trial, the supplement wanted was that the appeal suit should be commenced by an entry (say at the office of the clerk of the peace, or the like), and brought to trial by a notice of trial, say of eight days, or the like. But we are to administer the law as it is, and for the purpose of so doing we would presume that the quarter may be taken to be ninety days; that the order of removal may be served on the first days of the quarter, or any intervening day; that the appeal may be commenced by notice either of appeal alone, or of appeal and trial, on any day after service of the order of removal, and before the commencement of the next sessions; or the appeal may be commenced by entry at the sessions without any notice; and we find that the above-mentioned imperfections have been partially remedied both by the courts and by the Legislature. The courts have held "next sessions" to mean, next practically possible in order that the app. might have the possibility of exercising his right, and, at first, very short intervals were considered as sufficient to make the sessions practically possible for the entry of an appeal. Thus, in *Reg. v. The Justices of Here-*

*fordshire*, 3 Term Rep. 504, two days, and in *Reg. v. The Justices of Wilts*, 2 Bott. 717, four days were held to be sufficient. Afterwards, as the time required varied with the circumstances in each case, the space allowed by the practice for a notice of trial was suggested as a time within which it would, generally speaking, be practically possible to decide on appealing: (see *Rex v. Devon*, 8 B. & C. 640, and *Rex v. Southampton*, 8 B. & C. 641.) The Legislature has required prompt decision both to prevent waste of costs and save the misery of suspense to the pauper; and if notice of appeal gave the resp. no rights to any costs till after notice of trial should have been served, in analogy to the practice at Westminster with respect to the costs of preparing for trial, there would be no hardship in requiring the receiving parish to say (at least, within the time allowed for notice of trial) whether it would receive the pauper or appeal! If the app. chose to give notice of appeal, and afterwards found he had no ground, and gave no notice of trial, the matter would be promptly disposed of, and no expense would be incurred. Although the court gave some relief to the app. by holding "next" to mean "practicable," yet this gave no relief to the resp. if the app. brought on the appeal without reasonable notice to him, and the Legislature remedied this grievance by the 9 Geo. 1, c. 7, enacting that no appeal shall be proceeded upon unless reasonable notice be given to the resp., the reasonableness to be judged of by the sessions; and if it shall appear to them that reasonable time of notice was not given, then they shall adjourn the appeal to the next sessions. This statute imposed a duty to adjourn, in respect of which *mandamus* lies when the sessions find that reasonable time of notice of trial has not been given; and it is the only statute we are aware of giving power to interfere with the discretion of the justices in respect of adjournments of trials of appeals. This statute was obviously intended to give relief to resps. in securing to them reasonable notice of trial; and the sessions of the North Riding gave it that effect, at the same time preventing the app. from gaining delay by his own laches in refusing to respite his appeal where they found that there had been sufficient time after the removal of the pauper (on the 28th Nov.) for the apps. to give notice and to come prepared to try the appeal (at the sessions held on the 18th Jan. following), and in this decision they were supported by the K.B.: (see *Rex v. North Riding*, 3 T.R. 150.) But Lord Ellenborough held the contrary, and it was finally decided that the app., by omitting notice altogether, acquired a right under this statute to demand an adjournment and to enforce his demand by *mandamus*, because, if no notice at all was given, in that case the new notice of the sessions could not find that a reasonable notice had been given: (*Reg. v. Staffordshire*, 7 Ex. 554.) From the time of this decision the app. who gave no notice at all could always obtain a delay of ninety days by entering and respiting, till the Poor Law Amendment Act was passed, whereby some check was given to this delay. That statute, the 4 & 5 Will. 4, c. 76, by s. 79 prohibited the removal of a pauper until twenty-one days after the order had been served, with a further delay of the removal in case notice of appeal should be given, till such appeal should be determined. And sect. 81 required the app. to give the grounds of appeal with the notice of appeal, fourteen days at least before the first day of the sessions at which the appeal was intended to be tried. This statute is to be construed by reference to the evils incidental to pauperism which were to be remedied by it, and as far as the present question is concerned by reference to the evils incidental to litigation concerning removal of paupers as it then existed. There was the evil of delay, because apps., if they chose, had a certainty of delay for one

quarter and more by entering and respiting the appeal. There was evil to the pauper from the delay, who had to suffer the annoyance of being thrust out and back from parish to parish; and there was evil to the tribunal and to the litigants from the absence of any information on either side of the matter to be tried. The attempted remedies were these: that the paupers should not be removed until after twenty-one days from service of the order of removal, as above stated, unless there was notice of submission to the order. This provision, in its direct terms, relates solely to the protection of the pauper and to the saving of expenses, and has not any connection with the time within which it is practically possible to decide on appealing or submitting to the order. As the order of removal might be served on any of the ninety days of the quarter, the Legislature took twenty-one days as a medium time for staying the removal. Still, if the session began within the twenty-one days, it gave no authority to pass them over as impossible, but during the twenty-one days left the parties as they stood therefore under the statute of the 13 & 14 Car. 2, c. 12. This statute further provided, by sect. 81, that each party should supply to each other information of the matter to be tried, the removing parish by sending the grounds of appeal and the provision requiring the delivery of a statement of the grounds of appeal with the notice of appeal, fourteen days at least before the first day of sessions, and this is the provision which we have to construe in this judgment. In making this construction we take the enactment as it stood before the passing of the 11 & 12 Vict. c. 31, although we consider that the intention of the Legislature in passing the 4 & 5 Will. 4 was not fulfilled till ulterior appeals were barred by sect. 9 of the latter statute. But we postpone for the present the consideration of the latter statute, and proceed to the construction of the 81st section of the 4 & 5 Will. 4, and we consider that it is to be construed according to the plain meaning of the words, so that the apps. may deliver the grounds of appeal either with the notice of appeal or fourteen days before the sessions begin, and our reasons are as follows: As the statute 4 & 5 Will. 4 required the service of a notice of the act of appealing within twenty-one days after service of the order of removal, and as the order of removal might be served in the early part of the quarter, the appeal might frequently be commenced a longer time before the sessions than would be reasonable for a notice of trial, and as the statement of the grounds of appeal might need alteration when the trial was nearer, therefore a power of delivering the statement of the grounds of appeal later than the service of the notice of the act of appeal was given. Moreover, the practice in regard to the time for notice of trial varied in different counties very widely (from twenty-eight days to six days, as it is said), and, as in case of a long notice there might be reason to alter the grounds of appeal after the notice of appeal was served, it is probable that the space of fourteen days was chosen for all sessions as a medium time for the delivery of the grounds of appeal, so that, if the statement should not accompany the notice of appeal, it should be given fourteen clear days before the sessions; also, this alternative of serving a statement of grounds separately might be wanted for the same reason when the notice of appeal should be served long before the beginning of the sessions of trial, by reason of an entry and respite. The grounds of appeal delivered with the notice of appeal would in all cases appear to have been a delivery in a reasonable time for preparing for trial, according to the practice of the sessions where it is made, because before the statute such a notice of appeal at these sessions would have operated as a notice of trial

without any grounds, and if it was a reasonable notice without any grounds, it would, *a fortiori*, be reasonable with the grounds giving definite information of the issue to be tried. If sect. 81 is read with reference to these considerations, all the words have a reasonable meaning in their ordinary sense, and operate with beneficial simplicity; but the construction contended for by the prosecutors has a confused and purposeless complexity, and ill accords with the strength that pervades this statute. This part of the judgment relates to the construction of the clause requiring delivery of the grounds of appeal with notice of appeal, fourteen days at least before the beginning of the sessions, and contains the reasons for the first ground for reversal above stated. It relates also to the point respecting the app.'s right to demand an adjournment, as it shows that the statute 4 & 5 Will. 4, c. 76, had no relation to defining the time after service of the order of removal within which it is practically possible for a receiving parish to decide whether they will appeal or submit to the order, but left that matter as it stood under 13 & 14 Car. 2, c. 12. This brings us to the 11 & 12 Vict. c. 31. One of the evils to be remedied by this statute arose from the decision in *Rex v. Suffolk*, 4 Ad. & E. 319, and *Rex v. Cornwall*, 6 A. & E. 894, namely, that 4 & 5 Will. 4, c. 76, had not required the appeal to be brought within twenty-one days, nor any notice of appeal to be given within twenty-one days, and had not altered the practice as to appealing, except as to removing the pauper within twenty-one days, and had left further power of appeal against the removal itself as a new grievance occasioned thereby. To cure this and to supplement these omissions in the 4 & 5 Will. 5, c. 76, it was enacted by sect. 9 that no appeal should be allowed unless notice of appeal should be served on the resp. within twenty-one days after the service of the order of removal; and if the enactment had stopped there it would have been complete, but it was made subject to a proviso for fourteen days in respect of depositions. This provision was made in consequence of the repeal of the clause, requiring examinations to be sent with the order of removal, and the repeal of that clause was made in order to remedy the evil referred to in the preamble of the statute, namely, expensive and useless litigation upon the point, "whether the caption of an examination showed jurisdiction," in which the merits of the appeal were entirely disregarded. This excessiveness in the law was excised by putting an end to the sending of examinations with an order of removal and substituting for them grounds of removal by sects. 1 and 2. Then sect. 4 required that the final decision should not be upon the form of the notices and other documents, and that amendments should be made and adjournments granted, as need might be, for procuring a decision on the substance; and the recital that the grounds were mutually delivered in order that the parties should prepare for trial thereon, meant that the parties should direct their attention to the substance, and that the decision should be thereon rather than on matters of useless form. So far the provisions are salutary; that which follows relates to the fourteen days, and has had a different effect. Sect. 3 provided that the clerk to the justices should send a copy of the depositions to the app. within seven days if he applied and paid for them. Then sect. 9 contained the proviso, that the app. should have fourteen days from the delivery of the depositions, within which time his notice of appeal should be valid. The defect of sect. 3 is that it does not limit the time within which the app. should be obliged to apply for a copy of the depositions; the consequence is that a dilatory app. consumes the twenty-one days given for trying his appeal in making a

colourable application for a copy of the depositions, and by that pretence acquiring a right to the further delay, beyond the twenty-one days, of fourteen days after the copy had been delivered. The proviso giving fourteen days after delivery of the depositions was intended to prevent undue delay in that delivery; but the effect has been to enable the apps. again to baffle the intention of the Legislature in respect of bringing appeals against orders of removal to a prompt decision. These are the statutes that govern the decision of the present question. The statute 13 & 14 Car. 2, requiring the appeal to be to the next practicable sessions, has the same operation now as it had when it was passed. The 4 & 5 Will. 4, c. 76, s. 81, supplemented by the 11 & 12 Vict. c. 31, s. 8, as to time, is a statute of limitation, barring all appeal of which no notice has been served within the limited time, and preventing the app. from entering and respiting as a matter of right, as above described. These statutes fix a minimum of delay, after which the appeal is barred, but they have no reference to fixing the maximum of delay after which the sessions next in fact may be passed over as not the next practicable, or after which the app. may demand an adjournment, although the sessions think he has not used due diligence in giving notice of appeal and trial. According to our construction of the statutes, the app. derived no right from them to assume that it is not practically possible to prepare for trial of an appeal in less than twenty-one days, with an addition of fourteen days; and as it is clearly possible to prepare for the trial of an appeal in less than thirty-five days after service of the order of removal, the sessions have a right to find, as the sessions for the North Riding in the case above cited found, that the app. has been guilty of unreasonable delay, and on that account to refuse the adjournment; and if they so found, they had the right to decide on the question of adjournment as they thought right. There is ample authority for saying that an app. cannot, by his negligence or dilatory conduct, make the sessions impracticable which were in fact practicable: (see *Rex v. Serenoaks*, 7 Q. B. 136; *Rex v. Peterborough*, 7 E. & B. 643; *Rex v. The West Riding*, E. B. & E. 717.) It has been said in some of these cases, that the app. may take all the time—that is, twenty-one days *plus* fourteen days—without losing the right of appeal. This is true, where more than thirty-five days intervene between the service of the order of removal and the beginning of the sessions, but not true according to the statutes above reviewed, where the sessions begin within thirty-one days. Then the question being whether the app. had by any statute a right upon these facts to demand an adjournment? Our answer is in the negative, and it follows that, even if grounds of appeal should be sent fourteen days at least before the first day of sessions, this *mandamus* is bad. In coming to this conclusion we overrule an exposition of the meaning of 4 & 5 Will. 4, c. 76, ss. 79 and 81, which appears to have flowed from the judges in *Rex v. Suffolk*, 4 Ad. & Ell. 319, to some extent extra-judicial certainly, without discussion at the bar, and probably without much consideration on the bench, as the statute was very recent, and the judgments are in part self-contradictory in the manner pointed out by Blackburn, J., in the court below. But that exposition has been considered binding on the court where it was pronounced, and has been repeatedly adopted there. The Legislature interfered to correct this exposition, and gave such remedy as it afforded by the 11 & 12 Vict. c. 31; but that statute has also been the source of further difficulty, and the interpretations of those two statutes have been the source of such constant contention that it is alike impossible either

to apply the legal maxim *communis error facit jus*, or to assert as a fact that the practice has been settled. The matter has now been brought for the first time before a court of error. In this court we are limited to the statutes themselves as a fountain-head, and we are to declare the law as it appears to us to be contained therein, although at the expense of dissenting from several judicial opinions of eminent judges, founded in a great measure upon the case of *Rex v. Suffolk*, 4 Ad. & Ell., from which in the court below, according to usual course, they did not feel themselves at liberty to dissent. We have resorted to the statutes, and endeavoured to declare the law contained in them so far as is relevant to the case before us, and according to the law we think the judgment of the court below should be reversed on the two first grounds on which the apps. have relied. We now proceed to the third ground for reversal above mentioned, namely, that the rules of practice for the sessions held for the western division of the county of Sussex were valid, and that according to these rules the app. might have delivered grounds of appeal with a notice of appeal fourteen clear days before those sessions began, and so the refusal of the adjournment was right. It is not proposed to touch the question, whether the sessions for each division can be maintained to be original sessions as argued by Mr. Huddleston; it is assumed, for the purpose of this judgment, that the sessions for the western division are held by adjournment from the sessions for the eastern division, and although that is assumed for the purpose of this judgment, such assumption cannot prejudice the rights of the county in respect of the claim to two original sessions in each quarter if it should be hereafter renewed. Neither is it proposed to make any alteration in the rule that the next sessions after service of an order of removal having jurisdiction over an appeal against it must be ascertained by reference to the date of the original sessions for the county, and not of any adjournment thereof, as laid down in *Rex v. The Justices of Sussex*, 7 T. R. 107. But when for practical convenience the county is divided into distinct divisions, and in each division a distinct court is held, so that all the questions locally arising within each division can be raised, the practice belonging to that division and all the process for that division is returnable at the court for that division, and that panels of the jurors are made out for that division, and the rules of practice made by the court of each division for the conduct of business in it assume that the day when the court for that division begins its sittings is the first day of the sessions for that division, we see good reason for holding that the conduct of an appeal suit which has been properly commenced, and which belongs to one of those divisions, should be governed by the rules of practice for that division in the same manner as the notices, summonses and proceedings other than those relating to appeals against orders of removal and poor-rates are governed thereby. Much inconvenience would be saved and many failures of justice would be prevented if such were the law, and no advantage has been suggested to arise from holding the contrary, unless it be the danger of confusion between the sessions which have jurisdiction to receive the appeal and the sessions which are to try it. But the danger from that source is much lessened since appellants are required by the 4 & 5 Will. 4, c. 76, and 11 & 12 Vict. c. 31, in almost all cases, to commence their appeal by service of notice of appeal on the resp., which notice would be so construed as to make it valid if the intention of the parties to give a valid notice was apparent. The only authority to the contrary is *Rex v. Suffolk*, 16 L. J. 36. M. C., which was by

a single judge alone (Erle, J.), founded on *Rex v. Sussex*, in 7 T. R. 107, above cited, from which it ought to have been distinguished on account of the considerations above mentioned, and the overruling of which would be the proper function of a court of appeal, if the decision appeared to be erroneous. The other cases referred to in that case from 19 Vin. and 2 Str., support the judgment in *Rex v. Sussex*, 7 T. R. 107, and are distinguished from the case of *Rex v. Suffolk*, 16 L. J., by reason of those considerations. Then, as the case of *Rex v. Suffolk*, 16 L. J., M. C., is not supported by authority, and as the rule it lays down introduces useless complexity without any compensatory advantage, and as it is expedient that the rules of practice made by the justices should be supported according to their intention, unless there be law to the contrary, we have come to the conclusion that we ought to overrule that case. The 81st section of the 4 & 5 Will. 4, c. 76, directs the fourteen days to be counted before the first day of the sessions at which the appeal is to be tried; that in common understanding would express the session for the division which is to try it. Blackburn, J. suggests that the section might be so construed, and Crompton, J. expresses himself to the same effect. For these reasons we think that the judgment ought to be reversed on this third ground also.

*Judgment reversed.*

### CROWN CASES RESERVED.

Reported by J. THOMPSON, Esq., Barrister-at-Law.

Jan. 21 and 28, 1865.

(Before COCKBURN, C.J., ERLE, C.J., POLLOCK, C.B., WILLIAMS, J., MARTIN, B., WILLES, J., CHANNELL, B., KRATING, BLACKBURN and MELLOR, JJ., FROOTT, B. and SHEE, J.)

REG. v. JAMES ROWTON.

*Evidence—General good character of prisoner—  
Evidence to rebut.*

*When a prisoner calls evidence of general good character, the prosecutor may call evidence to rebut it.*

*Evidence to general good character of a prisoner must be in the nature of reputation, and not of the individual opinions of the witnesses as to the disposition of the accused (Erle, C.J. and Willes, J. dissentientibus).*

*Witnesses to character cannot go into particular facts in support of it.*

*A witness called to rebut evidence of general good character of the prisoner, who was charged with committing an indecent assault, said that he knew nothing of the opinion of the neighbourhood as to the prisoner's character, because he was only a boy at school when he knew the prisoner; but his own opinion and that of his brothers who were also pupils of the prisoner was, that his character was that of a man capable of the grossest indecency:*

*Held, that this answer was inadmissible, as it was in the nature of a statement of a particular fact.*

Case reserved for the opinion of the Court of Criminal Appeal by the Deputy-Assistant Judge at the Middlesex Sessions.

The case was argued before Pollock, C.B., Willes, J., Channell, B., Byles and Shee, JJ., on the 19th Nov. 1864, but the Court being divided in opinion the case was directed to be reargued before twelve Judges.

#### CASE.

James Rowton was tried before me, at the Middlesex Sessions, on the 30th Sept. 1864, on an indictment which charged him with having committed an

indecent assault upon George Low, a lad about fourteen years of age.

On the part of the deft., several witnesses were called who had known him at different periods of his life, and they gave him an excellent character as a moral and well-conducted man.

On the part of the prosecution it was proposed to contradict this testimony, and a witness was called for that purpose.

This was objected to by the deft.'s counsel, who contended that no such evidence was receivable, and recited the case of *Reg. v. Burt and others*, 5 Cox's C. C. 284.

I thought the evidence was admissible, and after the witness had stated that he knew the deft., the following question was put to him:

"What is the deft.'s general character for decency and morality of conduct?"

His reply was, "I know nothing of the neighbourhood's opinion, because I was only a boy at school when I knew him; but my own opinion, and the opinion of my brothers who were also pupils of his, is, that his character is that of a man capable of the grossest indecency and the most flagrant immorality."

It was objected that this was not legal evidence at all of bad moral character.

I considered that it was some evidence, and I left the weight and effect of it as an answer to the evidence of good character, to be determined by the jury.

The deft. was convicted, and is now in prison awaiting the judgment of your Lordships.

The questions upon which I respectfully request your decision are—

1. Whether, when witnesses have given a deft. a good character, any evidence is admissible to contradict.

2. Whether the answer made by the witness in this case was properly left to the jury.

JOSEPH PAYNE, Deputy-Assistant Judge.

Oct. 22, 1864.

*Sleigh for the prisoner.*—This conviction cannot be sustained. First, as to whether evidence can be called on the part of the prosecution to contradict the evidence of general good character given for the prisoner, in the case of *Reg. v. Burt*, 5 Cox C. C. 284, Martin, B., after consulting with Erle, J., ruled that it could not. The question of the prisoner's character forms no part of the record or of the issue, and the earliest case reported in which evidence of character was received (*Rex v. Harris*, 7 St. Tr. 980), seems to put its admissibility in *favorem vitæ* (3 Russ. on Crimes, 784.) In Buller's N. P. 295, it is said: "The prosecutor cannot enter into the deft.'s character unless the deft. enable him so to do by calling witnesses in support of it, and even then the prosecutor cannot examine to particular facts, the general character of the deft. not being put in issue, but coming in collaterally: (*Clark v. Periam*, 2 Atk. 333-337.) Secondly, as to the other question reserved, whether the answer of the witness was properly left to the jury, it is submitted that it was not. No specific fact, or individual opinion of a witness in support or impeachment of the prisoner's character can be admitted in evidence. The only admissible evidence is that of the reputation which the prisoner has held; not what opinion any one person may have formed of him, and on that ground it is submitted that the individual opinion of any person, no matter the number of years he may have known the prisoner, or what opportunities he may have had of judging of his character, is inadmissible. The learned counsel then referred to the definition of the word "character" given in Johnson's, Webster's and Richardson's Dictionaries, and also to Erskine's

eloquent definition of it in *Hardy's case*, 24 St. Tr. 1079, and cited

- 2 Stark on Evid. 304, 2nd edit.;
- 1 Phil. on Evid. 507 (edit. 1852), *Rez v. Cole* (M. S. S.);
- 3 Bentham, 191-195 (Rationale of Evidence);
- Best on Evid. 326 (edit. 1854);
- Hookwood's case*, 18 St. Tr. 211;
- Rez v. Davison*, 81 St. Tr. 189-190;
- Rez v. Jones*, Ibid. 310;
- Sharp v. Scoging*, Holt N. P. 541;
- Mawson v. Hartsink*, 4 Esp. 102;
- Attorney-General v. Hitchcock*, 11 Jur. 476, Parke, B.

G. Taylor for the prosecution.—(The Court informed him that he need only address his argument to the second question.)—With respect to the answer of the witness that was left to the jury, there is no rule of law by which it can be excluded. The objection is rather one of form than of substance. There is no authority for saying that the witness should have been stopped as soon as he had said that he knew nothing of the neighbourhood's opinion. There is a wide distinction between a witness stating his own opinion, or the judgment he has formed of the prisoner's character, and his going on to state particular facts in support of character. The only limit that ought to be put on evidence as to character is, that the witness must not go into particular facts. In this case the answer of the witness was substantially a general opinion formed by him of the prisoner's character. [COCKBURN, C.J.—In that sense the word character is synonymous with disposition. EARL, C.J.—The question of character in this case is, what was the disposition of the prisoner with regard to such offences?] The prisoner, by calling witnesses to his character, raised the question, what was the disposition or tendency of his mind in such cases. Evidence of character does not mean evidence of reputation in the same sense as when reputation is applied to cases of right of way, or ancient customs, or matters of that nature. It has relation to the opinion or judgment formed by his fellows of a man's conduct. The only authority for saying that a witness's individual opinion or judgment of a man's character is inadmissible is that of Lord Ellenborough in *Rez v. Jones*. [POLLOCK, C.B.—A master who can speak to a servant's character for a number of years for honesty and fidelity is surely entitled to do so.] In *Rez v. Jones* no doubt Lord Ellenborough said, on a question of character, that it must be reputation, and not what a man knows of any particular act of the prisoner's. The learned counsel then reviewed the authorities cited on the other side, and submitted to the court that the opinion or judgment formed by a particular witness was admissible as evidence of character, and that the only exclusion was as to the statement of particular facts in support of such general opinion:

- Taylor on Evidences;
- Best on Evidence, 367 (3rd edit.);
- Mawson v. Hartsink*, 4 Esp. 102;
- Penny v. Watts*, 2 De G. & Sm. 528;
- Rez v. Murphy*, 9 St. Tr. 726.

*Sleigh* was heard in reply.

COCKBURN, C. J.—The question for the court in this case is, whether an answer is admissible given by a witness called on the part of the prosecution to rebut the general evidence of good character given in favour of the deft., and who was asked this question, "What is the deft.'s general character for decency and morality of conduct?" and to which question the answer was in these terms, "I know nothing of the neighbourhood's opinion because I was only a boy at school when I knew him, but my own opinion and the opinion of my brothers, who were

also pupils of his, is, that his character is that of a man capable of the grossest indecency and the most flagrant immorality." The question for the court is, whether that answer was properly received in evidence? I am of opinion that it was not properly received, and that the conviction cannot stand. Two questions have been discussed: the first, whether, when evidence has been given of general good character for the prisoner, evidence of general bad character may be adduced on the part of the prosecution to rebut it. As to that question, I am clearly of opinion that such evidence may be properly received. It is true that no such evidence has been adduced within the recollection of most of us, for evidence of the prisoner's general good character is seldom called when the prisoner's counsel is made aware, as he is generally by the counsel on the other side, that the prisoner's good character is impeached on the part of the prosecution. But when we are called on to answer the question whether such evidence is admissible, it is impossible to come to but one conclusion. The question of the general good character of the prisoner is not a collateral issue in the ordinary sense of the term; it is one of the elements in the case from which the jury are to find their verdict. If the prisoner thinks proper to raise the question of his general good character by giving evidence of it, nothing could be more injurious to the interests of justice than that it should not be allowed to the prosecutor to rebut it, because, if the true character of the prisoner were known to the jury, they would not be likely to be misled in giving their verdict. Assuming then that evidence to rebut the evidence of the prisoner's general good character was properly received, the other question is, whether the answer of the witness given to a legitimate question was an answer which it was proper on the part of the presiding judge to leave for the consideration of the jury. In the first instance, it is necessary to consider what is the meaning of evidence of character. It is laid down in the text-books that the prisoner is entitled to give evidence as to his general good character. Does that mean evidence of the reputation he holds among those who know him, or of the disposition or tendency of his mind in relation to the character of the offence charged? I quite agree that what it is desirable to get at is, the tendency of the prisoner's mind as to his liability to commit the offence charged against him; but the only way allowed by law to get at that is by producing evidence as to the prisoner's general character. That is the sense in which the term is used by all the text-writers. Mr. Roscoe puts the admission of evidence of the prisoner's general good character on the ground that the fact of the prisoner being a person of unblemished reputation leads to the presumption that he is incapable of committing the offence charged, and therefore that it is evidence that he did not commit it. We are not now considering whether the law should be altered. It may be that it would be expedient to import into our law the practice of other countries and to inquire into the antecedents of prisoners, and to show therefrom that they are capable of committing the offences charged against them. But no one would contend that it is competent to enter into particular facts. The truth is, this part of our law is an anomaly. It is not allowable to go into the antecedent bad character of the prisoner, from which you might form a probability as to his guilt, from the desire to administer the criminal law as mercifully as possible. It is true that in practice sometimes, when a witness is called to prove the good character of the prisoner, he gives cogency to his evidence by a statement of circumstances which show that he had a good and abundant opportunity of acquiring information. In practice this is often

carried beyond what is justifiable. The limit is in my judgment, that evidence is admissible of general reputation of good character, and not of individual opinion. It is clear that if a witness to character is called who knows nothing of the general reputation of the prisoner, but speaks only as to his individual opinion, such evidence, if objected to, is not receivable; he is not allowed to give his individual opinion. The next question is, within what limits must the evidence rebutting general good character be confined? In my opinion it must be evidence of the same kind and be kept within the same line; it must be evidence of the same general description. In the present case the witness at once disclaims all knowledge of the general reputation of the deft., but says that in his opinion the prisoner's disposition is that of a man capable of the grossest indecency and immorality, for in that sense the word character was obviously used. I am strongly of opinion that that answer was not receivable. It is not, however, because an objectionable answer has been given to an unobjectionable question that a verdict can be impeached; and if the presiding judge had told the jury not to take it into their consideration, but to disregard it, I should not have been disposed to disturb the conviction; but here he told them to take it into their consideration, and the evidence became part of the case; therefore, I think the conviction ought not to stand. I rest on the fact that it has been uniformly laid down by text-writers that evidence of general character must be general evidence in the sense of reputation, and that evidence of particular facts to establish the disposition or tendency of the mind of the accused, and to show his capability of committing the offence charged, is inadmissible, and therefore I am of opinion that this conviction must be set aside.

ERLE, C. J.—I concur with the Lord Chief Justice in many parts of his judgment. The admissibility of evidence of good character for a prisoner stands on peculiar grounds. The questions for our opinion to-day are raised now for the first time for solemn adjudication. Our answer thereto ought to be regulated by attending to the important interests of truth. And if a prisoner having a bad character chooses to raise the question of his character by calling evidence to it I am of opinion that the impression likely to be so created ought to be removed by evidence on the part of the prosecution. With reference to the first question, whether evidence is admissible on the part of the prosecution to rebut evidence of general good character on the part of the prisoner, I agree with the Lord Chief Justice, that it is admissible, and that this question ought to be answered in the affirmative. With reference to the second question, I do not agree with him. I agree that individual facts are to be excluded, and I do not stop to inquire whether an answer to a proper question as to character, which includes in it something like individual fact, is receivable, because the main question is of such very general importance that I wish to give my opinion on that. On the general question, what is the principle of admitting character in evidence in criminal cases, I am of opinion that such evidence is admitted for the purpose of showing the disposition of the accused and raising a presumption from it, that the accused did not commit the crime charged. Evidence of character can only be obtained from the opinion of other persons than the accused; that opinion must be formed from the personal experience of the witnesses, or from that of others who have formed an opinion of the character of the accused from their own personal experience. The point at issue now is, whether the court is at liberty to receive evidence of the reputation of

the prisoner, founded on the personal experience of the witnesses called to prove it. I am of opinion that both sources of evidence are admissible, both the general rumour prevalent in the neighbourhood where the accused resides, and, in my opinion also, the personal experience of those who have had abundant opportunity of forming an opinion of the character of the accused. In my experience I never heard a witness to character examined without inquiry as to his own personal experience, and so his evidence has been left to the jury. Now if a witness was called to speak to the character of the accused, who should say, "I have had the accused in my employ twenty years, but I never heard a human being speak of his reputation," upon the rule as laid down by the Lord Chief Justice, the presiding judge would be required to say that his evidence was not admissible. That is the point on which I differ from him, and to my mind such a witness is entitled to give in evidence his personal experience of the prisoner's character. What a witness may say he has heard others say of the prisoner's character is slight in comparison with such personal experience. But if general character alone is admissible, it is important to get at it by evidence. General rumour, which is derived from a number of special statements, if strictly examined, will come to be the opinion of a number of persons speaking from their personal experience. The best character is generally the least talked about, the man whose honesty has never been thought to be in question is not talked of, and therefore the value of general rumour is doubtful. I have attempted to give expression to the argument of Mr. Taylor, which carried great weight with it to my mind. And when I look at *Rex v. Davison*, that argument was justified by the mode in which Lord Ellenborough and Mr. Holroyd acted. Eleven witnesses to the character of Davison were called, and five or six out of the eleven gave very considerable evidence of their own personal experience. Lord Moira, the first witness called, spoke generally from his own experience, but when he came to a special transaction, then Lord Ellenborough interfered. He was asked whether he thought Davison capable of committing a fraud. In answer to this question, "From your Lordship's general knowledge of his conduct, is he a person whom your Lordship would think capable of committing a fraud?" he said, "Certainly not. I never had the remotest ground for suspicion. If I had had the slightest ground, I never could have again solicited him to accept the office of Treasurer of the Ordnance under circumstances which never could have made it an object to him from any pecuniary consideration. Shall I state the particulars?" Then Lord Ellenborough interposed: "One is very unwilling to diminish the scope of these inquiries, but the general inquiry is as to the general character." That is confirmatory of my opinion. It is true that in the present case the answer of the scholar that was given was bad, and would have fallen within my principle, that you cannot speak as to a particular fact. But on a great question like this, as to the admissibility of personal experience or character, I do not stop to analyse the particular answer of the witness more fully.

COCKBURN, C. J.—I should not have thought for a moment to reply upon the judgment of the Lord Chief Justice of the Common Pleas, but I am anxious that I should not be thought by anything I have said to convey the idea that the negative experience of a witness to character should be excluded. I quite agree that, when a witness says "I have known the prisoner for a number of years and never heard anything against him," that is cogent evidence of a man's character, and



C. CAS. R.]

JONES v. GOUGH.

[Priv. Co.]

I did not intend to lay down that it should be excluded.

MARTIN, B.—I concur with the Lord Chief Justice of England that the answer of the witness related to particular facts known to himself and his brothers, and that the judge was wrong in leaving it for the consideration of the jury. With respect to the first point, whether evidence can be called on the part of the prosecution to rebut evidence of general good character given for the prisoner, I should have acted upon the practice that has prevailed for a long time, and had it depended on me I should have taken time to consider my judgment. The doubt on my mind arises from this: the common law of England is made up of practice and precedents; what has been the practice for years is the law of the land; if the practice is bad the Legislature interferes and sets it right. That is the history of the common law. In this case the indictment charged the prisoner with committing an indecent assault. If I were investigating the case for myself, my first inquiry would be, What was the prisoner's character in cases like this? and if I was informed that he was addicted to such practices I should be much influenced by that; but in a court of law that kind of evidence is not admissible: nothing but evidence bearing on the issue is admissible. The law says that the evidence in support of the charge shall be confined to evidence bearing directly on the issue before the jury. But a practice has sprung up that the accused may give evidence of good character, and he may show that he was therefore unlikely to commit an offence of the kind charged against him. That is an anomaly in the law, and the first case in the books in which it appears to have been done occurred nearly 200 years ago. No case can be cited in which evidence to rebut such evidence of good character has been admitted. In the text-books it is stated that such evidence is admissible, but no instance in which it has been done is cited. I rely on the fact that no instance in which such evidence has been admitted is cited, and I think it is better to leave the practice so. I can conceive cases in which it is likely that too much weight may be given to evidence of bad character. However, all my learned brothers are of a different opinion, and no doubt in strict reason the evidence is admissible. For my own part I should have been disposed to act on the course of practice that has been pursued for so long a time.

WILLES, J.—I am of opinion that on both questions the ruling of the presiding judge was right. With respect to the first question, whether evidence was admissible on the part of the prosecution to answer the evidence of general good character given for the prisoner, I own I should have been glad if the court could have come to the conclusion that it should be rejected. But looking to the text-books of Roscoe, Phillips and Starkie, it is clear that such evidence must have been given for years, and the practice have prevailed. The fact that there is no reported case does not operate on my mind. I cannot help thinking that where the practice has been resorted to it has been considered unusual, and been found inconvenient. With respect to the second question, I agree with Erle, C.J. Why is it that evidence of general good character is admissible on the part of a prisoner? I agree that it is a mistake to suppose that the prisoner can raise the question of character collaterally only. Evidence of general good character makes it less probable that the prisoner committed the offence charged. Evidence of bad character is not in the first instance admissible on the part of the prosecution; otherwise, as stated by my brother Martin, we should have the whole life of the prisoner ripped up in the course of the trial, and in

the result the prisoner might be overwhelmed with prejudice instead of being convicted on affirmative evidence. The question of character is relevant to the issue. General evidence of good character does not mean mere evidence of the general opinion among a man's acquaintance, but general evidence of the character of the man. I agree that particular acts must be excluded, because there is no notice to the prisoner that any inquiry is about to be made into the particular acts. What other persons know of the prisoner, and their judgment of him, is, I think, admissible; otherwise a person of a shy or retiring disposition, of whom only his intimates can speak, will suffer; whereas another man of a forward disposition, who may have earned a reputation without deserving it, will profit by the exclusion of the witness's own judgment. For the character of a servant you go to the last master; for the character of a boy to his parents and teachers; for the credit of a man to the man of business with whom he has dealt; and why not in point of law for the character of a prisoner go to the man who knows him, and has had an opportunity of forming a judgment of it? It is said that we are to be guided by the long practice as to the admission of such evidence. The practice as I find it is to call, not merely witnesses from the neighbourhood where the prisoner resides, but also the master at the time of the offence. In point of reason, I think the evidence of character on the part of the prosecution should be as co-extensive as that given for the prisoner. And I cannot help owning that, if I had tried this case, I should have attempted to persuade the counsel for the prosecution not to persevere with the witness; but not succeeding in that I should have fallen into the same mistake as the presiding judge.

The other Judges concurred with Cockburn, C.J.

COCKBURN, C. J. said that Byles, J. (who had heard the argument before the five judges) had requested him to say that he concurred in the view taken by the majority of the Judges in the court below, and in this court.

*Conviction quashed.*

#### JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by JAMES PATTERSON, Esq., of the Middle Temple,  
Barrister-at-Law.

Thursday, Feb. 2, 1865.

(Present—The Right Hon. Lords CRANWORTH and  
CHELMSFORD, KNIGHT BRUCE, L. J., and  
TURNER, L. J.)

JONES v. GOUGH.

*Church-rate—Ecclesiastical parish—Relinquishment of  
surplice fees—19 & 20 Vict. c. 104, s. 12.*

*Where an ecclesiastical district has been formed out of  
several parishes, the incumbent of the chapelry in the  
new district will not be entitled to the fees of  
marriages, &c. within the meaning of 19 & 20  
Vict. c. 104, s. 12, until after the next avoidance,  
or the relinquishment of fees by the incumbents of  
all the parishes out of which the chapelry has been  
formed.*

*The chapelry of L. had an ecclesiastical district annexed  
to it by Order of Council, such district being formed out  
of parishes A., B. and C. The Order in Council said  
nothing about fees, but the incumbents of A., B. and C.  
never claimed such fees, though they were also not  
clearly aware of their right to them. The incumbent  
of L. had taken the fees for his own benefit:*

*Held (affirming the judgment of the Court of Arches),*



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*that the facts were evidence from which a voluntary relinquishment of the fees by the incumbents of A., B. and C. might be inferred, and therefore that L. was now an ecclesiastical parish within 19 & 20 Vict. c. 104, s. 14.*

This was an appeal from the Arches Court of Canterbury, in a cause of subtraction of church-rate, promoted by Edward Gough and others, churchwardens of the parish of St. Mary, Shrewsbury, in the county of Salop, against John Jones, a parishioner and inhabitant of that parish, by virtue of letters of request from the chancellor of the diocese of Lichfield, to recover 16s. 1½d., the amount of church-rate assessed against the said John Jones.

The libel set forth that the churchwardens of the parish of St. Mary, Shrewsbury, exclusive of the districts of St. Michael, Leaton, Astley, Clive and Albrighton, made the rate in question, and John Jones the deft. was duly rated in the above sum.

The libel further set forth that St. Michael, Leaton, Astley, Clive and Albrighton have each one a district assigned to it, with power to each incumbent thereof respectively to publish banns of matrimony, to solemnise marriages, churchings, baptisms and burials, and also to receive, for his own use and benefit, the entire fees arising from the performance of the said offices, without any reservation thereout, and which said powers each of such incumbents exercises. That, in consequence thereof, each of the said districts became, by virtue and operation of the Act of Parliament intituled "The New Parishes Act 1856," sects. 14 and 15, and is, a separate and distinct parish for all ecclesiastical purposes, and is not liable for the repairs or other expenses of St. Mary, Shrewsbury, the mother church, to wit, St. Michael, on and after the 29th July 1856, in virtue of two previous orders of Her Majesty in Council, published respectively in the *London Gazette* bearing date the 28th May 1852, and 19th May 1854; and Leaton, Astley, Clive and Albrighton, in virtue of an order of Her Majesty in Council, published in the *London Gazette* in each case respectively, bearing date as to Leaton on the 31st March 1860, as to Astley on the 28th Aug. 1860, and as to Clive and Albrighton, 30th Oct. 1860. And all the fees aforesaid in respect of Leaton were voluntarily relinquished to the incumbent thereof immediately after its consolidated chapelry was formed, to wit, on the 31st March 1860.

In answer to the libel, the deft. set forth, among other things, that the consolidated chapelry of Leaton was created by an Order in Council, published in the *London Gazette* of March 3, 1860. That such consolidated chapelry is composed of part of the parish of St. Mary, Shrewsbury, part of the parish of Fitz, and part of the parish of Preston Gubbalds. That such consolidated chapelry had not, at or prior to the making the rate in question, become a separate and distinct parish for ecclesiastical purposes. That such part of the said consolidated chapelry as was taken from the said parish of St. Mary, Shrewsbury, contains property legally assessable to a church-rate.

The question raised by the above issue was, whether the district of Leaton had become a separate parish within the meaning of 19 & 20 Vict. c. 104, s. 14, when that Act passed, and whether the incumbent thereof was entitled to the fees of marriages, churchings and baptisms.

The incumbent of Leaton Church on the subject of fees stated as follows:

I am the incumbent of the perpetual curacy of Leaton aforesaid. I have been so since the consecration of the church there in Oct. 1859, a few months prior to the issuing of the Order in Council by which the district was assigned to the church. The district was formed by severance from three parishes, Saint Mary, Shrewsbury, Fitz and Preston Gubbalds. Since such the formation of the said district I have received for my own use and benefit the entire fees arising from the

publication of banns, the solemnisation of marriages, churchings and burials within the district without any reservation thereof. I have never had any claim made by the incumbent of either of the three parishes severed to form my district for or in respect of such fees or any part of them, nor have I rendered to either of them any account thereof, or been asked to do so. I do not know that there has ever been any formal relinquishment of the fees on the part of the said incumbents. I can only say that I remember that previous to my being appointed to the church while the thing was about I was informed by Mr. Lloyd, the patron of the living, that he was happy to say that the fees had been relinquished in my favour, and that I would take them to my own use, and I have done so exclusively throughout my incumbency. I may mention that within two months past I have seen in the possession of the said Mr. Lloyd, the patron of Leaton, a letter in the handwriting of the Rev. Thomas Bucknall Lloyd, the incumbent of St. Mary's, Shrewsbury, purporting to have been addressed to the said Mr. Lloyd at or about the time of my appointment to Leaton Church, in which letter it was stated by the said Rev. Mr. Lloyd that he had relinquished the fees in my favour, but since that time I have been informed and believe that the letter is missing, having been in some way lost or destroyed, and that it cannot now be found. I have no knowledge of any legal abandonment by the incumbents of St. Mary, Shrewsbury, Fitz and Preston Gubbalds of the fees for banns, churchings, marriages, and burials performed by me as incumbent of the consolidated chapelry of Leaton in respect of persons resident in those parts of Leaton which were taken out of their parishes. I know no more respecting that than appears in my deposition. I was not aware that I was by law bound to keep an account of such fees for the performance of such offices, and every year account to the incumbents of St. Mary, Fitz and Preston Gubbalds for the same. On the contrary, considering that they had voluntarily relinquished their right to the fees, there was no necessity for my doing so. I do not know that the incumbents of St. Mary, Fitz, or Preston Gubbalds have either of them by any legal instrument in writing relinquished the right to such fees or any of them.

The incumbents of the other parishes from which Leaton district was constructed said they had executed no formal relinquishment of the fees received at Leaton Church, but had understood that they were not legally entitled to these fees, and had never claimed them.

There were other objections to the rate which are not material.

The learned judge, Dr. Lushington, held, that though the Order in Council constituting the consolidated chapelry of Leaton made no mention of fees, yet, as the incumbents of the other parishes interested had not *de facto* claimed them, and as the incumbent of Leaton had *de facto* received them for his own use, it must be taken that those incumbents had voluntarily relinquished those fees, and therefore that Leaton being a separate parish, the rate had properly omitted the parishioners of St. Mary resident in that part of the parish now forming part of Leaton district: (see 9 L. T. Rep. N. S. 610).

The present appeal was now brought to Her Majesty in Council.

*Lush, Q. C., Deane, Q. C., and Wills*, for the appellants, contended that under the circumstances it could not be taken that the incumbents of the neighbouring parishes had voluntarily relinquished these fees, and so that Leaton was still part of St. Mary's, and ought to have been included in the rate, which rate was, by reason of such omission, void.

*Powell, Q. C. and Robertson* for the respondents.

(*Cur. adv. vult.*)

Lord CRANWORTH.—The sole question in this case is, whether or not Leaton, or any part of it, remains a portion of the parish of St. Mary's, Shrewsbury. No doubt a part of it once did belong to that parish, and the question therefore is, whether it has ceased to belong to it. From 58 Geo. 3, c. 45, downwards, there have been passed a number of Acts of Parliament authorising commissioners to create new ecclesiastical districts. The earliest authority given to them was, that where parishes were populous and large they might take out of those populous and large parishes a district, and form it into a separate

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ecclesiastical district. It was soon found that this power did not meet the whole evil it was meant to remedy. It might be inconvenient or impossible to take a district out of one parish and make a separate parish of it, but there might be several parishes lapping into one another, out of all of which a new district might conveniently be taken. Powers for this purpose were given by the 59 Geo. 3, c. 134, and the new district so formed is in the Act called a consolidated chapelry. The regulations by which these new districts, when formed, were to be governed, must have been intended to be the same, whether they came out of one parish or out of several parishes, and whether they are designated as districts or chapelries. That being so, their Lordships will now state what the enactment is on which it is contended that this district of Leaton has become a separate parish. In 19 & 20 Vict. c. 104, s. 14, it is enacted, "That whenever the solemnisation of marriages, churchings and baptisms according to the laws and canons in force in this realm are authorised to be published and performed in any consecrated church or chapel to which a district shall belong." We must here pause to say that, by an Order in Council in 1860, a district taken out of the parish of St. Mary's, Shrewsbury, and several adjoining parishes, was annexed to a consecrated chapel. There was undoubtedly, therefore, a district to which a consecrated chapel belonged. Then the section proceeds, "Such district not being at the time of the passing of this Act a separate and distinct parish for ecclesiastical purposes, and the incumbent of which is by such authority entitled for his own benefit to the entire fees arising from the performance of such offices, without any reservation thereof, such district or place shall become and be a separate and distinct parish for ecclesiastical purposes." And by the next section it is provided that, not only shall the new parish become a separate parish for all ecclesiastical purposes, but the inhabitants of that parish are to be, for ecclesiastical purposes, parishioners of that parish, and of no other parish, and all the laws relating to ecclesiastical matters as to that parish are to apply to that parish and to no other. The question therefore is, whether the incumbent of this new consolidated chapelry has become entitled, under such authority as mentioned in the Act, to the fees arising from the performance of the ecclesiastical offices therein mentioned. There are two questions. Has he become entitled to these fees? and, if so, has he become so entitled "by virtue of such authority," within the true meaning of those words as they are found in the 14th clause of the Act? The question whether he has become entitled to these fees depends upon this: he was not entitled simply by the constitution of the ecclesiastical district, i. e., the consolidated chapelry, because, by laws in force previously to the 19 & 20 Vict. c. 104, with reference to the constitution of such district, the incumbent of the old parish continued to be entitled to them, unless some other arrangement is made. But by this new Act a considerable change is made. The enactment on this subject is to be found in the 12th section of the Act, which enacts that from and after the next avoidance, or the relinquishment of such fees, by such incumbent, i. e., the incumbent of the original parish, then the fees shall belong to the incumbent of the new district. We are clearly of opinion that in the case of a consolidated chapelry the words "such incumbent" must mean the incumbents of all the parishes out of which the chapelry has been formed. The question therefore is, have the fees belonging to St. Mary's, Shrewsbury, and the other two parishes, or have they not, been relinquished? That was a question of fact which the learned judge below had to decide. There is no doubt it is

a question of some nicety. Of the three incumbents, one of them says, "I did expressly give them up;" the other two in substance say, "I made no formal resignation, but when I gave up the right to the parish which I was asked to give up, and did give up, I considered that I gave up everything." Three years after this happened they are examined, and they do not pretend to say that they have been otherwise advised since. What takes place after the institution of the suit is of course no otherwise important than as affording evidence of what the witnesses meant to do at the time when the district was formed. But we think the learned judge came to a reasonable conclusion; and even if there were no more doubt about it than there is, it is a principle of every court of appeal, upon a question of fact, that if a matter has been fully and fairly considered in the court below, unless the Court of Appeal is able to say that the decision of the fact was clearly wrong, it should not be disturbed. Therefore, upon the question of fact, we concur with the learned judge below. Then it was said, that what was to be proved was not merely that the incumbent had become entitled for his own benefit to the fees, but that he had become so entitled "by such authority" referred to in the 14th section. All these Acts are, unfortunately, very loosely worded; but when we come to look at the clause, we see that what must have been meant was the whole authority under which the district was constituted, including the 12th section of the Act; and by that section it was expressly provided that the relinquishment of fees by the incumbent of the old parish should be one mode in which the incumbent of the new district should become entitled to them. We think, therefore, that the judgment of the court below must be affirmed, and the appeal dismissed with costs.

*Judgment affirmed with costs.*

Apprs.' proctor, *E. W. Crosse.*

Resps.' proctors, *Nelson and Son.*

*Saturday, Feb. 11, 1865.*

(Present—The Right Hon. Lords CRANWORTH and  
CHELMSFORD, KNIGHT BRUCE, L.J., and  
TURNER, L.J.)

FRY v. TREASURE.

*Churchwarden—Suit for subtraction of church-rate.—  
Right of one to sue in name of both—Practice of  
Ecclesiastical Court.*

*One of two churchwardens has no right, without the other's  
consent, to use the latter's name as co-plt. in a suit  
against a parishioner for subtraction of church-rate,  
and there is no implied authority in such circumstances,  
the proper remedy, if any, being the removal of the  
obstinate churchwarden for misconduct.*

*Where a case comes before the Court of Arches by  
letters of request, the suit does not commence in the  
court below, but in the Court of Arches, the letters  
forming no part of the cause.*

This was a cause of subtraction of church-rate, and was instituted by the apprs. Bruges Fry and Robert Greaat, then churchwardens of the parish of Cheddar, in the county of Somerset and diocese of Bath and Wells, and province of Canterbury, against the resp. Levi Treasure, of the said parish of Cheddar, a ratepayer and inhabitant thereof.

The suit was commenced in the Arches Court of Canterbury by virtue of letters of request, issued at the instance of both the apprs., and under the hand and seal of the worshipful Charles Walter Bagot, Clerk, Master of Arts, Vicar-General of the Right Hon. and Right Rev. Father in God Robert John Baron

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Auckland, by Divine permission Lord Bishop of Bath and Wells.

The decree of the Arches Court of Canterbury, citing the deft. in the court below to appear in the suit, was returned by the proctor for the apps., the plts. in the court below, and the said proctor then exhibited proxy, under the hand and seal of the plt. Robert Greata, and alleged that the plt. Bruges Fry proceeded no further in the suit. The said Bruges Fry was not, however, dismissed from the suit, and all the subsequent proceedings had been had in the cause as originally entitled.

The deft. appeared in the suit, but under protest to the constitution of the cause, and an act on petition was on his behalf filed, extending the said protest. Both parties wrote to the said act, the proceedings upon which were subsequently concluded; and the proctor for the said plts. brought in further proxy under the hand and seal of the plt. Robert Greata, as acting on behalf of himself and the plt. Bruges Fry.

The questions raised by the act on petition having been argued, the Court, after deliberation, pronounced for the protest, and condemned the plt., Robert Greata, in costs: (see 10 L. T. Rep. N. S. 389.)

Against this sentence the present appeal was brought.

The further proxy of Mr. Greata on the 5th June was as follows:

Whereas there is now depending undetermined in judgment in the Arches Court of Canterbury, by virtue of letters of request from the Worshipful Charles Walter Bagot, Clerk, Master of Arts, Vicar-General of the Right Honourable and Right Reverend Father in God Robert John Baron Auckland, by Divine permission Lord Bishop of Bath and Wells, and Official Principal of the Consistorial Episcopal Court of Wells, lawfully constituted, a certain cause or business of subtraction of church-rate promoted and brought by Bruges Fry and Robert Greata, the churchwardens duly appointed of the parish of Cheddar, in the county of Somerset, diocese of Bath and Wells, and province of Canterbury, against Levi Treasure, a ratepayer and inhabitant of the said parish. Now know all men by these presents that I, the said Robert Greata (for divers good causes and considerations me thereto moving), have nominated, constituted and appointed, and do hereby nominate, constitute and appoint, William Tarn Pritchard, notary public, and Alfred John Pritchard, two of the procurators exerceant in the Arches Court of Canterbury, or in their absence any other proctor of the said court for them, to be jointly and severally the true and lawful proctors of myself and the said Bruges Fry, for and in the names of myself and the said Bruges Fry, to appear before the Right Honourable Stephen Lushington, Doctor of Laws, Official Principal of the said Arches Court of Canterbury, lawfully constituted his surrogate, or other competent judge, in this behalf, to exhibit this proxy, and to pray and procure the same, and the appointment herein contained, to be admitted and enacted, and generally, for and in the names of myself and the said Bruges Fry, and on behalf of myself and the said Bruges Fry, to do and perform all such other acts, matters and things as shall be necessary to be done on the part and behalf of myself and the said Bruges Fry, in and about the premises, hereby promising to ratify, allow and confirm, as firm and valid, all and whatsoever the said proctors, or either of them, or their or either of their substitute or substitutes, shall so lawfully do or cause to be done by virtue hereof in and about the premises. And I hereby give and grant to my said proctors, or either of them, full power and authority to appoint one or more substitute or substitutes in their or his place of stead, as often as occasion shall require, and the same at pleasure to revoke and appoint anew. In witness whereof I, the said Robert Greata, have hereunto set my hand and seal this 5th day of June, in the year of our Lord 1864.

ROBERT GREATA. (L. S.)

Signed, sealed and delivered by the said Robert Greata, in the presence of us

Alfd. J. Ham, of Axbridge, Somt., clerk to Mr. Greata.

Arthur Bowden, of Cheddar, Somerset, clerk to Mr. Greata.

The *Queen's Advocate* (Phillimore), *Milward* and *R. A. Pritchard*, for the app., referred to  
 Conn. Dig. tit. "Abatement," E. 8, 9, 10;  
*Starkey v. Berton*, Cro. Jac. 224.

*Dr. Deane, Q. C. and Swabey* for the resp.

*Cur. adv. vult.*

Lord CHANWORTH.—The question raised in this case was, as to the right of one of two church-

wardens to use the name of his co-churchwarden in a suit against a parishioner for subtraction of church-rate. The case came before the Court of Arches by letters of request from the diocese of Bath and Wells, purporting to have been issued at the special instance and desire of Bruges Fry and Robert Greata, the churchwardens of the parish of Cheddar, in that diocese. The decree of the Court of Arches, citing the deft. Levi Treasure, a parishioner of Cheddar, to appear and answer a charge of subtraction of church-rate, issued pursuant to these letters of request, which purported to have been accepted on the petition of the proctors of the said Fry and Greata. This decree bears date the 16th Feb. 1864. On the 18th April 1864, the decree was returned by the proctor of Greata, who then exhibited a proxy under the hand and seal of Greata only, alleging that Fry, whom he described as the other of his parties, proceeded no further in the cause. On the same day Treasure, the deft., appeared by his proctor under protest, alleging that the suit was improperly constituted, inasmuch as it was the suit of Greata alone, and not, as it ought to have been, of Fry and Greata jointly. At this stage of the proceedings the suit was clearly a suit by one churchwarden only. It was indeed contended at the bar that Fry was a party in obtaining the letters of request, and must, therefore, be treated as a party in the cause, until discharged by some order dismissing him, and we were referred to several cases, in which it has been laid down that a party in a cause does not cease to be a party by merely alleging in the court that he proceeds no further. Of the soundness of these decisions we entertain no doubt. A person who embarks in litigation incurs liabilities in its progress by the consequences of which, prospective as well as retrospective, he must be bound until discharged by the court. But in order to make this doctrine applicable, it was incumbent on the app. Greata to show that Fry was some time before the 18th April 1864, a party in the cause. And this he failed to do. It was contended that Fry, by joining in the letters of request, had become a party in the cause, but this is a mistake. It does not appear, except as may be inferred from the letters of request themselves, that Fry was a party to the obtaining of them. But even if he was, they form no part of the cause. Letters of request are issued, not in a pending cause, but on an allegation that the parties applying for them intend to enter into litigation, and wish to go to the Superior Court at once *pro saltum*. And when the Superior Court accepts the letters of request, and issues its decree citing the party complained of to appear, they are cited in the decree only for the purpose of showing how the Superior Court has acquired original jurisdiction. The cause originates to all intents and purposes in the Superior Court. The letters of request, when accepted, enable the Superior Court to authorise the persons who have obtained them to institute a suit, but they do no more; and till a suit is instituted in the Superior Court, litigation has not begun. But it was further argued that, even independently of the letters of request, Fry must be taken to have been a party in the cause up to the 18th April 1864, for that on that day the proctor alleged, not that Fry had never been a party, but that he would proceed no further. These latter words, it was said, contained in themselves a negative pregnant, and showed that up to that time he had been a party proceeding in the cause. But, even if this were a reasonable inference, still it must be shown that they were the words of a person to whom Fry had given authority to speak or act for him; and as no proxy from Fry had been exhibited, the words are inoperative against him, and he has a right to treat them as the words of a mere stranger. On the first

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appearance of the deft. in obedience to the decree, he in substance objected that he was called on to answer a charge purporting to be made by Fry and Greata, but which was really made by Greata alone. The only answer as matter of fact to such an objection would have been the production of a proxy from Fry; and as no such proxy was or could be produced, the only question was one of law, whether the concurrence of Fry was necessary, i.e. whether one churchwarden alone could sustain such a suit. We need not discuss this question; the case is too plain for argument, and was hardly contended for at the bar. In enforcing a demand in which two persons are jointly interested, whether beneficially or as trustees, each must, either as plt. or deft., be before the court, and the circumstance that the persons interested are churchwardens cannot make any difference. It was, no doubt, from feeling that the law on this point was against him, that Greata, after the deft. had appeared under protest, endeavoured to cure the defect insisted on, by exhibiting a further proxy, which, though under the hand and seal of Greata only, yet purported to appoint proctors to appear for Fry as well as for himself. And the second point urged for the apps. was, that this second proxy cured the defect insisted on. The general rule of the Ecclesiastical Court requires every proxy to be signed by the party himself, or by one duly authorised to sign for him. Neither of these requisites has been complied with here. No proxy was exhibited under the hand and seal of Fry, or of any person authorised to act for him. But necessity, it was urged, requires that, in the case of two churchwardens, each should be deemed to be invested with an implied authority to use the name of the other in suits for the benefit of the parish, or, at all events, in suits for subtraction of church-rate, for that otherwise it might be impossible to collect the rate. There is, however, nothing to warrant such an argument. It was endeavoured to show that such a power might be considered to exist by analogy to what is done in the courts of common law where a plt. has taken on himself to join as a co-plt. the name of another person who stands in the position of a trustee for him as to the subject-matter of action. There the court will in general permit the plt., who alone is the party substantially interested, to go on using the name of the other plt. whose name is introduced for conformity, on the terms of full indemnity against costs being given to the party whose name is thus used. But this is only done when a special case has been made showing that substantial justice requires such a course to be taken, and is never done in the case of two persons jointly interested beneficially in the subject-matter of the action. In the case now before us, no special circumstances are stated, and the course pursued can only be justified on the assumption that, in every suit for subtraction of church-rate, one churchwarden may always use the name of his co-churchwarden as a co-plt., without any authority from him. For such a proposition there is no warrant either in principle or authority. It was argued that the result of this decision will be to prevent the possibility of recovering church-rates if an obstinate churchwarden refuses to concur in a suit. Perhaps, if such concurrence were corruptly, or even vexatiously, refused, there might be good ground for removing the churchwarden from his office. But that question is not now before us. There is nothing to show that the non-concurrence of Fry has arisen from motives either corrupt or vexatious. This refusal to concur may have been the result of an honest desire to save the money of the parishioners. He may have been satisfied, for instance, that the rate is invalid, or that the person sued is insolvent. The

contention of Greata allows no exception for such cases. On these grounds we have no hesitation in expressing our concurrence in the conclusion at which the learned Dean of the Arches have arrived, and we shall report to Her Majesty that, in our opinion, this appeal ought to be dismissed with costs.

*Sentence affirmed with costs.*

Apps.' proctors, *Pritchard and Sons.*

Resps.' proctor, *E. W. Crosse.*

### COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and JAMES B. DAVIDSON,  
Esqrs., Barristers-at-Law.

Jan. 13, 14 and 31, 1865.

(Before the LORDS JUSTICES.)

Re THE HACKNEY CHARITIES.

(POOLE'S AND WHITE'S CHARITIES.)

*Charity Commissioners — Appeal from — Charitable Trusts Act 1860—Sect. 8—Right to appeal.*

*Under sect. 8 of the Charitable Trusts Act 1860, two private inhabitants of the parish in which the income of the charity is applicable cannot, when the yearly income is less than 50l., appeal against the order of the Commissioners. And although two charities, the income of which together exceeds 50l., may be dealt with by one and the same order of the commissioners, the Court will consider the case as if the incomes of the two had been dealt with separately.*

*The Court deals with such a case according to the income actually produced, and not according to the possible or probable income.*

This was an appeal by the Attorney-General against an order of the M. R., the hearing before whom is reported (*ante*, p. 23) so fully as to render any further statement of the facts unnecessary.

Their Lordships, it will be seen, decided the case upon the construction of the 8th section of the Charitable Trusts Acts 1860 (23 & 24 Vict. c. 136), which confers the right of appeal against orders of the board of Charity Commissioners, and enacts that the Attorney-General, or any person authorised by him or by the said board in the case of any charity, whatever may be the yearly income of its endowments, and any trustee or person acting in the administration of or interested in any charity of which the gross yearly income, to be calculated in manner aforesaid, shall exceed 50l.; or any two inhabitants of any parish or district in which the same shall be specially applicable, may, within three calendar months after the definitive publication of any order of the said board appointing or removing a trustee or trustees, or for or relating to the assurance, transfer, payment, or vesting of any real or personal estate, or establishing a scheme for the administration of the charity, present a petition to the High Court of Ch. in a summary way, appealing against such order, and praying such relief as the case may require.

The 4th section of the Act provides how the income of the charity is to be calculated.

The Attorney-General, *Hobhouse*, Q. C. and *T. H. Terrell* supported the appeal, and contended that where the annual income of a charity was below 50l. it was not competent to two private inhabitants to appeal, but that this right was in the Attorney-General, or any person authorised by him, or in the commissioners themselves. That the value of the land might be speedily increased was immaterial; its present value was the thing to be regarded. The

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legal estate was not in the churchwardens and overseers under the Act 59 Geo. 3, c. 12, s. 17, and the case was therefore not within the Act 16 & 17 Vict. c. 137. His Honour had been influenced by the consideration that this was a contentious case under the 5th section of the Act of 1860, which denied the commissioners jurisdiction in such cases; but by that section they were the only judges whether a case was contentious or not.

*Selwyn, Q.C.* and *Prendergast* for the resps.—The annual value of the land was in reality much more than 50*l.*, for it was shown that the ground was most desirable for building purposes, and a large increase of profits could be at once obtained. But the order of the board had dealt with the two charities as one, and together, even at the present moment, they exceeded 50*l.* in annual value. This was a gift for the poor of the parish, and parish property belonged to churchwardens and overseers as a corporation. The petition was really presented on behalf of the vestry, and not merely by the two gentlemen whose names appeared as petitioners. Even if the commissioners were in the first instance sole judges of what cases were contentious or not, there must be an appeal from their decision, and therefore to appeal to this court was no recognition of their original jurisdiction. The authorities cited were

*Doe dem. Jackson v. Hiley*, 10 B. & C. 885;  
*Smith v. Adkins*, 8 M. & W. 362;  
*Ex parte Amesley*, 2 Y. & Coll. Ex. 350;  
*Doe dem. Higgs v. Terry*, 4 Ad. & Ell. 274;  
*Doe dem. Hobbs v. Cockell*, 1b. 478;  
*The Attorney-General v. Lewin*, 8 Sim. 366;  
*Re The Paddington Charities*, 1b. 629;  
*Allason v. Stark*, 9 Ad. & Ell. 255;  
*Rumball v. Munt*, 8 Q. B. 382;  
*The Churchwardens, &c., of St. Nicholas, Deptford, v. Sketchley*, 1b. 394;  
*The Attorney-General v. Calvert*, 23 Beav. 248;  
*Rex v. The Inhabitants of Halesworth*, 8 B. & Ad. 717;  
*Reg. v. The Archdeacon of Exeter*, 11 W. R. 262;  
*Magdalen College, Oxford, v. The Attorney-General*, 6 H. of L. Cas. 189.

The Attorney-General having replied, judgment was reserved until the 31st Jan., when

Lord Justice KNIGHT BRUCE said, that, subject to one question, and to one question only, the order of the Board of Charity Commissioners made on the 10th Nov. 1863 was reasonable and convenient, and consistent with the merits of the case, and that it ought to be supported. That question was, whether the commissioners had jurisdiction by law to make the order. If they had, there was nothing of importance that could be said against it, but even if the commissioners had no jurisdiction he thought that the court ought not on the application now before it to discharge their order. The two petitioners against it were two private inhabitants of the parish of Hackney, respectable gentlemen no doubt, but, he repeated, merely two private inhabitants. Their petition had no authority or sanction of the Attorney-General; it was opposed by him, and he was desirous that the order of the board should stand. The trustees appointed by the commissioners were willing to act, and in such a state of things the course most consistent with the well-being of the charity was to decline to interfere, and to leave the order standing. With deference to the M. R., his opinion therefore was that, whether the order of the commissioners was perfectly regular, or not, his Honour's order should be discharged, and the petition dismissed. For on the petition presented he thought that, even if the order had been made without jurisdiction (which he did not

assert), this court had been under no judicial necessity to discharge or interfere with the order which the board had made.

Lord Justice TURNER said:—The principal question in this case, and the only question on which, in my judgment, it is necessary or would be right for us to give any opinion, is this, whether it was competent to the two inhabitants, upon whose petition the order under appeal was made, to appeal to the M. R. from the order made by the Board of Charity Commissioners; and, upon the best consideration which I have been able to give to the case, my opinion is that it was not competent for them to do so. The jurisdiction of the Charity Commissioners is wholly statutory, and the right to appeal from orders pronounced by them must be measured and is limited by the statutes on which their jurisdiction is founded. In this case it depends upon the construction to be put upon the 8th section of 23 & 24 Vict. c. 26. The M. R. has construed this section as consisting of and divisible into three distinct parts, giving three different and independent rights of appeal:—First, to the Attorney-General, or any person authorised by him, or by the Board of Charity Commissioners, whatever may be the yearly income of the charity; secondly, to any trustee or person interested in any charity, of which the gross yearly income exceeds 50*l.*; and thirdly, to any two inhabitants of any parish or district in which the charity or its income may be specially applicable, whatever the amount of the income may be; but, with all deference and respect to his Honour's opinion, I cannot agree in this construction of the section. It seems to me that, according to the true construction of the section, it consists of and is divisible into two parts only, the first giving the right of appeal to the Attorney-General, or to any person appointed by him, or by the board, whatever may be the yearly income of the charity, and whether it does or does not exceed 50*l.*; and the second giving the right of appeal to the trustees or persons interested, or to the two inhabitants of the parish or district where the gross yearly income of the charity exceeds 50*l.* This construction appears to me to be more consistent with the collocation, the terms and the spirit of the section, and with the scheme of the Act and the course of legislation upon the subject, than the construction which his Honour has adopted. Looking to the collocation of the section, it is difficult, I think, to imagine that the intention could have been to give an unlimited right of appeal to the two inhabitants, for in that case the section would have given, first, an unlimited, then a limited, and then again an unlimited, right of appeal. Had it been intended to give the two inhabitants an unlimited right of appeal, they ought, it should seem, to have been classed with the Attorney-General, or the person appointed by him, or by the board. Then, as to the language of the section, the right of appeal is given to any two inhabitants of the parish or district in which, to use the terms of the Act, "the same" is specially applicable. To what do these words, "the same," refer? They may refer to the charity, or to the income of the charity; but whether they refer to the one or to the other, the ordinary rule of construction, as I apprehend, is that relative words are to be referred to the last antecedent, and these words, therefore, ought, as I think, to be taken to refer to the charity or income last before mentioned, a charity or income exceeding 50*l.* per annum, and not to relate back to the charity or income first mentioned in the section, which is unlimited as to amount. The two inhabitants, therefore, to whom the right of appeal is given must, if this view be correct, be inhabitants of a parish or district in which a charity

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having a gross yearly income of 50*l.* is applicable. Then again, as to the spirit of the section and the scheme of the Act. The section clearly points to a distinction between charities the income of which is above, and charities the income of which is below, 50*l.* per annum. Why is this distinction made? Clearly, as I apprehend, for the purpose of preventing the funds of the smaller charities being exhausted by litigation, as they too frequently were before the appointment of the Charity Commissioners, and surely it is not unreasonable to suppose that the Legislature may well have intended with this view to limit the right of appeal on the part of inhabitants to cases in which the annual value of the charity exceeded 50*l.*, more especially having regard to this consideration, that the smaller charities would still have the protection of the Attorney-General and of the board of commissioners under the first part of the section. Passing then from the provisions of this particular section to the course of legislation upon this subject, it is obvious, from the provisions of the earlier Acts, that the policy of the Legislature has throughout been to protect the smaller charities from the exhaustion by litigation to which they were formerly subject, and there is nothing, therefore, to lead us to believe that it could be intended by this section that the right of appeal given to the two inhabitants should extend to cases in which the income was below the prescribed amount of 50*l.* Some attempt has been made on the part of the resps. to show that the income in this case was above that amount; but the resps.' evidence on this subject points only to the income which might be made of the property, and not to the income which it actually produces, and it was not disputed that the actual income of each of these charities was less than the prescribed amount. The case, I think, must be dealt with according to the actual income only, and I do not think that the fact of the two charities being embraced in the same order makes any difference. This suggestion on the part of the resps. therefore fails. I have said nothing as to the other points which were raised in the argument, because, if the conclusion at which I have arrived as to the right of appeal is well founded, these are points which, as it seems to me, must rest with the Attorney-General or the board of commissioners, and not with us. I think that the order of the M. R. should be discharged, and that an order dismissing the petition presented by the resps., with costs, should be substituted for it, but that there should be no costs of the appeal.

Solicitors for the apps., *Fearon and Co.*

Solicitor for the original petitioners, *R. Ellis.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,  
Barristers-at-Law.

Saturday, Nov. 19, 1865.

REG. V. PEDLER.

*Church-rates—Bona fides of objection—Jurisdiction of justices.*

*Some disputes having arisen in the parish by reason of the refusal of the incumbent to bury the child of a Baptist in consecrated ground, some of the inhabitants determined to contest the church-rate. The deft. was summoned for nonpayment of his rate, and appeared by his solicitor, who stated that he contested the validity of the rate. But the justices, believing that the dispute about the burial of the child was the real cause of the refusal to pay, and that the*

*legal objection was not made bona fide, held that their jurisdiction was not ousted, and made an order for payment of the rate.*

*Upon certiorari to quash this order, it was*

*Held, that to entitle the justices to assume jurisdiction in such case, they must have very strong evidence of mala fides, and that the facts disclosed by the affidavits were not sufficient ground for such a conclusion.*

*The duty of justices, where an objection is made to the validity of a church-rate, considered.*

This case came before the court on *certiorari* to quash an order made by the justices of Wellington, Somerset, for the payment of 2*l.* 15*s.* church-rates, and 4*s.* 6*d.* costs. The app. was summoned, with others, before the justices for the nonpayment of the church-rate made on the 24th July 1863, when Mr. John Bennett, solicitor, of Serjeants'-inn, Fleet-street, attended on their behalf before the magistrates and took the following objections to the rate, as set forth in his affidavit:—First, that there was an item of 264*l.* for the repairs of the pinnacles of the tower of the said church, whilst there was a sum of between 50*l.* and 80*l.* in the hands of the churchwardens raised by the church-rate of Nov. 1861, for the repair of one of the pinnacles, which had not been expended, and that consequently the rate was excessive; and, secondly, that the assessment upon which the rate was made was unequal and unfair. The magistrates accordingly held, after hearing evidence, that the objections to the rate were *bona fide*, and dismissed the summonses, on the ground that the objections were *bona fide*, and they had no jurisdiction, leaving the parties to the remedy of the Ecclesiastical Court. On the 7th Jan. 1864, the parties were again summoned before the justices, when the same objections were taken by Mr. Bennett, but the magistrates, without consulting their clerk, took an entirely new course; whilst treating the objections as *bona fide*, they decided that the deft.'s professional man had no power to raise any objections to the validity of the rate, and that if he wished to do it it must be done by appeal to the quarter sessions, the chairman declaring that it was not fair to throw the onus of proving the validity of the said rate on the churchwardens, and they accordingly made orders for the payment of the rate. The affidavits of the churchwardens, Messrs. Burridge and Edwards, stated that, at the making of the rate, no objection was taken to the item for the repairs of the pinnacles, and it was moved and seconded and agreed to that a rate of 6*d.* in the pound should be granted for defraying the expenses of the churchwardens for the current year, as shown in the estimate, and at that meeting two of the defts. were present and took part. They also state "that three months and upwards had elapsed after the said vestry meeting had been held and the said rate granted before any opposition whatever had been made to the payment of the said rate, and that considerably over two-thirds had then, or has since, been collected and paid over to the collector of the rates of the said parish. We say that about this time application was made to the vicar of the parish to bury and have the Church service performed over the body of an unbaptised child of pauper parents of the Baptist denomination, who were said to be too poor to pay for the funeral expenses at their usual place of burying, viz., the Baptist burying-yard, and which the vicar declined to do; and I, the said William Burridge, say that, very shortly afterwards, viz., on the 13th Nov. last, I met William Day Horsey, a leading and influential member of that denomination, who complained to me of the vicar's conduct in having refused to bury the said child, and he then informed

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me that, although there had been hitherto no opposition to the church-rate, he feared that I should find there would be opposition in future, and by reason, as he, the said William Day Horsey, alleged, of the said vicar's refusing the burying of the said pauper Baptist child; and we, the said W. Burridge and J. Edwards, say, that we verily believe that the opposition which has since been got up against the said rate has been in consequence, as alleged by the said William Day Horsey, of such refusal on the part of the vicar to bury such child, and not by reason of any real non-liability on the part of such objectors to pay the same, or invalidity in law of the said rate itself." The sum handed over to them by their predecessors was 9*l.* 18*s.* 5*d.*, and there was no minute in the vestry-book of any sum of from 50*l.* to 80*l.*, or any other sum, having been obtained by a church-rate made in Nov. 1861, or by any rate, for the repairs of the pinnacles. The church-wardens further stated that the rate was made upon an assessment of the poor-rate which had been used for twenty years and upwards without ever having been appealed against on the ground of its being unequal and unfair. There were other affidavits denying many of the allegations contained in those of the opponents of the rate, and the belief of the justices that the rate bore on it the stamp of legality, and that the objections were not *bonâ fide*. With regard to Sherry's case, it appeared that it had been heard and dismissed in Dec. 1863; and yet, that the magistrates insisted on hearing it again on the 7th Jan. 1864, denying that they had heard it before, and they made an order to pay.

*Karslake*, Q. C. and *Dowdswell* showed cause against the rule for quashing the order.

*Karslake* read Mr. Bennett's affidavit setting out the facts, and before he had finished the Chief Justice asked him what answer he had to it, and he referred to his own affidavit in reply.

COCKBURN, C. J.—The affidavits seem to be all one way; there is no attempt to deny that the magistrates referred the defts. to the quarter sessions, nor that they said it was not fair to throw the onus of proving the goodness of the rate on the church-wardens.

*Karslake* then contended there was no valid objection to the rate. It had been in force for some months, and a large amount of it had been collected, and it was not until after the unfortunate circumstance of the burial of the pauper child that anything was said or urged against its validity. The justices, with a full knowledge of the circumstances, came to a right decision in considering the objections frivolous and vexatious, and with regard to Sherry's case, they say they did not hear it the first time.

CROMPTON, J.—I do not think it is a fair way of putting it for the magistrates to say they had not tried it, when they put this note on the minutes, "Jurisdiction ousted."

*Karslake* again urged that the defts. had never objected to this rate until after the refusal of the vicar to bury the child, and they were called on to pay.

COCKBURN, C. J.—And was not that time enough? Why should they object before they were called on to pay?

*Karslake* then urged that the grounds of objection relied on by the defts. were not sufficient.

COCKBURN, C. J.—You are arguing as if the magistrates had to try the merits, with which they

had nothing to do; but if the validity of a rate was disputed, and notice was given to the justices, their jurisdiction was gone. All they had to decide was, whether the objection appeared to be *bonâ fide*.

*Browne*, in support of the rule for quashing the order, was not called upon.

COCKBURN, C. J.—I think we need not trouble you, Mr. Browne, as we are of opinion that this rule ought certainly to be made absolute. The statute expressly says that, if the validity of the church-rate is disputed, the party disputing is to give notice to the justices, and the justices shall forbear giving judgment thereon. The effect of that provision is stated in the judgment of this court in the case of *Ricketts v. Bodenham*, in 4 Ad. & El., in these words: "The effect of the proviso is that in every such case the moment it appears that the question is not one merely of enforcing payment, but touching the validity of the rate, the summary jurisdiction is at an end, and that of the Ecclesiastical Court attaches." On the other hand, the courts have laid it down, and I think most properly, that the right which is thus secured to a party against whom an order for payment by magistrates is sought to be obtained, and thus stopped, where he disputes the validity of the rate, must not be abused. Consequently, if the right so given is sought to be abused by a party stating that he disputes the validity of the rate, when in point of fact he does not really dispute it, and does not intend to raise the question as to its validity before the proper tribunal and within the proper time, but merely puts forth that statement fraudulently, in fraud of the statute, the justices, to prevent that, may say it is not a dispute of the validity of the rate, or a notice to which any value should be attached. But it is perfectly clear that we cannot allow magistrates to take on themselves, simply because on the merits they may be of opinion that eventually any attempt to dispute the validity can only end in the signal defeat of the party raising the dispute, to determine that the notice is not *bonâ fide*, and that it is not given with an intention of disputing the validity. And when a professional gentleman attends for the parties against whom the order is asked, and gives notice that, on various grounds, he intends to dispute the validity of the rating, I, for one, should not have doubted, from his statement, especially when he cross-examined witnesses with a view to establish the propositions on which his objections are to be founded, and calls a witness for the same purpose, even although he might fail in establishing that there really were *bonâ fide* grounds for disputing the validity, but I should have come to the conclusion that I ought to have required some strong evidence to satisfy me that all this was done with *mala fides*. It is said there is something showing *mala fides*—that this notice to dispute was given after a difference had arisen between the vicar and certain of the parishioners who did not belong to the Established Church. It very often happens that the harmony which would otherwise subsist between all parties, and which would lead to a willing acquiescence in the rate necessary to maintain the church, is disturbed by a course of conduct on the part of the authorities which could only lead to quarrel. That may have been the case here. We have nothing to do with that. It may be that certain persons in the parish, thinking they had grounds of complaint against the vicar, may have objected to the church-rate, which they might not otherwise have questioned. We have nothing to do with that. The simple question is, whether they really were in earnest in saying that they intended to dispute the validity of the church-rate? Upon all the affidavits,



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and all the facts, I cannot entertain a doubt that that they really did intend to dispute the validity of the rating; and if it had gone, as it might have gone, to the Ecclesiastical Court, there they would have sought to substantiate the objection which they have taken. As to the hasty conclusion at which the magistrates arrived, I cannot allow, in my judgment, that the proviso of the statute that saves the right of the party having an objection to a church-rate, should be defeated by the magistrates finding there was no *bonâ fide* objection.

CROMPTON, J.—I am entirely of the same opinion. Upon reading the affidavit, my impression is very strong that there are no circumstances here from which the magistrates could fairly say that this was *mala fides*. Now, in construing the Act of Parliament there are two difficulties, which arise from time to time, and which would lead to great mischief if a particular course were taken by the parties and they could do so successfully. On the one hand, if one party could come and abuse the Act of Parliament by making an utterly frivolous objection, I think that would be a great mischief, because the consequence would be that in every case it must go to the Ecclesiastical Court and not to the magistrates. On the other hand, an extreme inconvenience would be if the magistrates might say, "This is not *bonâ fide*; we are the judges of that, and we give ourselves jurisdiction by saying that it is *mala fide*." Therefore, I think this court has met the difficulty by establishing a very proper rule; that it will see that there is evidence that may fairly enable the magistrates to say that the transaction is not *bonâ fide*. When they have decided on evidence, the court will not disturb that. We ought always to look carefully to see that there was sufficient ground on which the magistrates might say that there was no jurisdiction. I think this is a case where there was no such fair ground. The principle is a right one, that we ought to see whether the magistrates had grounds before them to be able to say that the matter was not *bonâ fide*. I quite admit that such a ludicrous or absurd ground might be put forth as strongly to weigh on the minds of the magistrates. To apply this. According to the affidavits, there is a motive for these parties objecting or wishing to object. Those motives we have nothing to do with. But I will assume that they were trying to find a valid objection. Supposing they had said, "We will not pay the church-rate, because you have acted illegally in not burying our child." Nobody could accept that as a ground for disputing the payment of the church-rate, because it was a collateral matter which had nothing to do with it. If the case had been such, I think the absurdity of it, when put forward, might strongly weigh on the minds of the magistrates and govern their judgment. Upon the whole, after reading the affidavits, and still more upon hearing them discussed at the bar, I think that the magistrates, for the reasons given by all of us in the course of the argument, were wrong in the second conclusion which they came to, and that these parties appear to have been bringing forward an objection on which they had succeeded before, and which they had a right to expect to be allowed to raise again.

MELLOR, J.—I am of the same opinion. When the object of this Act of Parliament is considered, I think it is clear what should be the construction to be put upon it. Formerly (before the statute), if the churchwardens intended to enforce payment of a church-rate, they were obliged to go to the Ecclesiastical Courts. That was found to be a great hardship, both on the churchwardens and the parties who had to pay the rate, and the result was, that in case there was no real dispute as to the

validity of the rate, it was thought proper, within certain limits, to give jurisdiction to the justices. But it was not intended to take away from parties the right to question the validity of the rate, if they were so disposed. Then it is said, it is laid down in several cases in this court, that it was sufficient to go before the magistrates, and say that they object to the validity of the rate, in order to oust jurisdiction. What Lord Tenterden said was this: "The justices stopped too soon; they ought to have gone further and inquired whether the objection had *bona fides*, and a foundation for it or not." The justices are to inquire to this extent: is this a rate upon which there is a *bonâ fide* dispute? What is the evidence as to that? The party comes before them and says, "I do dispute it;" and then he puts forward the grounds of such dispute. The magistrates are not to decide upon those grounds except so far as whether they appear to be absurd or frivolous. In such case the magistrates may say: "The absurdity of the objection is an element which we have a right to take into our consideration in determining that there is no real dispute," and that it was a fraudulent attempt to evade the Act of Parliament. It must be a strong case to enable the magistrates to do that, and I think we ought, in all cases where the magistrates can by one decision give themselves jurisdiction, and where by another decision their jurisdiction is ousted, most carefully to see, when they do give themselves jurisdiction, that they do so upon reasonable grounds.

SHER, J.—I am afraid the course which the justices have taken in this case has been occasioned by a misapprehension of the use, by this court, of the expression *bonâ fide* in considering the proviso of this statute. A considerable proportion of the affidavits that have been brought before us, and of the arguments upon them, have been directed to convince us that the ground upon which this rate was objected to was a ground which had its origin in a religious irritation in the parish, and that therefore it was not a *bonâ fide* objection. It is just possible that the distinction, as pointed out by my brother Mellor to Mr. Karslake, and afterwards observed upon by my Lord, may have escaped the attention of the justices, and that they may have thought this objection was an objection not *bonâ fide*, upon the grounds on which it has been sought to-day to convince us it was not *bonâ fide*. If so, they made a mistake, and it is right they should know it.

*Rule absolute to quash the order of payment.*

There were four other cases, in which a similar judgment was given, and the rules in each case were made absolute.

Friday, Feb. 3, 1865.

OVERSEERS OF CALVERLEY (apps.) v. THE OVERSEERS OF BRADFORD (resps.)

*Poor—Settlement by estate—Grant of lease to a squatter by lord of the manor—Consideration.*

*The husband of the pauper having encroached on the waste land of a manor, and built three houses thereon, which were let out to tenants, the lord of the manor, after the husband's death, required an acknowledgment from the pauper, the widow, in respect of the land, and thereupon, in consideration of the yearly rent of 25s. and the covenants and services, granted to the widow a lease for 999 years. The pauper resided and slept in one of the cottages nearly twelve months, and was rated as owner. The value of the cottages was 130l., and of the annual rent upwards of 10l.:*

*Held, that it was competent to look beyond the indenture to ascertain the annual value, and that the pauper is*



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*this case gained a settlement by estate, though the annual rent reserved by the lease was only 25s.*

Case stated by justices on an appeal to the West Riding Christmas Quarter Sessions 1864, held at Wakefield, against an order for the removal of Mary Riley from the township of Bradford to the township of Calverley-with-Farsley, when the said order was confirmed, subject to the opinion of the court on the following case:—

The *resps.* case, as set forth in the grounds of removal and established by evidence, was, that the pauper Mary Riley was the widow of one Benjamin Riley, who died in 1850, and that B. Riley gained a settlement in the *apps.* township by renting a separate dwelling-house, in which he resided and slept, at a rent of 16*l.* per annum, for which he paid the rent and all poor's-rates and taxes for many years prior and up to his death.

The *apps.* relied on the following ground of appeal: that the said Mary Riley acquired a settlement in her own right during her widowhood in the township of Bradford, for that in or about the 16th Nov. 1855 she the said M. Riley became lawfully possessed of or entitled to another estate consisting of a plot, piece, or parcel of land, and three cottages or dwelling-houses and other buildings thereon erected, situated at Bradford-moor, in the township of Bradford, of the annual value of 10*l.* and upwards, and now occupied by Samuel Riley for a term of 999 years, created by an indenture of lease made the 16th Nov. 1855, between Mary Rawson and Elizabeth Rawson, therein described as ladies of the manor of Bradford, of the one part, and the said Mary Riley of the other part, at a yearly reserved rent of 25*s.*, and that in or about the years 1857 and 1858 respectively, and whilst so possessed of or entitled to the said estate lastly described, she the said M. Riley inhabited, resided and slept in and upon the said leasehold estate for forty days and upwards, to wit, for the period of one year and upwards.

The evidence given by the *apps.* in support of this ground of appeal was, that Mary Riley, the pauper, a widow, was occupying during the years 1854 and 1855, by her tenants, three cottages in Daniel-street, Bradford-moor, in the township of Bradford, which had been built about fourteen years before by her late husband, by encroaching on the waste lands of the moor belonging to the ladies of the manor; and that in 1855 the ladies of the manor, as such owners of the waste land on which the said cottages were built, required an acknowledgment from Mary Riley in respect of the said land, and that thereupon the said ladies of the manor, by an indenture dated 16th Nov. 1855, in consideration of the yearly rent, covenants, payments and services thereafter reserved, granted, and the said Mary Riley accepted, a lease for 999 years of the said cottages and lands; and by this indenture a yearly rent of 25*s.* is reserved to be paid by the said Mary Riley, her executors, administrators, or assigns, to the ladies of the manor, and covenants are also therein contained on the part of the said Mary Riley for payment of the said reserved rent, and to perform suit and service at the court baron of the said ladies of the manor and their appointees. A copy of the said lease, the due execution of which was proved, is annexed to this case.

In 1857 and 1858 Mary Riley removed to one of these cottages, and resided and slept in it for nearly twelve months. She paid all rates for the cottages, and was rated as owner under the Small Tenements Act by the *resps.* township, in which the said cottages are situated, and she had paid the rent reserved by the lease.

After 1858 the pauper went to reside at different places, but had never resided ten miles from the *resps.* township, and had never subsequently gained

any settlement before she came again to reside in the *resps.* township, and became chargeable to it by reason of poverty and sickness. The present value of the three cottages was proved to be 130*l.*, and their annual rent to be upwards of 10*l.*

The question for the opinion of the court was, whether on these facts the lease of 1855, coupled with the subsequent residence of the pauper in the *resps.* township of more than forty days, conferred a settlement on her by estate in the *resps.* township.

*Maule* and *West* in support of the order of sessions.—This case is like that of *Rex v. Horchurch*, 2 B. & Ald. 189, where the father of the pauper obtained from the lord of the manor a grant of a piece of land whereon he built three cottages, and it was held that the lord of the manor, in the absence of a custom to that effect, cannot make a new grant of copyhold, and if he does the grantee acquires thereby no settlement by estate. And it was also there held that the consideration stated in the grant governed the case, and here, that being the rent of 25*s.* per year only, no settlement was acquired. *Rex v. Warblington*, 1 T. R. 498, is to the same effect.

*T. Campbell Foster*, for the *apps.*, was not called upon.

*CROMPTON, J.*—It is well settled in such cases that you may look beyond the deed, and see whether the transaction was a gift or a purchase. Here part of the consideration was undoubtedly to get quit of the trouble and anxiety of the ladies of the manor ejecting a squatter on the manor, by having an acknowledgment of title and giving a lease. As the real value of the estate was more than sufficient, judgment must be given for the *apps.*

BLACKBURN and MELLOR, JJ. concurred.

#### HARTLEY (app.) v. BOWLZER (resp.)

*Turnpike—Evasion of toll—Taking horses from one team and adding to another—3 Geo. 4, c. 126, s. 41.*

*Two one-horsed carts went through a turnpike-gate and returned again. The horses were then unyoked and put to another vehicle of the same owner, from which the horses that had driven it some distance on the turnpike-road were removed before reaching the gate. The driver on passing the gate with the second vehicle paid only a smaller toll, contending that he was not liable to pay in respect of the two horses so yoked to the second vehicle, as they had paid toll and were allowed to pass through the gate four times per day, on the payment of one toll, under the Local Turnpike Act:*

*Held, that there was evidence on which a justice might find that this was done to evade the payment of toll, and on which he might convict under the 3 Geo. 4, c. 126, s. 41.*

Case stated by a justice under the 20 & 21 Vict. c. 48.

Complaint was made before a justice of the peace for the county of Derby, by William Bowlzer, the *resp.*, the collector of the tolls under the Derby, Duffield, Wirksworth and Sheffield Roads Act 1851, at a turnpike-gate called the Stone Gravels turnpike, in the said county, charging that the *app.* on the 16th Oct. 1864, at the township of Newbold, in the said county, being then and there the driver of a certain carriage, to wit a drag, upon a certain turnpike-road there situate, called the Derby and Sheffield turnpike-road, did unlawfully, wilfully and fraudulently evade the payment of 1*s.*, being the toll then and there lawfully due and payable at a certain tollgate, called the Stone Gravels gate, upon the said road, in respect of two horses drawing the

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said drag, by leaving the said drag upon the said road, and taking off the horses drawing the same before coming to the said turnpike-gate, and afterwards drawing the said drag through the said gate with other horses having before passed through the said gate and paid thereat, whereby the said sum of 1s. was evaded as aforesaid, contrary to the 3 Geo. 4, c. 126, s. 41.

The complaint was heard on the 10th Nov. 1864, when the resp. in person, and the app. in person and by his attorney, appeared, and witnesses were sworn and examined.

The app., in answer to the complaint, contended that he was lawfully entitled to pass through the said turnpike-gate with the drag drawn by two horses, on the occasion and under the circumstances hereinafter stated, without paying toll for the horses, and that he had not evaded or attempted to evade payment of tolls within the meaning of the 3 Geo. 4, c. 126, s. 41.

Under the Derby, Duffield, Wirksworth and Sheffield Turnpike Road Act 1851 (s. 8), herein-after referred to as the said Local Turnpike Act, the following toll is imposed :

For each horse or beast of draught drawing a waggon, wain, cart, or other such carriage having the sole or bottom of the fellicies of the wheels of a less breadth than six inches, the sum of sixpence.

By the said Local Turnpike Act there are other tolls, not material to this case, imposed on horses drawing other descriptions of carriages, and on horses, beasts and cattle not drawing any carriage, but no toll is imposed upon any carriages drawn or propelled by steam or other power other than animal power, on which the toll payable is 1s. per wheel.

By the 9th section of the said Local Turnpike Act, it is enacted

That no more than three full tolls shall be demanded or taken in one day for or in respect of the same horses, beasts, cattle, or carriages travelling between Chesterfield and Sheffield, provided that no person shall on the same day be permitted to pass through any one tollgate between Chesterfield and Sheffield, with any cart or carriage more than four times laden or unladen for one toll, that is to say, twice when going and twice when returning, and every person who shall have paid a second toll on the same day at any one tollgate as aforesaid shall and may afterwards pass and repass any number of times at the same gate on the same day with the same horse, beast, cattle and carriages, without paying or being liable to pay any further or additional toll.

The Stone Gravels turnpike-gate is situate on the part of the said turnpike-road lying between Chesterfield and Sheffield.

The turnpike-gate is lawfully established under the provisions of the said Local Turnpike Act, and the aforesaid tolls thereby authorised to be levied are payable at the said turnpike-gate, and the said resp. is the duly authorised collector of tolls at such gate.

The app. is the servant of Wm. Lee, who is the owner of stone quarries at Ashover in the county of Derby, and is also a carrier of timber.

On the morning of Saturday, 15th Oct. 1864, there started from the premises of the said Wm. Lee, at Ashover, a laden timber-drag belonging to the said Wm. Lee, and drawn by three of his horses under the care of a man not the app. The timber was to be delivered to Messrs. Fowler at their works at Sheepbridge in the parish of Whittington, in the said county. On the same morning there also started from the said Wm. Lee's place at Ashover two carts laden with stone, each drawn by one horse and in the care of the app. The carts and horses belonged to the said Wm. Lee, and the stone in the carts was to be delivered to Mr. Coates at another and less distant part of Whittington aforesaid. In passing from Ashover to Sheepbridge, or from Ashover to Mr. Coates's place at Whittington, a person would travel the first six miles along roads not affected by the said Local Turnpike Act until

he entered the borough of Chesterfield. He would then pass through the borough of Chesterfield, and at the northward boundary of the borough he would first enter upon the Sheffield and Chesterfield turnpike-road, to which the said Local Turnpike Act does apply.

The Stone Gravels turnpike-gate is situate in the township of Newbold, about half-a-mile beyond the northward boundary of the borough of Chesterfield; and in going from Chesterfield either to Mr. Fowler's works at Sheepbridge or to Mr. Coates's premises at Whittington, a person would have to pass through the Stone Gravels turnpike-gate. Mr. Coates's premises are situate about half-a-mile north of the Stone Gravels turnpike-gate, and Messrs. Fowler's works at Sheepbridge about one mile still further northwards.

On the 15th Oct. last the man who drove the timber-drag from Ashover stopped with his drag and horses at the Hare and Hounds public-house at Stone Gravels, situate about 120 yards south, that is, on the Chesterfield side of the Stone Gravels turnpike-gate. He put one of his horses in the inn stable, and left his drag and the other two horses standing on the road near the inn. The app. continued onwards with his two one-horse carts from Ashover through the Stone Gravels turnpike-gate, and on passing through the gate paid the toll of 1s., being the proper toll on two horses, each drawing one of the two carts. The app. then proceeded onwards with his two horses and carts, and unloaded the stone from his carts on Mr. Coates's premises at Whittington. The app. then came back with the two horses and two empty carts through the same turnpike-gate to the Hare and Hounds Inn at Stone Gravels, without a second toll being demanded or paid.

The app. and the man up to that time in charge of the timber-drag then changed horses opposite or near to the Hare and Hounds Inn. The two horses which remained in the drag being taken out and put into the carts and sent back to Ashover, and the two cart-horses being taken from the carts and harnessed to the timber-drag, and driven on by the app. from the Hare and Hounds Inn through the said turnpike-gate to Messrs. Fowler's works at Sheepbridge.

The resp. demanded toll of the app., and he passed through the said turnpike-gate on the last-mentioned occasion with his two horses drawing the timber-drag. The app. thereupon refused to pay toll, and on the hearing of his complaint contended that he was not liable to toll, as that was the third time only of his passing through the said turnpike-gate with the same horses on the same day, and he had already paid one full toll on two horses, when they first passed through the said turnpike-gate that day in going to Mr. Coates's premises with the two carts.

The toll payable at the said turnpike-gate in respect of the said two horses, if they were liable to toll, would be the same whether they each drew one of the said carts, or both drew the said timber-drag. There was no further evidence of an actual or intended evasion of toll than might be drawn from the facts above stated.

The justice decided that app. was guilty of evading the payment of toll at the said turnpike-gate, as complained of by the resp., and convicted the app. in the penalty of 1l. and costs for the said offence; and the ground of his determination was, that he considered the facts showed that the app. had evaded the tolls payable in respect of all or one of the three horses drawing the said timber-drag from Ashover along the said turnpike as far as the Hare and Hounds Inn aforesaid.

*Harington* for the resp.—The conviction was right. The point turns on the General Turnpike Act (3 Geo. 4, c. 126), s. 8, whereby (*inter alia*), if any person

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shall leave upon the said road any horse, &c., by reason whereof the payment of any tolls or duties shall be avoided or lessened, or shall take off, or cause to be taken off, any horse, &c., either before or after having passed through any tollgate, whereby the payment of all or any of the tolls shall or may be evaded, every such person shall for every such offence forfeit and pay any sum not exceeding 5*l*. The facts brought the app. within that section. The plt. evaded the toll by leaving the horses of the timber-drag behind, putting his own horses to it, and so passing through the gate. It was for the magistrate to say whether this was done for evading the toll. He has found that it was, and his finding is supported by the evidence.

*Raymond* for the app.—The app. had a right to act as he did. The horses in the timber-drag had come far, and those in the stone carts were comparatively fresh.

*BLACKBURN, J.*—But still the magistrate finds that the intent was to evade the toll.

*CROMFORD, J.*—Clearly the object was to lessen the toll that would otherwise have been payable, and is not that within the 8 Geo. 4, c. 126, s. 41?

*Raymond.*—The effect is to defeat the privilege of exemption, if horses may not pass through the gate four times per day, unless they are drawing the same vehicle.

By the Court.—

*Conviction affirmed.*

*Saturday, Feb. 4, 1865.*

POPE (app.) v. WHALLEY (resp.)

*Markets and Fairs Act—Shop—Stall—10 & 11 Vict. c. 14, s. 13.*

*The app. exposed laces, tapes, buttons and combs for sale in a structure within a borough, but not within the limits of the market, as fixed by the bye-laws, but within a yard appurtenant to a public-house. The main supports of the structure consisted of poles or pieces of wood (formerly used as a stall in the market-place) let into the ground in the public-house yard. The structure consisted of the upright posts fixed in the ground, of cross pieces of wood, on which the counter-boards were supported, and a wooden roof projecting a considerable distance beyond the counter-boards on each side so as to shelter the seller on one side and the customers on the other. The sellers were protected behind by a wooden frame-work. The stall was fitted with a door, which might be locked, and a window-frame, and it had shelves. The structure was of a slight character, and not weather-proof. It was let by the week, and was not rated.*

*Justices having, on an information under the Markets and Fairs Act, s. 13, decided that this structure was not a shop within the meaning of that section, and convicted the app.:*

*Held, per Blackburn and Mellor, JJ., that the conviction was right.*

Case stated by justices under 20 & 21 Vict. c. 43, on a conviction under the 10 & 11 Vict. c. 14, s. 13, the Markets and Fairs Clauses Act 1847.

The case stated that Wigan is an ancient borough, having an ancient market and market-place, and that the mayor, aldermen and burgesses of the borough are the owners of the tolls, picage and stallage of such market. That there is a local board of health constituted for such borough under the Public Health Act 1848, and within the borough.

The Local Government Act and the Market and Fairs Act, so far as relates to markets, have been adopted and applied. The ancient market-days are Monday and Friday in each week, but under the bye-laws Tuesday and Saturday, as well as Monday and Friday in each week, have been constituted market-days.

By the bye-laws it is ordered, that the market shall be held in the Market-place, Standish-gate-street, Wallgate, and Dicconson-street within the borough.

On and prior to the 16th Sept. the resp. was the lessee of the market tolls, picage and stallage under the corporation of the borough. A market was held within the borough on Friday the 16th Sept. 1864, and on the said 16th Sept. the app. exposed laces, tapes, buttons and combs for sale within the borough, but not within the limits of the market as fixed by the bye-laws, but within a yard at the back of and appurtenant to the Crofters' Arms public-house. The place where the said articles were exposed for sale was composed as follows: The main supports consisted of poles or pieces of wood which had formerly been used as a stall in the Wigan market-place, but which had been let into the ground of the Crofters' Arms-yard, and used as a stall there. The stall so used consisted of the upright posts fixed in the ground; of cross pieces of wood, on which the counter-boards were supported, and a wooden roof projecting a considerable distance beyond the counter-boards on each side, so as to shelter the seller on one side and the customers on the other. The sellers were protected behind a wooden frame-work. Subsequent to the conviction of John Beesley, under a similar charge, for exposing goods for sale on a similar stall, the app.'s stall, along with others, had undergone the following alterations, viz., from the floor up to the level of the counter-boards at one end slabs of wood, or undressed board, have been nailed to the posts. From these boards up to the square of the structure a loose window-frame has been placed at one end, and a fixed window-frame from that up to the roof adjoining the window and slabs. There is a moveable shutter or door giving access to the back of the counter-boards where the seller stands. The other end of the structure and the side behind where the seller stands are entirely boarded up. In front, from the counter-boards to the ground, slabs or boards are nailed to the upright posts, and from the counter-boards to the roof there is a loose shutter extending the whole length (except the breadth of a door) at one end, which is removed during business hours. The door at the end of the loose shutters is upon hinges, and has a lock upon it, and can be locked or unlocked at the outside. The place inside where the seller stands is about 2ft. 6in. broad. There is in that breadth a floor made of boards where the seller stands, but under the counter-boards and in front where the buyer stands the surface of the ground is bare and uncovered, save by the counter-boards and roof. The structures of the app. and others are placed side by side in a row, and are set back to back, so that the fronts of the stalls face each other, affording a double space for buyers, sheltered in some measure from wet by the projecting roofs meeting each other. The moveable glass window and the loose shutters have no hinges, but are so made that they can be taken down, and when put up again fastened inside. The dimensions of these structures are as follows: the height from the ground to the square is 6ft. 6in., and from the ground to the centre of the roof 9ft. 6in., the window frame at the end is nearly 4ft. wide, the breadth of the structure is 6ft. 10in., including the projection over the roof on each side of the counter-boards where the seller and buyer stands. The length of the structure is

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about 13ft., the space between two stalls fronting each other is entirely open at all times and is common to the customers of both stalls. There were shelves in the app.'s structure, and it was proved that some of the structures of the same kind and in the same yard were papered, but no evidence of being papered was given as regarded that of the app. The structures do not adjoin, neither are they in any manner connected with any house or other building of a substantial character. They are of a slight and unsubstantial character, and are not proof against the weather. The cost of the structure is from 4l. to 5l., and it was made at the expense of the landlady of the public-house, who lets each stall by the week, the app. having taken the stall from the landlady of the public-house by the week at the rent of 2s. per week. The other occupiers of these structures are not and never have been rated to the poor and highway rates in respect of the structures.

As regards the use of the structure, the app. and other holders of similar structures have access to them whenever they think fit. They expose goods for sale there every day in the week. The customers as a rule stand in front and outside the structure when they make purchases, but evidence was given that customers could go into the narrow space of 2ft. 6in., where sellers stand, if they choose.

The stall-holders generally removed their goods at night, though some evidence was given that in some instances goods were left there all night, though the witnesses would not state that the structures were such as would render it safe to leave anything valuable all night.

As regards the app. it was not proved that any person went inside her structure to purchase, or that she ever left goods on the premises all night, neither was the contrary proved.

It was contended on the part of the deft., the app. in this appeal, that the place mentioned in the evidence and in the facts before stated was the app.'s own shop within the meaning of the exception in the 13th section of the Markets and Fairs Clauses Act 1847.

The justices were of opinion, that in point of law and fact the structure where the app. exposed goods for sale was not, either in its nature, construction, or use, such as to constitute it a shop within the meaning of the exception in the said section:

1. Because of its want of a stable and substantial character.

2. Because it was a mere alteration of what had undoubtedly been a stall, in order to evade the provisions of the Markets and Fairs Act.

3. Because, although it is possible for a customer to go inside, for the purpose of buying, yet it is obvious, from the very narrow space behind the counter-boards (about 30 inches in breadth), and from the fact of the shutter in front being regularly removed for the purpose of selling goods, that such was never intended, and in practice could not be the case, and that the user of this structure must necessarily be the same as of a stall where the seller stands inside and the buyer outside.

4. Because the structure is not of such a nature as either to protect goods against rain, or render it safe to have goods of value on the premises during the night without being otherwise protected.

And it also appearing to us that the evidence given before us brought the case within the operation of the 13th section of the Markets and Fairs Clauses Act 1847, we gave our determination against the app. in the manner before stated.

*D. D. Keane* (Cottingham with him) for the app.—It is submitted that the place in question was the app.'s own shop, within sect. 13 of the Markets and Fairs Act 1847 (10 & 11 Vict. c. 14), on which the

case depends. That section enacts that, "After the market-place is open for public use, every person other than a licensed hawkker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorised to be taken, shall for every such offence be liable to a penalty not exceeding 40s."

*Field, Q. C.* (*Le Breton* with him) for the resp.

The following cases were cited:

*Rez v. Coversham*, 4 B. & C. 683;

*Reg. v. Hill*, 2 Moo. & Rob. 458;

*Mayor of Yarmouth v. Groom*, 1 H. & C. 112;

*Reg. v. Carter*, 1 C. & K. 173;

*Reg. v. Sanders*, 9 Car. & P. 79;

*Watson v. Cotton*, 17 L. J. 68, C. P.;

*Mayor of Macclesfield v. Chapman*, 22 M. & W. 78;

Com. Dig. "Market," F.;

*Willshire v. Willett*, 31 L. J. 8, M. C.; 5 L. T. Rep. N. S. 355;

*Willshire v. Baker*, 11 C. B., N. S., 237; 5 L. T. Rep. N. S. 355;

*Llandaff Market Company v. Lyndon*, 30 L. J. 105, M. C.; 2 L. T. Rep. N. S. 771.

BLACKBURN, J.—I think that the judgment of the magistrates should be affirmed. The question turns entirely on the construction of sect. 13 of the Markets and Fairs Clauses Act 1847, which says, "That after the market-place is open for public use every person other than a licensed hawkker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorised to be taken in the market, shall for every such offence be liable to a penalty not exceeding forty shillings." The first question is, what is meant by the word "shop," in which the seller may sell so as to avoid the penalty imposed by that section? The object of the Act was to protect the interests of the market, and the intention of the Act in reference to such an object may be inferred by considering what was the law before the passing of this Act as to a grant of a market. *The Mayor of Macclesfield v. Chapman* shows that it was the better opinion that an ordinary grant of a market did not of itself confer the right to restrain persons from selling in their own shops within the limits of the franchise on market days; such a right could exist only by immemorial custom, and it was not an incident to a grant by charter. In *Mosley v. Walker*, 7 B. & C. 53, it was said by Bayley, J., that in *Mosley v. Chadwick* it was decided "that the lord having a right of market in a particular place, a stranger could not lawfully set up what in reality was a different market in that place." That was the test where the Crown granted a right of franchise by modern charter. If some one set up what was really a different market within the limits of the franchise, then the person setting it up was liable to an action for the injury which he thereby caused to the grantee. Now the substantial meaning of sect. 13 is that whenever it appears the seller sells in a shop which is private and permanent, he is to be within the exception, just as before the Act he would not have been liable to an action. But whenever a man does not sell in his private shop, but sets up a private market of his own, and so would have been liable before the Act to an action at common law, in that case the section imposes a penalty. In the present case what the justices had to consider was, was the seller's place his permanent and real private shop? If it was, it was within the exception; but if what the seller did amounted to setting up a private market, it is not within the exception. Now there is no one element in the case which is conclusive of

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the character of the place, but its nature is well summed up in the reasons which the justices give for their decision. Those reasons were, first, because it was not of a stable and substantial character; secondly, because it was a mere alteration to evade the Act; thirdly, because it was unusual and inconvenient for the customer to go inside; and, fourthly, because there was no adequate protection against rain or thieves at night. The short terms for which these places were let would also be an element to be considered, and, in my opinion, the justices have come to the right conclusion; and if I had to come to a conclusion on the facts, I should be of the same opinion as they were.

MELLOR, J.—I think everything that could be said against the decision of the justices has been urged, but I am bound to say that, in my opinion, if we look at the object of the Act, the intention was plainly to introduce into local Acts certain clauses (just as was done in the Railways Clauses Consolidation Act), drawn up in the form of a general Act, which should be adapted to almost all circumstances. The object of this Act was to establish fairs and markets, and as that is for the benefit of the district, this enactment is to prevent the infringement of the privileges, and to secure that benefit. It is very reasonable, when the Legislature said that, after the market is opened, none but licensed hawkers should sell within the prescribed limits, that it should desire to protect *bona fide* sales by persons in their own dwelling-places or shops. I agree with my brother Blackburn that each of the reasons given by the justices is not conclusive by itself, but I think they rightly considered that these all taken together were important elements for their decision; and I think they came to a right conclusion. As to the true definition of the word "shop," I think it means something more than the mere place of sale, and that it implies that there should be room for storing goods according to the nature of the business carried on, for storing linen and woollen goods, for instance, if it is a draper's business. At the same time the absence of this is not decisive against a place being a shop in all cases, because a fishmonger's place may be undoubtedly a shop, though from the perishable nature of the articles it may not be necessary to have room to store them. However that may be (and it is not necessary to decide that here), I think the justices have come to the right conclusion, and that the conviction should be affirmed.

Conviction affirmed.

### COURT OF COMMON PLEAS.

Reported by W. MAYN and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

Wednesday, Jan. 25, 1865.

EATWELL (app.) v. RICHMOND (resp.)

*Local Turnpike Act, 10 Geo. 4, c. c. — Construction — Liability to subsequent tolls on same day — Licence to carry goods with modified licence to carry passengers — 16 & 17 Vict. c. 90, schedule D.*

*A local Turnpike Act imposed certain tolls on four classes of things: (1.) Every horse or other beast drawing any coach, &c., or other such light carriage (except stage-coaches), 4d. (2.) Every horse or beast drawing any stage-coach licensed to carry in the whole inside and outside not more than sixteen passengers, 6d.; and licensed to carry more than sixteen passengers, 6½d. (3.) Every horse or beast drawing any van or other carriage for the conveyance of goods for hire or pay, 6½d. (4.) Every horse or other beast drawing any*

*caravan, tilted waggon, tilted cart, or other such carriage (licensed to carry passengers for hire), at the same rate as stage-coaches carrying the same number of passengers. No second toll was in general to be paid for passing a second time through the same gate on the same day; but by a subsequent section tolls were to be paid for every time of passing and repassing on the same day of a "stage-coach, stage-waggon, van, caravan, cart, or other stage-carriage for the conveyance of passengers for payment, hire, or reward."*

*Held, that the sections must be read together, and that although the latter section contained the words "for the conveyance of passengers" without the word "licensed," yet that it did not apply to any carriage not in fact "licensed to carry passengers."*

*The app. drove a spring van on four wheels from A. to B. regularly on four days in the week, returning from B. to A. on the same day. The van was licensed under 16 & 17 Vict. c. 90 as a carriage principally and bona fide used for the conveyance of goods, and occasionally only used for the conveyance of passengers. The app. on one day was charged a toll of 6½d. on passing through the turnpike-gate from A. to B., and a second toll of 6½d. on his return on the same day from B. to A. He had one passenger on his first passage through the gate, and the same passenger on returning. He thereupon preferred an information against the tollgate-keeper for demanding greater tolls than he was authorised to do:*

*Held, that the van was not "licensed to carry passengers" within the toll-imposing section of the Act, and therefore did not come within the proviso empowering the tollgate-keeper to impose second tolls upon it as being "for the conveyance of passengers."*

*Held, further, that the app.'s van fell within the third clause of the toll-imposing section as being "for the conveyance of goods," and that it was liable to a toll of 6½d.*

This was a case stated by justices under 20 & 21 Vict. c. 43, and the material facts were as follows:

On the 18th June 1864 an information was preferred by George Eatwell, the app., who was the owner and driver of a spring van on four wheels, which travelled from Chippenham into Bath and back four times a week, against Andrew Richmond, the resp., the collector or keeper of the London turnpike-gate, for demanding and taking, on the 6th June 1864, a greater toll than he was authorised to do. The justices dismissed the information and, upon the application of the app., stated a case for the opinion of the Court of C. P., setting out the evidence given before them, and the clauses of the Local Act of Parliament under which the tolls had been demanded and taken.

The app. stated before the justices that he was a common carrier living at Chippenham, and travelling to Bath and back four days in each week, with a light caravan on four wheels drawn by one horse. The caravan had moveable seats which could be put up and down, and the app. carried goods occasionally and passengers occasionally, sometimes one and sometimes the other, and sometimes both, always for payment. He deposited passengers at their own doors occasionally when they requested it, and he universally delivered goods at their destination as directed. He further said that he did not travel over four miles an hour. On the 6th June he passed through the resp.'s gate on his way to Bath, having in his van one passenger and a bundle belonging to the passenger, and on returning he passed through with the same passenger and a parcel going to Chippenham. The resp. demanded a toll of 6½d. on each occasion, and the app. paid it under protest.

The app. was not licensed, but paid a duty of

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2l. 6s. 8d. under schedule D. of 16 & 17 Vict. c. 90 (the Assessed Duty Act), which enacts that duties shall be paid

For every carriage used by any common carrier principally and *bona fide* for and in the carrying of goods, wares, or merchandise, whereby he shall seek a livelihood, where such carriage shall be occasionally only used in conveying passengers for hire, and in such manner that the stage-carriage duty, or any composition for the same, shall not be payable under any licence by the Commissioners of Inland Revenue: where such last-mentioned carriage shall have four wheels, 2l. 6s. 8d.; and where the same shall have less than four wheels, 1l. 6s. 8d.

The tolls imposed by the local Turnpike Act, 10 Geo. 4, c. cx., s. 6, under which the resp. acted, were as follows:

For every horse or other beast, drawing any coach, barouche, sociable, berlin, chariot, landau, chaise, phaeton, curricule, gig, caravan, cart upon springs, hearse, litter, or other such light carriage (except stage-coaches), any sum not exceeding fourpence.

For every horse or beast drawing any stage-coach licensed to carry in the whole, inside and outside, not more than sixteen passengers, any sum not exceeding fivepence; and licensed to carry more than sixteen passengers, any sum not exceeding sixpence halfpenny.

For every horse or other beast, drawing any van, or other such carriage, for the conveyance of goods for hire or pay, any sum not exceeding sixpence halfpenny.

For every horse or other beast, drawing any caravan, tilted cart, or other such carriage (licensed to carry passengers for hire), at the same rate as stage-coaches carrying the same number of passengers.

Sects. 7 and 9 contained the following provisos respectively:—Sect. 7:

Provided always, and be it further enacted, that it shall not be lawful for the said trustees, or their collector or collectors, lessee or lessees, to demand or take more than the respective numbers of tolls in the whole hereinafter mentioned, for and in respect of the same horses, cattle, and carriages, for passing and repassing in any one day to be computed from twelve of the clock in one night, to twelve of the clock in the next succeeding night, along the whole line or lines of the said several roads as hereinafter mentioned (except as hereinafter mentioned); that is to say, on the said road which is called the London-road (forming part of the aforesaid first district), not more than one full toll, &c.

Sect. 9:

Provided always, and be it further enacted, that for or in respect of the horses, or other cattle or beasts, drawing any stage-coach, stage-wagon, van, caravan, cart, or other stage-carriage for the conveyance of passengers for payment, hire, or reward, for which toll shall have been paid and which shall return on the same day through the same turnpike-gate or bar, the tolls hereby made payable shall be paid for every time of passing and repassing through every such gate or bar in like manner as if no toll had been before paid thereat.

The app. contended, first, that as a second toll could only be charged under the proviso in which the word "stage" apparently governed all the other expressions, and as it was not clear that this was a stage-van or a stage-caravan, a second toll could not be levied upon it. Secondly, that as the van was not licensed to carry passengers, it did not come within the fourth clause so as to be liable to the same rate as stage-coaches. And thirdly, that although the resp. might have elected to have charged the app. 4d. under the first clause, or 6½d., as conveying goods for hire under the third clause, yet having elected to treat it as a goods-conveying van, and charged the higher toll, he had no power to demand such toll again under sect. 9, which extends only to conveyances carrying passengers, and not to conveyances carrying goods.

Kingdon appeared for the app.

Karslake, Q. C. for the resp.

ERLE, C. J.—The first question in this case is, whether or not the tollgate-keeper had a right to demand a second toll. The app. passes backwards and forwards from Bath to Chippenham, and from Chippenham to Bath; and his carriage is licensed under 16 & 17 Vict. c. 90, as being principally and *bona fide* used for the carrying of goods, and occa-

sionally used in conveying passengers, but not liable to pay stage-carriage duty. The carriage is not licensed for the conveyance of passengers, but for the carriage of goods. It is a modification of the licence that the carrier is entitled to take up passengers occasionally. Then is this a carriage on which a second toll is imposed by sect. 9 of the local Turnpike Act? Sect. 6 imposes tolls on a variety of carriages. The app.'s carriage was certainly not a stage-coach within the meaning of that section; and if it falls within any of the classes of carriages described in sect. 6, it must be the fourth class, and then, as it does not carry more than sixteen passengers, the toll should be 5d. per horse. But is it in fact, in the words of that paragraph of the section, a "caravan, tilted cart, or other such carriage (licensed to carry passengers for hire)?" The app. is licensed to carry goods, with a modified licence to carry passengers; and I think that his van does not fall within the description as being licensed to carry passengers. Now sect. 9 must be taken as to be read with sect. 6, and by sect. 6 the rate of toll is to be settled by the licence of the driver, and therefore, although sect. 9 does not contain the word "licensed," yet I think that it must be taken to include only such stage-coaches and other vehicles as are licensed to "carry passengers for hire." If that is the fair construction of sect. 9, the app.'s carriage does not fall within it. The construction put upon sect. 9 by the resp. is, that the allusion to the licence is purposely left out, and that the tollgate-keeper has a right to look at every carriage passing through the gate, and ask, *Quo intuitu* did you make this journey, for goods or for passengers? But it is very clear that the statute imposes toll on the habit of the carriages, and it would be most pernicious that the tollgate-keeper should have the right of asking what was the driver's object on each particular journey. I think that the Legislature intended the tollgate-keeper to be satisfied with the licence as showing what the habit of the carriage is. If the Excise authorities are satisfied to let people have a licence to carry goods with a modified licence to carry passengers, the tollgate-keeper ought to be satisfied also. It would not do to have a shifting liability at the discretion of the tollgate-keeper. It was said by Mr. Karslake that the usage, when the Act was passed, when there were no railways, must govern the construction of the Act, but the statute must be taken to contemplate future times, and it contemplates a licence *de anno in annum*. As to the toll which ought to be charged upon the app.'s carriage, I think that it comes within the third clause of sect. 6, and is liable to a toll of 6½d. The case must be sent back to the justices with an intimation of our opinion that the app.'s carriage was liable to a toll of 6½d., but to no return toll.

WILLIAMS, WILLES and KEATING, JJ. concurred.

*Judgment for the app. without costs.*

Attorneys, E. Doyle, Whitakers and Woolbert.

## COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGS, Esqrs., Barristers-at-Law

Wednesday, Jan. 18 and 25, 1865.

MOUNSEY v. ISMAY.

*Custom—Horse-racing—Entry on land for purposes of horse-racing on Ascension-day—Not an easement—Prescription Act, 2 Will. 4, c. 71, s. 2.*

*A custom for the freemen or citizens of Carlisle upon Ascension-day to enter upon another man's land for the purpose of holding horse-races there, is a good*

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custom (see *Mounsey v. Ismay*, 7 L. T. Rep. N. S. 717); but it is not an easement within the 2nd section of the Prescription Act, 2 Will. 4, c. 71.

*This custom is not, in fact, an easement at all.*

Declaration in trespass for breaking and entering a close of the plt., pulling down a bank and tearing up thorns, &c.

Fifth plea:

That for the full period of twenty years next before this suit on a certain day in each and every year, to wit, on Ascension-day, commonly called Holy Thursday, horse-races have been, and of right or title have been, and still ought to be holden on a piece of land in the extra-parochial hamlet of Kingsmoor, in the said county (being in the neighbourhood of the said city of Carlisle), and for the full period of twenty years next before this suit, the freemen of the said city of Carlisle, on the day aforesaid, in each and every year, have, during all the time aforesaid, of right and without interruption, enjoyed and claim to enjoy as a custom a certain reasonable and laudable right and privilege; that is to say, that the freemen of the said city of Carlisle on the day aforesaid in each and every year should enter into and upon the said piece of land in the said hamlet for the purpose of holding horse-races thereon, and the said freemen of the said city of Carlisle on the day aforesaid in each and every year without interruption have during all the time aforesaid been used and accustomed to enter and of right have entered and ought to have entered, and still of right ought to enter into and upon the said piece of land in the said hamlet for the purpose of holding horse-races thereon.

Averment:

That the close, &c., at the time when, &c. was parcel of the said piece of land in the hamlet, wherefore the deft. being one of the freemen of the said city broke and entered the said piece of land and the said close in the declaration mentioned on Ascension Day 1862 for the purpose of holding the said horse-races, and because the plt. a short time before the time when, &c. had wrongfully placed and erected fences, posts and rails, and a bank and thorns upon the said land and the part of the said land where the said horse-races were accustomed to be held as aforesaid, and continued to keep the same there placed and erected until the same time when, &c., inasmuch that the said freemen were unable to hold the said horse-races as they were accustomed and of right entitled to do, wherefore the deft., being one of the freemen of the said city, for the purpose of enabling the said horse-races to be held as aforesaid, did on the second day remove the said fences, posts and rails, and the said bank and thorns, doing no more damage than was necessary for the purpose aforesaid, which are the trespasses alleged in the declaration.

Sixth plea, alleged the right and custom to have existed for forty years.

Seventh and eighth pleas, laid the right, &c., of the citizens of Carlisle for twenty and forty years respectively.

The 9th, 10th, 11th and 12th pleas, claimed a right to enter the land before Ascension-day for the purpose of preparing for the races, and justified accordingly.

Demurrer thereto; and replication that at the commencement of the twenty and forty years before this suit there was a vested or legal custom as mentioned in the pleas.

Joinder in demurrer and demurrer to the replication.

*C. Hutton*, for plt., argued first, that the freemen of Carlisle or the citizens were not a class of persons capable of enjoying by grant such a right as claimed by the pleas. Secondly, that the right or custom claimed was not one which was included under the 2 & 3 Will. 4, c. 71, s. 2.

*Crompton*, contra, for the deft.

*Cur. adv. vult.*

Jan. 25. — *MARTIN*, B. delivered judgment. — This case was argued before Pollock, C. B., my brother Channell and myself. We were of opinion that the pleas were bad, but as my brother Pigott had a doubt about it, we took time to consider, in order to prepare a written judgment, which has been done. I am authorised to state that my brother Pigott has bestowed considerable attention upon the matter since, and is now satisfied that the view we took was the correct one. This is a

demurrer to pleas. The declaration is trespass, for breaking and entering a close and breaking down the fences, &c. There are several pleas which are demurred to, all grounded upon the Prescription Act, 2 & 3 Will. 4, c. 71. The first alleged that for the full period of twenty years next before the suit on a certain day in every year, namely, Ascension-day, or Holy Thursday, horse-races have been of right, &c. held on a certain piece of land, whereof the close in which, &c. was parcel; and for the same full period of twenty years the freemen of the city of Carlisle had of right, and without interruption, enjoyed a custom that they should enter upon the said piece of land for the purpose of holding horse-races thereon, and the said freemen had, during all that time, used, &c. The pleas proceeded to justify the trespass by virtue of the custom in the usual manner. The next plea was the same, the user of the custom for forty years. The next plea was similar to the first demurred to, save that the right was alleged to be in the citizens of Carlisle. The next was similar to the last save that the user was alleged to be for forty years. The four pleas following were substantially the same as the preceding, and one objection only was made to all of them, namely, that the custom alleged was not within the Prescription Act. Some short time ago this custom was the subject matter of discussion before us. It was then pleaded as a custom at common law, and we are of opinion that it was a good custom. The case is reported in 1 H. & C. 729 (and also 7 L. T. Rep. N. S. 717). The present pleas have been added since. It is perfectly clear that such a right as is here set up can only exist by custom. A grant of such right to the freemen of Carlisle or the citizens of Carlisle would be void, such undeterminate bodies as the freemen of a city or the citizens of a city, not being themselves a corporation, are incapable of being grantees; and there is probably another objection to it as not being the legal subject of grant, but only of a licence. The question, therefore, really comes to this: Assuming that the owner of this close had forty-one years before the commencement of the suit, by parol, granted to or conferred upon the freemen of Carlisle or the citizens of Carlisle this right, and that they had during the forty years preceding the suit in fact exercised it as of right and without interruption, would the operation of the 2nd section of the statute render it absolute and indefeasible, notwithstanding that the origin of it could be clearly and satisfactorily proved, and that it began shortly before the commencement of the period of the forty years. It had been long established that the enjoyment of an easement, as of right, for twenty years was practically conclusive of a right from the reign of Richard I.; or, in other words, of a right by prescription, except proof was given of an impossibility of the existence of the right from that period. A very common mode of defeating such a right was proof of unity of possession since the time of legal memory. To meet this the grant by lost deed was invented, but in progress of time a difficulty arose in requiring a jury to find, upon their oaths, that a deed had been executed which every one knew never existed. Hence the Prescription Act. The 1st section of the Act relates to *profits à prendre*, and the respective periods therein mentioned as thirty years and sixty years. The present case is not alleged to be within that. The pleas are all grounded upon the 2nd section, which enacts "that no claim shall be lawfully made at common law by custom, prescription, or grant, to any way or easement, or to any watercourse, or the use of any water to be enjoyed upon any land, &c., and such way or other matter shall have been actually enjoyed by any person claiming right thereto, without interruption for twenty years, shall be defeated or destroyed by showing only that such way or other matter was



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first enjoyed at any time prior to such period of twenty years; and when such way or other matter should have been so enjoyed for the period of forty years, the right thereto should be deemed absolute and indefeasible, unless it shall appear that it was enjoyed by consent or agreement by deed or in writing." The question which has been argued before us, and which is the true one, is, whether a custom for the freemen or citizens of Carlisle, upon Ascension-day, to enter upon another man's land for the purpose of holding horse-races there, is an easement within the 2nd section. To be so, it must be within the words "custom, prescription, or grant, to a way or other easement, or to a water-course, or the use of any water to be enjoyed upon the land of another," and we think it is not. In the first place we do not think this custom is an easement at all. One of the earliest definitions of an easement with which we are acquainted is in the "Termes de la Ley," and it is "a privilege that one neighbour hath of another by writing or prescription, without profit, as a way or sink through his land." In this definition custom is not mentioned; prescription is, and that therefore seems to point to a privilege belonging to an individual, not a custom which appertains to many as a class. Again, in Mr. Gale's book on Easements, p. 5, an easement is defined; a very great number of authorities are collected, and it is stated in the most explicit terms, that to constitute an easement there must be two tenements, the dominant one to which the right belongs, and the servient one upon which the obligation is imposed. We further think that the 2nd section itself points to a right belonging to an individual in respect of his land, not to a class, such as freemen or citizens claiming a right in gross, wholly irrespective of land, for to obtain the benefit conferred by the 2nd section, it must be enjoyed by a person claiming right thereto for the full period of twenty years or forty years. We are not aware of any case or expression of opinion by any judge contrary to this view. But the 5th section of the Act has been relied on as establishing it. This section relates to pleadings and enacts that in all pleadings to actions of trespass and other pleadings, wherein before the passing of the Act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupier of a tenement in respect whereof the same is claimed, &c. It has been said, that this shows that an easement within the protection of the statute must be an easement belonging to a dominant tenement. We think it affords an argument and illustration as to what the Legislature contemplated, but after what fell from this court in *Welcome v. Upton*, 5 M. & W. 398, and in the same case 6 M. & W. 536, and the note of the late Mr. Henry Willes in p. 152 of the edition of "Gale on Easements" edited by him, we are not prepared to say that the statute may not extend to easements in gross; although it is to be observed that all which Lord Wensleydale says in the last report of the case is, "We might be disposed to think that the present case (an alleged easement in gross) is within the equity of the statute." And he goes on to add that the question was there immaterial. But however this may be, we are of opinion that to bring the right within the term "easement," in the 2nd section, it must be one analogous to that of a right of way which precedes it, and a right of watercourse which follows it, and must be a right of utility and benefit, and not one of mere recreation and amusement. In our opinion, therefore, the present alleged right is not within the language or meaning of the Prescription Act, and we are satisfied that it was never in the contemplation of the Legislature who

framed it (Lord Wensleydale, 5 M. & W. 409) to include within the Act such customary rights as entering land to enjoy rural sports, as in *Millechamp v. Johnson*, Willes Rep. 202, or to dance upon a green, as in *Abbott v. Weely*, 1 Levintz, 176; by analogy to which we hold this alleged customary right to run horse races a lawful one at common law. What we think contemplated were incorporeal rights incident to and annexed to property for its more beneficial and profitable enjoyment, not custom for mere pleasure. In our opinion, therefore, the pleas demurred to are bad, and our judgment is for the plt.

FIGOTT, B.—At the time of the argument I thought easements in gross were within the 2nd section, and at that time I thought this was an easement in gross. On further consideration I agree with the rest of the court that this case is not within the 2nd section.

POLLOCK, C.B.—I have only to add to the judgment of my brother Martin a reference to the case of *Hewlins v. Shippam*, 5 B. & C. 221. Bayley, J., in giving the judgment of the whole court, says: "The 'Termes de la Ley,' a book of great antiquity and accuracy, defines an easement to be a privilege that one neighbour hath of another by charter or prescription without profit, and it instances 'as a way or sink through his land, or such like.'" It appears to me that the opinion of the whole court at that time was, that though there may be what, for want of a better expression, you may call an easement in gross—as, for instance, a right of common without land to a man and his heirs—yet, properly speaking, that is a right and not an easement; but an easement, according to the legal notion of it, necessarily requires a servient and a dominant tenement; there must be a claim in order to be an easement. There would be a claim in respect of some tenement. You find in Kent's Commentaries on the American Law a long note of what is to be found collected on the civil law of several of the American States, the Spanish law, the French law, and the law of some other European nations; but they all hold that a right of that sort must be connected apparently with some tenement; and though it may be not properly called an easement, it expresses what the thing is which is contained in the name and the substance, and you call that an easement which is not attached to a tenement, though claimed by one neighbour from another.

Judgment for the plt.

Plt.'s attorney, G. Capes, Gray's-inn.

Deft.'s attorneys, Mounsey and Gray, 9, Staple-inn.

Nov. 7 and Feb. 10, 1865.

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LONGLAND v. DOLING.

*Northam Bridge and Roads Act* (36 Geo. 3, c. 94), sects. 2, 9, 46, 53—*Exemption of county police from turnpike toll—Proprietary bridge and road—Definition of "turnpike road and bridge"*—*General Turnpike Act* (8 Geo. 4, c. 126)—*County Police Amendment Act* (3 & 4 Vict. c. 88), s. 1.

The words, "any turnpike road or bridge," in sect. 1 of 3 & 4 Vict. c. 88, are not limited to a "turnpike trust road or bridge," or to a road or bridge where tolls are authorised to be taken in respect of "horses and carriages only," and therefore the exemption, in that section, of the county police from toll applies to the tolls which "the Northam Bridge and Roads Company," are by their Act (36 Geo. 3, c. 94) authorised to demand and take from persons passing, on foot or with



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*horses or carriages, &c., over the bridge built by the said company across the river Itchen, at Northam, in the county of Southampton, or through the tollgates erected by the said company on the roads made and maintained by them leading to the bridge.*

These were two actions brought by the plt. against the respective defts. to recover back toll demanded of and paid by the plt. to each of the above-named defts., and from which he claimed to be exempt under the following circumstances set forth in the case stated by judge's order for the opinion of the Court of Ex. without pleadings, and which case stated in substance as follows:—The plt. is a constable and superintendent of the Southampton county police, established under the Police Acts after mentioned; and the deft. in the first of the above-named actions is a toll-keeper in the service of a company called "The Company of Proprietors of Northam Bridge and Roads," and appointed to take toll from persons passing along the bridge hereinafter mentioned; and the deft. in the other of the above actions is a toll-keeper in the service of the said company, and appointed to take tolls from persons passing along the road hereinafter mentioned.

In 1796 certain persons (incorporated by the above name) obtained an Act of Parliament (36 Geo. 3, c. 94), enabling them to build and maintain a bridge over the river Itchen, at or near Northam, and to make and maintain a certain road, with a footway by the side thereof from Southampton to the end of the said bridge, and a certain other road from the end of the said bridge on the opposite shore.

By sect. 2, the company are directed to build, or cause to be built, a good and substantial bridge at, near, or from Northam, over and across the river Itchen to the opposite shore; and that after the said bridge should be built and completed, the same should for ever be and remain a public bridge, and all persons, horses, cattle and carriages should have free liberty, upon payment of the respective tolls thereunder mentioned and granted, to pass over the same without any hindrance or interruption of or by any person or persons whomsoever.

By sect. 46 certain tolls therein mentioned may be demanded and taken at the several gates, toll-houses and tollbars to be erected under and by virtue of the Act. And by sect. 53, the roads thereby directed to be made were to be deemed and taken to be turnpike-roads within the intent and meaning of the 13 Geo. 3, c. 84 (the then General Turnpike Act), and of the several Acts explaining, amending, or repealing the same or some part or parts thereof, and that all clauses, &c. contained in 13 Geo. 3, c. 84, subject to the provisions of the said other Acts (except where otherwise altered by this Act), should be in force with regard to the roads included in this Act as fully and effectually to all intents and purposes as if this Act (36 Geo. 3, c. 94) had been passed previous to the 13 Geo. 3, c. 84.

By 3 & 4 Vict. c. 88 (County and District Constables Act Amendment Act), after reciting the said County Constables Act (2 & 3 Vict. c. 93), it was enacted by sect. 1 that no toll should be demanded or taken on any turnpike-road or bridge for any horse or police van, carriage, or cart passing along such road or bridge in the service of the police established under the provisions of the said Act (2 & 3 Vict. c. 93), provided that the constable in charge of such horse, van, carriage, or cart, if not the chief constable, should produce an order in writing under the hand of the chief constable, or should leave his address according to the regulations of the police force at the time of claiming the exemption.

After the passing of 36 Geo. 3, c. 94, the com-

pany duly built the said bridge and made the said roads authorised to be made by them, and also erected a tollhouse, with a gate for the collection of tolls at the Southampton end of the said bridge, and a tollhouse and bar at the other extremity of the said road.

On the 1st Jan. 1863, plt. so being a constable, and in charge of horse and police cart, and in the service of the said police, and having his dress according to the regulations of the said police force, requiring to pass along the said bridge, claimed from deft. the right to pass along the bridge and through the gate without payment of any toll, but deft. demanded 7½d. as such toll, which plt. paid under protest, and this action was brought to recover it back.

The case contained a similar statement of a demand and taking by deft. Dolling of a toll of 3d. from plt. (after a like claim of exemption) on the same day, on passing along the road leading from the end of the said bridge, near Bitterne, and leading to Botley turnpike-gate, and through the said Hedge-end gate, with the said horse and police cart, &c.

It is admitted by plt. that the amount of toll demanded and paid in each case is the proper and legal toll to be paid in respect of the said horse and cart under 36 Geo. 3, c. 94, if plt. is not entitled to the exemption claimed.

The question for the opinion of the court is, whether plt., so being such constable as aforesaid, and having his dress and being in charge of the said horse and police cart in the service of the police as aforesaid, was exempt from paying the said toll in passing along the said bridge, and also in passing along the said road and through the said gate?

*Coleridge, Q. C.* (with whom was *Poulsen*) for the plt. in both actions.—The two cases raised the question of liability of the county police to toll on passing over the bridge and over the road respectively mentioned in the case, and might be argued together. (He here read and commented on sects. 2, 8, 9, 21, 46 and 48 of the Act of 36 Geo. 3, c. 94, incorporating the Northam Bridge and Roads Company, and then proceeded as follows:—) By sect. 53 of the Act the roads to be made under the Act were "to be deemed and taken to be turnpike-roads within the meaning of the then General Turnpike Act, 13 Geo. 3, c. 84, and of the Acts explaining, amending, or repealing the same;" and by sect. 1 of 3 & 4 Vict. c. 88 (the County Police Amendment Act), "no toll was to be demanded or taken on any turnpike-road or bridge for any horse, or police van, carriage, or cart in the service of the police established under the provisions of the County Constables Act, 2 & 3 Vict. c. 93, provided," &c., as was set forth in the case. Therefore every carriage or horse in the service of the police passing over either this bridge or road was exempt from toll. *The ratio decidendi* of the Barons of the Ex. in *The Northam Bridge and Roads Company v. The London and South-Western Railway Company*, 6 M. & W. 428; 9 L. J., N. S., 165, Ex., applied strictly here, and the matter was *res judicata*. As was there said, "A turnpike-road was a road on or across which there were turnpike-gates;" and though the bridge only was before the court in that case, the same reasoning applied exactly to the road.

*Lush, Q. C.* (with him *C. Pollock*), contra, for the defts.—The case cited from 6 M. & W. decided only that the Northam-road was a "turnpike road" within the meaning of the London and South-Western Railway Act. But the expression "turnpike road" admitted of various meanings. In the present case it was used in the sense given to it in the general Turnpike Acts, which was another and different one from that in which it was used in the

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Railway Acts in the case in 6 M. & W. This was a *proprietary* bridge and road, made by a joint-stock company out of private funds, and all the profits went into their own pockets, and were not received in trust for the benefit of the public. The 13 Geo. 3, c. 84, was repealed by 8 Geo. 4, c. 126, which contained a list of exemptions clearly not applying to this road, because the 4 Geo. 4, c. 95 (explaining and amending the general Act of 8 Geo. 4, c. 126), in sect. 90, said that nothing in the 8 Geo. 4, c. 126 should extend "to any road *not under the care and management of trustees or commissioners*." Now, this road was not a "trust" road, and so the exemption claimed did not apply to it. The exemption of the police must be ranked with the general exemptions in the general Turnpike Act. Had the Legislature meant it to apply to roads not operated on by the general Act, it would have been made complete. Now here, a policeman going on foot with a prisoner must pay. So also, if the van were drawn by an ass or mule, the exemption applying only to going on horseback, or with a van drawn by horses. Under the general Act (8 Geo. 4, c. 126), a constable taking a prisoner under a warrant to gaol, or returning therefrom, was exempt, but was not so in going to fetch a prisoner, and that omission was remedied by the Police Act, 3 & 4 Vict. c. 88, which extended the exemption only, and not the roads, or the area over which exemption was to be claimed. Again the company's Act contained no clause freeing persons for twenty-four hours after once paying, as in the Turnpike Acts, which was another distinction operating on the question of exemption. In a similar case of *Ex parte Fraser, Reg. v. Thornbury and others* (see L. T. Agenda, Jan. 18, 1862, and s. c. nom. *Hornby v. Fraser*, Feb. 22), in which toll was taken for a police van passing over Gainsborough-bridge, the Q. B. adopted the view here urged, and held that the 3 & 4 Vict. c. 88 did not apply. [CHANNELL, B. referred to *Rex v. Trustees of the Great Dover-Street road*, 5 A. & E. 602; 6 L. J., N. S., 88, Q. B.]

Cur. adv. vult.

Feb. 10.—CHANNELL, B. now delivered the considered judgment of the Court (Pollock, C.B., Bramwell, Channell and Pigott, BB.).—The question in this case is whether, under the circumstances stated, and having regard to the sections of the Act of Parliament set out in the case, the plt. was liable to pay toll for passing over Northam-bridge, the bridge mentioned in the special case. The toll was demanded under the provisions of the 36 Geo. 3, c. 94, and would be payable by the deft., unless he is exempted by the 1st section of the 3 & 4 Vict. c. 88. The case seems to us to turn on the question whether the bridge mentioned in the case was a "turnpike bridge" within the meaning of the 1st section of the Act last referred to. If so, the plt., under the circumstances stated in the case, comes sufficiently within the other provisions of that section, and is entitled to the exemption claimed. It was argued, on the part of the deft., that the words "turnpike bridge" apply only to a "turnpike trust bridge," and that Northam-bridge is not a trust bridge; that the company of proprietors are owners of property in their own right, bound indeed to allow the public to pass over the bridge on payment of toll, where not entitled to exemption, but that the company in no case receive the tolls as in trust for the public. It was further argued that the words referred to, namely, "turnpike bridge," apply only to a bridge where tolls are taken in respect of horses and carriages only. We see no reason for so limiting the construction to be placed on the words of that section. It is clear, we think, from the 2nd, 7th, 9th, and 46th sections of the 36 Geo. 3, that a toll is authorised to be taken

at the bridge, and though the 53rd section of that Act only in terms applies to roads (for the purpose of bringing roads within the operation of the General Turnpike Act), we think the bridge erected by the company of proprietors of the Northam-bridge roads, at which the company are entitled to take toll, subject to such exemption as may be provided for, is a "turnpike bridge" within the 1st section of 3 & 4 Vict. c. 88. We see no ground for limiting the very general words of that which speaks of any "turnpike bridge," to a "turnpike trust bridge," as contended for in the argument, or to a bridge at which tolls are authorised to be taken in respect of horses and carriages only, and not, as by the 46th section of the 36 Geo. 3, for persons as well as for a horse or carriage. So to limit the operation of the 1st section of the 3 & 4 Vict. c. 88, would be, we think, to do violence to the plain language of the Act of Parliament. Our judgment must be for the plt. to enter a verdict for him for 40s. and costs of suit.

Judgment for plt.

LONGLAND v. DOLING.

The question in this case is substantially the same as in the last. The toll claimed is for passing through a tollgate on the road, and not over the bridge. We think that the exemption equally applies here, and we give judgment for the plt.

Judgment for plt.

Attorney for plt. (in both actions), T. Westall, 8, Gray's-inn-square.

Attorneys for defts., Rickards and Walker, 29, Lincoln's-inn-fields.

Monday, May 1, 1863.

IBBOTSON v. PEAT.

Game—Adjoining proprietors—Action by one proprietor against the other for frightening away his game—Alluring game from another's land—Pleading—Demurrer.

A person is not justified in firing off rockets and making other noises upon his own land, adjoining and close to the land of another, with intent to drive and frighten away the game from off that other's land, but is liable to an action for so doing.

And in an action by A. for damage by reason of his grouse and other game having been so frightened and driven away by B., a plea to the effect that A., in the first instance, "fraudulently and wrongfully, and with intent to lure and entice the said grouse from B.'s land on to his own, laid and placed on his own land near to the land of B. quantities of corn and other substances on which grouse feed, and thereby lured and enticed the said grouse from B.'s land on to his own, and was about so to lure and entice other grouse from B.'s land and to shoot them; wherefore B., in order to prevent A. from shooting the grouse so lured, &c., and from luring, &c. other grouse, committed the said grievances, &c., doing no more, &c.," is a bad plea and no defence to the action.

So held, on demurrer, by the Court of Ex. (Pollock, C. B., Martin, Bramwell and Pigott, BB.)

By Martin, B.—That the principle of *Carrington v. Taylor*, 11 East, 571, decided the present case.

By Bramwell, B.—That, without any reference to propriety or neighbourly conduct, there was nothing in point of law to prevent A. from doing that which the plea said he had done.

Declaration—First count:

That before and at the time of committing the grievances, &c., plt. was and still is possessed of certain land at, &c., yet

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[Ex.]

deft. well knowing the premises, on divers days, &c., unlawfully and with intent to drive and frighten away grouse and other game then lawfully being in and upon the said land of plt. from and off and away from the said land of plt. to certain other lands, and to prevent plt. from hunting, shooting, killing and taking the said game on his said land, fired, exploded and projected, and caused to be fired, &c., certain offensive and injurious, noxious, terrifying and dangerous rockets, fireworks, missiles, projectiles and combustibles, and made and caused to be made divers loud, jarring, annoying and disturbing noises close to and over the said land of plt. so as to be, and the same were, a nuisance and a grievous disturbance to plt. in his lawful and quiet occupation and enjoyment thereof. And thereby also plt.'s horses and cattle, which were then lawfully in and upon the said land of plt. were then greatly alarmed, terrified and rendered wild, unmanageable and furious, and impelled to run and rush violently in and about and over the said land of plt. and into certain bogs and quagmires therein and against and over the walls, banks and fences of the said land of plt., and to break down and destroy such walls, banks and fences of plt., and to escape out of the said land of plt., and to go at large, and by reason of the premises the said horses and cattle sustained great injury and damage, and became and were rendered wild, dangerous and unmanageable, and thereby also divers large numbers of grouse and other game, then lawfully being in and upon the said land, were scared, frightened and driven off and away from the said land of plt., which otherwise plt. might and would have shot, hunted, killed and taken, and plt. was otherwise also greatly disturbed and damaged in the lawful occupation of his said land.

## Plea 2 :

To so much of the first count as relates to the said grouse, that before and *et. c.*, his grace the Duke of Rutland was seized in fee of certain lands abutting on and next adjoining to the said land of plt. in the first count mentioned, and was entitled to the exclusive right of shooting, killing and taking grouse on his said lands, and the said duke before, &c., had gone to great expense in getting up and preserving great numbers of grouse on his said lands, as plt. well knew, and that just before the committing of the said supposed grievances plt. fraudulently and wrongfully, and with intent to lure and entice the said grouse away from the said lands of the said duke on to the said land of plt., and to obtain for himself the benefit of the said expense so incurred by the said duke as aforesaid, laid and placed on the said land of plt. near to the lands of the said duke, quantities of corn and other substances on which grouse feed, and thereby then lured and enticed the said grouse in the first count mentioned, and was about to lure and entice other grouse away from and out of the said lands of the said duke on to the said land of plt., and was then and there about to shoot and kill the said grouse, wherefore the deft., as the servant of the said duke, and by his command, in order to prevent plt. from shooting and killing the said grouse so lured and enticed as aforesaid, and from luring and enticing the said other grouse as aforesaid, committed the said grievances in this plea pleaded to, doing no more than was necessary for the purpose aforesaid.

## Demurrer and joinder in demurrer to plea 2.

Plt.'s points:—1. That while the grouse were on plt.'s land plt. had an interest therein, and deft. none, and deft. had no right to drive them off plt.'s land, and thereby to prevent other grouse from coming on. 2. That plt. had a right to entice grouse to his land; and whether he had or not, such act of plt. would not justify deft. in driving grouse off plt.'s land and preventing other grouse from coming on. 3. That the facts disclosed in plea 2 show no right or title in the deft. to commit the grievances complained of.

Deft.'s points:—1. That the first count does not show any cause of action. 2. That plt. by the demurrer admitting that he had had recourse to unfair means for the purpose of enticing the grouse from off the land of the Duke of Rutland, deft. was justified in resorting to the measures complained of. 3. That the demurrer admits that the matters complained of were done for the purpose, amongst other things, of preventing plt. from enticing grouse from the duke's lands, and that no more was done than was necessary for that purpose, and that deft. was justified in taking measures to prevent grouse leaving the duke's lands by plt.'s procurement, notwithstanding that the effect of such measures was to drive off grouse from the plt.'s land.

Baylis, for plt., in support of the demurrer.—This case raised the question whether A., having a qualified property in game on his own land, another man B. had a right to disturb and frighten away that

game by discharging rockets and other projectiles on his own land adjoining that of A. The plea afforded no answer or justification. It was pleaded to so much only of the declaration as related to the grouse. The acts done by deft. caused certain damage to plt. [BRAMWELL, B.—The merely sending up a rocket is not actionable, it is the consequential damage.] Just so; plt. had a qualified property in the grouse whilst they were on his land. [MARTIN, B.—Did not the plt. allure the grouse from the deft.'s land in the first instance?] That was a lawful act. Every one who sets up a preserve does so. [POLLOCK, C. B.—It may be lawful, but decidedly it is an unneighbourly act. MARTIN, B.—What is the distinction between that and frightening them away?] The two things were very distinguishable. Take the case of rival schools: to entice scholars from the one school to the other by cakes and sugarplums, would be lawful; but to prevent them from going to school by firing a gun would be unlawful: (see per Holt, C. J., *Keeble v. Hickeringill*, Holt's Rep. 14-19; 3 Salk. 9; 11 East, 572, note a.) Apart from the question of propriety or neighbourly conduct, it was a perfectly lawful act, and not prohibited by any statute, to allure grouse from other lands to one's own, but deft. had no right to frighten them away from the plt.'s land as he had done. *Keeble v. Hickeringill* (*ubi sup.*), and *Crington v. Taylor*, 11 East, 571, which were very similar to the present case, showed that an action on the case lay for discharging guns near a decoy pond, with design to damage the owner by frightening away the wildfowl resorting thereto. [BAURWELL, B.—What the deft. did here was not done in order to get the game back again. He should do that, or prevent them from migrating to plt.'s land by feeding them better, and by adding to the attractions and allurements on his own land.] There was no distinction between the present case and *Read v. Edwards*, 11 L. T. Rep. N. S. 811; 36 L. J. 31, C. P.; 17 C. B., N. S. 245, where a man was held liable for damage done by his dog to game in plt.'s preserve, deft. knowing the dog's propensity to hunt on his own account, and allowing it to go at large, and here, where deft. deliberately made noises to frighten away the game. The moment the grouse left the duke's lands he ceased to have any property, right, or interest in them. It was needless to go into all the cases showing a man's qualified possessory property in game whilst it was on his own land—a right recognised by the Legislature. The following would be sufficient:

*Sutton v. Moody*, 1 Ld. Raym. 250;

*Rigg v. Lord Lonsdale*, 11 Ex. 654; 25 L. J. 196, Ex.;

Ex.; s. c. in error, 1 H. & N. 923; 26 L. J. 196, Ex.;

*Blades v. Higgs*, 5 L. T. Rep. N. S. 752; 31 L. J. 151, C. P.; 12 C. B., N. S., 501; s. c. in error

7 L. T. Rep. N. S. 798 and 834; 32 L. J. 196, C. P.; 13 C. B., N. S., 844.

[POLLOCK, C. J. refers to *Reg. v. Pratt*, 4 E. & B. 860; 24 L. J. 113, M. C.] His three points were, first, plt.'s qualified possessory property in the grouse; secondly, deft.'s unlawful act done with intent to frighten the grouse away; thirdly, that there was nothing unlawful in plt.'s alluring the grouse to his own land.

*Wills* (with whom was *Lush, Q. C.*), for deft. in support of the plea, would adopt great part of the argument contra, because it was his own. It was a new case. The more successfully plt. showed that game was a valuable property, the clearer was it that plt. was himself in the wrong in taking the means to obtain it which the plea showed he had done. Means, lawful in themselves, did not remain so when taken with intent to injure and annoy a neighbour. Holt, C. J., in the case cited, said: "Suppose

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deft. had shot on his own ground : if he had occasion to shoot, that would be one thing ; but to shoot on purpose to damage the plt. is another thing, and a wrong." (11 East, 574.) So here, putting the corn, &c., and thereby enticing away deft.'s game, was a wrong and damage to deft. The words, "in order to prevent plt. from shooting the said grouse," &c., were sufficient to save the plea. In order to prevent plt.'s attack on deft.'s possessory property, and to protect that possessory property, deft. fired off guns, &c., on his own land, as he had a right to do. The firing on the highway to frighten the schoolboys would be a nuisance, and was distinguishable. Plt. was the first wrong-doer, for he must be taken to have done what he did, as stated in the plea, with express intent to injure and annoy his neighbour, which falls within the *dictum* of Holt, C. J. (11 East, 574.) He thereby attacked and injured deft.'s possessory rights, and so deft. was justified in protecting his own rights from injury, and preventing the grouse on his land from passing across the boundary between it and plt.'s land. [MARTIN, B.—On the pleadings, it must be admitted that deft.'s intent was to frighten and drive away the grouse which were already on the plt.'s land. But, in truth, the case cannot be distinguished from *Carrington v. Taylor*.] There it was alleged to be an injury to the plt.'s trade. There was no such allegation *here*, which was necessary before that case could apply.

POLLOCK, C. B.—We are all of opinion that in this case the declaration is good, and that the plea is bad. The declaration complains of an act being done which is apparently injurious, and done for the purpose which is attributed to the deft. in the declaration ; and supposing there had been no plea pleaded, the declaration would be good. But then the deft. by his plea says, "You have done me some wrong, and I have been endeavouring to redress that wrong by doing some wrong to you." I think, generally speaking (if there is such a thing as a general proposition), it may be laid down that you cannot do that. If a man attacks you by force, you may defend yourself by force ; but you cannot commit some other wrong of a totally different character, by way of repairing or avoiding the consequences of the wrong that has been done to you. You must seek redress for that wrong in a lawful and proper way. As my brother Bramwell suggests, if a man horsewhips you, you cannot libel him ; or if he libels you, you cannot justify the horsewhipping him to prevent him doing it again. On these grounds it appears to me that, the declaration being good and the plea bad, the plt. is entitled to our judgment.

MARTIN, B.—I think the principle of the case of *Carrington v. Taylor*, 11 East, 571, decides this case.

BRAMWELL, B.—I also am of opinion that the plt. is entitled to our judgment. The declaration appears to me to be clearly good. It alleges that he plt., being the owner of certain land, the deft., well knowing the premises, on divers days and times, and so forth, "unlawfully and with intent to drive and frighten away the grouse and other game then lawfully being on and upon the said land of the plt. from and off and away from the said land of the plt. to certain other lands, and to prevent the plt. from hunting, shooting," and so on, "fired rockets and made a noise, &c." The deft. pleads a plea which admits the declaration to be true, and then sets up the right to do the thing complained of for the purpose which the declaration attributes to the deft., that is, to do the act for the purpose of

frightening away the game. What is the reason given? The reason given is this, "That the game which I frightened away was game which you, wholly or partially, got from off the Duke of Rutland's land—say the deft.'s land—he having attracted it there by providing food for it, or taking care of it, and then you improperly attempted to get it on your land by putting some grain there. Then, in order that you may not shoot the game which you have so attracted, and in order that you may have no inducement to go on with such conduct"—for that is the only meaning, for preventing him from "alluring the grouse aforesaid,"—"in order that you should be without inducement for such acts as that, I did the thing complained of." It appears to me clearly that that is a bad plea, because I see nothing in point of law to prevent the plt. from doing that which the plea says he has done. I say, in point of law, if there is anything wrong in it, that will be the subject-matter of an action ; but, if there is no wrong, how can there be a justification? No one can pretend for a moment that any action would lie at the suit of the duke against the plt. The truth is this, without saying anything as to the propriety of such conduct as this between gentlemen and neighbours, about which I say nothing, because I do not know what the facts are—without saying anything about that—the true remedy, I take it, where a person knows game is attracted away from his land, is to offer them stronger inducements to remain where they are. It is really like the case I mentioned in the course of the argument, of *Chasemore v. Richards* (Ex. Ch., 2 H. & N. 168 ; 26 L. J. 393, Ex. ; s. c. in the H. of L. 7 H. of L. Cas. 349 ; 29 L. J. 81, Ex.), where, if a man has the misfortune to lose his spring by another's digging a well, the proper remedy is for him to dig a still deeper well.

PIGOTT, B.—I am of the same opinion.

*Judgment for plt.*

Plt.'s attorneys, *Burt and Stevens*, 10, South-square, Gray's-inn.

Deft.'s attorneys, *Eyre and Lawson*, 1, John-street, Bedford-row.

#### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,  
Barristers-at-Law.

Friday, Feb. 3, 1865.

TOMLINS (app.) v. NUISANCE REMOVAL COMMITTEE OF GREAT STANMORE (resps.)

*Nuisance Removal Act—Owner not abating nuisance pursuant to order of justices—18 & 19 Vict. c. 121, ss. 13, 14.*

*An order to abate a nuisance by removing offensive privies, &c., was directed to "the owner or to the Nuisance Removal Committee," the owner being directed to remove the same within seven days, and if such order were not complied with, the committee were authorised and required to enter and remove it. The seven days elapsed, and neither the owner nor committee removed the nuisance :*

*Held, that the justices had power to fine the owner, under sect. 14, for disobedience of the order, notwithstanding that it was addressed to the nuisance committee as well as to the owner.*

This is a case stated for the opinion of the Court of Q. B., pursuant to the provisions of the Act 20 & 21 Vict. c. 43, entitled, "An Act to improve the Administration of the Law as respects Summary Proceedings."

The app. is the owner of a plot of land at Great

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Stanmore, Middlesex, on which he has erected twenty-two cottages, and for the accommodation of the occupiers of them has erected seven privies, so constructed that the soil is intended to be conveyed into a drain which passes under the premises and enters the adjoining close of land belonging to other owners.

The Nuisance Removal Committee appointed under the Nuisance Removal Acts 1855 and 1860, on the 9th Aug. last, gave the app. notice that there existed the following nuisance, namely :

Seven privies erected close together in the rear of the cottages, being distant only five yards from them : that two of the privies were locked up ; that they are over an open ditch or sewer, and are overflowing with soil ; the smell arising from the same is of the most offensive kind and likely to create fever, there being upwards of ninety individuals inhabiting the cottages, and no dust-bin for their use. And further, that after the expiration of seven days the committee would cause the truth of the said complaint to be ascertained by an inspection, and if the nuisance should be still existing, or, if removed or discontinued, be likely to be repeated, proceedings would be adopted against him under the Act.

On the 24th Aug. last the app. appeared before two of Her Majesty's justices of the peace for the said county, to answer the complaint of the said nuisance committee, who, after hearing the evidence of a medical man and proof being given of the app. having erected seven of these cottages within the last two years, now occupied by forty-one people, without providing sufficient accommodation for them or for the other cottages which had been built some years, as also other witnesses, made an order of which the following is a copy :

To the owners of the several cottages occupied by, &c., and of one unoccupied situate at the bottom of Stanmore-hill, in the parish of Great Stanmore, in the county of Middlesex, or, to the nuisance removal committee chosen by the vestry, and for the said parish, being the local authority for executing the Nuisance Removal Acts 1855 and 1860, or to their servants and agents, and to all whom it may concern.

County of Middlesex.—Whereas, on the 18th Aug. Inst., complaint was made before David Begg, Esq., one of Her Majesty's justices of the peace, acting in and for the county stated in the margin, by Robert Wilke on behalf of the Nuisance Removal Committee of the said parish of Great Stanmore, that in or upon certain premises, situate at the bottom of Stanmore-hill, in the parish aforesaid, and in the county aforesaid, and in the district under the Nuisance Removal Acts 1855 and 1860, of the complaints above named, the following nuisance then existed, viz., seven privies near to the cottages occupied as aforesaid, placed over an open ditch and an accumulation of offensive matter, and that the said nuisance was caused by the act or default of the owner of the said premises. And whereas, Silvester Tomlins, the owner of the said premises within the meaning of the said Nuisance Removal Acts 1855 and 1860, hath this day appeared before us justices, being two of Her Majesty's justices in and for the county aforesaid, sitting in petty sessions at our usual place of meeting to consider the matter of the said complaint. And whereas it hath been proved to us, upon oath, that the said nuisance doth exist upon the aforesaid premises, and that by reason thereof the cottages now occupied by, &c., and the one unoccupied, are rendered unfit for human habitation, and that the same is caused by the act or default of the owner of the said premises. We, the said justices, in pursuance of the said Acts, do order the said S. Tomlins, the owner of the said premises, within seven days from the service of this order, or a true copy thereof, according to the said Acts, to take down and remove the said offensive privies, to remove the offensive matter, and to restore and reconstruct the drain under the said privies so as the same shall no longer be injurious to health as aforesaid. And we, the said justices, being satisfied that the nuisances proved to us this day to exist on the said premises as aforesaid, are such as to render the cottages occupied by, &c., and the one unoccupied, unfit for human habitation, do hereby prohibit the using of the said cottages, or any of them, for human habitation until they are rendered fit for that purpose in the judgment of us, the said justices. And if the above order for abatement be not complied with, or if the above order of prohibition be infringed, then we do authorize and require you, the said nuisance removal committee of the said parish of Great Stanmore, your servants and agents, from time to time, to enter upon the said premises, and do all such works, matters and things as may be necessary for carrying this order into full execution according to the Acts aforesaid. Given under the hands and seals, &c.,

S. P. KEYWARD [L. S.]  
D. Begg [L. S.]

This order was duly served upon the app., and no

appeal was made against that part of the order which had reference to the prohibition. The app. neglecting to obey the said order, an information was laid against him, of which the following is a copy :

Middlesex to wit.—The information and complaint of R. Wilke, Inspector of Nuisances on behalf of the Nuisance Removal Committee of the parish of Great Stanmore in the said county, made before one of Her Majesty's justices of the peace in and for the said county, the 28th Sept. 1864.

Who saith : That by an order made under the authority of the Nuisance Removal Act, 1855 and 1860, at the Petty Sessions holden in and for the hundred of Gora, in the said county, on the 24th Aug. 1864, by two of Her Majesty's justices of the peace in and for the said county, acting for the said hundred then and there assembled, S. Tomlins, the owner of the several cottages occupied by, &c., and of one unoccupied, situate at the bottom of Stanmore-hill, in the parish of Great Stanmore, in the said county, was thereby ordered within seven days from the service of the said order, or a true copy according to the said Acts, to take down and remove certain offensive privies, and to remove the offensive matter, to reconstruct a drain on the same premises so that the same should no longer be injurious to health. And further, the said justices, by the said order, did prohibit the using of the said cottages for human habitation until they were rendered fit for that purpose in the judgment of the said justices making the said order. And further, that the said S. Tomlins hath had due notice of the said order, and the same having been personally served upon him on the 2nd Sept. 1864, and that he hath disobeyed the said order, and hath not taken down or removed the said privies, that he hath not removed the offensive matter from the said premises, that he hath not constructed a drain upon the said premises nor hath he prevented the said cottages from being used for human habitation, and by such wilful neglect and default hath disobeyed the said order, and rendered himself liable to a penalty of 10s. per day during such his default. This information therefore prays justice in the premises, and that the S. Tomlins may be summoned before two justices of the peace for the said county for the said penalties.

ROBERT WILKE

Exhibited before me at Edgware in the said county.  
R. W. Cox.

The app. appeared before us, the undersigned two of Her Majesty's justices for the county of Middlesex, on the 19th Oct. 1864, to answer the said information. It was then proved to our satisfaction that the app. had not obeyed the said order. The app. also failed to satisfy us that he had used all due diligence to carry out such order. It was also proved to our satisfaction, that the said nuisances still continued unabated, and were dangerous to health, that none of the tenants of the said cottages had been removed as directed by the said order, and that the said cottages were still, as before the said order, in our judgment, unfit for human habitation.

It was contended by the app. that, inasmuch as the order for the removal of the said nuisances was addressed to the Nuisance Removal Committee as well as to the owner of the said premises, requiring them, in the event of the owner not obeying the order to enter upon the premises, and do all such works as might be necessary for carrying the said order into execution, we had no jurisdiction to enforce the penalty of 10s. a-day imposed by the 14th section of the Nuisance Removal Act 1855.

The repps. submitted and proved to our satisfaction, that the app. had within the last twelve months erected seventeen cottages, which were now occupied by forty-one persons, without giving them sufficient accommodation. It was contended by the repps. and proved to our satisfaction, that they were unable to execute the said order so far as related to them, inasmuch as they had no legal power to remove the said tenants, and also because, in their judgment, there was no fit place upon the said premises on which to erect sufficient privy accommodation for ninety persons who occupy the premises.

We, the said justices, thereupon convicted the app. in the sum of 84. 10s., being at the rate of 10s. per day for seventeen days' default, and in 34. 7s. for costs.

The question of law for the opinion of the Court is, whether we, the said justices, could legally convict the said app. under the circumstances above stated.

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the said order for the removal of the nuisances in question being directed to the nuisances committee as well as to the app., and they having failed, as well as the app., to obey the said order for the reasons above stated.

Whereupon the opinion of the Court of Q. B. is requested, 1st. Upon the said question of law, whether we, the said justices, were correct in our determination as aforesaid. 2nd. What further should be done or ordered by the said justices in the premises.

E. W. COX.  
G. T. HARRIS.

*Bradt* for the resp.—The justices had power to convict. It is immaterial that the order to abate the nuisance was addressed to the Nuisance Removal Committee as well as the owner of the premises. It was not the less the duty of the owner to comply with it on that ground; the order was made on him, and he having failed to obey it, the justices had power to convict him. (He was then stopped by the Court.)

*Clark* for the app.—The order appealed against is bad. The order to remove the nuisance was operative on the owner for seven days; after that, the Nuisance Removal Committee were authorised to do the work. The committee are the parties now in default: (18 & 19 Vict. c. 121, ss. 13 and 14.) [BLACKBURN, J.—If the committee have also incurred a penalty how does that discharge the app. from his default to obey the order to abate?]

By the COURT.

Conviction affirmed.

Saturday, Feb. 25, 1865.

PEW (app.) v. THE METROPOLITAN BOARD OF WORKS (resps.)

*Metropolis Local Management Act—Sewers rate—Separate sewerage district.*

*The Metropolitan Commissioners of Sewers, under the 11 & 12 Vict. c. 112, borrowed 200,000l. on the security of the rates, and expended 67,000l. thereof upon the A. district, of which parish C. formed part; but the actual amount expended in parish C. was only 1074l. That liability still existed when the commissioners were superseded by the Metropolitan Board of Works and the Metropolis Local Management Act came into operation. The Board of Works, under sects. 180-1 of the 18 & 19 Vict. c. 120, assessed the 67,000l. on the A. district, and apportioned the quota to be paid by parish C. on the rateable portion of its property to the entire district, and not to the amount expended in the parish:*

*Held, that a rate (sect. 168) assessed on that principle was valid.*

Case stated by order of Blackburn, J., after notice of appeal against a rate made by the resp. on the parish of St. Giles, Camberwell, dated May 3, 1861.

From the passing of the 11 & 12 Vict. c. 112, until the expiration of that Act, the Metropolitan Commission of Sewers included within its limits separate sewerage districts or levels, some of which contained and consisted of distinct parishes, whilst others contained and consisted of distinct parishes and parts of parishes; and the practice of the commissioners was to make all assessments and rates for sewerage works upon each separate district or level on the rateable value of the property therein, and not upon the individual parishes within such district or level.

In 1854 the commissioners, by virtue of the statutes 11 & 12 Vict. c. 112, and 16 & 17 Vict. c.

125, borrowed from the Rock Life Insurance Company the sum of 200,000l., and for securing the repayment thereof assigned to the trustees of the said society all the moneys arising and to arise from the several district rates in and for the whole of the separate sewerage districts within the limits of their commission.

The said sum of 200,000l. was borrowed for the purpose of the main drainage of the Metropolis, but instead of applying the same to that purpose the commissioners expended it in the local drainage of certain parishes within the limits of their commission.

The parish of St. Giles, Camberwell, prior to and until the passing of the Metropolis Local Management Act 1855, formed part of one of the said sewerage districts or levels within the limits of the Metropolitan Commission of Sewers called the Surrey and Kent Sewerage District, which comprised the following parishes and parts of parishes: St. Giles, Camberwell (part); St. Mary, Lambeth; St. Mary, Newington; Wandsworth (part); Clapham; Battersea (part); Bermondsey; St. George the Martyr; St. Saviour's; Christ Church; Rotherhithe; St. John, Horsleydown; St. Olaves; St. Thomas; Streatham (part); Tooting Graveney (part); St. Paul's, Deptford (part); Croydon (part); St. Nicholas, Deptford.

Prior to the Metropolis Local Management Act 1855 there had been expended by the Metropolitan Commissioners of Sewers, for local drainage in the said parishes and parts of parishes comprised in the Surrey and Kent sewerage districts, 67,000l. part of the said sum of 200,000l. Of this sum of 67,000l., only 519l. was expended in the parish of St. Giles, Camberwell, and the residue of the 67,000l. was expended in other parishes forming part of the said Surrey and Kent sewerage districts, and the said parish of St. Giles, Camberwell, did not nor will receive any benefit from such expenditure, or from any part of the 200,000l. beyond the said sum of 519l., except in so far as it receives benefit (as stated in the thirteenth paragraph of this case) from the generally improved drainage of the Surrey and Kent sewerage district, consequent on the expenditure of the said sum of 67,000l.

The Metropolitan Board of Works did not apportion the whole of the said sum of 200,000l. among all the said parishes within the limits of the Metropolitan Commission of Sewers, but did apportion the said sum of 67,000l. among the several parishes comprised in the Surrey and Kent sewerage district, according to the rateable value of the property in such parishes respectively, and not according to the proportion of such sum of 67,000l. expended in such parishes respectively, or to the benefit derived by such parishes respectively from such expenditure. The amount charged by such apportionment upon the parish of St. Giles, Camberwell (including the said sum of 519l.), was 9000l. and interest thereon, to be paid by twenty yearly instalments of 790l.

At a meeting of the Metropolitan Board of Works, held on the 3rd Dec. 1858, it was resolved that the board should, in the then ensuing session of Parliament, apply for statutory powers to reapportion among the several parishes concerned the debt in respect of the said sum of 200,000l. according to the actual benefit derived by each parish from the expenditure thereof, and that it should be referred to a committee of the said board to consider and frame a proper apportionment on that basis, and that the same should be submitted for the approval of the said board.

On the 1st July 1859 the board approved and adopted the apportionment made by the said committee on the basis aforesaid, and it was resolved by the said board that in the Bill which was then about

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to be brought into Parliament by them for amending the Metropolis Local Management Act 1855, the said sum of 200,000*l.* should be charged on the several parishes and districts in the proportions therein mentioned, and the sum of 1074*l.* 6*s.* 10*d.* (including the said sum of 519*l.*) was therein charged on and apportioned to the said parish of St. Giles, Camberwell, as the amount chargeable thereon in respect of the benefit derived by the said parish from the expenditure of the said sum of 200,000*l.* The said Bill for amending the Metropolis Local Management Act 1855 was afterwards brought into Parliament by the said board for the purpose (among others) of charging the said sum of 200,000*l.* on the several parishes and districts in the proportions last aforesaid, and of charging the aforesaid sum of 1074*l.* 6*s.* 10*d.* on the said parish of St. Giles, Camberwell, and in the schedule to the said Bill the sum of 1074*l.* was inserted against the said parish as the sum to be charged thereon; but the clauses in the said Bill for the reapportionment of the said debt never passed into law.

For the purpose of this case and the said rate the said sum of 1074*l.* 6*s.* 10*d.* may be taken to represent the whole benefit received, directly and indirectly, by the said parish of St. Giles, Camberwell, from the expenditure of the said sum of 200,000*l.*

In consequence of the vestry of St. Giles, Camberwell, refusing to obey the precept of the Metropolitan Board of Works requiring them to pay the amount assessed upon them, the said board did, on the 3rd May 1861, appoint the said resps. Samuel Collins and Thomas Howell to make, and they accordingly made, a rate upon the said parish of St. Giles, Camberwell, for the said sum or instalment of 790*l.*, which is the rate appealed against.

The apps. contend that the said board ought either to have apportioned and charged the whole of the said sum of 200,000*l.* amongst all the parishes comprised within the limits of the Metropolitan Commission of Sewers at the time of the expiration of the 11 & 12 Vict. c. 112, according to the rateable value of the property in such parishes respectively; or, if the said Surrey and Kent sewerage district was chargeable with and liable to pay the said sum of 67,000*l.* charged by the said board on the said district, that the said board, in apportioning the amount of the said sum of 67,000*l.* amongst the respective parishes comprised in the said district, had power under sects. 170 and 181 of the Metropolis Local Management Act to apportion, and ought to have apportioned, the amount not only according to the rateable value of the property in the respective parishes comprised in the said district, but also to the benefit received by the respective parishes from the expenditure of the said sum of 67,000*l.*

The questions for the court are:

1. Whether the rate so made is, under the circumstances, a valid rate.

2. Whether, assuming it to be a valid rate, the board had the power to apportion, or now have the power to re-apportion, the said amount of 67,000*l.* among the parishes comprised in the said Surrey and Kent sewerage district, according to the benefit received by the said respective parishes from the expenditure of that sum, or to apportion or re-apportion the said sum of 200,000*l.* among all the said parishes which at the time of the expiration of the 11 & 12 Vict. c. 112 were within the limits of the Metropolitan Commission of Sewers, according to the rateable value of the property in such parishes respectively.

Jan. 13.—*Lush, Q. C. Raymond* with him, in support of the rate.—The rate is valid. By the 11 & 12 Vict. c. 112, s. 34, the Commissioners of Sewers for

the Metropolis had power to form separate sewerage districts, and by sect. 106 to borrow money on mortgage of the rates for the expenses to be incurred in the execution of the Act. By sect. 76 the commissioners were empowered to levy on each separate sewerage district a separate rate for the expenses incurred for the especial benefit of each separate sewerage district, and that was to be a uniform rate on the net annual value of all the rateable property in each district. Then came the Metropolis Local Management Act, the 18 & 19 Vict. c. 120, and the commissioners were superseded by the Metropolitan Board of Works. Sect. 180 enacts that the debts and liabilities charged upon or payable out of any rates authorised to be levied under the old Sewers Act shall be charged upon the rates to be raised under the new Act. Now, under the 11 & 12 Vict. c. 112, the sums borrowed were charged on the entire rates of the sewerage district; and by sect. 180 of the 18 & 19 Vict. c. 120, the Board of Works had no power to charge it on any particular parish, but could only regard the sewerage district. Accordingly, the Board of Works has charged on the district in question the amount expended in the district: sect. 170 (repealed and re-enacted with a slight modification by 25 & 26 Vict. c. 102, s. 5). To repay the 67,000*l.* expended on the district, every inhabitant of the district was bound to contribute to an equal pound rate without regard to the amount expended in each particular parish of the district. This principle has already been decided in *Reg. v. Haul and The Metropolitan Board of Works*, 82 L. J. 115, M. C.

*Bovill, Q. C. (Holl with him)* for the app.—The rate is bad. The Board of Works ought to have apportioned the debt according to the amount expended in each particular parish. Under the old sewers law the rating was decided to be not by an equal rate on the whole district, but by a separate rate on each level or division of the district according to the benefit derived from the drainage: (*Bar v. The Commissioners of Sewers for the Tower Hamlets*, 9 B. & C. 517.) The proviso in sect. 76 of 11 & 12 Vict. c. 112, is important:

Provided always, that the district sewers rate shall not exceed in any one year the sum of 1*s.* in the pound of the net annual value of the property rateable thereto, such value being ascertained as herein mentioned. Provided also, that where in any separate sewerage district any property is by law or by the practice of the existing commissions or commissioners of sewers entitled to exemption, wholly or partially, from or to any reduction or allowance in respect of the sewers rate, the commissioners shall, in making the district sewers rate, observe and allow such exemption, reduction, or allowance.

In the *Metropolitan Board of Works v. The Vauxhall Bridge Company*, 26 L. J. 253, Q. B.; 7 E. & B. 964, Lord Campbell, C.J., in delivering the judgment of the Court, says: "The plt.'s counsel then relied upon sect. 76 of 11 & 12 Vict. c. 112, which regulates the mode of rating. But having regard to the whole of this clause we think that it carefully preserves the ancient principle of rating for sewers; and the last proviso, instead of sanctioning a uniform rate over the whole district, anxiously directs 'that where in any separate sewerage district any property is by law or by the practice of the existing commissioners entitled to exemption,' &c. This seems clearly to intimate that, in rating, the benefit derived from the sewers by the property rated shall still be regarded. Further, the powers given to the commissioners with respect to district rates seem to have a special reference to the well-known rules of law respecting rates by commissioners of sewers, whereby property is to be assessed according to the benefit which is derived from the sewers." [*Cockburn, C.J.*—In that case it was not a question between parish and district.] The Board of Works may by law take the



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parts of a district which may have been benefited, and rate them exclusively. Sect. 181 of 18 & 19 Vict. c. 120, means only that the places liable before shall still be liable under that Act. By sect. 180, giving power to apportion the debt it was not intended to alter the principle of liability. The present case arose before the 25 & 26 Vict. c. 102 came into operation, and therefore sect. 170 of the 18 & 19 Vict. c. 120 applies in its entirety; and taking sect. 170 in connection with sects. 180 and 181, the rating should be with regard to the benefit derived by the property rated. *Reg. v. Head and The Board of Works* does not affect this case, for it arose on another section, sect. 161:

*Howell v. The London Dock Company*, 8 E. & B. 202.

*Lush* in reply.—Sect. 170 does not apply; that applies only to current rates for current expenses. This case turns on the effect of sect. 34 of 11 & 12 Vict. c. 112, and *Rex v. The Commissioners of Sewers for the Tower Hamlets* merely illustrates the old doctrine as laid down in *Callis on Sewers*. The proviso in sect. 76 of 11 & 12 Vict. c. 112, refers to property which is perpetually exempt from liability. The dictum in the judgment in *The Metropolitan Board of Works v. The Vauxhall-Bridge Company* was extra-judicial.

*Cur. adv. vult.*

BLACKBURN J.—This is a case stated on appeal against a rate made by the resps. by virtue of an apportionment made by the Metropolitan Board of Works under the 168th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, in consequence of the default of the vestry of St. Giles, Camberwell, to pay the amount required by the precept of the Metropolitan Board of Works. It appears from the statement in the case that the Metropolitan Commissioners of Sewers had, whilst acting under the 11 & 12 Vict. c. 112, borrowed the sum of 200,000*l.*, out of which sum they had expended 67,000*l.* in drainage works for the benefit of the Surrey and Kent sewerage district. That district had been formed by them under the powers given in the 84th section of the 11 & 12 Vict. c. 112. The district comprises parts of nineteen different parishes, as is stated in the 7th paragraph of the case. On the passing of the Metropolis Local Management Act, the Metropolitan Board had to provide for the payment of the liability of the Metropolitan Commissioners of Sewers. The Metropolis Local Management Act (18 & 19 Vict. c. 120, s. 181), directs that the money necessary to discharge the liability of the Metropolitan Commissioners of Sewers shall be raised in like manner as the expenses of the board, and sect. 170 directs how these expenses of the board are to be assessed. The Metropolitan Board, acting under these sections, have apportioned this sum of 67,000*l.* amongst the several parishes comprised in the Surrey and Kent sewerage district, and it is not disputed that this was the correct course to take. It appears from the statement in the case in paragraph 9, that the Metropolitan Board apportioned it amongst the several parishes comprised in that district according to the rateable value of the property in such parishes respectively, and not according to the proportion of the sum expended in such parishes respectively, or to the benefit derived by such parishes respectively from the expenditure, and following this principle, the sum charged to the parish of St. Giles, Camberwell, in which the app. property lies, is 9000*l.* It further appears from the case, paragraph 8 and paragraph 13, that the actual expenditure for works locally situate within the parish was only 519*l.*, and that the whole benefit derived directly and indirectly by the parish from the whole expenditure in drainage works amounts to a sum much less than 9000*l.*, and which, for the

purpose of the case, is, by paragraph 13, to be assumed to be 1074*l.* 6*s.* 10*d.* The contention of the app. is stated in the 15th paragraph. It is, that the board ought to have apportioned the amount, having regard not only to the rateable value of the property in the respective parishes comprised in the district, but also to the benefit received by the respective parishes by the expenditure; and if he is right in this contention no doubt the sum which has been assessed on the parishes is very considerably larger than it ought to have been, and his counsel before us argued that the rate was in consequence bad on appeal. The contention on the part of the resps. is, that the board have no power, or at all events were under no obligation, to enter into such an inquiry, and that no appeal was given against the apportionment by the board, which, even if on a wrong principle, was final. The court is called upon to determine judicially whether the rate made is a valid rate or not, which is the first question asked in the case. Mr. Bovill, the counsel for the app., pointed out that in sect. 170 of the Local Management Act, 18 & 19 Vict. c. 120, the Metropolitan Board were bound, in apportioning the expenses of the board amongst the different parts of the metropolis, to have regard to the annual value of the property in the several parts of the metropolis, and also in the case of expenditure on works of drainage to the benefit derived from such expenditure by the several parts of the metropolis affected thereby. But he chiefly relied on the argument that, according to the old law of sewers, the rate was to be only on those deriving benefit from the sewers; and he relied on the extra-judicial opinion delivered in the *Metropolitan Board of Works v. The Vauxhall-Bridge Company*, as an authority that, under the Metropolis Sewers Act, 11 & 12 Vict. c. 112, the effect of the proviso at the end of sect. 76 was to preserve this old principle, which, according to the same authority, extended so far, that in making a sewers rate, the amount to be imposed on each property should be proportionate to the benefit derived by the property from the expenditure. Mr. Lush, in support of the rate, denied that the old principle of sewers always was, that in making a sewer rate different owners were to be assessed according to the proportion of the benefit derived by their respective properties. He admitted that, according to the old law, no person could be assessed in respect of property which derived no benefit from the works, and also that the commissioners of sewers might, and according to *Rex v. The Commissioners of Sewers for the Tower Hamlets*, 9 B. & C. 517, ought to divide the limits of their commission into districts or levels, so laid out that every part of each district or level should receive some benefit from the drainage works constructed for it, but he contended that all rates on the inhabitants of a level were to be made equally on all the inhabitants of such level. In the 117th section of the Metropolis Local Management Act, the words "the several parts of the metropolis" were, according to his contention, to be understood as meaning the several levels or districts in the metropolis, and he contended that when the commissioners of sewers, acting under the 11 & 12 Vict. c. 112, s. 34, had formed a sewerage district such as the Surrey and Kent sewerage district, there was no place of a district or level properly set out under the old commissioners of sewers, and that all rates to be imposed on the inhabitants of that district must be imposed equally on all the inhabitants according to the value of their property, without inquiring whether the amount of benefit derived by the several properties was equal or not. He did not dispute that the extra-judicial opinions given in the *Metropolitan Board of Works v. The Vauxhall-Bridge Company*.



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7 E. & B. 964, were adverse to this argument, but contended that the opinion there given had been given without sufficiently considering that it threw upon those imposing the rate the task of ascertaining what was the separate benefit derived by every property within the district from the works, a task which it would be quite impracticable for them to perform, and which should never be imposed upon them. He contended that the opinion there expressed was inconsistent with what is said in *Rex v. The Commissioners of Sewers for the Tower Hamlets*, that it was extra-judicial and consequently not binding upon us. He further contended that the objection, if at all, could not be raised on appeal. On the whole, we think Mr. Lush's argument must prevail. Though we are not bound by the opinion expressed in the *Metropolitan Board of Works v. The Vauxhall-Bridge Company*, the respect we feel for this authority makes us reluctant to decide in opposition to it; but we are not prepared to hold that the Metropolitan Board were bound to enter into an inquiry as to the amount of benefit derived by the different parochial divisions comprised within the sewerage district. The boundaries of the parish were originally fixed without any reference whatever to the levels or drainage of the district. If, therefore, the mode of apportionment was wrong, it must be because the inquiry ought to extend to the amount of benefit derived from the different houses within the district, an inquiry for which no machinery is provided; and we find no authority before the *Vauxhall-bridge* case in which such an inquiry was thought to be required; and we do not think that the Metropolitan Board were at all events bound to make such an inquiry. It is, in this view of the case, unnecessary to inquire whether an appeal on such a ground as the present can or cannot be maintained on the ground above indicated. We answer the first question in the case, and that only. We are of opinion that this rate is a valid rate.

*Judgment for the resps.*

*Friday, April 21, 1865.*

REG. v. WRAY.

*Municipal corporation—Disqualification for office—Bribery.*

*Under the 22 Vict. c. 35, s. 11, a conviction in the County Court for bribery at a municipal election does not create a six years' disability to hold any municipal office.*

*Field, Q.C.* applied for a *quo warranto* against Wm. Baynes, a town councillor of the borough of Leeds, to show by what authority he exercised that office. Mr. Baynes was duly elected on 1st Nov. 1864, but it was contended that he had become disqualified by reason of having been since convicted, on the 10th Feb. last, in the County Court, and fined in the penalty of 40s. for the offence of bribery, committed by him at an election of a town councillor of the borough of Leeds, which took place on the 28th Nov. 1864. The 5 & 6 Will. 4, c. 76, s. 54, enacts that for the offence of bribery at a municipal election the person offending shall forfeit 50l. to be recovered by action in the Superior Courts, and be disabled for ever from voting at any municipal or parliamentary election, and also from holding any municipal office. The 17 & 18 Vict. c. 102 (the *Corrupt Practices Prevention Act*), s. 6, enacts that revising barristers shall, upon proof of conviction for bribery or undue influence at a parliamentary election, expunge the names of the persons convicted from the list of voters and place them on a list of persons disqualified for bribery. The 22 Vict. c. 35 (the *Municipal Elections Act*), s. 11, enacts:

If any person, at any election of mayor, councillors, &c., for any borough shall be guilty of bribery, he shall, for every such offence, forfeit the sum of 40s. to any person who shall sue for the same in the County Court. And any person offending in any case in which, under the Act or Acts for the time being in force with respect to the election of members to serve in Parliament for boroughs, the name of the offender may be expunged from the list of voters, being lawfully convicted thereof, shall, for the term of six years, be disabled to vote in any election in such borough or in any municipal or parliamentary election whatever in any part of the United Kingdom, and shall for such term be disabled to hold, exercise, or enjoy any office or franchise to which he then shall or at any time afterwards may be entitled as a Burgess of such borough, as if such person were naturally dead.

It was contended that the construction of sect. 11 of 22 Vict. c. 35, was that the disqualification attached to bribery committed either at a municipal or parliamentary election. [MELLOR, J.—That may have been the intention, but the language of the section does not seem to carry that out.] By reference to the 5 & 6 Will. 4, c. 76, s. 54, and 17 & 18 Vict. c. 102, s. 6, this will appear to be the right construction. [COCKBURN, C. J.—The language seems to limit the disability to bribery at a parliamentary election.] The 17 & 18 Vict. c. 102 provides for that class of offences. [COCKBURN, C. J.—Sect. 54 of 5 & 6 Will. 4, c. 76, is not repealed, and a person may proceed under that if he pleases. But the 22 Vict. c. 35 creates an additional penalty recoverable in a speedy way in the County Court. And further imposes a six years' disability in respect of holding any municipal office.] So limited, the enactment seems unnecessary.

COCKBURN, C. J.—The words of sect. 11 will not bear the construction contended for, and I doubt if the Legislature intended what has been suggested. I rather think they intended to make the conviction for bribery at a parliamentary election only a disqualification for six years for municipal office. But it is unnecessary to say more than that the words of the section do not warrant the construction we are asked to put on them.

BLACKBURN, MELLOR and SHEE, JJ. concurred.

*Rule refused.*

*Wednesday, April 26, 1865.*

REG. v. HARRIS.

*Night poaching—Open or inclosed land—Waste by side of a highway.*

*On each side of a metalled road (being a highway) was waste land covered with brambles and furze five feet high, and patches of grass, and there was no sign of traffic thereon, although persons could pass over portions thereof on foot or horseback. On each side, at the extremity of the waste, there was a hedge. Persons were found by night on this land with a harnet fastened to the hedge on the one side stretched across the road, but not quite reaching to the hedge on the other, for the purpose of taking game there, and they were convicted under the Night Poaching Act (9 Geo. 4, c. 49), s. 1, for unlawfully entering and being in open land, with a net for the purpose of taking and destroying game there by night:*

*Held, that they were not upon open land, within the meaning of the Night Poaching Act (9 Geo. 4, c. 49), s. 1.*

On an appeal to the Quarter Sessions by Charles Harris against a conviction of two justices for the county of Devon, under 9 Geo. 4, c. 69, s. 1, whereby Charles Harris, of Stockland, in the county of Devon, farmer, was convicted before two justices of the peace for the said county, for that he the said C. Harris, in the parish of Upottery, in the county of Devon, within

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six calendar months now last past, to wit, in the night of the 30th Nov. 1863, by night, after the expiration of the first hour after sunset, and before the beginning of the last hour before sunrise, that is to say, about the hour of half-past one in the night of the said 30th Nov. 1863, did by night then and there unlawfully enter and was in certain open land situate in the parish of Upton, in the county of Devon, the property of the Right Hon. and Rev. William Leonard Viscount Sidmouth, with a net for the purpose of then and there by night taking and destroying game, contrary to the form of the statute in such case made and provided, the said conviction was affirmed, subject to the following case :

The following were the grounds of appeal :

First, that the said C. Harris is not guilty of the said offence.

Secondly, that the formal conviction is not in law sufficient to support the said conviction of him the said C. Harris.

Thirdly, that the said C. Harris did not unlawfully enter on the said land for the purpose of taking and destroying game within the meaning of the statute 9 Geo. 4, c. 69, s. 1.

Fourthly, that the said C. Harris was, at the time in the said conviction mentioned in the Queen's highway, and not on any land within the meaning of the said statute, and ought not to have been convicted, of all which premises you and each and every of you are hereby desired to take notice.

GEO. TWEEED,

Residing at Honiton, attorney for and on behalf of the said app.

Dated 31st Dec. 1863.

The said C. Harris, with a certain other man called Frederick Vesey, in the night of the 30th Nov. 1863, entered certain land hereinafter more particularly described, in the parish of Upton, in the said county of Devon, the property of Lord Sidmouth, for the purpose of taking and destroying game, with a certain hare-net then and there found in his possession.

The land in question has a hedge on either side of it, and a metalled road running through it, while between the said road on both sides of the same and the said hedge is waste land, varying in extent.

The fields on either side of the said metalled road and waste land are the property of the said Lord Sidmouth, who is also lord of the manor wherein the land so entered as aforesaid is situated.

The said waste land on either side of the said road, except where there are interspersed patches of grass, is covered with thick bramble and furze as high as five feet, and there is no sign of any traffic in or use of the said waste land, although persons could pass over portions of the said waste land on foot or horseback.

The said net was found across the said road touching and fastened to the hedge on the one side, but not quite reaching the hedge on the other, the said C. Harris standing between the end of the net and the hedge. At the point where the net was laid there was nine feet waste land on the one side and three feet waste land on the other side of the said road, the road itself being eleven feet wide. At the point where the said F. Vesey was first seen there was eighteen feet waste land on the one side, and twelve feet waste land on the other side of the said road, the road itself being twelve feet wide. At a point 408 feet distant from where the net was found, and in the direction where the said F. Vesey ran, as hereinafter mentioned, there was sixty-four feet waste land on the one side of the said road, and eight feet waste land on the other, the road itself being twelve feet wide.

The said F. Vesey was first seen in the waste land under the hedge 168 feet from the spot where

the said net was laid, and he ran along the waste land and not in the road down to the place where the said net was laid as aforesaid.

It appeared that the notice and grounds of appeal were not signed by the said C. Harris, or by his attorney or agent, but by the attorney's clerk, who was called as a witness, and admitted in cross-examination that he had no authority to sign such notice and grounds of appeal, and that he had signed the same in his employer's absence, without his employer's knowledge.

It was objected on the part of the app. that under these circumstances he could not be convicted under the 9 Geo. 4, c. 69, s. 1, as being by night in inclosed or open land for the purpose of destroying game.

It was also objected that the conviction could not be upheld, as it did not describe with sufficient accuracy the place in which the offence had been committed. An objection was also raised by the resp. that the notice and grounds of appeal were not duly signed.

The questions for the consideration of the Court are :

First, whether the land in question is land open or inclosed within the meaning of the statute ; and

Secondly, whether the description of the place as the property of Lord Sidmouth, situate, &c., is a sufficient local description ; and

Thirdly, whether the notice and grounds of appeal are duly signed.

If either or both of the first and second points be decided in the negative and the third point in the affirmative, then the conviction to be quashed ; but if the third point be decided in the negative, or both the other points in the affirmative, or if the third point be decided in the negative and both the other points in the affirmative, then to be confirmed.

*Karslake and Lopes* for the resps.—No part of the waste land on either side of the highway formed part of the highway, but it was open land within the meaning of the 9 Geo. 4, c. 69. [COCKBURN, C. J.—Could the justices have convicted the app. for entering this bit of land ?] The only part of the land dedicated to the public is the metalled road. [BLACKBURN, J.—That is not found as a fact in the case. COCKBURN, C. J.—I cannot see that a man is a trespasser for stepping off the high road on to waste land like this where there is no fence to keep persons off.] The app. was unlawfully on the waste ground, he was not using the road as a road. The case of *Reg. v. Pratt*, 24 L. J. 118, M. C., supports the conviction. [COCKBURN, C. J.—The 7 & 8 Vict. c. 29 is a strong legislative exposition of what is meant by open land and shows that it did not mean waste land like this.] The case of *Beckett v. Upton*, 5 E. & B. 629, was then cited. Secondly, the notice and grounds of appeal were not properly signed. The case finds that the clerk had no authority to sign them. [BLACKBURN, J.—The app. is required to give notice and grounds of appeal, but what requires him to sign them ?]

*H. T. Cole* and *M. Bere*, for the app., were not called upon.

By the COURT :

*Order of sessions quashed.*

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WARD v. GRAY.

[Q. B.]

WARD (app.) v. GRAY (resp.)

*Soldiers—Mutiny Act—Exemption from toll—Floating bridge.*

*By a local and personal Act a company were authorised to purchase a ferry over the river Itchen and to establish a floating bridge over the river, which they did. The bridge is a moveable structure resembling a small pier, and is floated over the river by chains laid across the bed of the river. The Mutiny Act 1864, s. 72, exempts from toll officers and soldiers on duty and on march, "in passing along or over any turnpike or other roads or bridges:"*

*Held, that under that section soldiers on the march were not exempt from the toll granted by the Companies Act for using the floating bridge to cross the river.*

Case stated by justices under the 20 & 21 Vict. c. 43.

An information was laid under sect. 86 of the Mutiny Act 1864 (27 Vict. c. 3), intituled, "An Act for punishing mutiny and desertion, and for the better payment of the army and their quarters." Sect. 86 makes toll collectors demanding and receiving toll from officers and soldiers on duty or on their march liable to a penalty not exceeding 5*l.* nor less than 40*s.*

Upon the hearing of such information we dismissed the same.

The Company of Proprietors of the Southampton and Itchen Floating Bridge and Roads were incorporated by an Act of Parliament passed in 1834, which Act was amended by other Acts passed in the years 1835, 1839 and 1851 respectively. All these Acts were repealed by an Act passed in 1863 (26 & 27 Vict. c. cil., local and personal), except some clauses which are, however, contained in the schedules to the last-mentioned Act. Such parts of these Acts as are now in force, and also the said Mutiny Act 1864, are to be taken as part of this case.

By the Act of 1834 the company were authorised to purchase, and did purchase, an ancient ferry over the river Itchen, between the town of Southampton and the parish of St. Mary Extra, in the county of Southampton; and they were authorised to establish, and have established, a floating bridge over such river, with chains laid down across the bed of the river, and with roads and approaches.

Sect. 49 of the Act of 1863 directs the company to provide ferry-boats in aid of the bridge. Sect. 52 defines the regular hours for working the bridge; and sect. 58 directs that, when the bridge is out of repair, the company of proprietors shall provide ferry-boats to convey passengers across the river.

Sect. 59 of such Act enacts "that, subject to the provisions of the Act, the company from time to time may demand and take for the passage across the river by the bridge or boats of the company, at the place or within the limits of the company's ferry, any tolls not exceeding the tolls" specified in the Act.

They are also, by sect. 66, authorised to take tolls for the use of the landing-places, from persons landing or embarking, and not using the floating bridge or boats.

The company own about ten miles of road leading to the ferry; and by sect. 51 they are authorised to set up tollgates or bars, and by sect. 67 to take the tolls therein specified for the use of the road. Sect. 87 of the Act provides that no toll shall be demanded or taken at any tollgate or toll-bar erected on the company's road for any soldiers or marines on their march or on duty; but there is no similar exemption from the tolls for the use of the floating bridge.

By sects. 83, 84 and 85, the Royal Family, Custom-

house officers, and persons in the employ of the Post-office, are exempt from all tolls, both on the roads or for the use of the floating bridge.

By sect. 100, the bridge, floating jetties, and other works and property of the company, are to be deemed a bridge and a vessel within the meaning of the 24 & 25 Vict. c. 97, relating to malicious injuries to property.

By sect. 72 of the Mutiny Act 1864, it is enacted as follows:

All Her Majesty's officers and soldiers on duty and on their march, and their horses and baggage, and all recruits marching by route, and all prisoners under military escort, and all enrolled pensioners in uniform, when called out for training, or in aid of the civil power, and all carriages and horses belonging to Her Majesty, or employed in her service under the provisions of this Act, or in any of Her Majesty's colonies when conveying any such persons as aforesaid, or their baggage, or returning from conveying the same, shall be exempted from payment of any duties and tolls on embarking or disembarking from or upon any pier, wharf, quay, or landing place, or in passing along or over any turnpike or other roads or bridges otherwise demandable by virtue of any Act already passed or hereafter to be passed, or by virtue of any Act or ordinance, order, or direction of any colonial legislature or other authority in any of Her Majesty's colonies.

The before-mentioned floating bridge is propelled from one side of the river Itchen to the other, being a distance of about 1400 feet, by steam power, and is kept in its proper course by passing across the river by means of parallel chains laid across the bed of the river, which chains are passed over wheels attached to the floating bridge, and are fastened on each side of the river to heavy weights which are sunk in wells in the ground.

The ferry-boats are constantly crossing the river in aid of the floating bridge, and when a passenger has paid his toll and passed the tollgate, he is at liberty to cross either by the boat or the floating-bridge, and foot passengers usually select either the floating bridge or the boat, according to which is about to make the next trip, unless influenced by weather or other causes.

The resp. is one of the collectors of tolls appointed by the said company.

At the hearing of the aforesaid information it was proved that the app. was a soldier of Her Majesty's Army; that on the 20th Oct. last he was on duty, and on his march in charge of a party of Her Majesty's soldiers proceeding from the Royal Victoria Hospital at Netley to the railway-station at Southampton; that at the toll-house of the said company in the said parish of St. Mary Extra he produced to the resp. a route, and demanded a free passage for himself and the soldiers with him across the river Itchen on the floating bridge, but which demand was refused, and that the app. then paid the toll of one penny for himself and one penny for each of the soldiers with him, and they were conveyed across the river on the said floating bridge.

It was contended on the part of the app. that the said floating bridge is a bridge within the meaning of sect. 72 of the Mutiny Act 1864, and that therefore the resp. illegally demanded and received toll of the app. for his passage over the river Itchen by such floating bridge.

On the part of the resp. it was contended that the said floating bridge is a steam ferry-boat and not a bridge within the meaning of such last mentioned section of the Mutiny Act 1864.

We were of opinion that the said floating bridge is not a bridge within the meaning of such section, and that the app. did not simply pass over the floating bridge, but was conveyed by it across the river, and we therefore dismissed the before-mentioned information.

The question of law arising on the above statement therefore was: Whether the said floating bridge is a bridge within the meaning of sect. 73 of the Mutiny Act 1864.

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[Q. B.]

The *Solicitor-General* (Dowdsonwell with him) for the app.—The soldiers were in the service of the Crown, and on march at the time, and were, therefore, not liable to the payment of toll. In the *Mayor, &c. of Weymouth v. Nugent*, 11 L. T. Rep. N. S. 672, it was held that the prerogatives of the Crown could not be affected except by express enactment, and that in the absence thereof, stone brought into the harbour of W. for the use of the Government works was not liable to the wharfrage dues granted by a local Act. The floating bridge was a bridge within sect. 72 of the Mutiny Act, and on that ground the toll was not payable. [COCKBURN, C. J.—The words of sect. 72 are, “or in passing along or over any turnpike or other roads or bridges;” and the word bridge there means a bridge over which the road is continued. BLACKBURN, J.—A bridge in that section does not mean a ferry-boat.] The meaning of the word “bridge” in Webster’s Dictionary was then cited, and the 4 & 5 Will. 4, c. 85, s. 89, referred to. [COCKBURN, C. J.—The language of sect. 72 is, that Her Majesty’s officers and soldiers shall be exempt from toll in *passing along or over* any turnpike or other roads or bridges. How can persons be said to pass over this bridge? It is the bridge that takes them over the river. BLACKBURN, J.—They get over the river by the motive power which moves the bridge. In fact, it is the motive power that is paid for. This bridge is like a ferry-boat, and you cannot say that a ferry-boat is a bridge. SHEE, J.—By their Act the company are bound to provide ferry-boats as well as floating bridges, and could it be argued that soldiers going across in the ferry-boat were exempt from toll? The company call this a bridge, and their language is to be interpreted most strongly against themselves.

*Milward, Q. C. and M. Bere.* for the resp., were not called upon to argue.

COCKBURN, C. J.—It is not a bridge within the Mutiny Act.

BLACKBURN and SHEE, JJ. concurred.

*Judgment for the resp.*

BEVINS (app.) v. BIRD (resp.)

*Salmon Fishery Act 1861—Fixed engines—Stake-nets Sea-shore.*

*In answer to an information under 24 & 25 Vict. c. 109, s. 11, for catching salmon with fixed engines in tidal waters, where all the Queen’s subjects have a right to fish in the ordinary way, the deft. gave evidence that his father and his family and others of the public had for more than forty years been accustomed to fish for salmon in the locus in quo with stake-nets:*

*Held, that this was not evidence of any ancient right or mode of fishing, lawfully exercised at the time of the passing of the 24 & 25 Vict. c. 109, within the exception in sect. 11.*

Case stated by the Justices of Lancaster, under the statute 20 & 21 Vict. c. 43.

On the 28th July 1864 the resp. was charged on the information and complaint of W. J. Bevins, the app., for that he the said T. Bird, on the 11th July 1864, at the township of Ulverstone, in the said county, was then the owner of a certain fixed engine, to wit, a certain stake-net, which was then unlawfully placed for catching salmon in certain tidal waters there, contrary, &c.

Upon the hearing the justices dismissed the information.

The following facts were proved:—That the app. was a keeper appointed by the Severn Fishing

Association. That upon the 11th July 1864 the app. visited what are called Cork Sands, being part of an estuary called the Bay of Morecombe, within the county of Lancaster, which is navigable for vessels when the tide is in, and found on that part of the sands over which the tides flow and reflow, every day stakes firmly driven into the sands two or three yards apart, about five feet out of the sands, with nets fixed on them. Spars were fixed to the nets. The nets rose and fell with the tide by means of tied spars, but the stakes remained fixed, and the nets on them, when the tide was out. The nets were taken up every tide. There was evidence of the resp. being the owner or one of the owners of the nets, and indeed it was not disputed on the part of the resp. that he was the owner. The nets were so found as aforesaid with salmon lying against the stakes on which the nets were fixed; and in our opinion were so fixed to the soil as to be fixed engines within the 11th section of 24 & 25 Vict. c. 109. The nets so found were taken off the stakes by the app. and carried away, and while the app. was engaged in carrying them away, the resp. with his brother (against whom a similar information was laid) and others came up to the app. and said to him, “They are our nets thou’st taking away;” and resp. further said, that the app. had no business to carry them away, and then took them from the app. and carried them to his (resp.’s) house. That afterwards on the same day, with the assistance of a police constable, app. got the nets back from the resps.

On the part of the resps. it was contended that in taking the nets from the app. he did it to assert his right to use the nets in the way in which they were found, *bonâ fide* believing that by long usage a right had been acquired so to use them.

There was no evidence before us of any exclusive right of fishery there. Evidence however was given on the resp.’s behalf by his father, that nets of this kind with lawful size of mesh and fixed in like manner had for more than forty years past, up to the time of the committing of the alleged offence, been used by resp.’s father and his family and others of the public in fishing on Severn sands or estuary for salmon, and we being satisfied that the evidence was sufficient evidence of this being an ancient right or mode of fishing lawfully exercised at the time of the passing of the said Act, by virtue of immemorial usage within the meaning of the said 11th section of the said statute, dismissed the information.

The questions for the opinion of the court are:

1. Whether the right or mode of fishing so claimed, as aforesaid is such an ancient right or mode of fishing as is exempted by sect. 11 from the operation of that section.

2. If so, whether evidence to the effect above stated was sufficient evidence of immemorial usage to support such an exemption under the circumstances of the case.

Mellish, Q. C. for the app.—The justices ought to have convicted. Sect. 11 of 24 & 25 Vict. c. 109, enacts, “No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters: and any engine placed or used in contravention of this section may be taken possession of or destroyed, and any engine so placed or used, and any salmon taken by such engine shall be forfeited, and in addition thereto the owner of any engine placed or used in contravention of this section shall for each day of so placing or using the same incur a penalty not exceeding 10*l.*; and for the purposes of this section a net that is secured by anchors or otherwise temporarily fixed to the soil shall be deemed to be a fixed engine; but this section shall not affect any ancient right or mode of

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fishing as lawfully exercised at the time of the passing of this Act by any person by virtue of any grant, or charter, or immemorial usage, provided always that nothing in this section contained shall be deemed to apply to fishing weirs or fishing mill dams." The right set up by the resp. in this case was not a right lawfully exercised at the time of the passing of the Act. As a matter of law there could not be a right in all the Queen's subjects to fish in this way. In a case tried at Carlisle, before Shee, J., the jury found that fishing by stake-nets was of modern origin; and in a case in the Court of Ex. two of the barons of that court seemed to think that the exception in sect. 11 applied only to incorporeal rights. In *Hudson* (app.) v. *McRae* (resp.), 9 L. T. Rep. N. S. 678, it was held that upon an information for unlawfully and wilfully fishing in a non-navigable river, being a private fishery (contrary to 24 & 25 Vict. c. 96, s. 24), a claim by the deft., as one of the public, to fish in the river does not oust the justices of jurisdiction, as such a right cannot possibly be acquired. The case of *Mayor of Oxford v. Richardson*, 4 T. R. 437, was then referred to. [COCKBURN, C. J.—All persons would have a right to fish in Morecombe Bay in the ordinary way. How can the resp. have that right and also the right of fishing in an extraordinary way by stake-nets? The evidence was only evidence of acts by persons as part of the general public, and how could they, as part of the general public, acquire a right as against the general public to use stake-nets, contrary to the provision of this statute, which was passed for the general public benefit?]

*Kaye*, for the resp., was then called on.—The case does not find any right in all the Queen's subjects to fish there. And there was evidence from which the justices might infer a free fishery in gross in the resp.'s family. [BLACKBURN, J.—There cannot be a right in gross in the resp.'s family at large, but only in them as individuals.] The learned counsel then referred to

*Hale de Jure Maris*, 12.

COCKBURN, C. J.—There was no evidence of right to which the justices should have attended.

BLACKBURN, J.—The true construction of the exception in sect. 11 is, that it only applies to individual rights of property belonging to individuals lawfully exercised at the time of the passing of the Act.

SHEE, J. concurred.

*Case remitted to justices.*

Thursday, April 27, 1865.

*Ex parte* CHARLES WINDSOR.

*Extradition treaty—Specified crimes—Crimes to be construed according to the law of England.*

Where by the provisions of a treaty (confirmed by statute) with a foreign state the Crown undertakes upon requisition to deliver up fugitives to this country who have committed certain specified crimes in such foreign state, such crimes are to be construed according to the definition of the law of this country; and if therefore a fugitive has committed in such foreign state an act which, though it be one of such specified crimes in such foreign state, is nevertheless not such a crime by the law of this country, the case is not within the treaty.

By a treaty (confirmed by statute) with the United States of America the two Governments agreed that upon mutual requisitions they would deliver up all persons who being charged with (inter alia) forgery committed within the jurisdiction of either should seek an asylum,

or be found within the territories of the other. Also by an Act of the local Legislatures of the State of New York it was enacted, that every person who with intent to defraud shall make any false entry in any book of accounts kept by any moneyed corporation within the state shall on conviction be adjudged guilty of forgery. A. B., who had brought himself within the terms of this enactment by making such false entries, was a fugitive in England:

Held, that as by the law of England such offence of A. B. was wanting in an essential element to constitute the offence of forgery, his case was not within the terms of the treaty and statute, and that he was not liable to be apprehended under them.

McMahon on a former day obtained at chambers a *habeas corpus*, directed to the keeper of Whitecross-street gaol, to bring into court one Charles Windsor, a prisoner. A return to the said writ was accordingly made, which set out the cause for which he was in custody. It appeared that the said Charles Windsor had been a clerk in "The Mercantile Bank of New York," in the United States of America, and that whilst in that capacity he was under suspicion of having made false entries in the bank-books to conceal certain embezzlements. By the law of the State of New York this is declared to be a forgery in the third degree, it being enacted by the local Legislature that

Every person who, with intent to defraud, shall make any false entry, or shall falsely enter or shall falsely alter any entry made in any book of accounts kept by any moneyed corporation within the state, or any book of accounts kept by any such corporation or its officer, and delivered, or intended to be delivered, to any person dealing with such corporation, by which any pecuniary claim, obligation, or credit shall be, or purport to be, discharged, diminished, created, or in any manner affected, shall, on conviction, be adjudged guilty of forgery in the third degree.

The said Charles Windsor absconded from New York on the 29th Oct. last, and came to this country, where, on the 7th of the following Dec., he was arrested on a capias granted by Crompton, J., and issued under the Absconding Debtors' Act, at the suit of the before-mentioned bank. Upon this he was taken to the Debtors' Prison at Whitecross-street, where he has since remained. Criminal proceedings were taken against him in New York, and a warrant issued against him on a charge of forgery. That warrant was brought to England, and was sent by the American Minister to the Secretary of State for the Home Department, with a requisition for the extradition of the said Charles Windsor under the provisions of the treaty between the two countries. The Secretary of State issued his warrant to the chief magistrate of Bow-street, signifying to him that such requisition had been made, and requiring him to investigate the matter. On the 25th Jan. last, Sir Thomas Henry accordingly took the evidence of a Mr. Blake, who brought over the information. He proved the original warrant granted at New York, the certified copy of the original information on which it issued, and he proved the correctness of such copy. Upon this Sir Thomas Henry issued his warrant for Windsor's apprehension, and, he being already in custody, a *habeas corpus* was issued to the gaoler on the 27th Jan. last, whereupon Windsor was brought up before the magistrate. Ultimately, on the 3rd Feb., the facts having been gone into, the magistrate held that the offence was made out, and he issued his warrant for Windsor's detention, in order that he might be delivered up in pursuance of the treaty; and he certified the facts to the Secretary of State.

The facts connected with the charge were as follows:

The bank received moneys on deposit, and had in its service a clerk whose duty it was to receive the moneys and securities so deposited, and who was called the "receiving teller," and another clerk,

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called the "paying teller," whose duty it was to pay all cheques and draughts and orders for the payment of money drawn against the moneys so deposited; that it was the duty of the "receiving teller" to pay over to the "paying teller" all the moneys and all cheques, draughts and orders received by him from depositors, to the end that the same might be by the "paying teller" collected and converted into money, and, with the other moneys and cash received from depositors, applied so far as was necessary to pay draughts and cheques drawn upon the bank, and that the residue might be deposited by him in the vaults of the bank for safe keeping, after the same had been properly entered to the credit of the paying teller in a book. That all the moneys so received from depositors, and the proceeds of cheques, &c. deposited were in the charge and custody of the paying teller, and that he was primarily responsible therefore, and was in duty bound to deposit the same in the vaults of the bank. That at the time in question the prisoner Windsor was the paying teller of the bank, and it was his duty to collect and convert into money all the cheques and draughts received from the receiving teller, and deal with them as above mentioned. That among the books of account kept by the bank was one called "the first teller's proofs," and that it was the duty of the paying teller (the prisoner) daily to make in that book entries showing and specifying the gold and silver coin, bank bills, cheques, draughts and orders, and other written securities for money which were received by him each day, and all the sums paid by him thereout, and also showing the balance of such moneys remaining in his possession at the close of business hours on each day, and also in what manner the same was accounted for, and how the same was made up, and in what it consisted, and how much of it was in specie, and how much consisted of vouchers or securities for money, and that all the coin and cheques therein stated to have been received by him were charged to him, and he was liable to account for the same, he being likewise credited with payments entered as made. That on the 28th Oct. 1864 the prisoner, being the paying teller, made in the book entries showing and stating that he had received and was chargeable with the sum of 2,248,918 dols., and that he had paid out the sum of 1,145,984 dols., and that the balance, 1,102,934 dols., remained in hand in his possession and control, and that he made entries specifying that there were then in the vaults 289,000 dols., and in the trays or tills 1831 dols., and that there were notes, bank bills, &c. to the amount of 545,490 dols., and that the entry of specie to the amount of 290,831 dols. was false or fraudulent, and that there was, in fact, to the prisoner's credit in the vaults in specie only the sum of 258,915 dols., and that the entry that there were notes, &c., to the amount of 545,490 dols. was also false and fraudulent, and that there was, in fact, to his credit in the vaults only the sum of 338,392 dols. in notes, &c., and that his pecuniary obligation and credit purported to be effected by means of such false and fraudulent entries to the amount of the deficiencies aforesaid, and that the prisoner had abstracted from the vaults those amounts.

By the treaty of Washington of the 9th Aug. 1842, ratified on the 18th Oct. in the same year, it is agreed,

That Her Majesty and the said United States should, upon mutual requisition by them to their ministers . . . respectively deliver up to justice all persons who, being charged with the crime of murder, assault with intent to commit murder or piracy, or arson, or robbery, or forgery committed within the jurisdiction of either of the high contracting parties, should seek an asylum, or should be found within the territories of the other. Provided that this should only be done upon such evidence of criminality as according to the law of the place where the fugitive or person so charged should be found, would justify his apprehension and

commitment for trial if the crime or offence had been there committed, &c.

This treaty was afterwards ratified by the 6 & 7 Vict. c. 76, which enacts,

That in case requisition shall at any time be made by the authority of the said United States in pursuance of and according to the said treaty for the delivery of any person charged with the crime of murder, or assault with intent to commit murder, or with the crime of piracy or arson, or robbery, or forgery, or the utterance of forged paper committed within the jurisdiction of the United States of America, who shall be found within the territories of Her Majesty, it shall be lawful for one of Her Majesty's principal Secretaries of State . . . by warrant under his hand and seal to signify that such requisition has been so made, &c.

The return to the *habeas corpus* having been read,

McMahon and Edward Clarke now moved that the prisoner should be discharged out of custody, on the ground that the offence, as not being by our law one of forgery, was not within the provisions of the Treaty and Extradition Act (6 & 7 Vict. c. 76); that the offence as charged against the prisoner was really only embezzlement, or it may be false pretences, but that in no sense could it be designated as a forgery either by our law or the general law of the United States, and that, if it were sufficient that it was designated as forgery by the United States, they might designate the most innocent acts as forgeries or other crimes mentioned in the treaty, and so have a right to demand the extradition of persons who in this country would be considered wholly free from criminality; that the object of the treaty was the delivery up of those criminals who have committed any of the crimes specified, and which crimes must be such as are recognised by both countries.

Giffard, Q. C. and Poland argued that the prisoner was not entitled to be discharged; for that, admitting that the offence charged was not within our definition of the crime of forgery, the true test is, whether or not it is a forgery according to the law of the country demanding the culprit:

Wheaton's International Law, 236, 241;  
Ortolan Regies Internationales;  
Vattel, 108;  
*R. v. Hart*, 1 Moo. C. C. 486.

The further arguments are sufficiently set forth in the following judgments.

COCKBURN, C. J.—We are called upon here to put a construction upon the statute relating to the extradition treaty, and the surrender of criminals committing a particular crime within the jurisdiction of the United States who are found in this country, and the surrender of whom is demanded on the part of the American Government. The offences to which the statute applies are enumerated in the statute, and amongst others the offence of forgery is specified. In this particular instance, in which application is made to the court to obtain the discharge of an American subject who is found in this country, and whose surrender is demanded, and who is now in custody, it appears that he was guilty of making a false entry in a book kept by him in the office of a money corporation in New York, in which book it was his duty to keep an account of the moneys received by him as an officer of the bank, and of the manner in which such money was disposed of. There is no doubt that the entry was a false entry: there is no doubt it was made for fraudulent purposes; but I think it quite clear, for the reasons which have been given by the various members of the court in the course of the argument, that, according to the common law of this country and the state of the law of this country, the offence would not have amounted to the crime of forgery; and I must take it, there being nothing found to the contrary, that, according to

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the common law of the United States of America taken in the aggregate—and the criminal law generally corresponds with the civil law and the rights of this country—that according to the general law, this would no more amount to the offence of forgery in America than here, and consequently it is only by the act of the Legislature of the State of New York that this particular offence is made to amount to forgery. The question we have to determine is, whether the offence in question, not being an offence according to the law of England, nor, I take it, the common law of the United States of America, and the fact that the local legislation of the State of New York has constituted this particular offence to be forgery, is sufficient to bring the case within the statute, and to call upon the Government of this country to deliver up this American citizen to the American States? I am of opinion that it is not. I think the only true construction to be put upon this statute is, that the terms used in the statute specifying the offences in respect of which criminals are to be surrendered by the respective states must be taken to imply offences that have common elements in the legislation of the two countries, and that where one of two nations thinks proper to make that an offence which does not fall within the definition of an offence as known to the general law of either, it will not be sufficient to bring the case within the statute. Here, by what I have more than once ventured to call a piece of artificial legislation, a matter which would not amount to forgery, according to the general law of this country or the United States, is made to assume that character. I think we ought to interpret this statute according to what may fairly be taken to have been the intention of both parties. I think it would be going a great deal too far to assume that, in passing this statute as to the effect of the treaty, the Legislature of this country went into an elaborate inquiry into what might happen to be the local law of any one of the States composing the United States; or whether they have made this treaty and passed this statute intending to embrace the whole. I do not believe that it was in point of fact done. I think it would be a very monstrous assumption if we were to take it for granted that it was. I think we must, more especially in a case where we are dealing with a country whose laws, if not the same as our own, have so much in common with them, assume, and we ought to assume, that the terms they have used were intended to have the signification which they have in our own law, and not that which they happen to have in the legislation of any particular State. I think, therefore, as in that particular enactment the local law of New York, creating this offence a forgery, does that which is entirely departing from the law of this country as to what constitutes forgery, we cannot consider such a case as within the statute, and therefore not one in which it is the duty of this country, acting under the statute, to surrender the criminal. Therefore, so far as the surrender on the criminal charge is concerned, looking at the statute and the effect of the treaty, Mr. Windsor ought to be discharged. I understand he is in custody on a civil process.

BLACKBURN, J.—I am entirely of the same opinion. The only power that the extradition treaty gives to surrender a prisoner is that derived from the statute; and that statute, as far as I see, does not enact that all fugitives from justice shall be given up, but only those who have committed certain enumerated crimes,—for the delivery of any person charged with the crime of murder, assault with intent to commit murder, the crime of piracy, arson, robbery and forgery; these, both in the treaty and the statute passed to give effect to it, are the

definitions given by those high contracting parties to the treaty to deliver over prisoners to each other. Now the charge that is made out against this person is that he, being a clerk in a bank, did steal a large sum of money, and in order to conceal it has made an entry in a book, which entry, as I made it out, was an entry stating on his behalf that a certain quantity of specie had been deposited in the vaults, whereas, in point of fact, the statement was wilfully and fraudulently false, with the intention to conceal and embezzle. But though he was guilty of that crime, it did not amount to forgery. Forgery is the false making of an instrument purporting to be that which it is not; it is not the making of an instrument which purports to be what it really is, but which contains false statements. Telling a lie does not become a forgery because it is reduced into writing. The guilt of the thing which he has done is by no means more than that. He has not made any statement that is purported to be made by the authority of any person on behalf of that person. Now this man has made a false statement, falsely stating a fact which purports to be what it is. It is quite true that the State of New York by statute has enacted that those guilty of this offence shall, on conviction, be deemed guilty of forgery in the third degree. I pass by, without entering into them, the various observations that have been made to show that this did amount to this crime within the New York State; I am inclined to think it would be certainly a crime in the New York State. But then, if this is not forgery, how does the fact that the local State of New York in the United States has declared in effect that he shall be deemed guilty of forgery, make it a forgery within the meaning of the statute? That, I think, we cannot do. I think we must construe this statute and the treaty between the two high contracting parties, Her Majesty the Queen of Great Britain on the one part and the United States on the other part, as a bargain and treaty; but that bargain, notwithstanding the dignity of the parties, must be understood like every other contract according to the meaning of the words fairly understood and the intention expressed by them in terms, both parties using the same English language and both speaking of the same sort of thing as to the particular crimes for which prisoners shall be given up—murder, piracy and forgery. I cannot think that is to be construed as meaning any crime; and though this forgery may be so called by the other side, I think it must be fairly limited to mean that this crime according to the United States, though in the nature of forgery, consists of the false making of an instrument purporting to be what it is not. Then that shows the forger to be a man who might be given up for the crime. But I do not think, if either country was to declare that some particular offence shall be a forgery, or called a forgery, that this will do. The true and fair meaning of the local statute is merely, that he who commits a crime, though not forgery in itself, shall be punished as if he had committed forgery. In this case the man who is guilty of a crime is a fugitive, and we might wish that the Legislature gave us the power to give up any criminals who committed a great crime; but that has not been done. I agree with my Lord that he is to be discharged, so far as this ground of objection is concerned.

SHEE, J.—I am of opinion that the demand for extradition upon the terms of this treaty and the Act giving effect to it must be founded upon the charge that an offence has been committed, which offence is to come in all material particulars within the definition by the laws of both the contracting states of the crime for which the extradition is stipulated. Every word designating the crime is



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the treaty itself must be taken to be the language of both the contracting parties, and to be used by both of them in the same sense. As to forgery, one of the crimes which in this treaty of extradition is stipulated for, it is the making or altering of a document with intent to defraud or prejudice another so as to make it appear to be a document made by another. The false document, which in this case is alleged to have been a forgery, was not made or altered so as to make it appear the document of another; it appeared to be, as it was, the document of Charles Windsor, not of any one else; and therefore it is not a forgery, and not within the treaty or the Act giving effect to it.

*Ordered to be discharged as to this imprisonment.*

Attorney for the prosecution, *J. S. Mullins*; for the deft., *J. P. Murrough*.

#### Re THE BROUGHTON LOCAL BOARD OF HEALTH.

*Public Health Act—Highway rate for a part of the district—Invalidity of.*

A local board of health for a district consisting of a parish comprising three townships came within the description set out in the 3rd sub-section of sect. 37 of the 21 & 22 Vict. c. 98 (the Local Government Act 1858), "where no public works of paving, water supply and sewerage are established," and the local board levied a district highway rate for one of the townships:

*Held, that they had no authority to do so, for that the highway rate could alone be levied over the whole district.*

*Philbrick* showed cause against a rule obtained by *Keame, Q. C.*, calling upon the Broughton local board of health to show cause why a writ of *certiorari* should not issue to remove a certain highway rate or assessment made for the district of Castlethorpe in, the county of Lincoln, on or about the 10th Oct., with the view to its being quashed.

It appeared that the parish of Broughton, which comprised three townships of which Castlethorpe was one, was constituted a district under the Public Health Act 1848 (11 & 12 Vict. c. 61), and that the highway rate in question was made for the township of Castlethorpe alone.

By sect. 117 the local board are constituted surveyors of the highways within the district.

By the Local Government Act 1858 (21 & 22 Vict. c. 98), which is to be construed together with and deemed to form part of the Public Health Act 1848, it is recited in sect. 37, that doubts have arisen as to the rate out of which the repair of highways is to be provided for in districts under the Public Health Act 1848, and it is then by such section enacted (*inter alia*), that

"where no public works of paving, water supply, and sewerage are established in the district the repair of the highways in the district shall be provided for by a highway rate to be levied over the whole district by the local boards as surveyors of highways."

The district in question came under this provision.

*Philbrick* now showed cause and contended, first, by sect. 137 of the Public Health Act, no order is to be removed by *certiorari*, this rule could not be granted. [*Cockburn, C. J.*—That section does not apply if the local board have acted without jurisdiction. If they have done anything irregularly which is nevertheless within their jurisdiction, the section would apply; but here it is said they have made a rate when they had no right to make it.] Secondly, the rate is good, for the local board are not merely surveyors of the highways, but are something more, having great powers with

reference to the streets and thoroughfares not possessed by surveyors of highways:

*Barber v. Jessop*, 1 Hur. & Nor. 578;

*Hanson v. The Epsom Local Board of Health*, 5 Ell. & Bl. 589.

*Keame, Q. C.* contended, in support of the rule, that the 3rd sub-section of sect. 37 of the 21 & 22 Vict. c. 98, was clear as to the power of the local board only to make a highway rate to be levied over the whole district.

*Cockburn, C. J.*—I think this rule should be made absolute. Upon looking at the original Public Health Act, 11 & 12 Vict. c. 63, in connection with the Local Government Act, it is clear that the local board of health have done that which they were not authorised to do. In some cases no doubt the local board have the power to divide their district, but they cannot divide it when it is a district of this description for the purpose of making separate highway rates. The 37th section is clear and positive, that where, as in this case, there are no public works of paving, water supply and sewerage in the district, the repair of the highways in the district shall be provided for by a highway rate to be levied over the whole district. Here we have a positive provision applicable to this case.

*Blackburn, J.*—I am of the same opinion. Under the first Act there was great difficulty in reconciling all the conflicting decisions; but under the subsequent statute the Legislature has laid down a positive and an express rule. The 3rd sub-section of the 37th section directs that in such a case as this the rate shall be levied over the whole district.

*Steele, J.*—I am of the same opinion.

*Rule absolute.*

Wednesday, May 3, 1865.

REG. on the prosecution of the VESTRY OF ST. MARY, ISLINGTON, v. THE KEEPER OF THE HOUSE OF CORRECTION IN COLDBATH FIELDS.

REG. v. COLVILL.

*Gaol—Order of sessions regulating classes of prisoners—Commitment to—Refusal to receive—4 Geo. 4, c. 64, ss. 2, 4.*

By the 4 Geo. 4, c. 64 (General Gaol Act), s. 2, there is to be for each county one common gaol and at least one house of correction.

By sect. 4 the justices at their sessions are by order to declare to what classes of prisoners any such gaol, house or houses of correction, or any part of them, shall be applicable, and after the making of such order such classes of prisoners as shall be specified in such order, and no other, are to be committed to or detained in any such gaol or house or houses of correction, or any part of them respectively. The justices for Middlesex made such an order, and directed that, with respect to the house of correction at Coldbath-fields, such prison should be applicable only to male prisoners of certain classes, but not including prisoners for nonpayment of rates, who by the same order were to be imprisoned in the House of Detention at Clerkenwell.

By the Islington Parish Acts Amendment Act 1857 (20 & 21 Vict. c. cxviii.), sect. 14, *defenders in non-payment of parish rates* may be committed to the common gaol or house of correction for Middlesex. *A. B.*, who was such a defaulter, was committed by a justice to the house of correction for Middlesex at Coldbath-fields, the keeper of which, acting upon



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*the before-mentioned order of justices, refused to receive him:*

*Held, that he was right in so doing.*

This was a special case, stated by direction of the court upon a rule calling upon the keeper of the house of correction for Middlesex at Coldbath-fields to show cause why a *mandamus* should not issue commanding him to receive and detain the body of one Richard Spraggs, pursuant to a warrant of Arthur Ballantine, Esq., justice of the peace, commanding the said keeper to receive the said Richard Spraggs and imprison him for the space of three calendar months, unless certain sums of money mentioned in the said warrant should be sooner paid.

The facts were as follows:

On the 6th Aug. 1863, one Richard Spraggs was summoned under the provisions of the Islington Parish Acts Amendment Act 1857 (20 & 21 Vict. c. cxviii.) s. 14, before Arthur Ballantine, Esq., one of Her Majesty's justices of the peace in and for the county of Middlesex, for nonpayment of certain poor and other rates for the said parish. The complaint was heard, a warrant of distress issued, and no effects being found, he was apprehended under a warrant, and committed to the house of correction at Clerkenwell for the space of three calendar months, unless the sum ordered to be paid, and the costs, should be sooner paid. The case then proceeded to state that the police officer, pursuant to the said warrant, on the 24th Sept. 1863, took the said R. Spraggs and conveyed him safely to the house of correction for the said county of Middlesex at Coldbath-fields, in Clerkenwell, in the said county, and there tendered him the said R. Spraggs, together with the said warrant, to Thomas Harpur Colvill, who then was and now is the keeper of the said house of correction, and requested him as such keeper as aforesaid to receive the said R. Spraggs at and detain him in the said prison pursuant to the said warrant; but the said Thomas Harpur Colvill then absolutely refused to receive or detain the said R. Spraggs, or in any way to act upon or obey the said warrant.

By the 14th section of the above-mentioned Act power is given to any police magistrate or justice of the peace for the said county of Middlesex to issue a warrant for the apprehension and commitment of a person making default in the payment of his rates under that section, for the committal of such defaulter to the common gaol or house of correction for the said county.

The house of correction for the county of Middlesex is situated in Coldbath-fields, in the parish of Clerkenwell, in the said county, the said Thomas Harper Colville, being the keeper thereof, and the said house of correction is not a common gaol, but is a house of correction of the ordinary kind, and was built in pursuance of 26 Geo. 3, c. lv., which statute is to be deemed to form part of this case. There is another prison in the same parish, called the House of Detention, which was erected under letters patent of King James I., as mentioned in the order of justices of the 14th Jan. 1864, hereinafter referred to, but this prison is not a common gaol or house of correction. There is not now, and never was, a common gaol for the county of Middlesex, locally situate in the said county, except as stated in paragraph 9 of this case.

9. The Queen's gaol of Newgate, which is situate in the city of London, or the suburbs thereof, has been from time immemorial, and is now, the common gaol, both for the county of Middlesex and the city of London, which is a county within itself, and under the government of the corporation of

London. It was rebuilt under the public Acts of 7 Geo. 3, c. 87, and 18 Geo. 3, c. 48, which statutes are to be deemed part of this case. The statute of 18 Geo. 3, c. 64, is also to be deemed part of this case.

Under the provisions of the Public Act, 52 Geo. 3, c. 209, which is to be deemed part of this case, the new prison called the Debtors' Prison for London and Middlesex was erected. It is situate in Whitecross-street, in the city of London. The justices of Middlesex and the metropolitan police magistrates have always exercised the right of committing Middlesex prisoners to the Queen's gaol of Newgate, as the common gaol of the said county, and they are daily in the habit of committing them there under the 4 & 5 Will. 4, c. 36 (the Central Criminal Court Act). Since the passing of the said statute, 52 Geo. 3, c. 209, the justices of Middlesex have, from time to time, committed persons for nonpayment of rates to the said Debtors' Prison for London and Middlesex, in Whitecross-street, and the keeper thereof has received them into the said prison and detained them there, but of late years the said keeper has declined to receive them into the said prison, and still refuses so to do. There is no other prison, either in London or Middlesex, except the Queen's gaol of Newgate, and the Debtors' Prison for London and Middlesex, which can be deemed to be the common gaol for the county of Middlesex.

On the 24th May 1860, the Court of Quarter Session for the said county of Middlesex made an order, a copy of which order is annexed, marked A, and is to form part of this case), purporting to be in pursuance of an Act passed in the fourth year of King George the Fourth, intituled "An Act for consolidating and amending the laws relating to the building, repairing and regulating of certain gaols and houses of correction in England and Wales" (4 Geo. 4, c. 64), s. 4, whereby the said house of correction in Coldbath-fields was declared to be applicable only to male prisoners convicted of felony, and to male prisoners convicted of misdemeanor or other crimes or offences, and to all other male prisoners, being prisoners who may be by law committed to a house of correction, and being prisoners not included in the class of prisoners to which the said prison or gaol called the Middlesex House of Detention is by the said order declared to be applicable.

The said order was duly made, signed, published, advertised and notified, as required by the said last-mentioned Act, and a copy thereof was duly served upon the said Thomas Harpur Colvill, the keeper of the said house of correction at Coldbath-fields, and upon the keepers of the other prisons, shortly after the same was made and before it came into operation, and ever since the making of the said order, the said keeper, in professed obedience of the order, has refused, and still does refuse, to receive persons committed to his custody as keeper of the said house of correction under warrants of commitment for default of payment of rates by justices of the said county of Middlesex. This order remained in full force and effect from the 25th June 1860 until the end of Feb. 1864.

On the 14th Feb. 1864, at the General Quarter Sessions of the peace holden in and for the said county, another order (a copy of which is hereto annexed marked B), was duly made and signed, and was duly notified, published and advertised as required by the 4 Geo. 4, c. 64, s. 4, and a copy of such order was duly served upon the said Thomas Harper Colvill, the keeper of the said house of correction, and upon the keepers of the other prisons, shortly after the same was made and before it came into operation. This last-mentioned order is now said to have been since the end of Feb. 1864 in full force and effect.

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The said Thomas Harpur Colvill, in refusing to receive and detain the said Richard Spraggs under the warrant of the A. Ballantine, Esq., acted in proffered obedience to the said order of sessions of the 24th May 1860, which was then in full force and effect, so far as it in law may justify the said keeper of the said house of correction in his refusal as aforesaid. And it is contended on behalf of the deft. that the said Richard Spraggs ought to have been committed either to the said Queen's gaol of Newgate, or to the Debtors' Prison for London and Middlesex, or to the House of Detention, and not in any event to the said house of correction. It is also contended on behalf of the deft. that the justices had power to make the orders before mentioned, and that the said keeper was on the 24th Sept. 1863, and is now, justified in not receiving the said Richard Spraggs into the said house of correction.

It is contended on behalf of the Crown that the deft. was on the 24th Sept. 1863, and is now, bound to receive the said Richard Spraggs into the said house of correction, there to imprison him for the space of three calendar months, unless the said sums mentioned in the said warrant shall be sooner paid; and that the said justices had no power to make the said orders, or either of them, for the purpose of excluding rate defaulters from the house of correction. It is agreed that no technical objections shall be taken on either side; and it is admitted, for the purposes of this case, that the warrant of commitment is good in its form, and is to be treated as if it was addressed alone to the keeper of the house of correction for the county of Middlesex, situate in Coldbath-fields, Clerkenwell, in the county, and omitted all mention of the common gaol. It is also agreed that no objection is to be taken to the form of the two orders made by the justices in sessions, both parties hereto being desirous of having the real question in dispute determined by this honourable court.

The question for the opinion of the court is, whether under the circumstances mentioned in the case a *mandamus* ought to go to the keeper of the said house of correction at Coldbath-fields to compel him now to receive the said Richard Spraggs under the warrant of A. Ballantine, Esq., and to imprison him in the house of correction for the space of three months.

If this question is answered in the affirmative, the judgment to be given for the Crown with costs. If in the negative, then the judgment to be given for the deft.

But it is agreed between the parties, that if the court shall be of opinion that the keeper ought to have received Richard Spraggs into the house of correction at the time that he was taken there, then the deft. is to pay the prosecutor's costs, although the court should be of opinion *mandamus* ought not now to go by reason of the validity of the second order of sessions made subsequently to the execution of the warrant of commitment.

But if the court should be of opinion that the keeper was justified in refusing the said Richard Spraggs at the time when he was tendered to him, then the deft. is to be entitled to his costs.

By an order of sessions (referred to as A in the case) made pursuant to the foregoing 4th section on the 24th May, it was directed (*inter alia*),

That from and after the 25th June 1860 the prison or gaol called the Middlesex House of Detention at Clerkenwell, in the said county, shall be applicable to prisoners committed for want of sureties, and to prisoners committed on charge or suspicion of felony, and to prisoners committed for trial, and to prisoners committed, detained, or remanded for examination . . . and to all other prisoners not convicted of felony, misdemeanor, or other crime or offence, and being prisoners who may by law be committed to a prison or gaol, &c.

That from and after the said 25th June 1860 the Middlesex House of Correction at Westminster, in the said county, shall be applicable to female prisoners convicted of misdemeanor

or other crime or offence, and to all other female prisoners who may by law be committed to a house of correction, and being persons not included in the classes of prisoners to which the said gaol, called the Middlesex House of Detention, is above declared to be applicable; and that from and after the said 25th June 1860 the Middlesex House of Correction at Coldbath-fields, in the said county, shall be applicable to male prisoners convicted of felony, and to male prisoners convicted of misdemeanor, or other crime or offence, and to all other male prisoners being prisoners who may by law be committed to a house of correction, and being prisoners not included in the classes of prisoners to which the said prison or gaol, called the Middlesex House of Detention, is above declared to be applicable.

By a subsequent order of sessions (referred to as B in the case), made the 14th Jan. 1864, after reciting that the said house of detention was, by letters patent of James I., appointed to be a prison or gaol for the restraining, custody and safe keeping of all and all manner of offenders and malefactors (other than for capital crimes), to be sent or committed by any justice of the peace for the county of Middlesex; and also that there are two houses of correction for the said county, one situate in the city of Westminster, and the other situate at Coldbath-fields; and also that the gaol of Newgate is not only the common gaol both of and for the city of London, and of and for the county of Middlesex, for the confinement of felons and other offenders, but is also a prison for the confinement of other persons in the custody of the sheriffs of London and of the sheriff of Middlesex . . . it is ordered

That from and after the 29th Feb. 1864, the prison or gaol called the Middlesex House of Detention, at Clerkenwell, in the said county, shall be applicable to prisoners committed for want of sureties, and to prisoners committed on charge or suspicion of felony, and to prisoners committed on charge or suspicion of misdemeanor or other crime or offence, and to prisoners committed for trial, and to prisoners committed, detained, or remanded for examination, and to all other prisoners not convicted of felony, misdemeanor, or other crime or offence, who may not by law be committed to the common gaol for the said county, or to the Debtors' Prison for London and Middlesex, &c.

By the 4 Geo. 4, c. 64 (the General Gaol Act), it is, by sect. 2, enacted:

That from and after the commencement of this Act there shall be maintained at the expense of every county in England and Wales one common gaol, and at the expense of every county not divided into ridings or divisions, and of every riding or division of a county (having several and distinct commissions of the peace, or several and distinct rates in the nature of county rates, applicable by law to the maintenance of a prison for such division) in England and Wales, at least one house of correction, &c.

By sect. 4 it is enacted:

That at the Michaelmas general Quarter Sessions . . . the justices of the peace there assembled shall proceed in carrying this Act into effect, and such justices shall by orders to be made for that purpose ascertain and declare to what class or classes of prisoners every such gaol, house, or houses of correction, or any part or parts of any of them respectively shall be applicable; and every such order shall be signed by the chairman of such sessions, and shall be notified by the clerks of the peace to the several justices of the peace in every such county, riding, or division, district, city, town, or place respectively . . . and a copy thereof shall be served upon the keeper of every gaol or house of correction within every such county . . . and after the making of such order and service of such copy thereof upon such keeper as aforesaid, such class or classes of prisoners as shall be specified in such order, and no other, shall be committed to, or detained in, any such gaol, house, or houses of correction, or any part of them respectively, &c.

Keane, Q. C. (*H. T. Cole* with him) now appeared on behalf of the prosecution, and argued that, as the Legislature had by the 20 & 21 Vict. pointed out that such a committal as in the present case might be to the house of correction, no order of the justices made under the 4 Geo. 4, c. 64, could control it:

*Ex parte Evans*, 8 T. R. 172;

*Reg. v. Cope*, 6 A. & E. 226;

*Re Masters*, 83 L. J. 144, Q. B.; 9 L. T. Rep. N. S. 788.

Bovill, Q. C. (*Poland* with him) appeared on behalf of the deft., and contended that the order of the justices was valid, and applicable to the present

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case, and so the keeper of the house of correction was justified in refusing to receive the prisoner.

Keane was heard in reply.

BLACKBURN, J.—In this case, I am of opinion that our judgment must be for the deft. The enactment of the local Act, 20 & 21 Vict., is, that persons who have committed an offence not amounting to a crime, but being in the nature of nonpayment of rates, may be committed by a magistrate to the common gaol or house of correction, and under that the deft., the governor of one of the houses of correction in Middlesex, has been required under a warrant to receive a prisoner. Now it appears that, under the 4 Geo. 4, an order had been made by the justices at quarter sessions, by which they declare that the house of correction (the deft.'s house) should not be applicable to the reception of prisoners of that class, and it enumerates the class of prisoners to the reception of which it shall be applicable; and this is not one of them. The matter comes to this, whether or not the order, such as it was, is in law valid to excuse the deft. (the keeper of the house of correction) from receiving him under the warrant? That depends entirely upon the construction of the 4 Geo. 4, c. 64, as applicable to a subsequent enactment, by which such prisoners as in the present case are to be sent to the common gaol or house of correction. Now, by the 4th section of the 4 Geo. 4, we find that after the passing of that Act the justices at quarter sessions in every county in England shall, by orders to be made for that purpose, ascertain and declare to what class or classes of prisoners every such gaol, house, or houses of correction, or any parts of them, shall be applicable. Then the order is to be made, declaring to what class or classes of prisoners the gaol shall be applicable. The order is then to be signed by the magistrates; and after the making of such order and service of such copy thereof on such keeper as aforesaid, such class or classes of prisoners as shall be specified in such order, and no other, shall be committed to or detained in any such gaol, house or houses of correction, or any part of them respectively. Therefore it, in terms, simply comes to this, that the justices at quarter sessions may, from time to time, make an order declaring what particular house of correction or gaol is applicable to the same classes of prisoners, and those only, and none others, shall afterwards be admitted. There is then afterwards a provision rather clumsily worded, "and all persons not coming within the class or description of persons who may lawfully be committed to or detained in such such prison as shall be appointed by the justices for the confinement of one or more class or classes of prisoners may be removed to the gaol or house of correction of the county, riding, or division." I think the meaning of that plainly enough is, that those who are detained in a gaol which is not made applicable to the particular class of prisoners, are to be removed to the house of correction, and those who have been detained in the house of correction, though not applicable to such classes, shall be removed to the gaol; saying they may be removed to the house or houses—*reddendo singula singulis*, removed from the gaol to the house of correction, or from the house of correction to the gaol, as the case may be. That shows that the justices at quarter sessions have got the jurisdiction given to them to declare that a particular house of correction shall be applicable only to a particular class of prisoners. Now, this order in terms applies to all the houses of correction, and the effect of it is, that this particular class of prisoners who are to be committed for not paying rates are not to be taken into any house of

correction, though both houses of correction are made inapplicable to the class of prisoners. That leaves it that they must go to the gaol, and that may raise the inconvenience that arises from the justices having general powers given to them to take away the classes from the houses of correction not being applicable to any class of prisoners, and saying that that class of prisoners shall only go to the gaol. But if there be such an inconvenience the Legislature must correct it; because it seems to me that this section has, in ample terms, and without any qualification, given the power to the justices at quarter sessions from time to time to declare that the house of correction shall not be applicable to the reception of a particular class of prisoners. There is only one other thing to remark upon, and that is, that the Act of Parliament under which this particular prisoner was sent is subsequent in date to the passing of the 4 Geo. 4, and is general in its terms, saying he is to be committed to the common gaol or house of correction. But when we look to the previous enactment of the 4 Geo. 4, c. 64, construing it as I have just done, the only way to read the enactment is to say that they shall be sent to the common gaol or house of correction which from time to time, under the orders which the justices have by the general enactment power to make, shall be applicable to the reception of such a class of prisoners. Construing it in that way the whole case is intelligible and clear, and consequently this class of prisoners cannot be lawfully committed to the house of correction of which the deft. is governor, and that if any inconvenience arises from that it should be rectified by the Legislature. Unless further authority is to be found, our present view of the matter is, that the complainant is in the wrong.

SHEP, J.—I am of the same opinion. It appears to me that under the 4th section of the 4 Geo. 4, the magistrates in quarter sessions assembled are empowered by their order to declare to what classes of prisoners every gaol and every house of correction in the county shall be applicable. They are not bound to declare to what gaol and to what house of correction the prisoners are to be applicable, or what gaol is to be applicable, or what house of correction is to be applicable to the particular classes of prisoners: they may declare it is applicable only as to one of those descriptions of prisons, gaol, or house of correction. Now in this case they have declared that the house of correction for the county of Middlesex, that is a portion of the Coldbath-fields prison, shall be applicable to classes of prisoners which classes do not include poor-rate defaulters; that they have the power so do, and having exercised that power, I think the governor of Coldbath-fields prison is perfectly justified in not obeying the order. But we were pressed by Mr. Keane with the express enactment of the 20 & 21 Vict. which provides that a justice of the peace shall have power by his warrant to commit a person making default in payment of his rates to the common gaol or house of correction for the said county; and it has been contended that that Act of Parliament having passed, the 20 & 21 Vict., many years after the 4 Geo. 4, c. 64, the former Act cannot be taken in any way to control the discretion of the magistrate; that he has, and he has given to him under the 20 & 21 Vict., the power of selecting to which of the two goals the defaulter shall be committed. But it appears to me that this provision in the 20 & 21 Vict., giving magistrates power "to commit such prisoner to the common gaol or house of correction for the said county," may have this meaning under the earlier Act, the general Act, 4 Geo. 4, c. 64, it was competent to the magistrates of a

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county to make an order respecting the gaol of the county, and the house or houses of correction; but they were not bound to make it as to both. I think the fair meaning of those words would be, taken in conjunction with the express enactment of the 4 Geo. 4, c. 65, "or may commit such prisoner to the common goal or house of correction in the said county, or to one of them, under any regulations lawfully to be made, which at the time of issuing such warrant would be applicable to the reception of the person making such default." So that a justice knowing that the house of correction by the order of the justices in quarter sessions assembled had been declared not a proper prison for defaulters not paying their poor-rates, it would be in his power and discretion—a discretion which it seems to me he ought to have exercised—to commit the defaulter to the common goal as to which in this case no order had been made stating it should be applicable to any class of persons. It appears to me that the governor of Coldbath-fields prison was justified in not obeying the order of the magistrates at quarter sessions.

*Judgment for the deft.*

Attorneys for the deft., C. and J. Allen and Son.

[*Note*.—COCKBURN, C. J. and MELLOR, J. were absent through indisposition.]

*Saturday, May 6, 1866.*

**THE COMMITTEE OF VISITORS OF THE CAMBRIDGESHIRE, ISLE OF ELY AND BOROUGH OF CAMBRIDGE PAUPER LUNATIC ASYLUM (apps.) v. THE CHURCHWARDENS, &C., OF THE PARISH OF FULBOURNE, IN THE COUNTY OF CAMBRIDGE (resps.).**

*Poor-rate—Pauper lunatic asylum—Assessable upon the lower scale—16 & 17 Vict. c. 97, s. 35; 25 & 26 Vict. c. 111, ss. 6 & 11.*

*The Committee of Visitors of the Cambridgeshire, Isle of Ely and Borough of Cambridge Pauper Lunatic Asylum purchased thirty acres of land, which they cultivated, with the assistance of the pauper lunatics, as a garden; they also received into the asylum paupers from other unions and a few private patients, and a considerable profit was annually derived from the asylum.*

*Held, that such asylum came within the operation of sect. 36 of the 16 & 17 Vict. c. 97, and was not assessable to the poor-rate upon the higher scale.*

This was an appeal by the Committee of Visitors of the Cambridgeshire, Isle of Ely and Borough of Cambridge Pauper Lunatic Asylum, against a rate made for the relief of the poor of the parish of Fulbourne, in the county of Cambridge.

The appeal came on to be heard at the Midsummer Quarter Sessions for the said county in 1864, when the sessions allowed the appeal, subject to a special case to be stated by the parties.

The case stated that the Cambridgeshire, Isle of Ely and Borough of Cambridge Pauper Lunatic Asylum is situate in the resp. parish, and was completed in 1858 under the provisions of the 8 & 9 Vict. c. 126, and of the 16 & 17 Vict. c. 97; that a committee of justices was appointed; that the land built on and the land not built on, numbered 126, 127 and 128 in the rate, is now in the possession of the apps. It was purchased by them with the approval of the Secretary of State, under the powers of the Lunatic Asylums Act, and comprises an area of 59a. 8r. 1p.; at the time the land was purchased the same was assessed at the annual value of 88l. 10s.; that of the land in the possession and occupation of the apps. about five acres are covered by buildings; about twenty

acres are laid out as a garden; about four acres are used for roads and shrubberies, and the remainder, comprising about thirty acres, is under cultivation as a farm; the garden and farm are well stocked and planted, and are partly surrounded by a brick wall covered with fruit trees, and are part of the asylum; that the farm and garden are cultivated by the gardeners assisted by the patients; the result of the year ending 31st Dec. 1863 was a source of profit, as shown by the 6th annual report of the asylum, which forms part of the case; that, acting under the powers of the 42 & 43 sections of the 16 & 17 Vict. c. 97, the apps. on the 20th June 1862 entered into an agreement with the mayor, &c. of Ipswich for the reception into the said asylum of all the pauper lunatics of the said borough of Ipswich for the term of five years, and to keep and provide for the same in the same manner as the patients in the said asylum chargeable to the county of Cambridge, not exceeding the sum of 13s. per week each; that, acting under the same powers, the apps. have from time to time admitted other pauper lunatics than those belonging to the counties and boroughs above mentioned, and also lunatics not paupers; that the average weekly expenditure for each patient in the asylum during the year 1863 was 8s. 11½d.; that the excess of income over expenditure for the year ending 31st Dec. 1863 was 113l. 11s. 7d.; that prior to the year 1863 the apps. were assessed to the poor-rate at a gross estimated value of 90l., and at a rateable value of 88l. 10s.; that in the year 1863 the assessment committee for the Chesterton Union, in which union the resp. parish is situate, assessed the apps. at a gross estimated value of 1094l. 13s., and at a rateable value of 1008l. 5s.; that the resps. assessed the apps. in the rate appealed against in accordance with the said valuation list; that the apps. duly appealed against the rate on the following grounds: first, that the said visitors are overrated; secondly, that they are rated at a higher rate than they should be according to the provisions of the Lunatic Asylums Act; thirdly, a somewhat similar ground; fourthly, that the said visitors are in the said rate rated twice over in respect of the said buildings, lands and tenements by them occupied in the said parish, once as "lunatic asylum, farm buildings, house and gas-house," and a second time as "land;" that the apps. contend first, that in pursuance of the 35th section of the 16 & 17 Vict. c. 97, they ought not to be assessed to the poor-rate in respect of the lands and buildings occupied by them in the parish of the resps. at a higher value or more improved rent than the value or rent at which the same were assessed at the respective times at which such lands and buildings were purchased or acquired; and secondly, that if the said 35th section does not modify their liability, they ought not to be rated except in respect of the profits of lunatics not paupers; that the resps. contend that the apps. as occupiers are liable to be assessed to the poor-rate in respect of the said lands and buildings at a higher value and a more improved rent than the value or rent at which the same were assessed at the respective times at which such lands and buildings were purchased or acquired.

The question for the opinion of the court is, whether the apps. are right in one, or which, of the above contentions? After the decision of the court the case is to go back to the Court of Quarter Sessions, and that court is to settle the amount at which the apps. are rateable in accordance with the opinion of this court.

By sect. 35 of the 11 & 12 Vict. c. 97 (the Lunatic Asylum Acts 1853), it is enacted that

No lands or buildings already or to be hereafter purchased or acquired under the provisions of any former Act or this Act for the purposes of any asylum (with or without any

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additional building erected or to be erected thereon) shall while used for such purposes be assessed to any county, parochial, or other local rates at a higher value or more improved rent than the value or rent at which the same were assessed at the time of such purchase or acquisition.

By sect. 6 of the 25 & 26 Vict. c. 111 (the Lunacy Acts Amendment Act 1862), it is enacted that

Where the committee of visitors enter into any agreement for the reception into the county asylum of pauper lunatics belonging to a county or borough, which has not contributed to the erecting or providing such asylum, and think fit under the Lunacy Act, c. 97, s. 54, to fix a greater weekly sum than is charged by them in respect of lunatics sent from or settled in some place, parish, or borough, which has contributed to the building or providing such asylum, they may if they think fit pay over the excess created by the payment of such greater weekly sum to a building and repair fund to be applied by them to the altering, repairing, or improving such asylum, and shall annually submit to the general or quarter sessions a detailed statement of the manner in which such fund has been expended.

By sect. 11 it is enacted that

It shall be lawful for any committee of visitors, with the sanction of the Court of General or Quarter Sessions, to hire or take on lease from year to year, or for any term of years, at such rent, and upon such terms and under such covenants as they may think fit, any land or buildings, either for the employment or occupation of the patients in the asylum, or for the temporary accommodation of any pauper lunatics for whom accommodation in the asylum may be inadequate. The land and buildings so to be hired or taken shall, while used for the purposes of this section, be deemed part of the asylum, and all existing provisions as to the asylum, or part of the asylum, shall be applicable thereto accordingly.

Keane, Q. C., *D. Brown* and *Abdy* now appeared for the apps., and contended that this farm was taken and used for the purposes of the asylum, and so was not rateable upon the higher scale, being used for the purposes of the asylum, the object being the sanitary improvement of the patients:

*Gambier v. Lidford*, 3 Ell. & Bl. 346;

*R. v. De la Beech*, 24 L. J., M. C. 74,

and that the asylum was not assessable at the higher sum, merely because pauper lunatics from other unions and others were received at a profit.

*Lush, Q. C., Markby* and *Mills*, for the resps., contended that the farm was liable to be rated at the higher amount inasmuch as it was not essential for the asylum, though purchased for the purposes of the asylum: (*Congreve v. Upton*, 9 L. T. Rep. N. S. 684.) Also that inasmuch as a profit was made out of the lunatic paupers from other unions and others the asylum itself was rateable upon the higher amount.

COCKBURN, C. J.—The whole question is contained in this: whether this asylum is an asylum within the meaning of the 35th section of the 16 & 17 Vict. c. 97. [His Lordship here read the section.] Now, *primâ facie*, this asylum is within that section. Mr. Lush says it is taken out because, under the authority of another enactment, those who have the management receive foreign paupers and private patients. Now, I do not see that because the asylum is larger than is required for the proper lunatics and therefore other pauper lunatics are received, that it is less an asylum on that account under this section, and indeed there is a provision whereby any surplus arising from this cause is to be applied to other important purposes connected with the asylum. Then it is said that there are lands which are used undoubtedly for the asylum, but which must not be taken to have been acquired for the asylum. Now, if the whole question rested upon the 35th section, there might be a good deal in Mr. Lush's argument, as these lands were not obtained when the 16 & 17 Vict. passed; but then we must look at sect. 11 of the 25 & 26 Vict., which clearly applies to such a case. I assume (and of this there can be no doubt) that it is the practice to have land for the purposes of the asylum, and I

take it that is not so much for the purpose of making a profit out of it as to afford salutory employment to the unfortunate inmates; and as the object of these asylums is not merely to take care, but to effect a cure, of the patients, I think that the land in such a case must be considered as taken for the purposes of the asylum. Then, as to the profits. No doubt a large sum is realised, but then the committee have the power of applying it to a building fund. I think, therefore, the realising of such profits may well have been within the intentions of the Legislature. The whole question is really; whether this asylum is within the 35th section. I think that it is, and that the exemption should be allowed.

SHEE, J. (a) was of the same opinion.

*Judgment for the apps.*

Attorney for the apps., *G. S. Hall*, Cambridge.

Attorney for the resps., *Clement Francis*, Cambridge.

REG. v. THE INHABITANTS OF THE PARISH OF BUCKLAND.

*Highway—Indictment—Not guilty on the ground that road is not a highway—Order for costs.*

*Upon an indictment directed by parties to be preferred by virtue of sect. 19 of the 25 & 26 Vict. c. 61 (Highway Act) against a parish for the non-repair of a highway, the court before which it is tried has no jurisdiction to make an order upon the parish for the costs of the prosecution, if the debts are acquitted upon the ground of the road not being a highway.*

*In this particular the law is the same as it was under sect. 95 of the 5 & 6 Will. 4, c. 50.*

This was a rule calling upon the prosecutor to show cause why an order of sessions, made on or about the 18th Oct. 1864, whereby the inhabitants of the parish of Buckland were ordered to pay the sum of 72l. 18s. 11d., the amount of costs incurred by the prosecutor on the trial of certain misdemeanors whereof the said parish were indicted and acquitted, should not be quashed for the insufficiency thereof.

It appeared that an information had been laid before justices at petty sessions; that the said highway was out of repair, and, upon the hearing, the waywardens of the highway district, by the two waywardens of the parish, appeared and denied the liability of the said parish to repair it, whereupon the justices directed an indictment to be preferred at the ensuing quarter sessions; and at the trial the debts were found not guilty, on the ground that the road in question was not a highway. Thereupon the Court made an order for the costs of the prosecution, amounting to the said sum of 72l. 18s. 11d., to be paid by the said parish of Buckland.

By the 25 & 26 Vict. c. 61 (Highway Act), s. 18, provisions are enacted for summoning before justices the waywardens of a parish, the roads of which are out of repair.

Sect. 19 enacts:

When, on the hearing of any such summons . . . the liability to repair is denied by the waywarden on behalf of his parish, or by any party charged therewith, the justices shall direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpoenaed at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace . . . against the inhabitants of the parish or the party charged therewith, for suffering and permitting the said highway to be out of repair; and the costs of such prosecution shall be paid by such party to the proceedings as the court before whom the case is tried shall direct, and if directed to be paid by the parish, shall be deemed

(a) Mellor and Blackburn, JJ. were engaged in the Court for Crown Cases Reserved.

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to be expenses incurred by such parish in keeping its highways in repair, and shall be paid accordingly.

The foregoing section is in substance similar to sect. 95 (now repealed) of the 5 & 6 Will. 4, c. 50 (the General Highway Act), except that the provision in such section is, that

The costs of such prosecution shall be directed by the judge of assize before whom the said indictment is tried, or by the justices at such quarter sessions, to be paid out of the rate made and levied in pursuance of this Act in the parish in which such highway shall be situate.

Under the said 95th section it has been held in several cases that if, upon such an indictment, the defts. are acquitted upon the ground that the road is not a highway, there was no power to give the prosecutor his costs. See

*R. v. Chadwick*, 9 C. & P.;

*Reg. v. Heam*, 6 Q. B. 764;

*Ex parte Bartlett*, 80 L. J. 65, M. C.

Barrow and Biron now showed cause, and contended that the sessions were empowered under the new Act to give costs, for that the decisions under the old Act do not apply, inasmuch as the words in the recent statute are more extensive, the court having a general power to order the costs of the prosecution to be paid by such party to the proceedings as the court shall direct, no reference being made to the road being "a highway."

*R. v. Arnold*, 27 L. J. 92, M. C.;

*R. v. Justices of Surrey*, 21 L. J. 195, M. C.;

*R. v. Johnson*, 84 L. J. 85, M. C.; 11 L. T. Rep. N. S. 889.

*F. Russell* and *F. White*, in support of the rule, argued that the new Act effected no alteration in this respect, and that if the road were not proved to be a highway, the court had no power to give the prosecutor his costs as against the parish.

COCKBURN, C. J.—I think the recent statute leaves the matter just where it was before as to this. It is perhaps to be lamented that the Legislature had not given greater discretion to the court; but, as it has not done so, we are bound by the former decisions, which hold that unless the road is a highway there is no authority to give the prosecutor his costs.

*Rule absolute.*

Attorney for the prosecutor, *Thos. Fox*, Dover.

Attorneys for the defts., *Surragé* and *Emmerson*, Sandwich.

Monday, May 8, 1865.

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*Local Government Act (21 & 22 Vict. c. 98)—Provisional order of Secretary of State—Cannot be removed by certiorari.*

*By the Local Government Act 1858 (21 & 22 Vict. c. 98), which incorporates the Lands Clauses Consolidation Act 1845, powers are given whereby local boards of health may compulsorily purchase lands for certain purposes; but such powers can only be acquired by certain notices being given, and obtaining a provisional order from the Secretary of State, which order, however, is not to be of any validity unless confirmed by an Act of Parliament, which Act parties aggrieved are to be at liberty to petition against and oppose:*

*Held, that such provisional order of the Secretary of State is not one that can be removed into this court for the purpose of being quashed.*

This was a rule calling upon the Hastings Local Board of Health to show cause why a writ of certiorari should not issue to remove into this court the

provisional order of the Secretary of State, and all proceedings connected therewith, empowering the said local board of health to put in force the powers of the Lands Clauses Consolidation Act 1845, with respect to the purchase of land otherwise than by agreement, as to certain lands of Charles Henry Frewen, as being made without jurisdiction, &c.

The borough of Hastings was under the operation of the Public Health Act 1848 and the Local Government Act 1858, which is to be deemed part of the former Act. By sect. 75 of the latter Act, the Lands Clauses Consolidation Act 1845 is incorporated with the same. Under these Acts powers are given to purchase lands for the purpose of widening, opening, enlarging, or otherwise improving any street.

The 75th section of the Local Government Act (21 & 22 Vict. c. 98) enacts:

That the said local board, before putting in force any of the powers of the said Lands Clauses Consolidation Act with respect to the purchase and taking of land otherwise than by agreement, shall publish and serve certain notices, &c., and upon compliance with these regulations they may present a petition under their seal to one of Her Majesty's principal Secretaries of State, and the petition is to state the land intended to be taken with other particulars; and upon receipt of such petition and due proof of the compliance with the previous requisites, the Secretary of State is to take such petition into consideration, and either dismiss the same or direct an inquiry in the district in which the land is situate, or otherwise inquire as to the propriety of assenting to the prayer of such petition; that after the completion of the inquiry the Secretary of State may, by provisional order, empower the local board to put in force, with reference to the land referred to in such order, the powers of the said Lands Clauses Consolidation Act with respect to the purchase and taking of land otherwise than by agreement, &c., but "no provisional order so made shall be of any validity unless the same has been confirmed by Act of Parliament, and it shall be lawful for the Secretary of State as soon as conveniently may be to obtain such confirmation, and the Act confirming such order shall be deemed to be a public general Act of Parliament."

By sect. 77 it is enacted (*inter alia*):

In case any petition shall be presented to either House of Parliament against any provisional order framed in pursuance of this Act in the progress through Parliament of the Bill confirming the same, the Bill, so far as it relates to the order so petitioned against, may be referred to a select committee, and the petitioner shall be allowed to appear and oppose as in the case of private Bills."

The local board of health of Hastings requiring certain land of Mr. Charles H. Frewen, all the preliminaries were complied with, and the Secretary of State sent an officer to the district to make the proper inquiries, and upon his report he made a provisional order; but no Act of Parliament has as yet been obtained.

The rule was moved on the grounds, first, that the order was made for purposes not within the Act; secondly, that it was made with respect to land not properly described in the notices.

*Lush*, Q. C., *Brown*, Q. C. and *Hance* now showed cause and contended that, as the provisional order has no effect until confirmed by Act of Parliament, this court has no power to quash it, and that the remedy of the applicant, if he feels himself aggrieved by it, is to petition Parliament, when he will be heard against the Act of Parliament by which the order must be confirmed. They were stopped by the Court, who called upon

*Field*, Q. C. and *Wills*, in support of the rule, who contended that, as the provisional order is the foundation of the Act of Parliament, they were justified in coming to the court and seeking to have it quashed.

COCKBURN, C. J.—I am clearly of opinion that we have no authority to interfere with this provisional order. The object of the inquiry by the Secretary of State, whereon he makes his order, is to supersede certain inquiries by the Parliament itself, which would considerably enhance the ex-

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pense; in fact, to substitute an inquiry by the Secretary of State, and so assist the Legislature in deciding whether or not the measure is a proper one to pass into a law, and until the Act of Parliament is obtained the order itself has no validity; and were we to question this order we should be usurping functions which do not belong to us, and be stepping in to stop the action of Parliament. This is beyond our sphere of action.

BLACKBURN and MELLOR, JJ. CONCURRED.

Plt.'s attorney, *Ellman*, Battle.

Defts.' attorney, *Grouse*, Hastings.

*Rule discharged.*

Tuesday, May 9, 1863.

REG. v. JUSTICES OF WEST RIDING OF YORKSHIRE.

*Appeal—Reference by order of sessions—Order silent as to costs—Jurisdiction of subsequent sessions—12 & 13 Vict. c. 45, s. 13.*

*An appeal against an assessment to the poor-rate was ordered by the quarter sessions to be respited, to enable the parties to state a case for the opinion of the Q. B., with the view of ascertaining the principle of the assessment, and when so ascertained "the appeal shall be referred to an arbitrator, who is to certify whether the apps. have been assessed at too high a sum, and to what extent." The order was silent as to costs. The case was stated, and the Q. B. laid down the principle of assessment, and the arbitrator certified that the assessment was not too high:*

*Held, that a subsequent Court of Quarter Sessions had no jurisdiction to make any order as to costs, and that the order of reference being silent as to costs, each party had to bear his own costs.*

*Rule nisi for a mandamus to the justices for the West Riding of the county of York to compel them "to enter or cause to be entered continuances from session to session to the next general quarter sessions for the said riding, upon the appeal of the Sheffield United Gas Company against a rate or assessment made by the overseers of the township of Sheffield, in the said riding, on the 11th Nov. 1859, and at such next general quarter sessions to proceed to consider, award and order such costs as by the said justices in their discretion shall be thought meet, reasonable and just to be paid by the apps. to the resps., in pursuance of the several statutes in that case," &c.*

On the 11th Nov. 1859 the overseers of Sheffield made an assessment on the gas company to the poor-rate. The company appealed, and the appeal came on at the Easter General Quarter Sessions holden at Pontefract in the year 1860, when the Court of Quarter Sessions ordered the appeal to be respited until the then next general quarter sessions to be holden by adjournment at Rotherham, to enable the counsel on the appeal to agree upon a case for the opinion of the Court of Q. B., with a view of ascertaining the principle upon which the company ought to be rated. And further, that if the principle can be so ascertained by reference to the Court of Q. B., the appeal shall be referred to an arbitrator, who is to certify whether the apps. have been assessed at too high a sum, and to what extent.

A case was agreed upon for the Court of Q. B., which gave its decision in May 1863 (see 32 L. J. 169, M. C.), and the case then went to the arbitrator, who on the 29th April 1864 gave his certificate that the gas company had not been assessed at too high a sum. In the interval the appeal was respited from session to session. At the Midsummer Quarter Sessions 1864, at Rotherham, after the pub-

lication of the award, the Court, after hearing counsel on both sides, confirmed the rate with costs, the chairman saying, "We give the resps. all the costs which it is in the power of the court to give." The clerk of the peace on the taxation refused to allow any costs of the reference or award, saying the sessions had no power to give any costs except the costs actually incurred at the sessions.

At the Michaelmas Quarter Sessions 1864, at Doncaster, the resps. applied to the court to direct the clerk of the peace to tax their costs of the reference and award. In reply to the chairman the clerk of the peace informed the court that the practice had been to allow such costs, but that he had been advised that the practice was illegal, and for that reason he had refused to tax them. The Court of Quarter Sessions then declined to interfere, on the ground that they had no power to do so.

*Overend, Q.C. and Barker* showed cause against the rule.—The case turns on the construction of the 12 & 13 Vict. c. 45, s. 13, which empowers a Court of Quarter Sessions before which any appeal shall be brought to order, with the consent of the parties or their attorneys, that the matter or matters of such appeal be referred to arbitration to such person or persons, and in such manner and on such terms as the said court shall think reasonable and proper; and such order may be made a rule of the Court of Q. B. on the application of either party, and the award of the arbitrator or arbitrators, or umpire of the umpire, may, on motion by either party at the sessions next or next but one after such award or umpirage shall have been finally made and published, or after the decision of the Court of Q. B. on any motion for setting aside the same, be entered as the judgment of the Court of Quarter Sessions in the appeal, and shall be as binding and effectual to all intents as if given by the said court." By that section the decision of the arbitrator is to be entered up as the judgment of the Court of Quarter Sessions. The arbitrator had no power to give costs, as the order of sessions was silent as to costs. The court that made the order might, with the consent of the parties, have provided for the costs; but, not having done so, a subsequent Court of Quarter Sessions has no power to do so:

*Reg. v. Staffordshire*, 7 E. & B. 985; 26 L. J. 179, M. C.

*Mellish, Q.C. and Maule* in support.—There is a distinction between this case and *Reg. v. Staffordshire*. [COCKBURN, C.J.—Your difficulty is not on that case, but on the words of sect. 13.] By the course pursued in this case the whole matter was left open; the rate was confirmed subject to the case. [COCKBURN, C.J.—The sessions could only refer the appeal under sect. 13. BLACKBURN, J.—And the award is to be entered as the judgment of the Court of Quarter Sessions.] Although that is so, the sessions, by sect. 5 of the Act, have a general power to give costs in all cases of appeal. [BLACKBURN, J.—This was a reference of the entire appeal as to the facts as well as the law, and the sessions did not intend to reserve any jurisdiction or discretion to themselves in the matter.] It is submitted that the court kept back their authority as to the costs to be exercised when the case came back to them.

COCKBURN, C.J.—I am of opinion that this rule should be discharged. It appears to me that the 13th section which authorises the Court of Quarter Sessions to refer the subject-matter of the appeal to arbitration, when looked at carefully, amounts to this, that the Court of Quarter Sessions, whose duty and province it is to determine the appeal, may, with the consent of the parties, substitute, when convenience requires it, an arbitrator or umpire for itself, and at the time they do that they may impose what



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terms they think fit, and that too as to costs. I do not agree that the sessions may respite the appeal from one sessions to another in the interval pending the reference, and that when the arbitrator has published his award the court may take upon themselves to reconsider what he has decided, and to affirm or disallow his award as they please. There is no language in the section to warrant that view. The award being made, it is provided that at the next quarter sessions, or the next but one, not that the award is to be confirmed or disallowed as the court please, but that it is to be entered as the judgment of the court. That being so, we must look to the order of reference to see if there is any provision as to costs, and none having been made it follows that each party must bear his own costs. The sessions are *functi officio*, and have no power to award costs now.

BLACKBURN, J.—I am of the same opinion. The true construction of sect. 13 is, that when the Court of Quarter Session do with the consent of the parties (and they cannot do it otherwise) order the matter of an appeal to be referred, they may do so on such terms as may be then agreed upon. Those terms are then finally settled once for all. What the subsequent quarter sessions have to do is merely a ministerial duty, viz., to enter up the award of the arbitrator as the judgment of the court. It was not intended to reserve any future jurisdiction to the court in the matter. The order of the court as to the reference being silent as to costs, each party must bear his own costs.

MELLOR, J.—I am of the same opinion. This was a new power given by the Legislature to a Court of Quarter Sessions, with the consent of the parties. It was competent to the parties to agree to or to refuse to agree to any particular form of order or reference. There were special terms in this order which they have made with the consent of the parties. The order being silent as to costs, this court is now asked to decide that a subsequent Court of Quarter Sessions has the power to say what costs should be given in the appeal. I think that a subsequent quarter sessions has no such jurisdiction.

*Rule discharged.*

### COURT OF COMMON PLEAS.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

Wednesday, May 3, 1865.

DAY (app.) v. SIMPSON (resp.)

*Pepper's Ghost*—"Entertainment of the stage"—  
Licences from Lord Chamberlain, &c.—6 & 7 Vict.  
c. 68; ss. 2, 11, 16, 23.

*The app., who was a licensed victualler, and the occupier of a concert-hall, licensed under the Birmingham Improvement Act 1861, as a place for public dancing, music, and other public entertainments of the like kind, but which hall was not a patent theatre and had no licence from the Lord Chamberlain under 6 & 7 Vict. c. 68, caused the following performance to be represented in the hall:*

*On the rising of the curtain there was a representation of a storm at sea and of a man swimming. This was not a living person, but what in theatrical phraseology is called a "double." When the storm subsided a drop-scene was disclosed with a clear lake in the background, and a character then appeared upon the stage in the costume of a Greek prince, who spoke some lines relative to the shipwreck from which he had just escaped. He was then joined by another person, and a conversation was held between them; these two were the only persons who during the course of the evening*

*appeared bodily on the stage. They were twice on the stage together, and the dialogue on each occasion was short and comparatively unimportant; there were several other characters, and the dialogue between them was a composed set drama with a regular plot. The peculiarity of the representation was that, with the exception of the two persons above mentioned (the dialogue between whom was entirely subordinate to the plot of the piece), none of the characters were at any time bodily upon the stage. They had their places in a chamber below it, where they acted their parts and addressed each other in the words allotted to them, but by a combination of lenses and mirrors their figures were reflected on a mirror at the back of the stage so ingeniously and effectually that to the spectators the appearance was that of persons actually on the stage. There was also dancing and singing, but no change of dresses or scenery:*

*Held, that this was "an entertainment of the stage," within the meaning of the 6 & 7 Vict. c. 68, s. 23, and that the app. was properly convicted for causing the same to be represented in his concert-hall without having procured a licence according to the provisions of that Act.*

This was a case stated by the stipendiary magistrate for the borough of Birmingham.

By statute 6 & 7 Vict. c. 68, s. 2, it is enacted that

It shall not be lawful for any person to have or keep any house or other place of public resort for the public performance of stage plays, without authority by virtue of letters patent from Her Majesty, her heirs, &c., or without licence from the Lord Chamberlain of Her Majesty's household for the time being, or from the justices of the peace as hereinafter provided, and every person who shall offend against this enactment shall be liable to forfeit such sum as shall be awarded by the court in which, or the justices by whom, he shall be convicted, not exceeding 20*l.* for every day on which such house or place shall have been kept open by him for the purposes aforesaid without legal authority.

By sect. 11 of the same statute:

Every person who, for hire, shall act or present, or cause, permit, or suffer to be acted or presented, any part in any stage play in any place not being a patent theatre, or duly licensed as a theatre, shall forfeit such sum as shall be awarded by the court in which, or the justices by whom, he shall be convicted, not exceeding 10*l.* for every day on which he shall so offend.

By sect. 16:

In every case in which any money or other reward shall be taken or charged, directly or indirectly, or in which the purchase of any article is made a condition for the admission of any person into any theatre to see any stage play, and also in every case in which any stage play shall be acted or presented in any house, room, or place, in which distilled or fermented excisable liquor shall be sold, every actor shall be deemed to be acting for hire.

And, lastly, by sect. 23:

In this Act the word "stage play" shall be taken to include any tragedy, comedy, farce, opera, burletta, interlude, melodrama, pantomime, or other entertainment of the stage, or any part thereof.

On the 15th Dec. 1864, James Day (herein called the app.), licensed victualler, appeared before me, the undersigned, stipendiary magistrate for the borough of Birmingham, on two informations at the instance of Mercer Hampson Simpson, jun. (herein called the resp.), being the proprietor of a licensed theatre in the same borough, framed respectively upon the 2nd and 11th sections of the above statute, the first charging that on the 24th Nov. last he did unlawfully keep a certain house and place of public resort in the said borough, for the public performance of stage plays, without authority in that behalf by virtue of any letters patent, or a licence from Her Majesty's justices of the peace, &c., and did unlawfully continue keeping open the same for four successive days thereafter, contrary to the Act of 6 & 7 Vict. c. 68, which hath, for the said offence, imposed a forfeiture of any sum not exceeding 20*l.* for each of the said days on



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which the said house and place was so kept open for the purpose aforesaid.

The second information charged that the said app. did unlawfully, for hire, cause and permit, and suffered to be acted and presented, certain parts in certain stage plays called, &c. &c., in a certain place, to wit, a house, the said place not being a patent theatre, or duly licensed as a theatre, and continue the same for four successive days, contrary to the Act, &c., which hath for the offence aforesaid imposed a forfeiture of any sum not exceeding 10*l.* for each of the said days.

It was proved that the app. is the occupier of a concert-hall, licensed under the 73rd section of the Birmingham Improvement Act 1861, as a place kept and used for public dancing, music and other public entertainment of the like kind, and that he was a licensed victualler. That the concert-hall consisted of a large room, the floor being covered with seats and small tables for refreshment, consisting, among other things, of distilled and fermented excisable liquors.

That there was a gallery round three sides of the hall, fitted up with similar seats and tables. That the fourth side or further end of the hall presented the appearance of a regular theatre, with a stage raised above the floor of the hall, a proscenium, a curtain, a float for foot-lights, wings and drop scene, and that every person entering the hall paid sixpence, in exchange for which he received a cheque entitling him to refreshments of the value of threepence, and a seat in any part of the hall during the whole evening.

It was proved also that when the public were admitted the curtain of the stage was down, but that it was subsequently raised, and the following performance then took place on and about the stage:

On the rising of the curtain there was a representation of a storm at sea, and of a man swimming. This was not a living person, but in theatrical phraseology, a double of the prince hereinafter named.

When the storm subsided a drop scene was disclosed, with a clear lake in the back ground.

A character then appeared upon the stage in the costume of a Greek prince, who spoke some lines relative to the shipwreck from which he had just escaped. He was then joined by another person dressed as an attendant, and a conversation was held between them; the latter was described by the witnesses as a "low comedian." These two were the only persons who, during the course of the evening, appeared bodily on the stage. They were twice on the stage together, and the dialogue between them on each occasion was short and comparatively unimportant.

There were several other characters, a king, a princess, &c., and a chorus, and the dialogue between them was a composed set drama, with a regular plot of love, courtship and matrimony. The peculiarity of the representation, and that which, according to the contention of the app., distinguished it from an ordinary "stage play" or "entertainment of the stage" was the following:

With the exception of the two persons above mentioned (the dialogue between whom was wholly subordinate to the plot of the piece) none of the characters were at any time bodily upon the stage. They had their places in a chamber below it, where they acted their parts and addressed each other in the words allotted to them; but by a complication or combination of lenses and mirrors their figures were reflected on a mirror at the back of the stage so ingeniously and effectually, that to the spectators the appearance was that of persons actually upon the stage. There was a good deal of dancing, and music and singing, and there was no change of dress or scenery during the performance.

It was admitted that the place was not a patent theatre, and that the app. had no licence from the Lord Chamberlain or the justices, except as before mentioned.

It was contended on his behalf, that he was not liable to be convicted of an offence under the above-mentioned section of 6 & 7 Vict. c. 68, because

Firstly, he was licensed under sect. 73 of the Birmingham Improvement Act 1861, to keep a room or place for public dancing, music, and other public entertainments of the like kind. That the performance above set forth came under the description of a public entertainment of the like kind with those specified, and that the latter statute being of a later date, the 6 & 7 Vict. must be taken *pro tanto* to operate as an exclusion of the borough of Birmingham from the provisions of that statute.

I was of opinion that the entertainment was essentially different from those to which his licence extended, and that the defence on that ground was without weight.

It was then contended, secondly, that it was not an "entertainment of the stage," inasmuch as only one of the characters who sustained the plot of the piece was bodily upon the stage, the second being an unimportant subordinate, and that the others were merely represented upon a mirror at the back of the stage by optical illusion.

I was of opinion that, in order to constitute an "entertainment of the stage" (it having been proved there was a regular plot and dialogue), it was not at all essential that all the characters should be bodily upon the stage, and I considered the offence proved and convicted the app. in a nominal penalty upon each information.

(Signed) &c.

*Hayes, Serjt.* for the app.—I contend that the magistrate was wrong. The app. was properly licensed under sect. 73 of the Birmingham Improvement Act 1861, to keep this hall for public dancing, music and other public entertainments, and I submit that this is a public entertainment within the meaning of that Act. There are only two reported cases on the point. In *Gallini v. Laborie*, 5 T. R. 242, Lord Kenyon held that dancing was "an entertainment of the stage," but he afterwards revoked that opinion in *R. v. Handy*, 6 T. R. 286, and held that "tumbling" was not "an entertainment of the stage." Now, I say, according to Lord Kenyon, a new exhibition like this should not be drawn within the meaning of the statute, which is a penal one, as it is an exhibition of an entirely novel character, and such a one as was never contemplated when the Act passed. That Act contemplated living actors on the stage; here the actors were not on the stage, and those that were at the beginning were only subordinate to the plot.

*Field, Q.C. contra.*—I submit that the conviction should be affirmed. I cannot say what this performance is; if it is neither comedy, tragedy, or opera, it is certainly an "interlude." Two persons actually come on to the stage, and they assist by words and actions in the representation. The words in the statute are not only tragedy, comedy, &c., but "any part thereof;" and here you have at all events a part of the entertainment carried on by persons on the stage who tell the story. There is a regular plot from beginning to end, and every accessory of the stage. He cited

*Lee v. Simpson*, 3 C. B. 871;  
*Russell v. Smith*, 12 Q. B. 217; and  
3 & 4 Will. 4, c. 15 (Dramatic Copyright Act).

*ERLE, C.J.*—I am of opinion that the conviction should be affirmed. I am not anxious to prevent the use of this extremely ingenious invention, or to deprive persons of the entertainment derived

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therefrom; but the law says that no person shall for hire or reward act, represent, or cause to be acted, represented, or performed, any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part or parts thereof, without licence from the Lord Chamberlain. Now I think this entertainment given by the app. comes within the statute. It is an entertainment having all the accessories of the stage, curtains and lights, and there are two actors on the stage at the beginning; there are the words of a regular drama pronounced by living actors, and the images of these living actors are seen by the audience; the only difference between this and an ordinary stage entertainment is, that with the exception of the persons mentioned the dialogue between whom was subordinate to the plot, none of the characters were at any time bodily on the stage, but by a combination of lenses and mirrors their figures were reflected on a mirror in such a way as to make them appear as if they were actually on the stage.

BYLES, J.—I am of the same opinion. Nothing can be wider than the words of the Act. Sect. 23 says the "stage play shall be taken to include every tragedy, comedy, farce, opera, burletta, interlude, melodrama, pantomime, or other entertainment of the stage or any part thereof;" and these last words are the most comprehensive of all. Now it seems to me that in this case there have been at least three breaches of the statute. First, there was the double of the man who was swimming and who escaped from the storm, and who is joined on the stage by another, when a dialogue ensues; secondly, the introduction of a dialogue with several persons who are not seen, accompanied by the accessories of the stage; thirdly, the projection of the different persons on the mirror. Now, I by no means say that the mere projection of images on a mirror without a dialogue is within the meaning of the Act, but that question is not before us. In this case I cannot say that I think the justices were wrong.

M. SMITH, J.—I am of the same opinion. Here there were live people, a dialogue, and other accessories of the stage, and the only thing suggested to take the case out of the statute is, that the persons were reflected in mirrors instead of being on the stage, and, therefore, that it was not an "entertainment of the stage." I am, however, of opinion that it comes within the statute and that the justices were right.

*Appeal dismissed.*

Attorney for the app., J. E. B. Stevenson.

Attorneys for resp., Robinson and Preston.

Friday, May 5, 1865.

LEE (app.) v. RILEY (resp.)

*Animals—Liability of owner for injury by a horse—Negligence.*

*If a horse, through the neglect of the owner in not keeping his fences properly repaired, strays out of the field in which it is feeding into the field of an adjoining occupier, and there gets amongst his horses and kicks one in such a way as to cause its death, such owner is liable for the injury which his horse has done, and it is not a too remote consequence of the owner's negligence; neither is it incumbent on the plt. to show that the deft. knew his horse to be vicious.*

This was a County Court appeal. A plaint was entered in the said County Court by the plt. on the 10th Nov. 1864, whereby he sought to recover the sum of 22*l*., and the following is a copy of the par-

ticulars attached to the summons served upon the deft.:

Nov. 8, 1864.  
1864. Charles Lee to Samuel Riley, one  
Oct. 26. black horse ... .. £22 0 0

The action was brought to recover the sum of 22*l*., the value of a horse belonging to the plt., which had its leg broken in the night time. The horse had been left safe and sound in the plt.'s field on the evening of the 26th Oct. last, and was found the following morning standing there on three legs, the fourth having been broken, as was alleged, by the kick of a horse of the deft.

The plaint was tried before a jury, and it appeared in evidence that plt. and deft. occupied two adjoining farms, and that an occupation-road extended from a highway through the deft.'s farm, of which it formed part, into the plt.'s farm, where it formed part of plt.'s farm, and it terminated some two or three fields' length within the farm. That there was a gate across the occupation-road at the point where the two farms adjoined, which belonged to the deft. to repair, and had been erected by the occupier of his farm immediately preceding him some seven or eight years ago; and that being broken in two pieces, plt. had given notice to deft. to repair it about three weeks before the occurrence which gave rise to the action. It appeared further that the deft.'s horses, and particularly a large grey mare of his, had on several occasions passed through this gate along the plt.'s portion of the occupation-road, and thence through a small gateway opening from the occupation-road into a meadow field of the plt. called the Rye Bank, and thence through a hedge into another field of the plt., called the Pasture, being the field in which the plt.'s horse had been left sound and well on the evening of the day in question. That the last-mentioned gateway was a small one, for plt.'s cows to enter the close from the occupation-road, and that there was a gate raised against the opening and stones placed against it on the field side to support it, but that if a horse pushed his breast against it the gate would fall down.

It further appeared that on the night before the horse was found lamed, this gate had been fastened by one of the plt.'s sons, but it had been thrown down and recent footmarks of a horse were observed on the morning of the 26th Oct., on each side of it, and traced into the field where the plt.'s horse was found standing on three legs strong marks of horses "scuffling" where observed, and patches of black and of grey hair were found at the same spot corresponding with the colour of the plt.'s horse, which was black, and that of the deft.'s grey mare on the morning of the 26th Oct. The mare was found to be damaged so much that she was obliged to be killed.

The deft.'s mare was a large powerful animal, seventeen and a-half hands high, and its shoes had attached to them large strong "caulkings," formed by the shoes being turned down at the heels. The plt.'s mare was about fifteen hands high. There was no evidence of the deft.'s mare being a vicious one. No evidence was given on part of the deft., except as to the value of the plt.'s mare.

A letter was put in, dated the 28th Oct. 1864, from the plt.'s attorney to the deft., charging the death of his horse to have been occasioned by a kick from the deft.'s mare, and claiming compensation, to which no answer had been returned. On the close of the plt.'s case the attorney for the deft. submitted that there was no evidence to go before the jury, and directed the judge's attention to the case of *Cox v. Burbridge*, 32 L. J. 88, C.P. The judge decided there was evidence for the jury, and that it was not necessary for the plt. to prove that the grey mare of the deft. was a vicious animal;

that there was a distinction between the two cases; that it might not be in the ordinary course of nature for a horse to kick a child, but that it was so for one horse to kick another, particularly a strange one when they met in a field.

The judge in summing up to the jury told them that the case depended mainly on circumstantial evidence. That there was no direct evidence bringing the plt.'s horse in contact with the deft.'s, and showing that the deft.'s mare caused the injury, but that he thought there was sufficient evidence for them to take the case into consideration, and in the exercise of their judgment to consider whether sufficient ground of complaint had been made out by the plt. That the plt. was bound to furnish them with reasonable evidence from which they might presume that the deft.'s mare was the cause of the accident. That was one question, but in order to make the deft. liable supposing that his horse had done the mischief, it must be shown that the deft.'s mare was wrongfully in the plt.'s land. That if the deft. was bound to repair the gate it was also his duty to keep his cattle from trespassing on other people's land.

The main point for consideration was, did the jury think the circumstances given in evidence were sufficient to satisfy them that the deft.'s mare caused the death of plt.'s horse? if so, then whether the deft. was liable.

The question had arisen whether the deft. was liable, supposing the plt. did not give evidence of notice to deft. that his mare was a violent animal. The Judge said, that he was of opinion that had nothing to do with the present question. He added, that if deft.'s horse got into the plt.'s field, whether plt.'s horse began to kick first or not did not affect the question, if the deft.'s mare was a trespasser. It was for the jury to consider, first of all, whether the death of the plt.'s mare was caused by the deft.'s mare; secondly, whether deft.'s mare was trespassing, and then the amount of damages. The jury found a verdict for the plt.; damages 14*l*.

The following were the grounds of appeal:

1. That there was no evidence to support the claim of the plt.
2. That the judge of the said court was wrong when, at the end of the case for the plt., he determined that it was not necessary for the plt. to prove that the grey mare of the deft. was a vicious animal.
3. That the judge of the said court was wrong when, at the end of the case of the plt., he determined that there was evidence for the jury in support of the case of the plt., if the plt. proved that the grey mare of the deft. had committed a trespass by entering the fields of the plt., and had, whilst committing a trespass, kicked the mare of the plt.
4. That the judge of the said court misdirected the jury at the trial, when he said that, whether the deft.'s mare was a violent animal or not, he was of opinion that had nothing to do with the question; nor, if the deft.'s horse got into plt.'s fields, whether plt.'s horse began to kick first or not.

*Mauls* for the app.—Assuming that the app.'s grey mare did trespass into the resp.'s field, and there kicked his mare, yet the app. is not liable, unless he knew his mare to be vicious. In the case of *Cox v. Burbridge*, 32 L. J. 89, C. P., where a horse strayed on to a highway and kicked a child, the owner was held not to be liable, as it was not shown that the owner knew his horse to be of a vicious temper: and in that case Williams, J. says: "If a man's cattle or poultry stray on to his neighbour's land, and do such damage there as they may be from their nature expected to do, the owner is liable for it. The question therefore is, whether the injury done to this child comes within this rule.

I think not. I think that we must assume that the injury done to this child arose from the horse viciously kicking him in a way in which he would not do if he had been a horse of ordinary temper. That being so, the plt. cannot maintain this action, because it is not shown that he had any previous knowledge that the horse was liable to this infirmity of temper." And Keating, J. says in the same case: "It must be taken that the act was not attributable to any direct act of the plt., and the act was not one which an ordinary horse, not of a peculiarly vicious temper, would commit. In order therefore to sustain the action, it must be shown that the deft. knew the horse had committed or was likely to commit such an act." Here also there is no proof that the app. knew that the mare was vicious and in the habit of kicking other horses; consequently, on the authority of that case, I contend he is not liable.

*Horace Smith*, for the resp., contended that it was not incumbent on the part of the resp. to prove that the app. knew his mare to be vicious; that owing to the app. not keeping up his fences properly the mare got into the resp.'s field and there kicked the mare, and that it was in the nature of horses when they accidentally got amongst strange horses in a field to kick at each other. The cause of the damage was the fences not being kept in proper order, and such cause was not too remote. He cited

*Starr v. Rookeby*, 1 Sal. 338;  
*Powell v. Salisbury*, 2 Y. & J. 891;  
*Dooth v. Wilson*, 1 B. & Ald. 59;  
*Anon.* 1 Vent. 264.

*EALE, C. J.*—In this case I am of opinion that the judgment should be for the resp. The action is in substance either trespass for entering the plt.'s close and doing damage by killing his horse, or is in case for letting down the fences, by reason of which the deft.'s horse got out of his field into the plt.'s and killed the horse. If pleadings had been adopted, *extenso* one of these forms would have been adopted, but the action being brought in the County Court, the plaintiff says, "one bay horse, 22*l*;" still, the evidence shows what the plt. meant, and what the County Court judge had in his mind when he summed up as he did. The evidence was that the grey mare got through the gate and passed into the plt.'s close where his black mare was, and that they must have had a contest, and that in that contest the deft.'s mare kicked the plt.'s. Now, it was contended at the trial, on behalf of the deft., that he was not liable unless the plt. proved that the deft. knew that his mare was vicious; and the case of *Cox v. Burbridge* and other cases were cited to show that where damage was done by a tame animal its owner was not liable, unless it was shown that the owner knew it to be ferocious or vicious. I am, however, of opinion that it was not the duty of the judge to lay down that the deft. was not liable unless it was shown he knew his mare to be vicious. In my judgment the point upon which our decision is against him is, that this is an action of trespass for which he is liable, the only question being as to the remoteness of damage. He is certainly liable for some damage, as it is clear that his mare kicked the plt.'s; and I do not think that the damage is too remote. It is not shown that the mare was known to be vicious, but then the injury might not have arisen from vice. These horses which were strange to each other might have first begun to play and subsequently quarrelled. The main objection therefore raised at the trial being disposed of, as to the other points there is abundant evidence that it was the deft.'s horse who did the injury.

*BYLES, J.*—I am of the same opinion. In case

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REG. v. PATRICK JOYCE—REG. v. DANT.

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of this kind we must carefully scan the effect of the judgment, and see upon what complaint the appeal is grounded. Now the complaint is, that it was essential that the judge should have told the jury that it ought to be proved that the owner of the horse knew it to be vicious; but I do not think so. This grey mare had heavy shoes on, and there were marks on the other mare. Now might not such an animal as this have produced such an injury as complained of, and would not this injury be the proximate consequence of the deft.'s neglect in not keeping up his fences? I conceive that it would, and that it is sufficient to say that this injury was the proximate consequence of the neglect.

KRATING and M. SMITH, J.J. concurred.

*Judgment for resp.*

### CROWN CASES RESERVED.

Reported by J. THOMSON, Esq., Barrister-at-Law

Saturday, April 29, 1865.

(Before ERLE, C. J., CHANNELL, B., BLACKBURN, MELLOR and SMITH, J.J.)

REG. v. PATRICK JOYCE.

*Forgery—Undertaking for payment of money—Guarantee—24 & 25 Vict. c. 98, s. 23.*

*A guarantee given on the appointment of an agent to an assurance company against loss, &c. by negligence or dishonesty of the agent, is an undertaking for payment of money within 24 & 25 Vict. c. 98, s. 23, and the agent may be convicted of forging, &c. such a document under the above section.*

Case reserved for the opinion of this court at the Manchester Spring Assizes 1865.

Patrick Joyce was tried before me while sitting as Commissioner of Assize at Manchester, in March 1865, upon an indictment which charged him with forging, and also with uttering a certain undertaking for the payment of money.

The prisoner was desirous of being appointed the agent of an insurance society called the British Prudential Assurance Company, and forwarded to the officers of the company an application for such appointment, duly signed upon a printed form, and also delivered to such officers (according to the rule and practice of the company) a document purporting to be signed by Christopher McConville, as surety, and attested by Jno. Noonan.

The document in question was a printed form, filled up with writing in the blanks, and was in the words and figures following:

To the Directors of the British Prudential Assurance Company.

35, Ludgate-hill, London, E.C.  
In consideration of your appointing Mr. Patrick Joyce, of 8, Rockly-street, Pendleton, as agent for your company, I do hereby guarantee you against any loss, costs, charges, or expenses whatever which you may incur by reason of his culpable negligence or dishonesty in such situation, to the extent of 200 sterling; and I do hereby undertake that this guarantee shall be in force so long as the said Mr. P. Joyce is in your employment, and in whatever capacity he may be engaged; and you are quite at liberty to alter and vary his duties and emoluments from time to time without giving me notice.

(Signature) CHRISTOPHER MCCONVILLE.  
(Address) 57, Lisadel-street, Pendleton.  
(Witness) JOHN NOONAN.

Dated this 26th day of July 1864.

Upon the belief of the genuineness of this document, the prisoner obtained the appointment.

It was subsequently discovered not to have been signed by or under the authority of C. McConville, or attested by J. Noonan.

It was objected on behalf of the prisoner, at the trial before me, that the document in question was

not an undertaking within the statute 24 & 25 Vict. c. 98, s. 23.

I left the case to the jury, who convicted the prisoner under the count charging him with uttering.

I admitted him to bail until the ensuing assizes, then to appear and receive judgment, if the Court for the Consideration of Crown Cases Reserved should, upon hearing the present case, determine that the document above set forth be an undertaking for the payment of money within the meaning of the statute aforesaid. If the court be of opinion that the document be not within the statute, the conviction is to be quashed.

W. M. HINDMARCH.

*Holker* for the prosecution.—The conviction was right. The question is, whether this guarantee is "an undertaking for the payment of money" within the 24 & 25 Vict. c. 98, s. 23. The undertaking to the assurance company is to pay money to the extent of 200. on a contingency. [MELLOR, J.—The document is not necessarily an undertaking for the payment of money. There is no undertaking to pay anything if the agent performs his duty. SMITH, J.—The primary object of the instrument is not the payment of money. BLACKBURN, J.—The object is rather to indemnify the employer against loss, with a limit as to the extent.] There are two decided cases upon the 1 Will. 4, c. 66, s. 3, which contained a similar enactment to the one in question, where analogous documents were held to be "undertakings for the payment of money." In *Rex v. Reed*, 2 Moo. C. C. 62; s. c. 8 C. & P. 624, the forging an instrument whereby the alleged maker promised to pay 1000. to W. B. or order, or such other sum not exceeding 1000. as W. B. might incur by reason of his becoming surety for J. R. to the sheriff, was held a forging of an undertaking for the payment of money. And in *Reg. v. Stone*, 2 Car. & K. 364, a guarantee for the payment of goods sold and delivered to R. P. in the way of trade to the extent of 1000. the maker's name to which was forged, was held to be an undertaking for the payment of money within the 1 Will. 4, c. 66, s. 3.

No counsel appeared to argue for the prisoner.

ERLE, C. J.—The undertaking in this case is a promise to pay money on the contingency in the case if the party specified in it fails in his duty to his employer. The cases cited are in point, that a document for the payment of money on a contingency is an undertaking for the payment of the money. There is no distinction between those cases and the present.

The other Judges concurred.

*Conviction affirmed.*

REG. v. DANT.

*Manslaughter—Turning a vicious animal on to a common—Culpable negligence.*

*Across a common was an unfenced and open footpath, which the public have a right to use. A commoner knowingly turned a vicious horse on to the common to depasture. The horse kicked a child and caused its death, the child being at the time so near the boundary that the jury could not say whether it was on the footpath or beyond it, but found the owner guilty of culpable negligence and convicted him of manslaughter.*

*Held, that the conviction was right.*

Case reserved for the opinion of this court by Smith, J.

The prisoner was tried before me at the Spring

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REG. v. DANT.

[C. CAS. R.]

Assizes for Cambridge 1865, for feloniously killing and slaying Mary Ann Papworth.

The deceased was a child about eight years old, and was killed by a kick from a horse belonging to the prisoner.

The prisoner is an innkeeper, and also keeps horses to draw canal boats. The horse which had caused the death of the child had been in the possession of the prisoner about four years. There was evidence that it was a very vicious and dangerous animal; that it had kicked and injured several persons; that some of these instances had been brought to the knowledge of the prisoner; and that he otherwise knew the propensities of the horse.

There is a large common adjoining the town of Cambridge, between Jesus College and the river, called Midsummer-common, on which the ratepayers of the borough of Cambridge were accustomed to depasture their horses. Through this common there are defined public footpaths a yard wide or more, kept and gravelled by the municipal corporation of Cambridge. Two of these paths converge about twelve yards from a bridge over the river, and from the point where they meet, form a broad pathway to the river, but the boundaries of the public footpath from the said point to the river are ill-defined. The paths are all unfenced and open to the rest of the common. It was proved that the public have a right to use these footpaths, but it was not proved that the public had a right to traverse the other parts of the common although they often did traverse it. The prisoner claimed a right as a ratepayer of the borough of Cambridge to turn out his horses to depasture on this common, and it was not disputed by the counsel for the prosecution that he had this right. In pursuance of this right the prisoner had frequently turned out this vicious horse with others on the common. It appeared that the deceased with some other children was on the common, and when she was either on or very near to the broad pathway above described, the vicious horse of the prisoner, which had been turned out loose on the common by him, and which was then on the common near the broad path, kicked at the deceased with his heels, struck her on the head and killed her. It became a question on the evidence whether the deceased at the time she was so killed was on the footpath or beyond it.

I left to the jury the question whether the death of the child was occasioned by the culpable negligence of the prisoner, and I told them they might find culpable negligence if the evidence satisfied them that the horse was so vicious and accustomed to kick mankind as to be dangerous, and that the prisoner knew that it was so, and with that knowledge turned it out loose on the common, through which to his knowledge there were open and unfenced paths, on which the public had a right to pass and were accustomed to be. I also asked the jury to find as a separate question, whether the deceased, at the time she was kicked by the horse, was on the footpath or beyond it.

The jury found the prisoner guilty of having caused the death of the child by his culpable negligence, but answered the last question by saying that the evidence did not satisfy them one way or the other whether the child at the time she was killed was on the pathway or beyond it.

A verdict of guilty was then entered, and I passed judgment upon the prisoner, but respited the execution of it, and discharged the prisoner on recognisances to surrender himself in execution, reserving for the Court of Criminal Appeal the effect of the failure of the jury to find one way or the other on the separate question I put to them, and the materiality of the fact involved in that question.

MONTAGUE SMITH.

*Naylor* for the prisoner.—The conviction was wrong. It must be taken, for the purpose of the argument, that the child was off the public footpath, and had no right to be where she was; and that being so, this case is similar to a man putting a vicious horse into his own close and a person stepping off the footway through it would be a trespasser, and the owner of the horse could not be guilty of manslaughter if the horse kicked him while off the path and killed him. It is true that there was a well-defined footway over the common, but the prisoner had a right to put his horse on the common to graze. The accident arose from the path not being fenced off, but it was the duty of the corporation, and not of the prisoner, to fence, they being the owners of the soil. [SMITH, J.—The prisoner knew that the paths were not fenced when he turned the horse on to the common. BLACKBURN, J.—The negligence imputed is, the turning a vicious horse into a place where people came to for recreation and exercise, and where it was reasonably to be expected children might come.] Against that it may be said that there was negligence on the part of the child's parents to allow it to be in such a place where there were many horses, more or less vicious. Suppose a public footpath in a field, and the owner digs a gravel-pit, which, in course of time, gets full of water, and a person strays from the footpath and is drowned in the pit, could the owner be indicted for manslaughter? [BLACKBURN, J.—A person's duty who turns a vicious animal on to a common, is to clog it, or do something which shall be some kind of protection to the public. SMITH, J.—There was abundant evidence that the paths across the common were dedicated to the public, and that the public had a right to go there.] The right of the public is limited to the use of the paths, and they are not justified in going off them on to the common. [CHANNELL, B.—It is found that the death was caused by the culpable negligence of the prisoner; that amounts to a verdict of guilty, and the only point is whether the effect of that finding is got rid of by the inability of the jury to say whether the child was on the pathway or beyond it at the time she was kicked.] It must now be taken that the child was off the pathway, and if so she contributed to the accident by her own negligence. [MELLOR, J.—In *Reg. v. Swindell*, 2 C. & K. 230, the fact of contributory negligence on the part of the deceased was held to be no excuse in the survivor. BLACKBURN, J.—The same was held in the recent case where two persons agreed to commit suicide, and the survivor was held to be guilty of murder as an accessory.] Here the child was a trespasser, and while so she was killed by the horse. [An interlocutory discussion took place between the Bench and counsel as to some recent civil decisions on this subject:

*Barnes v. Ward*, 9 C. B. 414;

*Hardcastle v. South Yorkshire Railway Company*, 28 L. J., 189 Ex.; 4 L. T. Rep. N. S. 707;

*Houssell v. Smyth*, 7 C. B. N. S., 781.

In *Barnes v. Ward* the owner of land abutting on a public highway, built a house thereon, and excavated an area in front of it, and left it open adjoining the highway. A person walking along with ordinary care fell down the area and was killed, and it was held that the owner was liable to an action under Lord Campbell's Act. In *Houssell v. Smyth* the owner of waste land in which there was a quarry, left unfenced and unfenced at night, was held not liable to an action for personal injury caused to a passenger over the waste. The waste was open to the public, and the quarry was near to and between two highways. That case came before the court on demurrer to the declaration, and was distinguished from *Barnes v. Ward* on the ground that the allegations in the declaration did not show that leaving the

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DOGGETT v. CATTERNS.

[EX. CH.]

quarry as it was amounted to a public nuisance. In *Hardcastle v. The South Yorkshire Railway*, it was held that the owner or occupier of land along which there is a right of way leaving unprotected an excavation or reservoir of water is not liable for the injury or death of a person falling into it in the dark in consequence of his straying out of the way by mistake. And in *Binks v. The South Yorkshire Railway*, 32 L. J. 26, Q. B., the marginal note of the case is this: "The defts. were possessed of a canal, and the land between it and a sluice: an ancient public footpath passed through the land close to the sluice; there was a towing-path nine feet wide by the side of the canal, and an intervening space of twelve feet of grass between the towing-path and the footpath. By the permission of the defts. the intervening space had been lately used for carting, and ruts having been caused the whole space between the sluice and the canal had been covered with cinders, and thus all distinction between the path and the rest of the land had been obliterated. A person using the path at night missed his way, and fell into the canal and was drowned. Held, that the canal was not so near the footpath as to be adjoining to it, so as to throw upon the defts. the duty of fencing the canal off, and that the other facts did not render the deft. liable for the accident."]

*Markby*, for the prosecution, was not called upon to argue.

ERLE, C. J.—I am of opinion that this conviction should be affirmed. The deft. turned upon a common where there was a public footway a very dangerous animal, knowing what its propensities were, and it is found by the jury that the deft. was guilty of culpable negligence in so doing, and the death of the child was caused by the culpable negligence of the deft. That under ordinary circumstances would be sufficient to sustain a conviction for manslaughter; but the point contended for by Mr. Naylor is the fact that the child was not on the footway at the time when she was kicked, and her death thereby caused, and the jury were unable to say whether she was on the footway or beyond at the time. For the purpose of the judgment I assume that the child was not on the pathway, but very near it. In point of reason, I think that the deft. ought to be held responsible in this case, and that it is not a ground for the acquittal of the deft. that the child had strayed off the pathway. In *Barnes v. Ward* the Court said: "It appears to us, after much consideration, that the deft. in having made the excavation was guilty of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the road, for the danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public is in effect as much impeded as in the case of an ordinary nuisance to the highway." There the cause of death was not on the highway, and a person going along the highway would not have fallen into the pit. The principle of that case extends to a case like this, where a child walking on a public highway accidentally deviated into the neighbouring land, and met with her death from the kick of a vicious horse close to the public way. I differ from Mr. Naylor's contention that the corporation are under an obligation to fence the common from the footpaths. The public take a highway on the terms on which it is granted to them by the grantor, and as between them and the grantor must use the way subject to its risks; but the public are entitled to use the way without being subject to dangers like that in the present case. It was injurious to persons using the pathway in question to turn on to the common a vicious animal of this kind. The judgment is

confined to the fact of the child being near to the road at the time, and that having accidentally strayed from the pathway, but being very near it, her death was caused by the culpable negligence of the deft. I do not wish to sanction the notion that because a person may not be civilly liable for an act of negligence he is therefore not criminally liable. It is not necessary to discuss that proposition now, but I do not accede to it. On these grounds I think the conviction must be affirmed.

CHANNELL, B.—I also think the conviction should be affirmed. If I required any authority to support that conviction, I think that the principle laid down in *Barnes v. Ward* is sufficiently proximate. I however entertain no doubt that the turning a horse on to a common across which there is a public pathway with a knowledge of its vicious propensities, is an unlawful act, and exposes the person doing it to the charge of culpable negligence. The case seems to me to be reduced to this point: was the judge bound to tell the jury that they could not convict unless they were able to say in the affirmative that the child was on the footpath? I think he was not bound to do that.

BLACKBURN, J.—I am of the same opinion. *Barnes v. Ward* decides that the making an excavation for an area near to a footway, and leaving it open, if it make the footway dangerous, is a public nuisance. That principle applies to this case. It is not necessary to say whether a conviction could be sustained where a person strays off the pathway far on to the common.

MELLOR, J.—The principle of *Barnes v. Ward* applies to this case. It may be that there is a distinction between the case of a dangerous pit on land across which there is a public way, and putting a vicious animal into a place where it may reasonably be expected that people will not confine themselves to the way across it.

M. SMITH, J.—I reserved the point because I recollected *Hounsell v. Smyth*; but that does not govern the present case. In that case the act of negligence charged was the omission to fence a pit at some distance from the road—a very different act to that charged here.

*Conviction affirmed.*

### EXCHEQUER CHAMBER.

Reported by LUMLEY SMITH, Esq., Barrister-at-Law.

ERROR FROM THE COMMON PLEAS.

Monday, Feb. 6, 1865.

DOGGETT v. CATTERNS.

*Gaming—Act for the Suppression of Betting Houses* (16 & 17 Vict. c. 119)—"House, room, office or other place."

The deft., a betting agent and bookmaker, was in the habit of standing under a tree in Hyde-park and there making bets on horse-races and receiving deposits. The plt. having made a bet with him, and paid his deposit, brought an action for its return under sect. 5 of the Act for the Suppression of Betting Houses (16 & 17 Vict. c. 119).

Held (reversing the decision of the C. P.), that the ground underneath a tree in Hyde-park was not a "place" within the meaning of sect. 1 of the Act, and therefore that sect. 5 did not entitle the plt. to recover back the deposit.

This was an appeal from the decision of the C. P. making absolute a rule to enter a verdict for the plt.

for the amount claimed by him, on the ground that he was entitled to recover the same under sect. 5 of the Act for the Suppression of Betting Houses (16 & 17 Vict. c. 119).

The circumstances of the case and the judgment of the court are reported *ante*, p. 164.

The question upon which the decision of the court turned was, whether or not the neighbourhood of a tree in Hyde-park, under which the deft. was in the habit of standing for the purpose of making bets and taking deposits, was a "place" within the meaning of sect. 1 of the same Act, which enacts that "no house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, keeper thereof, or any person using the same, or any person procured or employed by, or acting for or on behalf of, such owner, occupier, keeper, or person using the same, or of any person having the care or management, or in any way conducting the business thereof, betting with persons resorting thereto," &c.

The Court of C. P. decided that it was such a "place," and against this decision the deft. appealed.

*Hayes*, Serjt. (*Baker Greene* with him) was for the plt.—The word "place" must be restricted to a place *ejusdem generis* with "house, office, room." As an open space under a tree, it could not be said to have an owner or occupier. [BRAMWELL, B.—If it is a "place" within the meaning of sect. 1, it must be a common gaming-house under sect. 2.]

*Yeatman* for the deft.—Sect. 5 is not restricted to cases to which sect. 4 applies, but is applicable to deposits paid anywhere. It is not essential that the place should have an owner or occupier.

POLLOCK, C.B.—We are all of opinion that the judgment of the Court of C. P. must be reversed. The judgments given there proceed on the ground that the *locus in quo* may be a "place" within the meaning of the statute. I so far agree with that as to think that its being an open place without any "house, office, or room," would not alone prevent it from being a "place" within the statute; but I think that it must be a place capable of having an owner or occupier, which was not the case here.

CROMPTON, J.—I am of the same opinion. The preamble of the statute refers to the owners and occupiers of betting-houses and persons acting on their behalf. And in sect. 5 the words "such person" refer to "any person being the owner or occupier of any house, office, room, or place" in sect. 4. The deft. could not come within such a description.

BRAMWELL, J.—I am willing that this judgment should be reversed, but am unwilling to reverse it on the ground that a person to come within sects. 4 and 5 of the statute must be an owner or occupier of the place or a person acting on behalf of the owner. The Act was intended to put down ascertained places of resort. I think that the place here was not capable of being a place within the meaning of the statute.

CHANNELL, B. and BLACKBURN, J. concurred for the reasons given by Pollock, C.B.

MELLOR, J. and PIGOTT, B. concurred for the reason given by Bramwell, B.

*Judgment reversed.*

Attorney for the plt., *T. Johnson.*

Attorney for the deft., *W. Venn.*

## COURT OF ARCHES.

(CANTERBURY)

Reported by Dr. SWABBY, of Doctors'-commons.

Wednesday, May 3, 1865.

BARNES v. GRANT.

*Church-rate—Occupation of property—Amendment.*

*G. was assessed in respect of five separate properties. By his personal answers he admitted his occupation of four, but denied that he had ever occupied the fifth.*

*The court allowed the churchwarden suing to amend the libel by striking out the assessment of G. in respect of his last-mentioned property, it appearing that the churchwarden was led into the mistake by the previous conduct of G. himself.*

*Costs of the amendment to be paid by the churchwarden.*

This was also a church-rate case. From one of the exhibits annexed to the libel it appeared that James Brighton Grant, the deft., was assessed on five separate properties, the total rateable value of which was 64l. 7s. 6d., and the total amount of rate demanded thereon was 1l. 17s. 6½d., the last of the five was described as "Land, Dennington's Trustees," its separate rateable value was 7l., and the amount of rate in respect thereof was 4s. 1d. In his personal answers the deft. admitted the occupation of the four properties first mentioned, but denied that he did at the time the pretended rate was made hold or occupy any other messuage, tenement, dwelling-house, land, or premises in the said parish. The eighth article of the allegation brought in on the deft.'s behalf was to the same effect.

On inquiry it seemed doubtful whether his legal occupancy could be established, but the circumstances in which he had been assessed in respect of such property were stated in an affidavit made by Charles Barnes, the churchwarden suing, to the effect that in 1856 Grant applied to the overseers of the poor that the assessment in respect of the said land might be altered by substituting his name in the place of that of John Grant his father, who had before that been assessed in respect thereof; that such alteration was then made, and the deft. was accordingly assessed in respect of the said land for the poor-rate made in Nov. 1856; that he paid such rate and had since been assessed in his own name in respect of such land for both poor-rates and church-rates without objection, save that he objected to and refused to pay the church-rate made in the year 1863, and also that of the 13th June 1863, the latter being the subject of the present suit; that when summoned before the magistrates in April 1864 the deft. made several objections to the validity of the rate, but did not deny his occupation of the land.

On this affidavit, Dr. Deane, Q.C. (Dr. Seabry with him) moved the court for leave to amend the libel by striking out so much of the assessment against Grant. The 4s. 1d., though a considerable proportion of the 1l. 17s. 6½d., will probably turn out to be immaterial on the whole rate. The case of *Hawes and Vicar v. Pollard*, 2 Curt. 473, seems a direct authority for discontinuing the proceedings for part of the sum originally assessed upon the deft. There the churchwardens were led into the mistake by the difficulty of construing a local Act of Parliament, here by the conduct of the deft. himself.

Dr. Tristram (Clarkson with him).—The application is open to the objection mentioned, that the court has no power to amend a church-rate. Having sum-



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EDWARDS AND MANN v. HATTON.

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moned Mr. Grant before the magistrates for a sum certain, and brought this suit for the same amount, the churchwarden cannot now vary it; at all events it is too late now. In the case cited the question arose on the admission of the libel.

Dr. LUSHINGTON.—I am of opinion that it is within the power and competence of the court to make any alteration in the pleadings up to the hearing of the cause. It is said that, if the court accedes to this motion, it would do what it is clear it has no power to do, namely, amend the rate; but I am of opinion that it is in the power of the churchwarden to sue for part and not for the whole amount originally assessed on the party, on reasonable cause shown. Now, on the affidavit before the court, which is uncontradicted, it appears that the churchwarden was absolutely led into the mistake by the previous conduct of the deft. The alteration must be made. As to costs, I think no additional costs should be thrown on the deft. The additional costs caused by the mistake and necessary amendments must be paid by the churchwarden.

Moore and Curry, proctors for the churchwarden.

Crosse for the deft.

March 25 and May 3, 1865.

(Before the Right Hon. STEPHEN LUSHINGTON,  
D.C.L., Dean.)

EDWARDS AND MANN v. HATTON (on admission of  
an allegation).

*Church-rate—Inequality—Injury to deft.*

*The Court will not reject an allegation averring inequality of assessment, though the deft.'s property is one of those alleged to be under-assessed, and the allegation contains no averment that the deft. is aggrieved by the inequality, for it might turn out that he is called upon to pay more than he would if all the properties in the parish were fairly assessed.*

*Query, whether the court would ultimately pronounce against a rate on the ground of inequality, unless the deft. succeeded in showing that he was himself injured by the inequality.*

This was a suit for subtraction of church-rate, brought by the churchwardens of the parish of Mattishall, in Norfolk, against Jonathan Hatton, a farmer, of that parish.

The libel was in the usual form.

The third article of the allegation, brought in on behalf of the deft., pleaded:

That certain lands and other properties mentioned in and assessed to the pretended rate in question in this cause are let to the occupiers thereof at annual sums greatly exceeding the amounts or sums set down in the assessment to the said pretended rate as the rental or annual value thereof respectively; and that the entries thereof under the head "Rental or annual value of property" are generally and throughout grossly inaccurate, and entirely disproportionate to the real rental or annual value of the properties against which the same are placed respectively, and that the amounts at which the properties are assessed therein as the rateable value under the head "Amount at which property is assessed," are less than the sums at which the same would reasonably let after deducting all usual tenants' rates, and less than the commutation rent-charge, and the annual costs of repairs, insurance, and other expenses necessary to maintain them in a state to command such rent, and in particular:

Then followed 109 instances of particular properties, the 45th of which stated:

That the farm in Norwich-road, in the occupation of Jonathan Hatton, which is numbered 127 in the said rate, and is assessed at the sum of 80*l.*, is of the annual rateable value 101*l.* 15*s.*, which is the sum at which it is assessed in the valuation hereinafter pleaded and referred to.

The 4th article and paragraph annexed set forth various properties said to be assessed on the rack

rental, or at sums exceeding the rack rental. Of these thirty-seven instances were specified.

The allegation contained no averment that the deft. or others was or were injured by the alleged inequality of assessment.

The admission of the allegation was opposed by

Dr. Swabey (with him the *Queen's Advocate* (Sir R. J. Phillimore).—On the face of the allegation it appears that the deft. is under-rated, and there is no averment that he suffers any grievance by the alleged inequality of assessment, which is the chief point made by the allegation in opposition to this rate. This is the first case, as far as is known, in which any party has opposed payment of a church-rate because he is called upon to pay too little. From *Lambert and Simpson v. Weall*, 4 Hagg. 91, to *Hill and Bailey v. Haskew*, 11 L. T. Rep. N. S. 253, every deft. who has opposed a rate on the ground of inequality of assessment has attempted to make out that he was injured by being overcharged. In *White and Jackson v. Beard*, 2 Curt. 500, the Court said: "The meaning of an unequal rate is this: that some party or other has a right to complain that under the rate, the payment of which is demanded of him, he is made to pay more than he ought to pay under a just assessment." If, in some of the more recent cases, as in *Attenborough v. Kemp*, 5 L. T. Rep. N. S. 67, and the *St. Neot's* case, the court has used language apparently varying from this position, it must be remembered that in those very cases the deft.'s ground was that he was called upon to pay more than he ought to pay.

Dr. Deane, Q. C. and Dr. Tristram contra.—The cases last cited show that the court must consider the fairness and equality of the rate generally without reference to the deft.'s particular assessment; an unequal, i.e. an illegal, rate cannot be enforced by the law against any one; and in this case, for aught that appears, the deft. may be called upon to pay more than he would on a fair assessment of the whole parish, though he is one of those whose property is under-assessed.

*Cur. adv. vult.*

May 3.—Dr. LUSHINGTON delivered the following judgment.—This is a cause of church-rate brought by the churchwardens of Mattishall against Jonathan Hatton, a parishioner. The libel is in the ordinary form, and a very long allegation has been given in on the part of Mr. Hatton. That allegation states very many instances in which, as alleged, the rate is unequal and unjust; instances where the various properties have been unduly assessed either at too high or too low a rate. But the peculiarity in this allegation is, that in the forty-fifth paragraph of the third article, as regards Hatton, the party proceeded against, it is pleaded that he is assessed to the church-rate at a value much less than he ought in fairness to be assessed. I say this is a peculiarity; to the best of my knowledge and belief no similar averment is to be found in any of the preceding church-rate cases. The churchwardens oppose the allegation, and they contend that on Mr. Hatton's own showing he is not aggrieved by the church-rate. The answer to that argument is, that it matters not whether he personally is aggrieved or not, if the church-rate is shown to be unequal, and therefore cannot be enforced. And it is further said that the court adopted and acquiesced in this argument in former church-rate cases. Now here I must observe that I verily believe, whatever might have fallen from the court in preceding cases, that nothing ever was said or was properly applicable to such a case as this, namely a case where the deft. himself alleged that he was rated below the real value of his property. Indeed, such a case not having actually



occurred, observations would be pertinent only to a suppositious case. In the *St. Neots* case, however, the Court did say that it must not be supposed that in the mode of considering the question the court could look only to the amount of rate for which a party may be sued, or how little such an individual may be personally affected. I must see how such an objection affects the rate itself, not an individual ratepayer. If the rate is proved to be itself erroneous in mode of rating, that is to say, some properties charged too much and some too little, and that to a serious extent, the probability is that the party proceeded against is not fairly assessed to the rate in question, though this result may not be at first apparent; but if, when the case came on for hearing, it should clearly appear that, though the assessment of rate were erroneous, the party proceeded against was not aggrieved, the court has never said that it would in his individual case pronounce against the rate; that is a question still left open. So in this particular case, the court will not before the hearing decide whether the party proceeded against is aggrieved or not; it is most probable that he is, but that conclusion must depend upon a review of all the facts. Until that review is made the court cannot safely say that, because an individual is not charged to the full amount of a fair valuation, therefore he is not charged excessively, for it is manifest that others may be so much undercharged as to make the rate unjust and unequal towards him. Under these circumstances I do not think I should be justified in rejecting the allegation.

*Moore and Curry*, proctors for the churchwardens.  
*Crosse* for the deft.

### HOUSE OF LORDS.

Reported by JAMES PATTERSON, Esq., of the Middle Temple,  
 Barrister-at-Law.

Monday, Feb. 27, 1865.

### DICKSON v. THE QUEEN.

*Excise—Spirit licence—Grocer—Statute—Implied  
 repeal—Taxable words—Construction.*

*The statute 6 Geo. 4, c. 81, imposed a higher duty on licences to retail spirits obtained by spirit grocers in Ireland, and a lower duty on other persons, the spirit grocers being defined as those who do not sell spirits in a greater quantity at one time than two quarts to be consumed on the premises. A later Act, 6 & 7 Will. 4, c. 38, s. 3, enacted that no spirit grocer should obtain a licence to sell on the premises other than a licence to retail spirits in quantities not less at one time than one pint, and to be consumed elsewhere than on the premises, and no other licence shall be granted to grocers:*

*Held (affirming the judgment of the Ex. Ch.), that the latter statute did not impliedly repeal the higher duty applicable to spirit grocers, but that the two statutes were compatible, the one fixing the maximum, and the other the minimum, of the quantity to be sold at one time; and the two descriptions of restrictions did not necessarily imply two different descriptions of persons.*

This was a suggestion of error in a judgment of the Ex. Ch. The plt. in error was a suppliant in a petition of right, claiming to recover back a sum of 16s. 6d., as alleged excess on duty claimed by the Crown, for a licence to retail spirits in Ireland.

The Act 6 Geo. 4, c. 81, imposed certain duties on all persons licensed to retail spirits in Ireland, all licences being divided into two classes: one being the spirit grocer's licence, authorising the person licensed to retail spirits in quantities not exceeding two quarts, and to be consumed elsewhere than premises; the other being all other licences

to retail spirits. The 6 Geo. 4, c. 81, in its 2nd section, fixes a general rate of duty to be paid throughout the United Kingdom on licences to retail spirits. That duty is regulated by the value of the house in which the retailer resides. The suppliant resided in a house valued at 36*l.* a-year, and the duty properly payable by him, according to the scale applicable to retailers of spirits under the lower licence, was 2*l.* 4*s.* 1*d.*, and no more. The words imposing the duty on retailers of spirits throughout the United Kingdom are as follows: "Every retailer of spirits (except retailers of spirits in Ireland after mentioned)." The words of the exception immediately follow in the same clause, and are as follows: "Every retailer of spirits in Ireland being duly licensed to trade, vend and sell coffee, tea, cocoa-nuts, chocolate, or pepper, and not selling spirits in any greater quantity at one time than two quarts; or any spirits to be consumed in the house or premises of such retailer."

The licence mentioned in this exception is explained in the 4th section, which enacts that

All persons who shall be duly licensed under this Act to deal in or sell coffee, tea, cocoa-nuts, chocolate, or pepper, shall be deemed grocers, within the meaning of the several laws of excise in force in Ireland at and immediately before the passing of this Act, and shall be entitled to take out the licence hereinbefore mentioned to retail spirits in any quantity not exceeding two quarts at any one time to be consumed elsewhere than in the house or on the premises of such retailer—subject nevertheless to all and every the regulations contained in the said laws, or any of them, in respect of grocers retailing spirits, except so far as any of them are repealed or altered by this Act.

Although this section entitled the Irish grocer to this special licence without any other qualification than that which he derived from his being licensed to sell groceries, there was nothing in the Act to prohibit him obtaining the ordinary publican's licence by going before the magistrates and obtaining the licence to sell beer, in accordance with the 18th and 14th sections of the Act. In this case he was included in the general class of retailers of spirits, receiving an unrestricted licence upon paying the lower rate of duty.

So long as these licences were issued to grocers in the terms of this Act, no question arose as to the duty payable. If the grocer held a beer licence and applied for a publican's licence, he paid on that licence the lower duty. If he applied for the special licence mentioned in the 4th section, he was charged with the higher rate of duty, and this matter continued up to the year 1836. In that year the statute 6 & 7 Will. 4, c. 38, made a change in respect of the retail licence obtainable by grocers.

The 3rd section of this Act was as follows:

And be it further enacted that from and after the passing of this Act, no person in Ireland who shall be duly licensed under any Act or Acts for granting excise licences to deal in or sell coffee, tea, cocoa-nuts, chocolate, or pepper, nor any person deemed a grocer within the meaning of the laws of excise in force in Ireland at or immediately before the passing of this Act, shall be entitled to take out any licence to retail spirits in the house or on the premises of such retailer or in any house or on any premises within one quarter of a mile of the house or premises of such retailer, other than a licence to retail spirits in not less than one pint at one time, and to be consumed elsewhere than in the house or premises of such retailer. And it is expressly enacted that "any licence to retail spirits in any other manner granted after the passing of this Act to any such grocer or person so licensed as aforesaid should be null and void to all intents and purposes whatever."

On the passing of the latter Act (6 & 7 Will. 4, c. 38) doubts arose whether that Act impliedly repealed the higher duty imposed on spirit grocers by the previous Act, 6 Geo. 4, c. 81. In 1841 the suppliant brought an action to try the question, and the Irish Ex. Ch. decided, by a majority of six to four, in his favour: (*Dickson v. Pope*, 7 Ir. L. Rep. 74.) In 1845 the latter Act was repealed by the 8 & 9 Vict. c. 64, whereupon the Irish spirit grocers demanded back the excess of duty which they had paid while the Act of 6 & 7 Will. 4, c. 38, was in

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force. The excise authorities having refused to refund the sums, the present petition of right was filed. The Court of Q. B., without hearing argument, followed the judgment of the Irish Ex. Ch., and gave judgment for the suppliant. The English Ex. Ch., in error, unanimously reversed the judgment of the Q. B., whereupon the present suggestion of error was made.

*Is. Butt*, Q.C., for the plt. in error, contended that the Ex. Ch. was wrong, and the Irish Ex. Ch. right in construing the Act; that the Act of 6 & 7 Will. 4 c. 38, having taken away the higher duty on the licence imposed by 6 Geo. 4, c. 81, that duty could not be transferred by implication to a new and different licence created by the latter Act; that at all events, inasmuch as there was a doubt, a tax was not to be imposed by implication.

The *Attorney-General* (Palmer), the *Solicitor-General* (Collier) and *C. Hutton*, for the resp., contended that there was nothing inconsistent between the two statutes. The first merely imposed a maximum on the saleable quantity, while the latter statute imposed a minimum restriction.

The LORD CHANCELLOR.—My Lords, the question which has been argued before your Lordships at considerable, but by no means unnecessary, length, is one of great nicety, and requiring much care and discrimination in language. The point for your Lordships to decide in reality is, whether the licence granted to the suppliant was properly chargeable with a duty of 3*l.* 0*s.* 7½*d.* or with a duty of 2*l.* 4*s.* 10*d.*, and this depends upon the question whether the suppliant was a retailer of spirits within the description contained in the schedule appended to the 2nd section of the 6 Geo. 4, c. 81, or whether he was within the exception contained in that clause, viz., within the words "except retailers of spirits in Ireland after mentioned." If the suppliant comes within the description of retailers of spirits in Ireland after mentioned, then he is properly chargeable with the larger duty; but if he no longer answers that description, then he is caught (if I may use the phrase) only by the general enactment which is applicable to all retailers of spirits. The words of the exception—that is, the description of those retailers of spirits who are after mentioned—speak of the retailers of spirits in Ireland who have obtained grocers' licences, and are not selling spirits in any greater quantity at one time than two quarts, or any spirits to be consumed in the house or on the premises of such retailers. The argument on behalf of the app. is, that that is a special and definite description of the then grocer who was licensed to retail spirits, and that that specific form of licence has been subsequently altered. So that, if you hold the duty here imposed to attach to the licensed individual who has received the specific form of licence here described, then, if it turns out that that specific form of licence has been altered, the contention is, that as the licence is different, the person bearing it becomes different; for if it be imposed on the person who has received licence A, the argument is, that it is not applicable to the person who has received licence B. Now, undoubtedly, we must not lose sight of that great rule in the construction of fiscal laws, that they are not to be extended by any laboured construction, but that you must adhere to the strict rule of interpretation; and if a person who is subjected to a duty in a particular character, or by virtue of a particular description, no longer fills that character or answers that description, the duty no longer attaches upon him and cannot be levied. The argument which has been most ingeniously and elaborately conducted on behalf of the deft. has been this: first of all it has

been said by the app., that the licence which is here intended to be referred to—I mean by the words I have already read, describing the excepted retailers—is the licence which is described in the 4th section of the same statute. That was a licence to be granted to grocers giving them power to retail spirits in any quantity not exceeding two quarts at any one time to be consumed elsewhere than in the house or on the premises of the retailer. The licence, according to this rule, if it be granted, would be a licence with the maximum of the quantity to be sold, but without the mention of any minimum. It appears from a variety of statutes to have been the earnest desire of the Legislature, in a way which the Legislature sometimes adopts under the notion that an Act of Parliament can render people moral or temperate, it seems to have been the earnest desire of the Legislature to impose every possible difficulty upon the grocers retailing spirits in small quantities. This particular object seems not to have been quite effected by the statute I am now adverting to, for it failed to fix anything like a minimum quantity. It imposed a maximum, but it left the grocer restrained from selling more than two quarts at liberty to retail spirits in small quantities. This point appears to have attracted the attention of the Legislature, and in a subsequent statute, the 6th and 7th of Will. 4, and by the 3rd section of that statute, it is enacted in substance, that after the passing of the Act no grocer (I am substituting the word grocer for the larger description which is there given) shall be entitled to take out any licence to retail spirits in the house or on the premises of such retailer, or in any house or any premises within one quarter of a mile of the house or premises of such retailer other than a licence to retail spirits in quantities not less than one pint, and to be consumed elsewhere than in the house or on the premises of the retailer. The former licence restrained the grocer from selling more than two quarts, but there was the same restriction with regard to the house and premises where the spirits sold were to be consumed, viz., the quantity was not to be consumed in the house or on the premises of the retailer. In this subsequent section the Legislature says: "You shall not sell less than one pint, and you shall not sell even a pint to be consumed in the house or on the premises of the retailer." It expressly enacts that the pint sold is to be consumed elsewhere. Now the argument on the part of Mr. Butt has been, that this addition made to the licence makes it a different licence, and that the grocer who is subjected to the restrictions contained in this addition become in reality, *quoad* the selling of spirits, a different person from the person described in the 6 Geo. 4, and that he no longer answers the description which alone is taxed, viz., of the grocer the retailer of spirits not selling spirits in any greater quantity at one time than two quarts. It is difficult so to express the matter as to convey to your Lordships' minds with anything like precision this nice and subtle distinction. It all turns upon this inquiry: Is the limitation of the maximum of the quantity to be sold repealed expressly or by implication by the enactment which I have read out of the 3rd section of the 6 & 7 Will. 4? Because, if the whole limitation as to the maximum be thereby repealed, then, my Lords, I think you will admit that the individual licensed under the 3rd section of the 6 & 7 Will. 4 has different powers and authorities by his licence than those which are contained in the former licence, and if he becomes by virtue of this subsequent statute a grocer at liberty to sell any quantity of spirits, then he would no longer answer the description of a grocer not selling, that is, not being at liberty to sell, any greater quantity than two quarts. But, my Lords, I have laboured

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in vain to find any reason for holding that these two enactments are not perfectly compatible the one with the other. I have also laboured in vain to find any reason for holding that when you have added to the licence it can no longer be regarded as answering the description of a grocer not selling, that is, not being licensed to sell, any greater quantity than two quarts. It all turns upon this, whether the two sections may not be most consistently and correctly reconciled by taking the one as fixing the maximum, and taking the other as superadding the minimum. If the superaddition of minimum materially affected the description contained in the taxing clause, and rendered it no longer applicable to the person, then the taxing clause could not be acted upon; but if the superaddition of the minimum leaves the licensee still retaining the characteristics which enable him to answer and exactly to satisfy the description contained in the taxing clause, then no rule of construction would require your Lordships to hold that the two sections are in any way inconsistent. You could not hold that the former section was in any manner affected or repealed by the latter. That is the conclusion at which I have, with some difficulty, been able to arrive, and to which I invite the assent of your Lordships. In this view the thing becomes reasonably clear and consistent. The Legislature had imposed a maximum, but it had not imposed a minimum. It apprehended that much danger might arise from the retailing spirits by grocers in small quantities, and therefore it added a minimum to take away or to obviate that danger. But when it added the minimum it did not say that the licence should be altered; it did not enlarge the capacity of the licensee with regard to quantity, and I think that the licensee still remains at liberty to sell no greater quantity at one time than two quarts, although he was subjected to the further restriction, that of being disabled to retail spirits in glasses, and was obliged to sell a quantity not less than one pint, and that to be taken away from the premises for consumption. It was contended by Mr. Butt that the construction of the statute would be affected greatly by a consideration of the fact of the practice. He has told your Lordships that a practice followed upon the statute of the 6 Geo. 4 of a grocer sinking his character of a grocer, and assuming the guise and character of a publican, getting a licence to sell beer, *eo nomine*, and then presenting himself before the justices for a general licence to sell spirits. He desired your Lordships to construe those specific words of the description, "not selling spirits in any greater quantity," &c., as having been used by the Legislature with a prophetic anticipation of the practice that might ensue upon the passing of the Act, and as descriptive of the grocers in their two capacities, viz., grocers that obtained grocers' licences to sell spirits, and grocers that got publicans' licences to sell spirits. I do not think that your Lordships would be at all warranted in giving to the words used in the Act of Parliament, and which are plainly applicable to the existing state of things, the meaning contended for by the learned counsel, that they were used with reference to a possible future state of things. Neither do I think, if the whole of the facts alleged by Mr. Butt were conceded, just for the purpose of the argument, that it would affect the real question upon which the decision of this appeal depends, and which I take to be simply this: whether the description contained in the schedule to the 2nd section of the Act 6 Geo. 4, is or is not rendered no longer applicable by the fact of the maximum quantity therein indicated being the limit, the *ne plus ultra*, and the licensee being repealed and altered by the 3rd section of the subsequent Act, 6 & 7 Will. 4. I find nothing to warrant the conclusion that

there was such a repeal. I find in the nature of things that the two enactments are perfectly consistent, the one having given a maximum without a minimum, and the other having given a minimum without disturbing the maximum. If the antecedent description is as I have said, and it refers only to the minimum, and the maximum remains undisturbed and unaffected, the description is applicable, although the minimum is superadded to the maximum. Upon these grounds, although it is impossible to render the matter quite as clear as one would desire to make it, I humbly move your Lordships that the judgment of the court below be affirmed, and that the appeal be dismissed.

Lord CRANWORTH.—My Lords, I entirely concur with my noble and learned friend the L. C. that the judgment in this case must be for the defendant in error. Before the passing of the Act of Geo. 4 there certainly was a licence that limited in its terms the grocer to selling spirits in any quantity within certain limits. The licence was a general licence that the grocer might obtain them, although by former Acts he could not have done so. Then the Legislature enacted that, in spite of his having such a licence, it should not be lawful for him to sell at one time more than two quarts. And so stood the law when the 6 Geo. 4 was passed. The former duties were then repealed, and amongst other duties that were imposed upon every retailer of spirits in Ireland being duly licensed to trade in, vend and sell, coffee, tea, cocoa-nuts, chocolate, or pepper, and not selling spirits in any greater quantity at one time than two quarts. That was the mode certainly (I think it was rather an inartificial and clumsy mode) of referring to the restriction which the law imposed upon the licensed grocer who obtained a licence to sell spirits. There was no such thing then as a licence to sell in any quantity at one time exceeding two quarts. There was a licence to sell, but the law said, "Although you have got that licence in your character of grocer, you shall not sell more than two quarts." It was contended by Mr. Butt, that however that might have stood before the passing of the Act, by the 4th section it became necessary that the licence should be a licence to sell in quantities not exceeding two quarts. That 4th section is very inartificially framed, and in a very blundering manner, because it assumes something to have been said before that had not been said at all. I take the object of the clause to have been this, to remove the doubts that I collect existed before as to who came within the description of grocers in Ireland. It enacts that from and after a certain day all persons who shall be duly licensed under this Act to deal in or sell coffee, tea, cocoa-nuts, chocolate, or pepper, shall be deemed grocers within the meaning of the several laws of the excise in force in Ireland at and immediately before the passing of this Act. And then it goes on in the passage upon which Mr. Butt seems to rely: "and shall be entitled to take out the licence hereinbefore mentioned to retail spirits in any quantity not exceeding two quarts at any one time." There has been no such licence hereinbefore mentioned in any part of the description of retailers of spirits in Ireland, as authorising persons to sell spirits not in any greater quantity at one time than two quarts. There was no licence that authorised that, and there was no intention to give any different character to the licence. That being the state of the law, the publicans' Act was passed, and that had reference, not to duties, but to the prevention of intemperance and drunkenness, and in that Act there were a great many provisions, the tendency of which no doubt was to make the inhabitants of that part of the United Kingdom less intemperate; and among other provisions there is

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this: "That from and after the passing of this Act no person in Ireland who shall be duly licensed under any Act or Acts for granting excise licences to deal in or sell coffee, tea, cocoa-nuts, chocolate, or pepper, nor any person deemed a grocer within the meaning of the laws of the excise in force in Ireland at or immediately before the passing of this Act, shall be entitled to take out any licence to retail spirits in the house or on the premises of such retailer, or in any house or on any premises within one-quarter of a mile of the house or premises of such retailer other than a licence to retail spirits in quantities not less at one time than one pint." What is there to show in the slightest degree that other restrictions which existed before were meant to be affected? I see nothing of the sort, and although I agree with what fell from the Lord Chancellor, that we must not strain Acts of Parliament so as to let it be supposed that a duty has been imposed upon the subject which the Legislature has clearly said shall not be imposed, I think one is not bound, because that is a very well-known principle, to shut one's eyes to the obvious meaning of the enactment. The former Act fixed a maximum, and said you shall not, although you have a licence to sell spirits, sell more under that licence than two quarts at any one time. Now it has been said, with a view to promoting temperance in the country, you shall be placed under this restriction, that you shall never sell less than a pint; that is to say, you shall never sell small quantities to persons who might come into your shop to tipple; you must sell a quantity that will be larger than could be so consumed. That, in my opinion, is the obvious intention of the enactment, and I see no reason to suppose that there was any intention to alter the former enactment, viz., they were not to sell more at one time than two quarts. And if so, they remained where they were before and were liable to the higher rate of duty.

Lord WENSLEYDALE.—My Lords, I entirely concur in the observations which have been made by the two noble and learned lords who have preceded me, and I have nothing to add to them. I have felt perfectly satisfied with the reasons which were given by Erle, C. J. in the judgment delivered in the Ex. Ch. It has appeared to me that the ultimate result was perfectly clear, and that the judgment of the court below ought to be affirmed.

*Judgment affirmed.*

Plt. in error in person.

Deft. in error's attorney, J. Timm.

### COURT OF COMMON PLEAS.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

Tuesday, April 25, 1865.

HUNT AND ANOTHER v. HARRIS.

*Metropolitan Building Act 1855—18 & 19 Vict. c. 122, ss. 3, 73, 74, 83, 84, 85, 88—Dangerous structure—Party structures—"Owner"—Lessee and sub-lessee.*

A person who has a long lease of a house at a small ground-rent, and sublets it in portions to different tenants at rack-rent, either on lease or as tenants from year to year, is the "owner" of the house within the meaning of the sections of the *Metropolitan Building Act 1855* (18 & 19 Vict. c. 122) which apply to the repair of dangerous party structures.

This case was tried before Erle, C.J. at the sittings in London after Michaelmas Term, and a verdict was entered for the plt. for the amount claimed, the deft. having leave to move to enter the verdict for him, or a nonsuit.

The declaration stated:

That whereas the plt. and the deft. were severally owners of a certain party-wall and structure, within the meaning of the *Metropolitan Building Act 1855*, and situate within the city of London, the said party-wall or structure being a party-wall, and situate on the west side of the premises of the deft., being No. 37, Eastcheap, and on the east side of the premises of the plt., being No. 38, Eastcheap, in the city of London, which said party-wall or structure was then in a dangerous state, and defective and out of repair; and the Commissioners of Sewers of the city of London then caused a survey of the said party-wall and structure to be made by a competent surveyor, who duly surveyed the same; and upon the completion of his survey certified to the said commissioners his opinion as to the state of such party-wall and structure, to the effect that the same was in a dangerous state; and afterwards the said commissioners gave and served, and caused to be given and served upon the plt. and deft., then being such owners as aforesaid, a notice in writing, in the words and figures following, that is to say: "*Metropolitan Buildings Act 1855.—Dangerous party structures.—To the owners and occupiers of the party structure, being a party-wall, and situate, &c., and whomsoever else it may concern.—In pursuance of the provisions of the said Act, I hereby, as the principal clerk for and on behalf of the Commissioners of Sewers of the City of London, give you and each and every of you notice that, it having been made known to the said commissioners that the party structure as aforesaid is in a dangerous state, the said commissioners required a survey of the same to be made by a competent surveyor, who having certified that the said party-wall is in a dangerous state, the said commissioners require you forthwith to, &c. [the notice as set out in the declaration here specified the necessary works to be done]; and I further give you and each and every of you notice that, if in the space of six days from the service hereof you fail to comply with the regulations of this notice, the said commissioners will make complaint thereof before a justice of the peace, and take such other proceedings in relation to the said party structure as are authorised by the said Act, and as may be necessary or expedient.—Dated 6th June 1863, signed, &c."* And the plt., after receiving such notice and within a reasonable time in that behalf, and while the plt. and the deft. continued such owners as aforesaid, did and caused to be done the works in the said notice specified, the same being necessary works to be done in respect of the then dangerous state of the said party-wall and structure, and the same being defective and out of repair. And whereas in the doing of the said works, the plt. were necessarily obliged to repair, restore and make good the internal works and finishings of and upon No. 37, Eastcheap, aforesaid, then being such premises of the deft. as aforesaid, which said internal works and finishings were necessarily damaged and destroyed by the doing of the first-mentioned works. And whereas the plt. and the deft. always made equal use of the said party-wall and structure, and whereas the deft. alone made use of the said internal works and finishings, and whereas the plt. were building owners and the deft. was an adjoining owner, within the meaning of the said Act, and the plt. as such building owners as aforesaid, within one month after the completion of the said works, delivered to the deft., as such adjoining owner as aforesaid, an account in writing duly made out of the expense of the said several works duly valued; and the deft. did not within one month after the delivery of such account declare his dissatisfaction to the party delivering the same by notice in writing, given by the deft. or his agent, and specifying his objection thereto. And whereas all things have been done and all times have elapsed, and all conditions have been fulfilled necessary to entitle the plt. to have and recover from the deft., under the provisions of the said *Metropolitan Building Act 1855*, one moiety of the expense of doing the first above-mentioned works, the said moiety being £21.15s. 8d., and the whole expense of repairing, restoring, and making good the said internal works and finishings, the same being 33s. 14s. 1d.; and to maintain this action for the recovery thereof—yet the deft. hath not paid either of the said sums, although duly demanded.

There were also counts for work and labour, money paid and on accounts stated.

The material allegations in the declaration were severally traversed by the pleas.

It was proved at the trial that the plt. were the occupiers of premises at 38, Eastcheap, and that the deft. had a lease for nearly ninety years of the adjoining premises, 37, Eastcheap, at a small rent, and that he did not occupy the premises, but sublet them to different persons, the sub-lessee of the ground-floor having a lease for twenty-one years, the sub-lessee of two upper floors having an unstamped lease for seven years (four years and a half of which, at the time of action brought, were unexpired), and the remainder being unlet. The plt. were desirous to alter and rebuild their premises, and after giving the proper notice to the district surveyor, they pulled them down. The party-wall between No. 37 and No. 38 was found to

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be in want of repair, and the p<sup>l</sup>ts. gave the def<sup>t</sup>. notice under sects. 83 and 85 of the Metropolitan Buildings Act 1855 (18 & 19 Vict. c. 122) of the work which required to be done to it. No arrangement was made between the p<sup>l</sup>ts. and the def<sup>t</sup>. as to the execution of the works and the proportion in which they were to be paid for, and eventually the p<sup>l</sup>ts. and the def<sup>t</sup>. were severally served with the notice set out in the declaration under sect. 72 of the Act. The p<sup>l</sup>ts. executed the works specified in the notice, and brought the present action to recover from the def<sup>t</sup>. the sums of 52*l*. 15*s*. 8*d*. and 33*l*. 14*s*. 1*d*., being respectively one moiety of the cost of rebuilding the wall and the cost of making good the internal works on the side of No. 37.

A rule was obtained on behalf of the def<sup>t</sup>. to enter the verdict for him, or a nonsuit, on the ground that he was not the owner within the meaning of the Metropolitan Buildings Act 1855.

By sect. 3 (the interpretation clause) of that Act the word "owner" is applied to "every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year, or for any less term, or as a tenant at will."

Sect. 73 enacts that

If the owner or occupier to whom notice is given as last aforesaid fails to comply, as speedily as the nature of the case permits, with the requisition of such notice, the said commissioners may make complaint thereof before a justice of the peace; and it shall be lawful for such justice to order the owner, or, on his default, the occupier of any such structure to take down, repair, or otherwise secure, to the satisfaction of the surveyor who made such survey as aforesaid, or of such other surveyor as the said commissioners may appoint, such structure or such part thereof as appears to him to be in a dangerous state, within a time to be fixed by such justice; and in case the same is not taken down, repaired, or otherwise secured within the time so limited, the said commissioners may with all convenient speed cause all, or so much of such structure as is in a dangerous condition, to be taken down, repaired, or otherwise secured, in such manner as may be requisite; and all expenses incurred by the said commissioners in respect of any dangerous structure, by virtue of the second part of this Act shall be paid by the owner of such structure, but without prejudice to his right to recover the same from any lessee or other person liable to the expenses of repairs.

By sect. 83, amongst the rights given to a building owner in relation to party structures is that of performing any necessary works incident to the connexion of party structure with the premises adjoining thereto.

By sect. 84 the adjoining owner may require the building owner to build chimneys, jambs, flues, &c. for his convenience.

By sect. 85

No building owner shall, except with the consent of the adjoining owner or in cases where any party structure is dangerous, in which cases the provisions hereby made as to dangerous structures shall apply, exercise any right hereby given in respect of any party structure unless he has given at the least three months previous notice to the adjoining owner by delivering the same to him personally, or by sending it by post in a registered letter addressed to such owner at his last known place of abode.

Sect. 88 provides that in cases of the repair or rebuilding of party structures the expense shall be borne by the building owner and adjoining owner in due proportion, regard being had to the use each owner makes of such structure.

By sect. 97, when expenses are to be borne by the owner of premises, it is enacted, *inter alia*, that

1. The owner immediately entitled in possession to such premises, or the occupier thereof, shall in the first instance pay such expenses with this limitation, that no occupier shall be liable to pay any sum exceeding in amount the rent due, or that will thereafter accrue due from him in respect of such premises during the period of his occupancy.

2. If there are more owners than one, every owner shall be liable to contribute to such expenses in proportion to his interest.

5. Any occupier of premises who has paid any expenses under this Act, may deduct the amount so paid from any rent payable by him to any owner of the same premises, and any owner of premises who has paid more than his due

proportion of any expenses, may deduct the amount so overpaid from any rent that may be payable by him to any other owner of the same premises.

*Coleridge, Q. C.* and *Day* showed cause and contended that the p<sup>l</sup>ts. were entitled to charge the def<sup>t</sup>. as owner, and that the present case was distinguishable from *Mourilyan v. Labalmondiere*, 1 El. & El. 533, where the sub-lessee had the whole house. In this case the tenant who had the unstamped lease was in law a mere tenant from year to year, whatever might be his right to a lease in equity: (*Cowen v. Phillips*, 33 Beav. 18.)

*Hoggins, Q. C.* supported the rule and relied on *Mourilyan v. Labalmondiere*, cited above. He referred also to

*Evelyn v. Whichcord*, 1 E. B. & E. 126;

*Tidey v. Mollett*, 16 C. B., N. S., 298; 10 L.T. Rep. 380.

**ERLE, C.J.**—This was an action by one adjoining owner against another adjoining owner to recover a contribution in respect of a party-wall, which was in a dangerous state, and was ordered by the Commissioners of Police to be pulled down by virtue of the powers in the Metropolitan Buildings Act. For the purposes of the present rule it must be taken that the p<sup>l</sup>ts., the owners on the east side, had given all the notices necessary under the Act to entitle them to call upon Harris, the alleged owner on the west, for a contribution to this party-wall. It appeared at the trial that Harris held the premises on the west side of the p<sup>l</sup>ts. upon the terms upon which the greater part of the house property within the Metropolitan Buildings Act is held, namely, that he had a long lease, say for eighty or ninety years, probably at a ground-rent, and that he was making a considerable profit by the improved rents, having let out the premises in floors; that is, the ground floor by lease to one person for twenty-one years, and the two upper floors to another person under an agreement for seven years, which, according to the case of *Cowen v. Phillips*, before the M.R., gives him in equity all the rights of a legal estate for the seven years, though it was in law only an agreement. As to the residue of the premises there was no evidence how it was disposed of, but it was not occupied by Harris, and I assume for the purpose of the present judgment that it was occupied by a person unknown, for a term unknown. Harris being in receipt of the rents and profits in the manner that I have mentioned, the claim is made against him, and it seems to me that under sect. 3 he clearly is the "adjoining owner." By that section the word "owner" is applied to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation thereof other than as tenant from year to year. He was the owner in possession and in receipt of all the rents and profits of this tenement, and he is the adjoining owner. Then the party-wall having been pulled down and a claim made against him, coming within the definition of owner, he says, "I am not the owner, because I am not in the immediate occupation of the premises." But, as I read the statute, the action is properly brought against him. The wall was a dangerous structure. Part the second of the Metropolitan Buildings Act contains provisions for pulling down dangerous structures, and sect. 73 gives the building owner, who is to pull down the structure and build up another in its place, a right to demand repayment of the expenses. It says, "all expenses incurred" (I leave out the words, "by the said commissioners," because the building owner is in the place of the commissioners—all expenses incurred by the building owner—as I read it), "in respect of any dangerous structure shall be paid by the owner

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of such structure, but without prejudice to his right to recover the same from any lessee or other person liable to the expenses of the repairs." It seems to me to be perfectly clear that the party upon whom the duty of payment is cast is the owner of the structure within the meaning of sect. 3, namely, a person in possession or receipt of the rents or profits of the premises, that is to say, the person having a beneficial lease, or entitled to it. The words "without prejudice to his right to recover the same from any lessee or other person liable to the payment of such expenses of repairs" clearly refer to the owner of a long term who has underlet the premises. There is a very great convenience in giving to the building owner, having all the rights of the commissioners, a recourse in the case of a party structure, to one owner of the entirety of the premises, an ascertained party from whom one payment may be obtained, and there would be a great inconvenience in holding that the building owner must have recourse to every one of the lessees of the adjoining house, where it is let out, as in the present case, to different sub-tenants for different terms. There is great convenience in requiring the owner of the entire house to pay the whole amount and adjust it with the sub-tenants according to their respective contracts. There would be great inconvenience in requiring that the building owner should have recourse to each of the sub-tenants to make them pay for the building up a party-wall. For, take the case of the man who has taken one floor of the house for a term, of which only four and a half years remain, it would be an enormous injustice to make him pay the entire expense of building up that portion of the party-wall which adjoins his floor. That the statute contemplated something in the nature of a permanent interest in the adjoining owner of the whole of the premises, appears from sect. 84, which enables the adjoining owner, while the process of restoration is going on, to require the building owner to build chimneys, jambs, recesses, and other like works belonging to the permanent structure of the adjoining house. It seems much more reasonable to give the right to insist on modifications of the structure of the party-wall to the person entitled to the long lease of the entirety of the premises than to allow such a right to be exercised according to the caprice or convenience of the persons having leases of the separate floors. One might require one line of fine and another another, and so on. It seems to me that the lessee for a long term in receipt of the improved rents and profits is precisely the owner contemplated by this statute against whom the building owner is to have recourse; and I think that sect. 97, construed in this way, tallies exactly with it. That section enacts that in respect of expenses to be borne, the owner immediately entitled in possession to premises, or the occupier thereof, shall, in the first instance, pay such expenses, with this limitation, that no occupier shall be liable to pay any sum exceeding the amount of rent due or to become due from him in respect of the premises. The owner immediately entitled in possession *primâ facie* would be the person to pay, and the clause has not contemplated cases where the tenant in fee might be in possession of the land. I think that the clause refers to the definition in sect. 3 of the word owner, and it means, "in the receipt of the improved rents and profits," and is put in contradistinction to an occupier living upon the premises, because the first is liable to the entire demand, and the other is liable only to the extent of the rent that might be due or become due from him. Therefore, if Mr. Hunt was bound to go against the under-lessees, instead of getting the whole from the original lessee, his remedies against them would be limited in each instance to the amount of the rent due or about to

accrue due from them to Harris. I think that this was what was in contemplation, making the party entitled to the permanent interest liable, because by sect. 74, if the "owner" cannot be found, or will not pay, the adjoining building owner has the right to sell the premises. What the section exactly means I do not pretend to say, and whenever a building owner comes to exercise such a right, it will behave him to act warily, and to sell only the interest of the party who makes default. But it would be strange if the premises could be sold and the fee-simple of one of the landowners, against whom the statute has not given any remedy, could be broken up in consequence of the default of a sub-lessee, who might have, as in the present case, an interest only for four years and a half. To my mind the statute has a thoroughly rational and convenient interpretation upon the principle I have stated. I do not mean to say but that the owner in fee-simple may be liable, and somebody else also. I do not pronounce any opinion upon that. But my opinion is, that an action will lie against the owner of the long term who has underlet the premises, and who is entitled to the rack rents, and not against the parties to whom he has underlet. The cases adverted to throw little light upon the question before us. In the case of *Evelyn v. Whichcord*, Evelyn was the owner in fee who had leased the land to one Searle at a peppercorn rent under a covenant with Searle to build houses on the land so let, and the claim made by Whichcord, who was the district surveyor, was for surveying the houses which Searle was building, and in respect of which Searle was the person for whom the service was done, and on his becoming bankrupt Whichcord made a claim for his fees under sect. 51 of this Metropolitan Buildings Act on Evelyn, the owner of the fee-simple. The judgment was, that he was not the owner within the definition in sect. 3, because, as stated in the judgment of Crompton, J., it is enacted that the word owner shall apply to a person entitled to the rents and profits, whereas a peppercorn rent cannot be called a rent or profit. I am reported to have only said in that case, "Under the peculiar circumstances of this case I read the statute as my Lord does." It was very clear to my mind in that case that it was the duty of the judges to look a long way round before they shifted the liability to pay the surveyor from the builder to the owner of the fee-simple. The statute makes the man entitled to receive the rents and profits liable. I consider that the beneficial interest was in the lessee of the term, and not in the person entitled only to a peppercorn rent. That case throws very little light upon the present one, because it has nothing to do with the rights created by proximity between building owner and adjoining owner; and it is contended that the liability of builders to surveyors is totally different from that of the adjoining owners to building owners. The same observation, to my mind, applies to the case of *Mourilyan v. Labalmondieri*. There a chapel had been let by Mourilyan to one Neill for twenty-one years, with a covenant by Neill to keep it in repair. I do not understand that it adjoined anything, or that there was any question of building owner or adjoining owner. The conditions of the lease were not performed, and the west end of the chapel was in a dangerous state, and the commissioners thereupon after a survey pulled down the west end as *per se* dangerous, not in the least degree because it was a benefit to the adjoining house. When the west end was pulled down, it was found that the residue of the chapel was also dangerous, whereupon a further order was made to pull down the residue of the chapel, and the residue was pulled down. These were the expenses in question; and then, as between Labalmondieri-

who was the Commissioner of Police, and Mourilyan, the owner in fee, the court came to the conclusion that Mourilyan ought not to have been proceeded against in the first instance. There is, I think, a distinction between that case and the present; but in one point of view it is in favour of the judgment I have come to. The court there say, that the action ought not to have been brought against the owner of the fee, but against the intermediate lessee entitled to the rents and profits. I consider that Neill, during his lease for twenty-one years under a covenant to repair, stood exactly in *pari jure* with Harris in the present case. According to the terms of the lease, Harris was making improved rents by letting to the under-tenants who held from him, and although the case does not say whether he got anything by the investment of the money, he intended it to produce a profit. So Neill was making a profit of the chapel by letting parts of it, for I assume that he was making a profit by letting the pews, and he had twenty-one years of the entirety under a covenant to put it in repair, and he was bound to rebuild it if it was falling down or was taken down by the Commissioners of Police in consequence of its bad condition, and he was the person within the reasoning of that decision who ought to have been called on to pay for the very reason that Harris ought to be called on here. It would be a source of infinite dispute and litigation if, without making Harris pay the whole, the building owner had to go against the under-tenants. Harris has a remedy against each of them. I am obliged to Mr. Hoggins for bringing these matters forward, and in coming to the conclusion at which I have arrived I do not in the smallest degree contravene any of the authorities referred to.

BYLES, J.—After the manner in which my Lord has dealt with this case, I will only add a very few words. I very much rejoice that we have had an opportunity of reconsidering the whole question this morning, and of hearing Mr. Hoggins. I cannot conceive, as the case at present stands, that any doubt can now remain upon the question. I think it right to say that, as far as I may venture to pronounce an opinion, all the three cases of *Mourilyan v. Labalmondiere*, *Evelyn v. Whichcord* and *Cowen v. Phillips* are rightly decided. In the first case it was held that the party who was a tenant for twenty-one years under a covenant to repair was the party liable, and further that he was the only party liable, and that his remedy was by contribution amongst the other parties who were liable to him. It is quite unnecessary to discuss the reasons why, but, on a full examination of the statute, I come to the conclusion that there is no reason whatever for impugning the soundness of that decision. The next case, as my Lord has pointed out, is the case of *Evelyn v. Whichcord*, where it was held that a receiver of a peppercorn rent was not in the beneficial occupation of the rents and profits, and therefore could not be the owner within the meaning of the statute. The third case was *Cowen v. Phillips*, and it is to this effect, that though a man, in point of law, may be a tenant from year to year, yet, if he has a contract for a term, he must be taken in a court of equity to be possessed of that interest, because equity considers that to be done which is contracted to be done. It is to be observed that a statute must receive the same construction in a court of law as in a court of equity. That case certainly shows, that if a person has a contract for a beneficial term, paying rent and putting into repair for twenty-one years, he would be the party liable to pay in the first instance under the statute. Every one of those cases is quite consistent with our decision here. This is an action by a building owner against the adjoining

owner for contribution. *Prima facie* the deft. is the plt.'s companion in the ownership of these premises. In what way did not exactly appear. According to the definition of party-wall, persons may have divided interests in party-walls; they may be joint tenants or tenants in common; or, in the case of parallel freeholds, the upper portions of a wall may belong to the owner on one side, and the lower portions to the owner on another; but in this case, whatever his interest, it is plain that the deft. is the "owner" both within the meaning of the Act of Parliament and in the popular sense of the word. It seems to me he is more than that; he is the occupier of the party-wall. It appears that the ground-floor and the basement are let to one tenant, and the two upper floors are let to another tenant; and, by the terms of a letting which we have not ascertained, the residue of the house, or a portion of it, is let to another. What is there to show that the demise of these tenements carries any interest whatever in the party-wall? Extreme cases, it is said, ought not to be put; but, on the other hand, extreme cases test principles. It seems to me that in this case it is plain the deft. is owner, and as far as I can see he is the occupying owner; and there is nothing in the case to show that any other person than himself is either the owner or occupier of the party-wall. We do not find that he demised any portion of the party-wall. That is a point upon which the case is silent. I should be astonished, if I took a lease for a term greater than from year to year, if I was told that it included a demise of a portion of the party-wall. After what my Lord has said I quite agree with his decision; and I cannot say that I now entertain any doubt that this verdict ought to stand.

M. SMITH, J.—I am of the same opinion. It may be difficult to put a definite construction upon this statute. The best the court can do is, to look narrowly to the facts of each case. I think that in this case the deft. answers the description of "owner" in the statute. He is in the immediate possession of the whole of the rents and profits, and therefore the beneficial owner; and the evidence does not satisfy me that there are other persons who answer the description, and who ought, in the first instance, to be sued. There may be other persons who are liable to contribute; but finding that the deft. is a person clearly within the description of owner in the statute, and the evidence not satisfying me that there are other persons within the description who ought in the first instance to be sued, I see no reason for disturbing the verdict. I thoroughly agree with my Lord that this is the best construction which the court has now put upon the statute. I quite agree with the decision of the M. R. in *Cowen v. Phillips*, but our judgment does not turn on the point raised in that case. On the other point I think the plt. is entitled to keep the verdict, and therefore I agree that the rule should be discharged.

*Rule discharged.*

Attorney for the plt., C. Harcourt.

Attorney for the deft., W. P. Scott.

Friday, April 28, 1865.

COMLEY (app.) v. CARPENTER (resp.)

*Local Turnpike Act—Cirencester Roads Act 1862—Construction—Liability to subsequent tolls on the same day—Stage coach or waggon—16 & 17 Vict. c. 90, schedule D.*

*A Local Turnpike Act imposed certain tolls on horses drawing (1) any coach, stage-coach, diligence, van, caravan, sociable, &c.; (2) any waggon, wain, cart, &c.*



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caravan, dray, &c.; only one toll to be taken in respect of such horse on one day, except in the case of a "stage-coach, diligence, omnibus, van, caravan, chaise, cart, chair, break, or stage waggon, or other stage carriage conveying passengers or goods for hire or reward," on which tolls were imposed every time of passing or repassing. The app. was a common carman, travelling on stated days of the week through one of the turnpikes at which tolls were collected under the Act, with a covered caravan or cart on four wheels, drawn sometimes by one and sometimes by two horses, but not travelling at a rate exceeding four miles an hour. He used his caravan chiefly for conveyance of goods, but took passengers on occasions. The caravan was not licensed under the Stage Carriages Act, but duty was paid for it as for a carriage used by a common carrier under 16 & 17 Vict. c. 90, schedule D.:

*Held, that the app.'s caravan was liable to pay toll on repassing through the turnpike:*

*Eatwell v. Richmond distinguished.*

Case stated by justices under 20 & 21 Vict. c. 43.

## CASE.

The resp. having appeared upon summons before us the undersigned, to answer to the said information, it was thereupon proved upon the part of the said app., that he is a common carrier, living at Cirencester, and travelling between that town and the town of Cheltenham every Tuesday and Thursday, that he so travels sometimes with a covered caravan or waggon, on four wheels, and sometimes with a covered caravan or cart on two wheels, drawn respectively by one or two horses, as the weight of a load or the state of the roads may require, and travelling at a pace not exceeding four miles an hour. That the said app. uses such caravans principally for carrying goods for hire, but that he frequently conveys therein also passengers for hire; that he is not licensed under the Stage Carriages Act for either of such caravans, but pays the duties of 2l. 6s. 8d. and 1l. 6s. 8d. for the same respectively as for carriages used by a common carrier under the 16 & 17 Vict. c. 90, schedule D. That on the day on which the alleged offence is charged to have been committed, being Thursday, the 16th Feb. 1865, the app. travelled as usual from Cirencester to Cheltenham and back, with the said covered caravan or cart on two wheels, and which on that occasion was drawn by one horse. That on the morning of the day in question the app. conveyed goods in such caravan from Cirencester to Cheltenham, and in the afternoon conveyed goods therein from Cheltenham to Cirencester, and in each case delivered such goods according to the directions thereon, and received payment for the carriage and delivery thereof according to a usual scale adopted by him. That he also, on the day in question, conveyed one passenger on each journey, and received payment of such passenger. That the app. travels from Cirencester to Cheltenham along the turnpike-road between these towns, and which is one of the district roads which are repaired and maintained under the provisions of the Cirencester Roads Act 1862. That there is a turnpike or toll-gate upon such road in the parish of Stratton, called the "Stratton-gate," and that the resp. is the collector of tolls at such gate. That on the morning of the day in question the app. passed through the said gate on his way to Cheltenham, and was charged by the resp. a toll of 6d. for the horse drawing the said caravan, and paid the same, and that on the afternoon of the same day (but before twelve o'clock at night), the app. repassed through the said gate on his return to Cirencester, and was then again charged by the resp. a toll of 6d. for the same horse drawing the same caravan, which second toll the app. thereupon paid under protest.

The Cirencester Roads Act 1862 was put in evidence. The preamble of such Act recites an Act passed in the sixth year of the reign of Geo. 4, c. cxliii., intitled "An Act for maintaining and improving certain roads leading to and from the town of Cirencester in the county of Gloucester," which last-mentioned Act was also put in evidence, and contains the following sections:

And be it further enacted that it shall and may be lawful for the said trustees, and for any person or persons to be appointed collector or collectors of the tolls to be taken by virtue of this Act, to demand and take the tolls hereinafter mentioned, at the several or respective tollgates, or turnpikes, or toll-houses, or side gates, or side bars, or chains which shall be erected or placed by virtue of this Act in, upon, across, or on the side or sides of the said roads, and on every day, such to be computed from twelve of the clock at night to twelve of the clock in the next succeeding night (that is to say),

For every horse or other beast drawing any coach, stage-coach, diligence, van, caravan, sociable, berlin, landau, chariot, vis-à-vis, barouche, phaeton, chaise, marine calashe, curriclo, chair, gig, whiskey, hearse, litter, chaise, or other such like carriage, the sum of 9d.

For every horse or other beast drawing any waggon, wain, cart, or other such like carriage having the fellies of the wheels thereof of the breadth of six inches or upwards at the bottom or soles thereof, the sum of 6d., and having the fellies of the wheels thereof of the breadth of four and a half inches or upwards, and less than six inches at the bottom or soles thereof, the sum of 7½d., and having the fellies of the wheels thereof of less breadth than four and a half inches at the bottom or soles thereof, the sum of 5d.

For every horse, mule, or ass, laden or unladen, and not drawing, the sum of 2d.

For every drove of oxen or neat cattle, the sum of 1s. 8d. per score, and so in proportion for any less number, and for every drove of calves, swine, sheep, or lambs, the sum of 10d. per score, and so in proportion for any less number:

Which said sums of money or tolls shall be demanded and taken before any horse, mule, ass, beast, or other cattle whatsoever shall be permitted to pass through any tollgate, or turnpike, or side-gate, or side-bar, or chain which shall be erected or placed by virtue of this Act in, upon, or across the said roads, or on the sides thereof, or any part thereof, and which said respective tolls shall be and are hereby veeted in the said trustees and shall be applied for the purposes of this Act in manner hereinafter directed.

Provided always, and be it further enacted, that in case the toll hereby authorized to be taken shall have been paid for the passing of any horse, beast, or cattle through any of such tollgates, turnpikes, or side-gates, such horse, beast, or cattle shall, upon a ticket denoting such payment on that day being produced, be permitted to pass toll-free through the same toll-gate, turnpike, or side-gate, and also through such other gate or gates (if any) as the ticket for such payment shall free, at any time or times during the same day, to be computed as aforesaid, except any such horse, beast, or cattle shall return drawing a different waggon, wain, cart, or other such carriage, in which case such horse, beast, or cattle shall be again liable to toll in respect thereof, anything in this Act contained to the contrary thereof in anywise notwithstanding.

Provided also and be it further enacted, that the tolls hereby made payable for and in respect of horses or beasts drawing any stage-coach, diligence, van, caravan or stage-waggon, or other stage-carriage conveying passengers or goods for pay or reward, shall be payable and paid every time of passing or repassing along the said roads or any of them.

The case then set out sects. 13 and 16 of the Act of 1862, which substantially re-enacted the toll-imposing clauses of the previous Act; imposing, however, the toll of 6d. on every horse drawing any "waggon, wain, cart, van, caravan, dray, timber-carriage, steam-engine, or other machinery," and exempting certain vehicles from a second payment of tolls on the same day by the following clause:

Sect. 20. The tolls hereby made payable for or in respect of horses or beasts drawing any stage-coach, diligence, omnibus, van, caravan, chaise, cart, chair, break, or stage-waggon, or other stage-carriage conveying passengers or goods for hire or reward shall be payable and paid every time of passing or repassing along the said roads or any of them.

On the hearing of the said information it was treated as an admitted fact on both sides that under the said Acts the sum of 6d. demanded and paid in respect of the app.'s caravan on the first time of the same passing the said gate as before stated, was the toll legally and properly payable in respect thereof; but it was not proved or admitted before us whether such toll was payable under the said Act of 6 Geo. 4 as continued by sect. 13 of the Act of 1862, or



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whether the same was payable by virtue of sect. 16 of the said Act of 1862.

The app. contended:

1. That his caravan was not a carriage conveying passengers or goods for hire or reward within the meaning of sect. 20 of the said Act of 1862, and that, therefore, the horse drawing the same was not liable to pay toll on each time of passing through the said gate.

2. That, according to the construction of such section, the stage-carriage thereby made liable to pay toll every time of passing along the turnpike-road means a stage-carriage licensed as such under the Stage Carriage Act (2 & 3 Will. 4, c. 120).

The resp. contended:

1. That the caravan driven by the app. was a stage-carriage conveying goods for hire or reward within the meaning of the said section, and that, therefore, the horse drawing the same was liable to pay toll on each time of passing through the said gate.

2. That, according to the true construction of such section, a carriage which is used as a regular conveyance for goods and passengers between certain places at stated times on fixed dates, and in respect of which duty is paid under the 16 & 17 Vict. c. 90, schedule D, as a carriage used by a common carrier, is a stage-carriage and liable to tolls on each time of passing, notwithstanding that by reason of such carriage travelling at a pace not exceeding four miles an hour, the same may not be licensed or required to be licensed under the Stage Carriage Act.

3. That, by giving the said section the construction contended for by the app., no meaning is attached to the words "or goods" contained therein, inasmuch as a stage-carriage is defined by the Stage Carriage Act, and means "a carriage used or employed for the purpose of carrying passengers for hire."

Whereupon we, the said justices, were of opinion that the app.'s caravan was a stage-carriage conveying goods for hire within the meaning of the said Act, and that the same was liable to toll on each time of passing and repassing along the said turnpike-road, and we therefore dismissed the said information.

The question for the opinion of the court is, whether, upon the above facts, the app. was legally chargeable with the toll of 6d. in respect of the said caravan, on the occasion of his repassing along the said turnpike-road on the day mentioned in the said information.

Kingdon appeared for the app., and relied on the judgment of the court in

*Eatwell v. Richmond*, 12 L. T. Rep. N. S. 52.

The resp. did not appear.

WILLES, J.—In this case the court has sustained considerable inconvenience from the fact that no counsel was instructed to argue on the part of the resp. Probably, from having heard only the argument on behalf of the app., my mind has fluctuated considerably; but at last, on the best consideration which I have been able to give to the case, I have come to the conclusion that the decision of the justices was right. I am not desirous to throw any doubt on the decision of the court in the case of *Eatwell v. Richmond*. I give my entire assent to that case. But comparing the Act of Parliament there with that now before us, it appears to me that the expression "conveying passengers or goods" in this Act is substantially different from that on which a construction was put in *Eatwell v. Richmond*. The conclusion to which I have come in this case is similar to that to which the court there came, be-

cause, whereas it was there held that, on the true construction of the statute, a stage-carriage meant to be excepted from the exemption was a stage-carriage licensed as such by the Act relating to the Inland Revenue, without reference to the particular employment of the carriage at the time of passing through the gate; so here my impression is, that all carriages which fall within the more extensive description of stage-carriage in this case must pay on repassing through the gate, without reference to the fact of there being actually passengers in them, or goods, provided they are carriages intended to be stage-carriages for the conveyance of passengers or goods, and are travelling on the road for that purpose. The expression "for the conveyance of passengers or goods" may be intended to denote either the employment of the carriage at the moment when it passes through the turnpike-gate, or the employment for which it is destined, and in which it is engaged at the time, although not at the moment earning money for any particular person or goods. I think that the latter is the true construction, and that the app.'s carriage fell within it, and that the conclusion arrived at by the magistrates was correct. The inconvenience of requiring a search to be made of each carriage coming through the gate was pointed out in *Eatwell v. Richmond*, and my decision here follows out the same train of argument. More effect will be given to the language of the Act, especially to the words "or goods," by adopting the decision of the magistrates, than by putting on the words the construction suggested by Mr. Kingdon, to which my mind inclined at first.

BYLES, J.—I am of the same opinion. It seems to me that the vehicle might fall within both of the single-toll imposing clauses. The first of them seems to comprehend vehicles of a superior class to the second, but the app.'s caravan or cart might fall within either of them. This, however, is immaterial. If any ordinary vehicle, belonging to one owner, goes through the gate once and returns on the same day, it does not pay the toll again, because the toll would fall twice on the same person; but where passengers or goods are carried, the incidence of the toll is on the passengers or goods, and the toll is to be paid twice. The app.'s vehicle falls clearly within the double-toll imposing clause. A stage-coach means, I conceive, a vehicle regularly plying from place to place. The case finds that that was done by the app.'s vehicle, therefore it was a stage, probably a stage caravan or stage waggon. This being so, supposing it is adapted to carry passengers or used to carry passengers at times, or, to take the narrowest definition, supposing it to be both adapted and used for carrying passengers, it comes within the definition. I agree with my brother Willes that no doubt is to be thrown on the case of *Eatwell v. Richmond*. I was not present at the argument in that case; nor am I so conversant with the Act of Parliament on which it depended as to be able to form any opinion upon it without further consideration, but so far as I do see my way to a conclusion upon it, I agree with the decision of the court.

KEATING, J.—I am of the same opinion. The difficulty in Mr. Kingdon's construction which I have not been able to overcome is, that he virtually strikes out of the Act of Parliament the words "or goods." Our decision does not conflict with that in *Eatwell v. Richmond*. The clause in the Act there construed alluded to carrying passengers, and was quite different to that which applies to the present case.

M. SMITH, J.—I also think that the decision of the justices was right. The principal basis

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ness of the app's cart was the conveyance of goods for hire, and though it occasionally carried passengers, it falls within 25 & 26 Vict. c. 13, as being a stage-coach conveying goods for hire. It is said that this is not so, because it is not a coach requiring a licence under the licensing Act, but neither does any carriage used for the conveyance of goods for hire. It is impossible otherwise to give effect to the words "or goods." The cart is, as pointed out by my brother Byles, hired by different persons on the two journeys. The case of *Eatwell v. Richmond* is distinguishable on the grounds pointed out by my learned brothers who were members of the court at that time.

*Judgment for the resp.*

Attorneys for the app., *Lewis, Wood and Street.*

### CROWN CASES RESERVED.

Reported by J. THOMSON, Esq., Barrister-at-Law.

*Saturday, April 29, 1865.*

(Before ERLE, C. J., CHANNELL, B., BLACKBURN, MELLOR and SMITH, JJ.)

REG. v. SHAW.

*Perjury—Sunday beer trading—Information—Summons—Corroborative evidence—Indictment.*

*An indictment, for perjury, alleged that after the 18 & 19 Vict. c. 118, K. was licensed to sell beer by retail on the premises; that he was duly summoned to appear before justices acting in and for the county of L. to answer an information and complaint for selling beer in his house at B. during the prohibited hours on a Sunday; that K. appeared at the petty sessions; and that the deft. appeared as a witness for him and committed the alleged perjury.*

*At the trial it appeared that a policeman reported the case to his superintendent, who went to the clerk of the justices and narrated what the policeman had said, whereupon the clerk filled up a blank summons against K. The superintendent took the summons to a justice, who read it and signed it without further inquiry, and the summons was served on K. K. appeared in pursuance of it, and called the now deft. as his witness:*

*Held, that it was not necessary on the trial of the indictment to prove that an information was laid as the basis of the summons:*

*That if a party appears before justices and allows a charge which they have jurisdiction to hear to be proceeded with without objecting, he waives the want of an information or summons:*

*That justices of the county, under the 18 & 19 Vict. c. 118, have jurisdiction to hear an offence against a beer-retailer of Sunday trading during the prohibited hours, and it is not necessary to allege that they are justices acting in and for the petty sessional division.*

*Quære, whether, where the indictment alleges that a party has been summoned to answer such a charge before magistrates, that allegation ought not to be proved:*

*Held also, that the corroborative evidence given at the trial was sufficient.*

Thomas Shaw was tried and convicted before me at the last assizes, 1865, at Liverpool.

The following is a copy of the indictment:

Lancashire to wit.—The jurors of our Lady the Queen upon their oath present, that heretofore and after the making of a certain Act of Parliament made and passed in the session of Parliament, holden in the eighteenth and nineteenth years of the reign of Her present Majesty, intituled "An Act to repeal the Act of the seventeenth and eighteenth years of the reign of Her present Majesty, for further regulating the sale of beer and other liquors on the Lord's day, and to substitute other provisions in lieu thereof;" to wit, on the 11th day of Dec.

A. D. 1864, at the township of Burtonwood, in the county of Lancaster and within the petty sessional division of Warrington in the county aforesaid, one Samuel Kilshaw was a person licensed to sell beer by retail to be drunk on the premises.

And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards and within the space of six calendar months from the day of the committing of the alleged offence next hereinafter mentioned, to wit, on the 11th Dec. in the year last aforesaid, the said S. Kilshaw was duly summoned to appear before such of Her Majesty's justices of the peace acting in and for the county of Lancaster aforesaid (being the county and place where the alleged offence next hereinafter mentioned was then and there and therein alleged, to have been committed by him the said S. Kilshaw, as therein mentioned), to answer before such justices a certain information and complaint against the said S. Kilshaw then and there preferred and laid against him, and then and there depending before the said justices, for that he, the said S. Kilshaw, had then and there and within the county and place aforesaid, unlawfully committed a certain offence against the said statute, to wit, that he, the said S. Kilshaw, on the 11th Dec. 1864, the said day being Sunday, at the township of Burtonwood, in the county of Lancaster, being then and there a beerhouse keeper, and duly licensed to sell beer, ale and porter by retail to be drunk and consumed in his house and premises there situate, did open his house so licensed as aforesaid for the sale of beer, ale and porter, after the hour of three, in the afternoon and before the hour of five in the afternoon, to wit, at the hour of forty minutes past four in the afternoon, contrary to the statute, &c.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said S. Kilshaw duly appeared at the petty sessions of the petty sessional division of Warrington, holden at the township of Newton-in-Mackerfield, in the county of Lancaster, the same being the county division and place where the said alleged offence against the said statute was then alleged to have been committed by him the said S. Kilshaw as aforesaid, before Benjamin Pierpoint, Esq. and the Rev. Harold Hopley Sherlock, being and acting as two of Her Majesty's justices of the peace in and for the county aforesaid, and thereupon then and there, to wit, on the 31st Dec. 1864, at the township of Newton-in-Mackerfield, in the county of Lancaster, before the said justices of the peace then and there having competent authority then and there to hear and determine the same, the said charge and complaint against the said S. Kilshaw for the said alleged offence aforesaid then and there depending as aforesaid before the said justices aforesaid came in due form of law, to be then and there heard and determined by and before them the said justices as aforesaid.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that upon the said hearing and determination of the said charge and complaint so depending as aforesaid before the said justices as aforesaid, Thomas Shaw, late of the township of Newton-in-Mackerfield, in the county of Lancaster, appeared as a witness for and on behalf of the said S. Kilshaw, and was then and there in due form sworn and took his corporal oath on the Holy Gospels of God, that the evidence he the said T. Shaw would then and there give should be the truth, the whole truth, and nothing but the truth, so help him God, by and before the said justices as aforesaid, and then and there having competent authority and jurisdiction to administer the said oath; and the jurors aforesaid upon their oaths aforesaid, do further present, that upon the said hearing of the said information and complaint so depending as aforesaid before the said justices as aforesaid, it became and was a material question whether the said T. Shaw was in the house of the said S. Kilshaw at all on Sunday, 11th Dec. 1864, and whether he had seen a certain policeman, to wit, John Todd, then and there and before the said justices then pointed out and shown to him the said T. Shaw, and whether he the said T. Shaw had been at Burtonwood aforesaid on the day and year last aforesaid, or within a fortnight previous thereto.

And the jurors aforesaid upon their oaths aforesaid do further present that the said T. Shaw, not having the fear of God, before his eyes nor regarding the laws of this realm, but seduced and moved by the malice and instigation of the devil, unlawfully, falsely, knowingly, wilfully and corruptly did swear and depose before the said justices aforesaid, and upon the hearing and determination aforesaid of the said information and complaint so depending as aforesaid, in substance and to the effect following: that is to say, "I was never in the house (meaning the beerhouse of the said S. Kilshaw) at all that day (meaning the said Sunday the 11th Dec. 1864), and never saw the policeman (meaning the said J. Todd) before in my life. I never was in Burtonwood (meaning the township of Burtonwood aforesaid) at all that day (meaning the said Sunday last aforesaid). I had not been in it (meaning the township of Burtonwood aforesaid) for a fortnight before that day (meaning the said Sunday last aforesaid)." Whereas in truth and in fact he the said T. Shaw was, upon Sunday the 11th Dec. 1864, in the house of the said S. Kilshaw and saw the said J. Todd there then, as he the said T. Shaw at the time he so swore then well knew. And whereas in truth and in fact the said T. Shaw had been at Burtonwood aforesaid the day and year last aforesaid and within a fortnight previous thereto, as the said T. Shaw at the time then well knew. And so the jurors aforesaid upon their oaths aforesaid do say that the said T. Shaw on the day and year last aforesaid, in the township aforesaid in the county aforesaid, did unlawfully commit wilful and corrupt perjury, to the great dis-

pleasure of Almighty God, in contempt of our Lady the Queen and her laws, and against the peace of our said Lady the Queen, her crown and dignity.

On arraignment before plea pleaded it was objected by the prisoner's counsel that the indictment did not show jurisdiction in the said justices to hear and determine the information against the said S. Kilshaw.

First, because, although it was alleged that the offence had been committed within the petty sessional division of Warrington, it was not alleged, nor did it anywhere appear, that the said justices had any jurisdiction whatever within such petty sessional division.

Secondly, because it did not show that the information against Kilshaw contained any offence over which they had any jurisdiction.

It was afterwards—that is to say, in the course of inquiry into the facts of this case—proved that the two magistrates named in the indictment did, in Kilshaw's case, act as such within the petty sessional division of Warrington.

Again, the only evidence at the trial before me of the fact of any information or complaint ever having been made against Kilshaw was this, namely, the policeman Todd reported to the superintendent the fact of his having seen the prisoner in Kilshaw's beerhouse between the hours of three and five p.m. on the day in question, and the circumstances thereof.

The superintendent submitted the facts and circumstances contained in this report to the magistrates' clerk, and he thereupon filled up a blank summons against Kilshaw. This blank summons so filled up was taken by the superintendent to the magistrate, who, after reading it, signed it. It was then put into the officer's hands for service. This was stated to be the usual practice in such matters. The magistrate who signed such a summons has always any explanation he may require made to him. In this case he made no inquiry into the particulars, facts, or circumstances, and no statement of any kind was in fact ever made to him. The summons against Kilshaw was not produced upon the trial before me, nor was any other evidence given of its contents or about it than what I have stated. At the close of the case for the prosecution the prisoner's counsel objected that there was, in fact, no information or complaint to justify the issuing of a summons against Kilshaw, and therefore that the whole proceeding before the magistrates was *coram non iudice*.

Again, to prove the perjury assigned, a policeman of the name of Todd was called. He swore, amongst other things, that he had seen the prisoner in Kilshaw's beerhouse in Burtonwood, and that he had spoken to him there at twenty minutes to five p.m., or thereabouts, on the day in question.

To confirm Todd two other witnesses were called for the prosecution. One of them swore that he had seen the prisoner Shaw in the village of Burtonwood (the village in which Kilshaw's beerhouse is) at two o'clock in the afternoon on the same day. The other witness swore that she had seen the prisoner between three and four o'clock in the afternoon of the same day on the road leading to Kilshaw's house, and when she last saw him he was close to Kilshaw's beerhouse. The direction the prisoner was then taking led also, as was proved, to the house of the prisoner's brother, where, according to the witnesses for the prisoner, he was, in fact, at the very time when, according to Todd's statement, he was in Kilshaw's house drinking ale.

It was contended upon this part of the case by the counsel for the prisoner, that there was no corroboration of the principal witness Todd, in support of the assignment of perjury. I overruled all these objections. A great number of witnesses was then

called for the prisoner with a view to contradict the witness Todd, and to show the truth of the prisoner's statement before the magistrates, namely, that he never was at Kilshaw's house on the Sunday in question, but that he was, in fact, at the house of his brother drinking tea at the time, when, according to Todd's statement, he was drinking beer in Kilshaw's house. One of the witnesses for the defence (one Sarah Bury) admitted that she saw the prisoner in the village of Burtonwood on the day in question, between three and four o'clock in the afternoon. I left all the facts and circumstances of the case, at once voluminous and conflicting, to the jury.

He was convicted, and I at once sentenced him to twelve calendar months' imprisonment, with hard labour.

He was, however, the next day, with the sanction of Mellor, J., let out on bail.

The opinion and advice of the Court is desired on the case, especially on the following points:

1. Is the indictment sufficient?
2. If sufficient, was the production of, or further proof of, an information or complaint, as the basis of the summons against Kilshaw, indispensably necessary on the prisoner's trial?
3. Is the last objection as to want of corroboration of any value under the circumstances?

GEORGE ATKINSON.

*Cottingham* for the prisoner.—The conviction was wrong. First, the non-production of the information before the magistrate and the summons was fatal to the indictment. In *Reg. v. Waybrow*, 8 Cox C. C. 438, where the prisoner was indicted for wilful and corrupt perjury committed at a police court upon the hearing of a summons, it was held essential that the summons should be produced. [BLACKBURN, J.—In this case it does not appear that the point was taken at the trial or anything reserved about that. For all that appears the prisoner may have had the summons and would not produce it, and secondary evidence may have been given of it. CHANNELL, B.—In the case cited the Court could not see the materiality of the answers of the defendant until it saw the charge in the summons.] Here the information was the basis of the jurisdiction before the justices, and in the absence of the summons there was not proper evidence of the charge depending before them. And before the magistrate could sign the summons he must have an information laid before him. But, in point of fact, there was no information laid before the magistrate; but the magistrate's clerk drew up the summons upon the report of a police superintendent, who reported what a policeman had told him. And further, the summons so drawn up was not produced at the trial. This, it is submitted, is a fatal objection.

*Paley* on Conv. by Macnamara, 54;

*Cripps v. Durden*, 1 Sm. L. C. 649;

*Reg. v. Millard*, Dears. C. C. 167; 6 Cox C. C. 130;

*Stone's J. P.* 55.

Secondly, as to the corroboration of the principal witness. The corroborative testimony must not be circumstantial merely, but probative: (*Best* on Ev. 672.) It should be of such force that, in a case where the testimony of one witness is sufficient, it would prove the case:

*Reg. v. Hurrell*, 3 Foa. & Fin. 271;

*Roscoe* Law of Ev. in Crim. Cas. 863, edit. 1861;

*Reg. v. Yates*, 1 Car. & M. 137;

*Reg. v. Boalter*, 2 Den. C. C. 896;

*R. v. Champneys*, 2 Lew. C. C. 62.

Here the question was, whether Shaw was in Kilshaw's beerhouse between three and five o'clock on the Sunday in question, and the utmost corroborative evidence came to was, that he was seen near the house at that time. Next, as to the sufficiency of the indictment. First, the indictment leaves it

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in doubt as to the statute in which it is framed. The indictment merely states that after the passing of a statute made in the session held in the 18th and 19th Vict., &c. Kilshaw was a person licensed to sell beer by retail, &c., &c. The proceedings may have been under that Act or under the 1 Will. 4, c. 64, or the 4 & 5 Will. c. 85. Then it is not alleged that the justices were acting in and for the place where the summons was heard: (*Reg. v. Rawlings*, 8 C. & P. 439.) [ERLE, C.J.—The 1 Will. 4 gave the petty sessions the jurisdiction, and the 18 & 19 Vict. c. 118, s. 5, gave jurisdiction to any justice of the county.] Here the indictment shows that the charge was preferred at the petty sessions; and it should also have averred that the justices were acting in and for the division in which the offence took place:

*Reg. v. Dowling*, 5 T. R. 818.

No counsel appeared to argue for the prosecution.

ERLE, C. J.—I think that this conviction must be affirmed. Kilshaw was proceeded against before two magistrates on a summons, and he was convicted of keeping open a beerhouse during the prohibited hours. The 18 & 19 Vict. c. 118, s. 5, says that every person who shall offend against that Act shall be liable upon summary conviction for the same before any justice for the county, riding, division, &c., or place where the offence shall be committed. Then Kilshaw being proceeded against for the offence under that statute, a policeman swore that Shaw was the person to whom the beer was supplied, and that he saw him in Kilshaw's house. To rebut that, Shaw was called for Kilshaw, and he swore not only that he was not in Kilshaw's house at all on the day in question, but that he had not been in it for a fortnight before that day. The indictment alleges that Kilshaw was summoned to appear before such of Her Majesty's justices acting in and for the county (being the county and place where the offence was alleged to have been committed) to answer a certain information and complaint preferred against him and depending before the said justices. Now, no summons was proved at the trial of this indictment, and no written information warranting the issuing of the summons was proved; but, in my opinion and in my experience, where a party appears before a justice charged with an offence within his jurisdiction, the justice has jurisdiction to dispose of the case without a summons or without any information in writing being laid before him, unless the statute creating the offence imposes the obligation of not hearing the case without these preliminaries. The whole of the proceedings may be drawn up at the time of the hearing. This indictment is so framed as to give countenance to the objection of the non-production of the summons at the trial, because it contains an allegation that a summons was duly issued to bring Kilshaw before the magistrates. As far as I can make out, no summons was produced at the trial, but there was a great deal of evidence to show that a summons had been issued, and I do not find it stated in the case that the objection was taken that the summons was not produced. It may have been there in court in the officer's pocket, and would have been produced if called for. We have only to decide on the points reserved, of which this is not one. The learned counsel for the prisoner then took an objection that there was no written information justifying the issuing of a summons against Kilshaw. A written information is not necessary for issuing a summons, and this objection fails to the ground. As to the objection to the indictment for not showing that the justices were acting in and for the petty sessions where the offence took place, I read the 18 & 19 Vict. as creating a different tribunal from that created by the 1 Will. 4, which

gave the jurisdiction over the offence of selling beer within the prohibited hours to the petty sessional division. As to the last objection, the one of substance and merit, that the testimony of the policeman was not supported by proper corroborative evidence, the law says that the offence of perjury is not established by one witness swearing to the contrary of that which the deft. swore, and the prosecution is bound to turn the scale by additional evidence. What degree of corroborative evidence is requisite must be a matter for the opinion of the tribunal that tries the case, which must see that it deserves the title of corroborative evidence. Any attempt to define the degree of corroboration necessary would be illusory. Then, in this case, was the oath of the accusing witness corroborated? One of the charges of perjury is, that the deft. swore that he was not in the parish on the Sunday in question. To corroborate the accuser two witnesses were called who saw the deft. not only in the parish on that day, but one of them saw him on the road and close to Kilshaw's beerhouse at the time. I think that this was some corroboration at least, and that the case was properly left to the jury.

CHANNELL, B.—I also think that the conviction should be affirmed. I entertained a doubt on one of the points during the argument; but, after carefully considering the matter, I think that the conviction should be affirmed. It was contended that the indictment was bad because it was uncertain under what statute the charge was preferred. I think that argument is without foundation, for the indictment refers to the 18 & 19 Vict. c. 118. Another objection was, that it did not appear that the justices were acting in and for the petty sessional division where the offence took place. That might or might not have been an objection if the indictment had been preferred under the earlier Acts; but under the 18 & 19 Vict. c. 118, it is no objection. Then it was urged that there was not sufficient corroborative evidence. There were two allegations on which perjury was assigned, and no objection was made to the materiality of those allegations. Now, two witnesses were called to prove one of the allegations, and, if the only allegation had been the other one, there would have been some corroborative evidence as to that. The only other objection is the one on which I entertain some doubt, viz., whether it was not a material allegation in the indictment that a summons had been duly issued, and whether on that point there was not a failure in the evidence. If it had been necessary to decide that point, I should have required more time for consideration. I do not find, however, that the point arises. The objection made at the close of the prosecution, that there was no information or complaint to justify the issuing of a summons against Kilshaw, does not raise the point.

BLACKBURN, J.—I am of the same opinion. The substantial objection was, that the justices had no jurisdiction to hear the case, because, prior to the summons, there was no information or complaint. But none such was required prior to the summons. It might be essential to know that the charge was one of perjury, and that was a good reason for asking for an adjournment when the party appeared. But if he chooses to waive the information, and allow the hearing to proceed, the justices have jurisdiction.

MELLOR, J.—I share in the doubt of my brother Channell; and, if the point was before us, I should require further time for consideration.

M. SMITH, J.—Unless it is required by statute, where a party voluntarily appears to answer a

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charge before a magistrate, no information or summons is necessary. It is clear that in this case the objection was not the non-production of the summons, but the want of an information.

*Conviction affirmed.*

# REG. v. BJORNSEN.

*Murder on the high seas—British ship—Register of ship—Prima facie proof—Alien owner—17 & 18 Vict. c. 104.*

A murder was committed on board a ship on the high seas, sailing under the British flag, and the accused brought to England in custody, and put on his trial for the crime. To show jurisdiction in the courts of this country it was sought to establish that the ship was a British ship, and the register of the ship at the port of London was put in evidence, wherein the owner's name was stated to be C. A. Rehder, of 14, London-street, City of London, merchant. It was proved, however, that Rehder was alien born, and it did not appear that he was a denizen of this country or naturalised. It was further proved that the ship was foreign built, and that the officers and crew, including the accused, were foreigners:

*Held*, that although the register might be *prima facie* evidence of the facts stated therein, and that the ship was a British ship, yet the proof that the owner was alien born rebutted the inference from the register that he was a British subject, and he was therefore disqualified by the Merchant Shipping Act (17 & 18 Vict. c. 104), s. 18, from being the owner of a British ship:

*Held also*, that it would not be presumed that he was denizenised or naturalised.

Case reserved by Channell, B.

The prisoner Adolph Bjornsen was indicted before me at the last Winter Commission for the county of Southampton, for the wilful murder, on the high seas, of one Heinrich Leonard Paul Scherck.

The jury acquitted the prisoner of murder.

They found him guilty of manslaughter.

This verdict is to be taken for the purposes of the present case to be correct, subject to the points of law hereinafter stated respecting the jurisdiction of the court to try the prisoner for the offence.

The offence was committed on board the barque *Gustav Adolph*, on the 21st June last, on the high seas, at a point about five days' sail from Pernambuco, and about 200 miles from the nearest land.

In opening the case to the jury the counsel for the prosecution stated that since the prosecution had been instituted doubts had arisen as to whether the *Gustav Adolph* was a British ship, so as to give jurisdiction to the Court to try the prisoner for an offence committed on board the barque on the high seas, and that he should place at the disposal of the prisoner's counsel, if desired by him, all the documents in the possession of the prosecution for clearing up those doubts.

The facts relating to the commission of the offence on board the ship having been proved, it was further proved that the ship in question was built at Kiel, in the duchy of Holstein, in the spring of the year 1864. That she sailed from Kiel to London, thence on the voyage in the course of which the offence was committed.

All the officers and crew were foreigners; the prisoner being second mate, and the deceased the master. The ship was sailing under the English flag on the 21st June 1864. The crew were told before sailing that Mr. Rehder was sole owner. He was not a born Englishman.

A certified copy of the register of the *Gustav*

*Adolph*, under the 17 & 18 Vict. c. 104, was put in by the counsel for the prosecution.

It was objected that the qualification of Mr. Rehder to be an owner of a British ship according to the 18th section of that Act ought to be proved.

I admitted the certified copy as *prima facie* evidence that the ship *Gustav Adolph* was a British ship.

In consequence of the opening statement of the counsel for the prosecution, the prisoner's counsel called for certain letters, which were then put in evidence by the prosecution, at the request of the prisoner's counsel. They were as follows:

Hamburg, 31st Dec. 1863.

C. H. Rehder, Esq., London.

Dear Sir,—As verbally agreed upon, I hereby make over to you my part of a contract signed on the 29th May, A.C., by and between Mr. C. L. Bock, shipbuilder of Kiel, and myself, whereby, after due delivery of the vessel therein contracted for, you become the sole owner of the barque-ship called *Gustav Adolph*, of the following dimensions:—

	ft. in.	
Length of keel .....	116 6	} British measurement.
Length over all .....	131 0	
Width outside all over .....	27 0	
Width inside .....	24 0	
Depth of hold from below to the upper deck plank .....	12 4	

at the price of cost stipulated for, say, Hamburg burmasks, 62,500. As further agreed upon, I shall make the necessary payment to Mr. C. L. Bock, and see to the true fulfilment of the contract, debiting you all payments made in accounts current. With regard to the vessel herself, I can in future act as your agent only, and it will thus be necessary for you to send me a power of attorney at your earliest convenience.—I remain, dear Sir, your obedient servant, PAUL EHLERS.

I, Edward Lehrenger, Doctor of Laws of the Free Hanseatic town of Hamburg, Notary Public, &c., hereby certify and attest that the letter herebefore written was duly signed by Mr. Paul Ehlers, &c.

Hamburg, 7th Jan. 1864.

(Signed)

LEHRENGER, DR.

London, 18th Jan. 1864.

Paul Ehlers, Esq., of Hong Kong, p. t., Hamburg.

Dear Sir,—I reply to your letter of the 31st Dec. last. I hereby accept your responsibility in a contract signed the 29th May 1863 by your good self and Mr. C. L. Bock, shipbuilder of Kiel, relating to the barque-ship *Gustav Adolph*, now in course of construction at or near Kiel. As sole owner of this vessel I beg to inclose power of attorney, and request you to be kind enough to undertake the whole and entire fitting out of my above-named ship *Gustav Adolph*, declaring at the same time that I shall be satisfied with all and everything that you may do or cause to be done in or to her interest. The vessel being intended for the China trade, I request at the same time that you will be kind enough to keep all the accounts, and in consideration of these services and upon condition that you charge no interest on any part of the first cost of the above vessel for which you remain under advance, I hereby promise, make over and transfer to you as verbally agreed between us, 6-7th, say six-sevenths parts of all the profits arising out of this venture. On the other side it is understood between us that in case any losses should arise out of this business you share in them to the same extent as in the profits, say for six-sevenths (6-7ths).

Trusting that the result may be a favourable one, I remain, dear Sir, yours truly,

(Signed)

C. A. REHDER.

Here follow two names as witnesses to the signatures of C. A. Rehder, James L. Wulff, and T. C. Bremer, jun.

It was admitted by the counsel for the prosecution that Paul Ehlers was not a natural-born British subject, and they had no evidence of his having received letters of denization or having been naturalised.

It was submitted on the part of the prisoner that these letters showed a partnership in the vessel between Rehder and Ehlers, and that it was shown by the 18th, the 38th, the 103rd, and other sections of the Merchant Shipping Acts, that the owner of a beneficial interest in a British ship must be qualified in the same way as the owner of a legal interest; that, even admitting the registration of the ship in the name of Rehder by the proper officer to be *prima facie* proof of Rehder's qualification to be an owner of a British ship, it could be no evidence of Ehlers's qualification, and therefore the letters proving

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Ehler's interest in the ship rebutted the *prima facie* evidence that she was a British ship. The 106th section of the Act was also referred to.

I respited sentence upon the prisoner, who is now in custody, till the next assizes, and reserved for the consideration of this court the following questions:

1. Whether I ought to have received the certified copy of the register of the ship as *prima facie* evidence that the ship was a British ship.

2. If it was rightly received as *prima facie* evidence, whether the letters of the 31st Dec. 1863, and of the 13th Jan. 1864, taken with the admission as to the status of Paul Ehlers, rebutted that *prima facie* evidence.

3. Whether, upon the evidence, there was sufficient proof that the *Gustav Adolph* was a British ship.

*Harington* for the prisoner.—It is submitted that the conviction was wrong. There was no sufficient evidence that this was a British ship. The register is only *prima facie* evidence of the matters contained or recited in the register or indorsed on it: (17 & 18 Vict. c. 104, s. 107.) The register describes Rehder as sole owner, and it was proved at the trial that he was alien born. He could not, therefore, be the owner of a British ship, because sect. 18 enacts that no ship shall be deemed a British ship unless she belongs wholly to owners of the following description, that is to say, first, natural-born subjects; second, persons made denizens by letters of denization or naturalised; third, bodies corporate established under, subject to the laws of, and having their principal place of business in the United Kingdom or some British possession. There was no proof that Rehder was denizensed or naturalised. The Merchant Shipping Amendment Act (24 & 25 Vict. c. 63), s. 3, shows the intention of the Legislature to exclude unqualified persons from the ownership of British ships and the privileges incident thereto. Accordingly, when a British ship is transferred to any person not qualified to be the owner of a British ship, that fact is to be notified to the registrar and the certificate of register is to be delivered up. Sect. 106, which enacts that unregistered ships shall be treated as British ships in respect of offences committed on board thereof, is limited to ships owned by persons qualified to be owners of British ships. It will be contended that as by sect. 38 no person shall be registered until he has made a declaration of ownership containing a statement of his qualification to be an owner of a British ship and other particulars, it must be presumed that Rehder has made that declaration. But sect. 97 enables the registrar for reasonable cause to dispense with such declaration. No such presumption can be made, therefore, in this case: (*Reg. v. Sewell*, 8 Q. B. 161.) A register is not a document required by the law of nations as expressive of a ship's character: (*Le Cheminant v. Pearson*, 4 Taun. 367.) As to what gives the character of a British ship independently of statute, there is no case to be found reported. The case stands thus, the *prima facie* evidence of the ship being a British ship is rebutted by the proof of Rehder being an alien born:

*The Eagle*, 1 W. Rob. 246;

*The Fortune*, 1 Doda. Adm. 81, 86;

*Pirie v. Anderson*, 4 Taun. 652;

*Liverpool Borough Bank v. Turner*, 1 H. & J. 159;

2 De G. F. & G. 502.

A certificated ship and a British ship are not convertible terms.

*Prideaux* (*M. Bere* with him) for the prosecution.—The conviction ought to be affirmed. There was evidence that this was a British ship. The question is not whether this was a British ship within the provisions of the Merchant Shipping Act, for a ship may be entitled to the protection of the British laws

although it may not be within its provisions. The Admiralty Courts hold that the tests of a ship being a British ship are the residence of the owner in the British dominions and the ship sailing under the British flag. The case shows that Rehder, the registered owner, was resident in London, and that the ship sailed from a British colony and carried the British flag. From these facts the court will infer that this was a British ship. It will be inferred that the declaration of ownership required by sect. 38 of 17 & 18 Vict. c. 104 was made previous to the ship being registered. [BLACKBURN, J.—Why so? The fact was not proved, and sect. 97 enables the registrar to dispense with it on reasonable grounds.] Sect. 42 requires certain particulars to be entered in the register-book, and among them the several particulars as to the ship's origin stated in the declaration of ownership. And on the principle *omnia rite acta presumuntur* it must be presumed that as the Act directs a public officer not to register a ship until such declaration is made, it will be presumed that it has been duly made. Illegality is not to be presumed, nor anything that would subject the ship to forfeiture.

Taylor on Evid. 123, 4th edit.;

*Buller v. Allnut*, 1 Stark. R. 222;

*Van Omerson v. Dowick*, 2 Camp. 44;

*Sissons v. Dixon*, 5 B. & C. 758.

The court will further presume that the party who made the declaration of ownership was qualified according to his declaration. [BLACKBURN, J.—I own I have great difficulty in a criminal case against a third person in making any such presumptions. Sect. 107 carefully avoids saying that the register and declaration shall be proof of the contents, but says that they shall only be *prima facie* evidence of the matters therein.] It is not to be presumed that a party has committed the indictable offence of making a false declaration and unduly assuming a British character: (sect. 108). [BLACKBURN, J.—The truth of a statement is not to be presumed against a stranger on the ground that the party making the statement is not to be presumed to have committed a crime.] In *Rex v. Hawkins*, 10 East, 211, it was held that the presumption of law being that every person has conformed to the law till something appear to rebut that presumption, it was to be taken that a person elected to a municipal office had duly taken the sacrament within a year as required by the 18 Car. 2, c. 12. [MELLOR, J.—But in this case it is an admitted fact that Rehder was not born in England. CHANNELL, B.—Suppose that a declaration of ownership had actually been put in evidence, would there have been any presumption of the truth of its contents?] In *Rodwell v. Redge*, 1 C. & P. 220, a theatre was presumed to have been licensed from the fact of performances having taken place there; and in *Sichell v. Lambert*, 15 C. B., N. S., 781, a Roman Catholic chapel was presumed to have been licensed for the celebration of marriages from the fact of marriages taking place there. A somewhat similar presumption was made in *McMahon v. Ellis and others*, 14 Ir. C. L. Rep. 499. By sect. 97 the declaration of ownership can only be dispensed with where the registrar is satisfied that from any reasonable cause it cannot be made, and in that case the registrar, upon production of such other evidence, and subject to such terms as he may think fit, may dispense with the declaration. So that it is to be inferred either that the declaration of ownership was duly made, or that evidence equivalent thereto was produced before the registrar. [BLACKBURN, J.—Supposing there had been no statutory enactment affecting the question, what is the definition or character of a British ship at common law?] There is no abstract definition to be found in the books:

*The Indian Chief*, 3 Rob. 13, 33;

*The Matchless*, 1 Hag. Adm. Rep. 103;  
*Tabbs v. Bendelack*, 3 B. & P. 207;  
*The Vigilantia*, 1 C. Rob. 12.

On the whole it is submitted that in this case this was a British ship for the purpose of giving jurisdiction to the Admiralty to prosecute for offences committed on board of her, and it would be dangerous to hold the contrary.

*Harington* in reply.—It is not found as a fact that Rehder was an English merchant or resident in London. Carrying any particular flag is evidence against the owner, but not for him, and is not a circumstance from which jurisdiction can be presumed against a foreigner.

ERLE, C. J.—I am of opinion that this conviction cannot be sustained. The prisoner was convicted of manslaughter committed on the high seas, and the question is whether there was any jurisdiction to try the prisoner in England. The crime was committed on the ocean thousands of miles away from British territory, and the ground on which the prosecutor relies for jurisdiction to try in England is that the crime was committed on board a British ship, which carries with it British law, and that the case is therefore as if the crime had been committed on British land. The whole question is whether the ship was a British ship. I am clearly of opinion that there was *prima facie* evidence that she was a British ship. There was evidence of a certificate of registry in London, wherein Rehder was described as the owner at that time as resident in London, and the ship was sailing under the British flag. But Rehder was described therein as sole owner, and I take it to have been proved at the trial that he was alien born. That reduces the question to this, whether the *prima facie* evidence of its being a British ship was rebutted by the negative proof that Rehder was alien born. I am of opinion that it was. Then is the proof that he was alien born disposed of by the presumptions relied on by Mr. Prideaux in his argument, viz., letters of denizenship or naturalisation, and is the court to make such presumptions because Rehder, being alien born, would have become liable to be proceeded against for penalties under the Merchant Shipping Act, for registering the ship as belonging to a British owner? I am of opinion that there is no presumption to justify us in inferring that letters of denizenship or naturalisation were granted to Rehder. I limit my judgment to the question of evidence, the point reserved is merely a matter of evidence.

CHANNELL, B.—I also am of opinion that the conviction cannot be sustained. The offence was committed on board a ship of which the captain, mate and crew, including the prisoner, were foreigners. In one sense the ship may be taken to have been the property of Rehder, who, it was clear, was not a British-born subject. The question is, whether an English court has jurisdiction to try the foreigner for this offence. An English court can have no jurisdiction unless it is to be presumed that this was a British ship, and I can see no ground for inferring that this was a British ship. On the Merchant Shipping Act I cannot come to that conclusion, but on the evidence I agree that there was *prima facie* evidence that the ship was British; but the ordinary rule that *prima facie* evidence may be rebutted applies in this case. I must look at the case then as presenting this fact, that the owner was an alien born. If letters of denizenship or naturalisation had been produced they would have removed that difficulty, but they were not. I see no ground on which the court may draw the inference that one or the other may have been granted. It was then said that the ship might be a British ship, independent of the provisions of the Merchant

Shipping Act, but I can see no ground for any such inference. Some doubt might arise on sect. 106 at first sight. That section, however, has no application; it supposes the capacity to register as a British ship, but the privileges of a British ship to be lost because some requisition has not been complied with. It is therefore quite out of the question.

BLACKBURN, J.—I am of the same opinion. It is established that if a ship is a British ship, it carries with it the notion that it is part of the British territory, and crimes committed on board thereof may be tried in England. I agree that the facts of the ship sailing under the British flag, and being treated as a British ship, and being registered in London, were *prima facie* evidence that it was a British ship. The register was *prima facie* evidence that apparently Rehder was sole owner, but it was proved that he was alien born. There would be no pretence for saying that this was a British ship, but from the circumstance of the register stating Rehder to be resident in this country at the time of the registry. That fact merely shows that he owed a temporary allegiance to this country, and in the case cited of the *Jaffee Chief*, that was the effect of the decision. For aught that appears, he might have left this country, and so his allegiance here would have ceased. The Merchant Shipping Act requires an owner to be a British subject, and sect. 106 does not apply where the sole owner is a foreigner. I do not think, therefore, that this ship could be said to be a British ship so as to make it part of British territory.

MELLOR, J.—I am of the same opinion. I will only add that Mr. Prideaux, while citing the cases which he brought before us, and which are unquestioned, was losing sight of the admitted fact in this case, that the owner was alien born.

SMITH, J.—I am of the same opinion. To prove jurisdiction, the register of the ship in London was put in evidence, but when it was proved that the owner was a foreigner, the *prima facie* effect of the evidence in the register was rebutted. The declaration of ownership is prior to the register being drawn up, and if the effect of the evidence of the register is got rid of it can hardly be said that something done prior to it is not also rebutted.

Conviction quashed.

Saturday, May 6, 1865.

(Before ERLE, C. J., CHANNELL, B., BLACKBURN, MELLOR and SMITH, JJ.)

REG. v. ROBINSON.

Coining—Uttering a medal resembling a coin—24 & 25 Vict. c. 99, s. 18.

The prisoner was convicted under the 24 & 25 Vict. c. 99, s. 18, of uttering "a medal resembling in size, figure and colour, a half-sovereign."

The medal was similar in diameter and colour to a half-sovereign: on one side of it was an impression of the Queen's head, with a legend different to that on a half-sovereign: there was no evidence as to what was on the other side of the medal. The medal was querled, but the querling instead of being square as it is in a half-sovereign, was round:

Held, that there was some evidence for the jury that the medal resembled a half-sovereign in size, figure and colour.

Case reserved by the Common Serjeant of the City of London.



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REG. v. LEVI.

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The prisoner was indicted at the Central Criminal Court, under 24 & 25 Vict. c. 99, s. 13, for that he on the 13th March 1865, in the county Middlesex, and within the jurisdiction of the said court, one medal resembling in size, figure and colour one of the Queen's current gold coins called a half-sovereign, the same medal then being of less value than one of the Queen's said current gold coins called a half-sovereign, unlawfully, unjustly, and with intent to defraud, did utter and put off to one Mary Piper as and for one of the Queen's said current gold coins called a half-sovereign, against the statute, &c.

## Second count :

That the said George Robinson afterwards, to wit, on the 13th March 1865, in Middlesex, and within, &c., one piece of mixed metals resembling in size, figure and colour, one of the Queen's current gold coins called a half-sovereign, the same piece of mixed metals then being of less value than one of the Queen's said gold current coins called a half-sovereign, unlawfully, unjustly, and with intent to defraud, did utter and put off to the said Mary Piper as and for one of the said Queen's said current gold coins called a half-sovereign.

## Third count :

That the said George Robinson, afterwards, to wit, on the 13th March 1865, in Middlesex, and within, &c., did with intent to defraud, utter and put off to the said Mary Piper, as and for one of the Queen's current gold coins called a half-sovereign, one coin not being such current gold coin called a half-sovereign, but resembling in size, figure and colour one of the Queen's said current gold coins called a half-sovereign, the same coin so uttered and put off then being of less value than one of the said Queen's said current gold coins called a half-sovereign.

After proof of the uttering by the prisoner of the medal, Mr. Webster, the Inspector of Coin to Her Majesty's Mint, was called, and his evidence was as follows :

This (the medal which was uttered) is a medal made of metal, the same diameter as a half-sovereign—somewhat similar in colour. On the obverse, there is the head of the Queen similar to that on a half-sovereign—the legend is entirely different from that on a half-sovereign, being “Victoria Queen of Great Britain” instead of “Victoria Dei Gratia.” The medal is round, but the garter is round and not square.

At this point in his evidence the witness accidentally dropped the medal, and it rolled on to the floor. Strict search was made for it by the witness assisted by the ushers, for more than half-an-hour, but it could not be found. The witness then added, “The medal is of less value than a half-sovereign.”

It had been proved by a former witness that the prisoner placed the medal in her hand, when he uttered it, with the obverse side uppermost. The medal was not shown to the jury. Mr. Webster was about to give a description of the reverse of the medal from memory after it was lost, but this was objected to by the prisoner's counsel, and the counsel for the Crown declined to press it.

For the prisoner it was objected that the word “figure” in the indictment meant the impression on the medal, and that such impression must be similar to the impression on the genuine coin for which it was uttered, and that there was under the circumstances stated no evidence to go to the jury that the medal resembled in size, figure and colour a half-sovereign.

For the Crown it was contended that “figure” meant the general shape and outline of the medal, not the impression upon it, and that there was evidence for the jury.

I thought it should be left to the jury, and the prisoner was found guilty and remains in custody.

The questions for the court are, first, what is the true meaning of the word “figure” in the statute and the indictment?

And, secondly, whether under the circumstances stated there was any evidence for the jury?

THOMAS CHAMBERS.

G. Francis for the prisoner.—Upon this indictment the counterfeit should resemble a genuine coin, in size, figure and colour. Now here there was not

sufficient evidence that the medal resembled in figure a half-sovereign. Figure differs from size and colour. The jury never saw the coin. Figure in this section means a delineation on the coin calculated to impress the mind that it is intended to resemble a current coin. The meaning of the word “figure” in Webster's Dictionary was referred to.

E. H. Crauford, contra, was not called on.

ERLE, C. J.—The conviction must be affirmed. We think that there was some evidence for the jury that this medal, in size, figure and colour, resembled a half-sovereign.

Conviction affirmed.

REG. v. LEVI.

*Bankruptcy—Evidence of—London Gazette.*

*The London Gazette is, by sect. 233 of the B. C. A. 1849, conclusive evidence of the bankruptcy on an indictment against a bankrupt, for a misdemeanor under the Bankruptcy Act, 24 & 25 Vict. c. 134, s. 221, clause 3, if it appear that the bankrupt was within the U. K. at the date of the adjudication, and that no step has been taken to annul the adjudication.*

Case reserved by Martin, B., at the Spring Assizes, 1865.

On the 4th March 1865, Morris Levi was tried and convicted before me at Warwick, on an indictment which charged that he became and was adjudicated a bankrupt on the 12th Nov. 1864, at Birmingham, in the Court of Bankruptcy for the Birmingham district, and that within sixty days next before the said adjudication he committed a misdemeanor under the third clause of the 221st section of the B. A. of 1861 (24 & 25 Vict. c. 134).

Upon the trial, the proceedings in bankruptcy were given in evidence, from which the following facts appeared :

On the 7th Nov. 1864, John Painter, a creditor to the amount of more than 50*l.*, presented a petition for adjudication of bankruptcy against Levi, which was duly filed.

On the 10th Nov. 1864, an order was made by the Court of Bankruptcy in the following words :

*The Bankruptcy Act 1861.*

In the Court of Bankruptcy for the Birmingham District. In the matter of Morris Levi, of Edgbaston-street, Birmingham, in the county of Warwick, clothier, against whom a petition for adjudication of bankruptcy had been filed, this 10th day of Nov. 1864.

Upon the application of Mr. Hodgson, solicitor in the matter of this petition, and upon reading his affidavit filed herewith, I do extend the time for opening the said petition until Saturday next the 12th Nov. Instant, at 12 o'clock at noon.

G. W. SANDERS, Commissioner.

On the 12th Nov. 1864, at about one o'clock in the afternoon, another order was made by the Birmingham Court of Bankruptcy in the following words :

*The Bankruptcy Act 1861.*

In the Court of Bankruptcy for the Birmingham District. In the matter of Morris Levi, of Edgbaston-street, Birmingham, in the county of Warwick, clothier, against whom a petition for adjudication of bankruptcy has been filed on the 7th day of November 1864.

The 12th day of Nov. 1864.

The petitioner John Painter, not having proceeded to obtain adjudication of bankruptcy within the three days after the filing the petition, nor within such extended time which was granted for the purpose by order of the court, dated the 10th day of Nov. inst.; it is hereby ordered, upon the application of Mr. Herbert Wright, on behalf of James Murray, John Hardy and John Kershaw, creditors to the amount required to constitute a petitioning creditor, that the said James Murray, John Hardy and John Kershaw be at liberty to proceed to obtain adjudication of bankruptcy against the said Morris Levi.

G. W. SANDERS, Commissioner.

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On the same day Morris Levi was adjudicated a bankrupt in the following words :

The Bankruptcy Act 1861.

In the Court of Bankruptcy for the Birmingham District.  
12th day of November 1864.

In the matter of Morris Levi, of Edgbaston-street, Birmingham, clothier, against whom a petition for adjudication of bankruptcy was filed on the 7th day of Nov. 1864.

Before Mr. Commissioner Sanders.

I, the said commissioner, upon good proof upon oath before me this day taken, do find that the said Morris Levi became bankrupt within the true intent and meaning of the law of bankruptcy, before the day of the date of the filing of the said petition against him, and I do therefore declare and adjudge him bankrupt accordingly.

G. W. SANDERS, Commissioner.

The alleged bankrupt was within the United Kingdom at the date of the adjudication, and has not taken any step or proceeding to dispute or annul it.

The *London Gazette* of the 15th Nov. 1864 was duly proved and put in evidence, and contains the advertisement of the adjudication.

Upon this it was contended for the debt. that the adjudication of bankruptcy was invalid, because that the proceedings must have been taken either under the 101st section of the B. A. 1849, or under the 96th section of the B. A. 1861; that the 101st section of the B. A. 1849 was inconsistent with the 96th section of the B. A. 1861, and was therefore repealed by the 230th section of the B. A. 1861; that under the 96th section of the B. A. 1861 a new petition ought to have been presented by James Murray, John Hardy and John Kershaw. It was also contended that the adjudication was void, because it did not appear from the proceedings upon what petition the commissioner proceeded to adjudication.

I reserved these points for the consideration of the Court for Crown Cases Reserved.

The act of bankruptcy on which the adjudication was made, and the only one proved at the trial before me, was an assignment by Morris Levi, made in the form given in schedule D. to the B. A. 1861. The deed was dated 5th Nov. 1864. It was stamped on the 9th Dec. 1864, and registered on the 10th Dec. 1864. It further appeared that on the 10th Dec. 1864 an order was made in the following words :

The Bankruptcy Act 1861.

In the Court of Bankruptcy, Basinghall-street, London,  
the 10th day of Dec. 1864.

In the matter of a trust-deed executed by Morris Levi, of Birmingham, in the county of Warwick, clothier, bearing date the 5th day of Nov. 1864, and made between the said Morris Levi of the one part and Henry Howell, of Birmingham, aforesaid, accountant, of the other part. Before Mr. Registrar Winslow, acting for Mr. Commissioner Fonblanque. Upon the application of Mr. Burton, solicitor for the assignees of the estate and effects of the said Morris Levi, it is ordered that the time for registration of the deed be extended to the 17th day of Dec. inst., so that the same may be receivable in evidence under the 194th section of the B. A. 1861, but the order is in no way to interfere with the 4th condition of the 192nd section of the said Act.

T. E. WINSLOW, Acting Commissioner. [L. s.]  
Filed 10th Dec. 1864.

No evidence was given as to Mr. Winslow's authority to make this order.

Upon this it was objected, that under sect. 192, clause 4, and sects. 193 and 194 of the B. A. 1861, the deed was invalid, and that it ought not to have been received in evidence of an act of bankruptcy before the Birmingham Court of Bankruptcy, and that therefore the adjudication founded on it was void. It was also objected that under the same sections the deed could not be received in evidence before me.

It was further objected, that as the conditions of sect. 192, clause 4, of the B. A. 1861 had not been fulfilled, it was not competent to the court in London to extend the time for its registration. It was also objected that evidence ought to have appeared on the face of Mr. Winslow's order, or to have been

given, of Mr. Winslow's authority to act upon the occasion under the provisions of the 27th section of the B. A. 1849.

I admitted the deed in evidence, and reserved these points for the consideration of the Court for Crown Cases Reserved.

I request the opinion of the Court of Criminal Appeal upon the following questions :

1. Whether the alleged bankrupt was precluded, under the circumstances, from raising any objection to the validity of the adjudication, and, if not,

2. Whether, in order to authorise a legal adjudication of bankruptcy, a new petition ought to have been presented by James Murray, John Hardy and John Kershaw.

3. Whether the adjudication is void by reason of its not appearing upon the proceedings on whose application the commissioner proceeded to adjudication.

4. Whether the deed of the 5th Nov. 1864 was admissible in evidence at all, and, if so, whether upon any of the grounds stated in the case there was any irregularity or defect in it, or the manner in which it had been dealt with, or any proceedings taken upon it which prevented its being made use of at the trial as evidence of a good and available act of bankruptcy.

*Fitzjames Stephen* for the prisoner.—The case depends upon the construction of the 233rd section of the B. A. 1849 (12 & 13 Vict. c. 106), which enacts that if the bankrupt do not dispute the flat or petition, the *London Gazette* containing the advertisement of the bankruptcy shall be conclusive evidence "in all cases" as against the bankrupt, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which the bankrupt might have been sued had he not been adjudged a bankrupt, that the person adjudged a bankrupt became a bankrupt before the date and suing forth of the flat, or before the date or filing of the petition for adjudication, and that the flat was sued forth or such petition filed on the day on which the same is stated in the *Gazette* to bear date." Does that section apply to criminal proceedings? It is submitted that it does not. The point has not yet been determined in this court. In *Reg. v. Lyons*, 9 Cox C. C. 299, it was held by Martin, B. that the section applied to civil proceedings only; but in a previous case, *Reg. v. Hilton*, 2 Cox C. C. 318, upon a statute *in pari materia*, the 5 & 6 Vict. c. 122, s. 24, the contrary was held. In *Reg. v. Harris*, 4 Cox C. C. 140, the *Gazette* was held to be evidence of the bankruptcy only against the bankrupt himself, and not against others though indicted with him. [*ERLE, C. J.* referred to 12 & 13 Vict. c. 106, s. 234.] The words "in all cases," in sect. 233, are limited to cases of the same nature, that is, "civil cases," as actions at law or suits in equity.

*Field, Q. C.* (A. *Wills* with him), for the prosecution, was not called upon to argue.

*ERLE, C. J.*—The conviction must be affirmed. I am clearly of opinion that the words of the 233rd section, "the *Gazette* containing such advertisement shall be conclusive evidence in all cases as against such bankrupt," show that the Legislature intended that, so far as the bankrupt is concerned, it should be conclusive evidence in all cases, both civil and criminal.

The rest of the Court concurred.

Conviction affirmed.

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REG. v. MULLANY—REG. v. EDWIN JOHNSON.

[C. CAS. R.]

Saturday, May 6, 1865.

(Before ERLE, C. J., CHANNELL, B., BLACKBURN, MELLOR and SMITH, JJ.)

REG. v. MULLANY.

*Perjury—Materiality—False swearing as to name.*

*The prisoner, sued for debt in a County Court as B. E. M., and having been sworn and examined, and the judge having come to the conclusion that the debt was due, was, pending a discussion as to the payment of the debt by instalments, asked by the judge, What was his name? he replied, E. M. only. The Judge refused to amend, and struck out the cause. The prisoner was afterwards indicted and convicted of perjury in having falsely sworn that his name was E. M. only, whereas in truth it was B. E. M.:*

*Held, that the conviction was right, and that the inquiry as to deft.'s name was a relevant and material inquiry.*

Case reserved by Martin, B.:

In the beginning of 1864 a person called Robinson sued in the County Court held at Birmingham, a person named in the proceedings Bernard Edward Mullany, for a debt of 8l. 13s. 6d. The suit went to issue and came on to be tried on the 2nd Feb. 1864. The plt. was called and gave evidence in support of his case. The deft. was called and sworn in the usual way and gave evidence, and the judge came to the conclusion that the debt was due and the plt. entitled to recover, and a discussion was taking place as to the times at which instalments of payment were to be made.

The Judge then asked the deft. what was his name. He replied, "Edward." The plt.'s attorney then asked him was it Edward only? The deft. answered, "Yes." And the plt.'s attorney then asked him whether it was not Bernard? The deft. answered, "not Bernard, only Edward."

Application was then made for leave to amend, but it was refused, and the Judge struck out the cause.

At the last Warwick assizes the deft. was indicted before for perjury in answering the above questions, and evidence was given which clearly proved that he had wilfully and corruptly sworn falsely in the above answers; that he was christened Bernard only and so called up to his manhood, when he left Ireland. No evidence was given as to how he came to take the name of Edward, but he had told the plt. that his name was Bernard Edward, and this was the name inserted in the Birmingham Directory, he being a tradesman there.

The jury found him guilty, but at the request of the counsel for the prisoner I desire the opinion of the Court upon the following question:

Whether the wilful and corrupt false swearing by the prisoner in giving the answers as above, under the circumstances and at the time above stated, was indictable as perjury.

*Gibbons* for the prosecution.—The conviction ought to be affirmed. The plaintiff in the County Court is not vitiated by misnomer of the parties: 9 & 10 Vict. c. 95, s. 59, "no misnomer or inaccurate description of any person or place in any such plaint or summons shall vitiate the same, so that the person or place be therein described so as to be commonly known." [BLACKBURN, J.—There is no evidence that the deft. was commonly known by the name of Bernard Edward Mullany, and the County Court judge seems to have thought the variance in the name as sworn to by the deft. fatal to the action.] The judge had power to amend (19 & 20 Vict. c. 108, s. 57), but not having exercised that power the false answer of the deft. as to his name was material. The right name was material, as otherwise difficulties might arise in enforcing execution upon the judgment. In *Reg. v.*

*Gibbons*, 9 Cox Cr. Cas. 105; 1 L. & C. 109, it was held that perjury could be assigned upon evidence relevant to the credit of a material witness that was improperly admitted by the court. And in *Reg. v. Philpotts*, 5 Cox Cr. Cas. 363; and 2 Den. C. C. 309, the deft. having sworn falsely that he had examined with the original a copy of a will that was produced on the trial of the cause, and the judge having determined to admit the copy in evidence, although the counsel thought proper to withdraw it, it was held that the deft. could be indicted for perjury, and Lord Campbell said: "We are of opinion, as the evidence was given in a judicial proceeding with the view to the reception in evidence of a document which was material, and as that evidence was false, that all the ingredients necessary to constitute the crime of perjury are present." Here the false swearing of the deft., that his name was Edward only, was in a judicial proceeding, and on a material point, viz., whether the plaintiff was rightly sued out against him.

No counsel appeared for the prisoner.

ERLE, C. J.—The question is, whether on the perjury alleged the conviction can be sustained. The perjury alleged is, that the deft. swore that his name was Edward only, and not Bernard Edward, and the objection made at the trial was, that the false swearing was upon a matter that was immaterial to the inquiry. I am of opinion that the objection cannot be maintained. The jury found that the prisoner gave the answer wilfully and corruptly, and for the purpose of deceiving the tribunal before which he was a witness. The answer was given in the course of a judicial inquiry, and with the intention of misleading the judge. The judge had made up his mind that the debt was due, and was in the course of deciding as to when the deft. should pay the debt by instalments. It was relevant to the court then to inquire as to the deft.'s name with reference to any misnomer, and the effect of the prisoner's answer was to cause the judge to strike out the case, and so virtually to nonsuit the plt. The principle of the decisions in *Reg. v. Philpotts* and *Reg. v. Gibbons* applies. Whenever the question arises whether perjury can be assigned on a false swearing in the course of a judicial inquiry in answer to an immaterial question, it may be worthy the consideration of the fifteen judges. This conviction must be affirmed.

The rest of the Court concurred.

Conviction affirmed.

Saturday, June 3, 1865.

(Before COCKBURN, C.J., MARTIN, B., CROMPTON, J., BRAMWELL and CHANNELL, B.B.)

REG. v. EDWIN JOHNSON.

*Indecent assault—Girl between ten and twelve years old—Consent.*

*An indecent assault on a girl between the ages of ten and twelve, if she is a consenting party, is not an offence punishable at law.*

Case reserved for the opinion of this court from the Surrey sessions.

At the General Quarter Session of the peace holden by adjournment at St. Mary Newington in and for the county of Surrey, on Monday, the 1st May 1865, Edwin Johnson was tried on the following indictment:—

Surrey.—The jurors for our Lady the Queen upon their oath present, that Edwin Johnson, on the twenty-ninth day of October, in the year of our Lord one thousand eight hundred and sixty-four, unlawfully did carnally know and abuse one

Emily Eliza Aslett, then a girl above the age of ten years and under the age of twelve years, to wit, of the age of ten years and nine months, against the form of the statute in such case made and provided.

#### Second count:

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Edwin Johnson afterwards, to wit, on the day and year aforesaid, unlawfully and indecently did make an assault in and upon the said Emily Eliza Aslett, and did then unlawfully beat, wound and ill-treat the said Emily Eliza Aslett, against the form of the statute in such case made and provided.

#### Third count:

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Edwin Johnson afterwards, to wit, on the same day, and in the year aforesaid, in and upon the said Emily Eliza Aslett, in the peace of God and our said Lady the Queen then being, did make an assault, and the said Emily Eliza Aslett then did beat, wound and ill-treat, to the great damage of the said Emily Eliza Aslett, and against the peace of our said Lady the Queen, her crown and dignity.

The jury returned a verdict of guilty on the second count, of an indecent assault on the said Emily Eliza Aslett, but stated that the girl consented to the acts with which the deft. was charged.

The counsel for the deft. moved the court to enter the verdict as of acquittal, but the Court refused to do so, and reserved the following point for the decision of the Court for Consideration of Crown Cases Reserved:

Can the deft. be rightly convicted of an indecent assault upon the second count of the above-mentioned indictment, the jury having found that the person upon whom the assault is charged to have been made consented to the acts which constituted alleged assault, she being under twelve years age?

The Court respited judgment and admitted the deft. to bail until the above-mentioned point shall be decided.

JOHN EDWARD JOHNSON,  
Chairman.

*Oppenheim* for the deft.—It is submitted that the conviction is bad. At common law it was not a criminal offence to have carnal knowledge of a girl under the age of twelve. It was made an offence by statute, although the girl was a consenting party, but the statute left untouched the case of an assault on a girl under that age. In *Reg. v. Read*, 3 Cox C. C. 266; 1 Den. C. C. 377, where, on a count for an assault on a girl of the age of nine years, the jury returned a verdict of "Guilty, the child being an assenting party, but that from her tender years she did not know what she was about," it was held that the conviction was wrong, the verdict showing an assent by the girl. Parke, B. there said, "If we are asked whether a girl of such tender years can consent in law, that is settled by *Reg. v. Martin*, 9 C. & P. 213." Those cases were acted on in *Reg. v. Mehegan*, 7 Cox C. C. 145, by the Court of Criminal Appeal in Ireland, where a conviction for an indecent assault on a girl between the ages of ten and twelve was quashed, on the ground that the girl was a consenting party.

No counsel appeared for the prosecution.

COCKBURN, C. J.—This case is quite concluded by the authorities, which rest on a very intelligible principle. Independently of the statutes, the having carnal knowledge of a child was not an offence at law. The statutes made it an offence, saying that whether the child was an assenting party or not, it should be an offence. It follows, therefore, that the offence in this case, not being an offence within any statute, it was not an offence at common law. However much we may regret it, this conviction must be quashed.

The rest of the Judges concurred.

*Conviction quashed.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SADDEN, Esqrs.,  
Barristers-at-Law.

Saturday, April 29, 1865.

#### LAUGHLIN AND OTHERS v. THE OVERSEERS OF SAFFRON-HILL.

*Poor-rate—National school-houses.*

*National school-houses, though no profit whatever is made of them, are assessable to the poor-rate.*

This was a special case, stated under the 12 & 13 Vict. c. 45, as to the rateability to the poor-rate of a national school-house.

The case stated, that by a deed dated the 18th Dec. 1852 a piece of land was conveyed by the minister and churchwardens of the ecclesiastical district of St. Peter's, Holborn, to hold to their use for the purposes of the 4 & 5 Vict. c. 38, and upon trust to permit the premises and all buildings to be thereon erected to be for ever appropriated and used as a school for the education of children and adults, or children only of the labouring, manufacturing and poorer classes of the said district, and for no other purpose. The school was to be at all times open to the inspectors of schools appointed in conformity with the Order in Council, and should always be in union with the National School Society, and be conducted according to its principles and in furtherance of its ends. The deed also provided that the management and government of the school should be vested in a committee to consist of the officiating minister of the district and fourteen other persons. Schools had subsequently, in accordance with this deed, been erected partly by parliamentary educational grants and partly by voluntary subscriptions, and consisted of rooms necessary for the purposes of the institution. Two small rooms were inhabited by the parish beadle, who, however, had nothing to do with the school, and these rooms had been duly rated. The rest of the building was only used for the ordinary purposes of a national school, no one residing on the premises. The children who attended paid a small sum per week of 2d. and 3d., and the school was open to all poor children irrespective of parish or locality. Such amounts were applied to the expenses of the establishment, but did not meet them by a considerable sum, which was made up by voluntary subscriptions and grants from the Church Education Society, and those also made by Government.

*Huddleston*, Q. C. (*Hopwood* with him) appeared for the resps. (the parish), and argued that the premises were liable to be rated:

*Reg. v. Sterry*, 12 Ad. & Ell. 84;  
*Reg. v. Temple*, 2 Ell. & Bla. 160;  
*Reg. v. The Baptist Missionary Society*, 10 Q. B. 891;  
*Reg. v. Stapleton*, 4 B. & Sm. 629.

*Mellish*, Q. C. (*Beresford* with him) appeared for the apps., and contended that, as the premises were wholly devoted to charitable purposes, and there was no beneficial occupier, they were not rateable:

*Reg. v. St. Lukes*, 2 Burr. 1058;  
*Sheppard v. The Churchwardens of Bradford*, 10 Q. B. N. S., 369.

COCKBURN, C. J.—I think that in this case our judgment should be for the resps. The parties to be assessed are clearly the persons in whom is vested the management of the school. With respect to the argument, that this is not rateable property inasmuch as it is wholly devoted to charitable purposes, I think we are bound by the previous deci-

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sions to hold that it is rateable property. I cannot distinguish this case in principle from *Reg. v. Stapleton*.

*Judgment for the resps.*

Resps.' attorneys, *Norris and Allen*.

Wednesday, May 31, 1865.

REG. v. STEVENS AND ANDERSON.

*Poor-rate—Licensees of premises—Actual occupation.*

*Certain gasworks were erected by the Crown at Aldershot for the use of the camp there, and by an arrangement with A. B., who agreed to make and supply gas to the camp upon certain terms, a licence was granted by the Crown to them to use the premises for seven years, for the purpose of enabling the said A. B. to perform their contract, the Crown reserving a right to enter by its servants for certain purposes at all times, the licence also containing a stipulation that it should be revocable at any time by writing, and that full possession might thereupon be had without any proceedings at law or equity. A. B. being rated to the relief of the poor in respect of their occupation of the said premises:*

*Held, that, as actual occupiers, they were liable to be so rated.*

This was a special case, stated upon a judgment for the resps. upon an appeal to the quarter sessions for Hampshire by James John Stevens and George Anderson against a poor-rate. The sessions confirmed the rate subject to this case. The case stated that James John Stevens and George Anderson were rated in a poor-rate for the parish of Aldershot, on the 3rd June 1864, in respect of gasworks, as occupiers, of which the War Department were owners to the rateable value of 100*l*. In their grounds of appeal they stated that they were not occupiers of the said gasworks, or of any messuage, premises, house, land, or other rateable property in the said parish, and that they had a mere licence, permission and privilege to use the same gasworks in a particular manner, the legal possession and right of possession remaining in the Crown; that the said gasworks and premises are not legally rateable in consequence of the possession and right of possession thereof being in the Crown.

Upon the appeal it appeared that the Camp Gas Works above mentioned are extensive gasworks, the property of the Crown, erected at a great expense by Government, under the direction of the Board of Ordnance, A.D. 1861, for the purpose of supplying gas for the lighting of the camp established at Aldershot, and the Government buildings in connection with it. The apps. are gas engineers and contractors for gasworks, and on the 2nd July 1862 the contract hereafter mentioned was entered into between the apps. and Her Majesty's principal Secretary of State for the War Department, and on the same day an indenture between the said parties was executed which forms part of the case. From the time of the making of the said contract to the present time the apps. have used the gasworks according to the provisions of the said indenture, and have made and supplied gas to the Government according to the contract, the gas being made by them in the said gasworks and supplied into the meter-house, from which the servants of the Government supply the gas to the camp and Government buildings thereto belonging, as it is required. The contractors have in their employ a manager of the works who resides upon the premises; he keeps one key of the meter-house, and a Government officer keeps another; the keys are of different makes, so that neither of the parties in possession of the keys

can gain admission without the other. The said manager also uses a room, on the door of which the word "office" has been painted by Government, separate from the place in which he lives, where he keeps his accounts with the Government and receives money in payment for coke and tar sold to the public as hereinafter mentioned. The Government officer goes to the meter twice a-day to turn the gas on and off, and to ascertain the quantity consumed. In order to get to the meter-house, he must pass through the premises belonging to the gasworks. The keys belonging to the other parts of the gas premises are in the possession of the manager; they are the property of the Government, and are marked with the broad arrow. Coke and tar, the residual products of the manufacture, are according to the contract sold by the said apps. to the public upon the premises, and produce a profit to the apps. There is one gate admitting to the gas premises which is never closed. There is a well upon the premises lately opened by the Government authorities, and which is used by them and from which they take water as they require it for their horses in the camp, and for the use of the commissariat department. It is necessary for the proper management and superintendence of the works that a man should be generally resident upon the premises, and the manager above mentioned, who is in the employ of the apps., is paid a weekly salary, does reside there with his wife, and they are provided with necessary accommodation and no more. Neither of the apps. reside on the premises. In making the calculations by which the payment for the gas was regulated in the contract, the expense of production alone was taken into consideration. The apps. pay no rent, and no allowance was made for charges in respect of rates. The apps. derive a profit from the supply of gas to the Government, and from the sale of coke and tar to the public, and they supply the gas to the public at a less price than they could do if they paid rent to the Government for the premises. The apps. contended that they had no exclusive occupation, nor any such occupation of the premises in question as rendered them liable to pay rates.

By an indenture made on the 2nd May 1862, between the Secretary of State for the War Department (called afterwards the licensor), and the apps. (called the licensees), the said licensor granted unto the licensees full licence to use all that building lately erected at Aldershot, known as the gas establishment, together with all the outbuildings, offices, plant, &c., the meter and meter-house being excepted during the term of seven years for the purpose of enabling the licensees to fulfil a contract entered into for supplying gas at Aldershot.

And it also being the true intent of these presents and the parties hereto, that these presents shall not be a lease, or an agreement for a lease, or in the nature of a lease or of an agreement for a lease, and that neither by these presents nor by reason of any act or thing to be done, suffered, or omitted by the licensor or his successors or otherwise on behalf of Her Majesty, or by the licensees, their executors or administrators, or any of them, the licensees shall have any term or interest whatsoever in the gas premises, or in any part thereof, or be or become actually or constructively vested in the licensees, their executors or administrators, or any of them, nor shall they or any of them be or become tenants or tenant of the gas premises or any part thereof.

The licence then contained certain restrictions as to the use of the premises by the licensees, and certain powers to the licensor to enter upon the premises. The licence then contained this proviso.

That the licence hereby granted shall be revocable and determinable by the licensor or his successors at any time by writing under his or their hand or hands delivered to the licensees, their executors or administrators.

And it was also provided,

That immediately upon the revocation of the licence hereby granted . . . may immediately . . . without bringing

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or instituting, or being obliged to bring or institute any action of ejectment or other proceeding at law or in equity, resume and take full and complete possession of the gas premises for the use of Her Majesty, &c.

*Giffard, Q. C.* (*Gates* with him) appeared in support of the order of sessions, and contended that the apps. were liable as actual occupiers, for that, until the will of the Crown was determined by notice, they had possession of the premises, and that it mattered not that they occupied only under what was termed a licence. [*COCKBURN, C. J.*—It is clear that, until the Crown gave notice, the apps. could not be dispossessed.]

*Hayes, Serjt.* (*C. B. Russell* with him) was called upon, and he argued that, as the Crown had the right to use the premises for certain purposes, and its officers to enter upon them at any time, and it was only a licence which was granted, the apps. could not be said to have such an occupation as would render them liable to be assessed to the poor-rate. [*COCKBURN, C. J.*—We must look at the whole instrument, and its effect is that the Crown has permitted the apps. to have possession, reserving to its officers a power to go upon the premises for certain purposes. Does this amount to anything else than a tenancy at will? The object may have been to prevent the apps. from being in a position to render an ejectment necessary to turn them out. The real question is, whether or not there is an exclusive occupation?] They refuse to make them tenants.

*COCKBURN, C. J.*—Just construe the deed with reference to its object. It is quite inconsistent to suppose that the Crown could use these premises itself for this purpose. There is an express provision showing that the Crown cannot put out the apps. without notice. It is not necessary to decide whether there is a tenancy or not, for there is clearly an occupation.

*CROMPTON, J.*—A licence to use is a liberty to occupy. It is not like a licence to use an incorporeal hereditament. They say that the licence is not to operate as a lease, but that you shall have the premises till we do an act which is to put an end to it. That, therefore, gave the possession.

*BLACKBURN* and *SHER, JJ.* concurred.

*Judgment for the resps.*

Attorney for the resps., *Eve, Aldershot.*

#### REG. v. HEATH AND OTHERS.

*Highways—Obstruction—Indictment to remove—Costs—*  
25 & 26 Vict. c. 61, s. 20.

*The township of W. was included in a highway district under the provisions of the 25 & 26 Vict. c. 61 (Highway Act), and A. having caused an obstruction in a street in W. the highway board, at the instance of the waywarden of W., indicted A. for the same, who removed the obstruction by certiorari. Upon the trial A. was found guilty, and subsequently paid the taxed costs of the indictment. There was, however, a sum of 60*l.* extra costs upon the indictment, which the highway board charged against the township of W.:*

*Held, that the costs of the indictment were such costs as the highway board were justified in incurring to remove an obstruction from a highway, and that they were properly chargeable in this case against the township of W.:*

In this case the township of Wareham had been included in a highway district under the provisions of the 25 & 26 Vict. c. 61; and a Mr. Burroughs having caused a nuisance by erecting a building

upon the highway in one of the streets (though not within fifteen feet of the centre), he was indicted by the highway board at the instance of the waywarden of the said township. This indictment he removed by *certiorari* into this court; and upon its trial at the assizes he was found guilty, whereupon he abated the nuisance and paid the taxed costs of the prosecution. There were, however, extra costs of the prosecution amounting to 60*l.*, and these costs were allowed by the highway board as against the township of Wareham. Against this allowance there was an appeal upon the ground that the highway board had no power to allow the costs of an indictment. The Court of Quarter Sessions affirmed the allowance, subject to a case for the opinion of this court.

By sect. 11 of the 25 & 26 Vict. c. 61 (*Highway Act*), all the powers, rights, duties, liabilities, capacities and incapacities (except the power of making highway rates) as were vested in or attached to any surveyor of any parish forming part of the district were vested in and attached to the highway board.

The 6th section of the 5 & 6 Will. 4, c. 50 (the *General Highway Act*), after directing the manner in which surveyor of the highway is to be annually elected, provides that he shall repair and keep in repair the several highways in the said parish for which he is appointed.

By the 69th section a penalty is imposed upon any person for encroaching by any building within fifteen feet of the centre of the highway, and the surveyor is empowered to pull down such building, &c.

Sect. 19 of the 25 & 26 Vict. c. 61, provides for the preferring of an indictment where a highway is out of repair, and the liability to repair is disputed.

Sect. 20 enacts that

The expenses of maintaining and keeping in repair the highways of each parish within the district, and all other expenses in relation to such highways . . . shall be a separate charge on each parish.

The obstruction in this case was more than fifteen feet from the centre of the highway.

*McIntyre* appeared in support of the order of sessions, and contended that, as it was the duty of the board to keep the highways in repair, it was necessarily incident that they should get an obstruction removed, which in this case could only be effected by indictment.

*Heath, contra*, contended that the costs of the indictment could not be charged against the township, that the highway board have no general powers to prosecute, but only such as are specified in sect. 19 of the 25 & 26 Vict. c. 61. [*COCKBURN, C. J.*—What other means except by indictment are there of removing such an obstruction?] It may be that there is an omission in the Act in this particular. Under sect. 111 of the 5 & 6 Will. 4, c. 50, the sanction of the vestry is necessary before the expenses incurred in defending an indictment against the parish can be allowed. [*COCKBURN, C. J.*—That is where an indictment is preferred against the parish.] The surveyor might enter and abate the nuisance. [*CROMPTON, J.*—Not in such a case where it is not within fifteen feet of the centre.] The words "maintaining and keeping in repair" cannot be construed to include preferring an indictment. [*COCKBURN, C. J.*—But there are the additional words, "and all other expenses in relation to such highways." Those words can only refer to matters expressly authorised by the Act. He cited

*Townsend v. Rees*, 10 C. B., N. S., 308; 4 L. T. Rep. N. S. 447.

*COCKBURN, C.J.*—Mr. Heath has thought it

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necessary to enter upon the general statutory law relating to highways, but in point of fact the question before us is a very limited one indeed, being simply this, whether where a highway board has instituted a prosecution against an individual for an obstruction to a highway, they can charge the expenses of the prosecution—in this case the extra costs of the prosecution—upon the parish in which the highway was situate, and upon which the nuisance existed which it was necessary for the prosecution to remove. I quite agree with Mr. Heath that a highway board is by a recent Act placed in the situation of the surveyor under the former Highway Act, but it does not follow that on that account they may not have extended to them under the Act of Parliament by which such board is created larger powers with regard to raising money for expenses than the surveyor had under the previously existing Act of Parliament; but even if this question had arisen under the former Act of Parliament, 5 & 6 Will. 4, c. 50, and the case had been that of a surveyor instituting a prosecution for the purpose of removing a nuisance from a highway, I should have been very much disposed to think so, though in the view I take I do not think it necessary to decide the question. I should be strongly disposed to hold, were it necessary, that the power to raise a rate for such a purpose, or to include the expenses of such a prosecution in a highway rate, would have been incidental to the power vested in the surveyor by the Act of Parliament, where he has power to make and levy a rate for the purposes of the Act. Now the main purpose of the Act is the repair of the highway, and the keeping of the highway in a proper condition; but the existence of an obstruction which is a nuisance on a highway is manifestly inconsistent with the highway being kept in a proper state of repair, and therefore I think, on a wise and liberal construction of the Act, they might have been fairly and legitimately included in the purposes of the Act, in carrying the purposes out. But it was pointed out that the words of the 20th section are much larger than under the old statute. The 20th section, while it gives the board power to charge upon the district fund whatever expense it shall incur for the benefit of the whole district, goes on to say that the expenses of maintaining and keeping in repair the highways of each parish within the district, and all the other expenses in relation to such highways, except those that are thrown on the district fund in the earlier part of the section, are to be borne by the individual parishes. The whole question, as it appears to me, in this case is one of simple solution and is easily answered; and it is whether this is an expense relating to the maintaining and keeping in repair the highway? Can it be said the expense incurred in the removal of a nuisance that obstructs a highway is not an expense incurred in relation to that highway? I called Mr. Heath's attention some time ago to the question whether a surveyor, *à fortiori* a highway board, removing an obstruction by mechanical or manual means, would not be entitled to charge the expenses so incurred; Mr. Heath, with all his anxiety in maintaining the case of his client, could not answer that in the negative, but sought to make a distinction between the having recourse to manual means, by labour or otherwise, in removing it, and by having recourse to proceeding at law. I should always uphold a man who has recourse to the process of law, in preference to a man who has recourse to force, which may lead to consequences by no means to be desired. I cannot think there is any difference, and I have no hesitation in saying, that the proper course of proceeding adopted with a view to the removal of an obstruction on a highway is an

expense relating to the highway, and therefore comes within the 20th section. If one looks at the expediency and the reason of the thing, one cannot doubt that is the construction the Legislature must have intended to have had put upon it, and which answers the clear justice of the Act. There is no doubt of the duty of those who have the care of a highway to keep that highway in a proper and effectual condition. If there is an obstruction, which it appears to them interferes with the use of it by the public, those are the authorities, and they have as incidental to their duty the power to take the necessary steps to remove the nuisance. No one can expect that those who are to act in a matter of that description should put their hands into their own pockets to defray the expenses of a prosecution if by any accident the prosecution fails and the expenses come to be taxed. Therefore, if they are expenses that must be borne by some one, and the costs which have been incurred must be paid, it would be monstrous to expect the authorities who have put the law in force to find themselves, personally, out of their own pockets, the amount that may be necessary, and therefore it ought properly to fall upon the parish who by this prosecution have occasioned the obstruction to be removed, the further continuance of which would be a nuisance. Both as regards the policy and the expediency of the matter, and the language of the enactment, I can entertain no doubt this was an expense which the highway board were right in incurring; and therefore the individual parish must bear it.

CROMPTON, J.—I am of the same opinion. Mr. McIntyre put his case very shortly and simply, and on two very short and simple propositions. He said, "Here is this body bound to keep in repair from time to time the roads. It is impossible to do that without removing obstructions. It is impossible in many cases that obstructions can properly be removed without having recourse to the arm of the law." He says those are repairs under one or both of these Acts. I have not heard a word that has been said during the whole course of the case that seems to meet that argument, and I think those propositions are correct, and the inference drawn from them is correct. I do not feel any difficulty in carrying out the Act of Parliament. As to there being any waste or improper proceeding, the board are now the representatives of the different parishes, and it may well be left to them more widely than it was before, and I am very strongly of opinion that it does not depend upon the success of the prosecution, but whether it was a proper expense; and when an appeal was sent to the sessions, and it had been successful, it might well be, if they thought it really was not for the benefit of the parish, that the expenses would not be allowed. To try it by an extreme case: if it was clear that the parties had indicted to put money into some attorney's pocket, the board would have been very right in disallowing the costs; but that is left in the discretion of the quarter sessions upon appeal. If the first Act did not include such a power, though I should be disposed to think it does, the second Act enlarges it and gives power to the surveyor. It does not necessarily follow that it only gives this power; it clothes them with all the powers the surveyor had; and it is impossible to say this is not an expense in relation to highways. I therefore think our judgment should be for the resp.

BLACKBURN, J.—I am of the same opinion. I think the old Act of 1835, by the 8th section, made it the duty of the surveyor to repair and keep in repair the several highways of the parish. I quite agree with what my Lord and my brother



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GUARDIANS OF WINCHCOMBE AND GUARDIANS OF STOURBRIDGE UNION.

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Crompton have said, that for the purpose of repairing and keeping in repair, it may be necessary and proper to institute a prosecution against some one who prevents the road from being kept in repair, and if such a prosecution is properly and rightly and fairly instituted, I think it would be one of the expenses falling within a part of their duty in carrying out the Act, and if it was wasteful, extravagant, or improper, then that would be a question of fact; they could not incur an expense of that nature, or if they did incur it, then on appeal the quarter sessions would properly disallow it if they were satisfied of the fact. Then under the former Act, in the 27th section there is power to raise a rate for the purposes of the Act, one of which was to pay the expenses of repairing the road and incidentally any prosecution really and properly necessary for that purpose. I am inclined to think that the new Act does not extend this further than before. The board are required to perform the duty the surveyor had to maintain the highways. I do not think it extends that duty further than before; but it does not cut it down. Then again, under the 20th section, they are to charge upon the parish the expenses in relation to the maintaining and repairing the highways, and all other expenses in relation to such highways. I do not think myself that it much extends it beyond, because the only expenses relating to highways were expenses for the purposes of the Act, maintaining and repairing; but, again, I say it does not cut it down. The board have at least as much power as the surveyor had, and as much right to do it; and if, under the former Act, the surveyor might have done it, subject always to this, that they could be disallowed by quarter sessions if they were wasteful and extravagant, the board can do it now.

SHEE, J.—I am of the same opinion.

*Order of sessions confirmed.*

*Saturday, June 3, 1865.*

REG. v. THE JUSTICES OF WORCESTERSHIRE, re AN APPEAL BETWEEN THE GUARDIANS OF THE WINCHCOMBE UNION AND THE GUARDIANS OF THE STOURBRIDGE UNION.

*Poor-law—Break of residence.*

*To render the absence of a party from his parish not a break of residence, it is essential that he should have a residence in such parish to which he has a right to return.*

*A. left his parish, where he had a lodging, which he gave up to seek elsewhere for work, intending to return when work was better, and the occupier of the house would have permitted him to have the same lodgings again on his return, and they were not, in fact, occupied in his absence:*

*Held, to be a break of residence.*

This was an appeal by the guardians of the Winchcombe Union against an order for the removal of George Whittle, a pauper lunatic, on the ground of his irremovability by reason of a three years' residence in resp. union. At the hearing the sessions quashed the order of removal, subject to a case.

The case stated, that the appeal was against an order of justices adjudging the settlement of George Whittle, a pauper lunatic, to be in the parish of Beckford, in the app. union; that the settlement at Beckford was proved, but the apps. called witnesses in support of a ground of appeal, alleging the pauper's irremovability from the resp. union by reason of a three years' residence therein prior

to the 17th Feb. 1864, when he was conveyed to the lunatic asylum; that the facts material were, that the pauper, who had lived with his wife and a child in a cottage at Quarry Bank, in the resp. union, about Whitsuntide 1861, left the cottage in consequence of his wife having deserted him and his goods being seized for rent; that the child was apprenticed to a tailor, with whom he went to reside, and has ever since continued to live, and the pauper became a lodger at the house of a Mr. and Mrs. Drew at Quarry Bank; that in Oct. 1862 he left Drew's and went to Kemmerton to work there, telling the Drews he meant to return when the trade (he was a puddler) at which he worked became better, and he asked them to write to him and let him know if the trade improved; that he left behind him a waistcoat and pair of trousers, which were stated by Mrs. Drew to be scarcely worth wearing; that during his absence his lodgings were not occupied by anybody else, but had he returned at any time he might have had them; that he was absent at Kemmerton, out of resp. union, for three months, when he returned to the Drews at Quarry Bank, and in a fortnight after left them again, and left his watch behind him because he was subject to fits; that his watch was afterwards sent to him; that after a period of three weeks he again returned to his lodgings; that during his absence his lodgings were not occupied by any one else, and had he returned at any time he might have had them.

Powell, Q.C. and E. T. Holland appeared in support of the order of sessions, and contended that there was no break of residence, for that the leaving of his residence with the Drews at Quarry Bank being for the purpose of seeking work, and his lodgings, in which he had left some of his clothing, being kept for him in the event of his returning, he must be held to have constructively resided there the whole time. [BLACKBURN, J.—He does not keep on the lodgings. I know of no case in which it has been held not to be a break of residence where there was no residence to which he had a right to return.] The question is, whether there was the *animus revertendi*:

R. v. *St. Marylebone*, 20 L. J. 109, M. C.;  
R. v. *Taoinestone*, 3 Q. B.; 18 L. J. 44, M. C.;  
R. v. *Stapleton*, 1 Ell. & Bla.; 22 L. J. 102, M. C.;  
R. v. *Brightelmstone*, 24 L. J. 41, M. C.; 4 Ell. & Bla. 236.

Gray, Q.C. and Streeten, for the resps., were not called upon.

BLACKBURN, J.(a)—I am of opinion that the order must be quashed. The question is, whether the pauper was resident during the requisite period? There have been several cases upon the subject, and some have been decided one way and some another. But there is no case whatever in which it has been yet decided that a man can be said to be residing in a place when he was physically absent and had no dwelling-place or residence in the parish. In the present case the facts appear to be these. The pauper had lodgings and gave them up; he did not live there; he went away, stating that he would come back when work was better; he said he intended to return, and no doubt that was his intention. He left behind him a waistcoat and a pair of trousers, which, however, were stated by the landlady to be scarcely worth wearing. The leaving them there might be some indication that he was intending to return. I cannot say the fact of a man leaving some old clothes behind him amounts to a retaining of his lodging as a dwelling-place in the

(a) Cockburn, C. J. and Mellor, J. were absent in the Court for Crown Cases Reserved.

Q. B.]

REG. v. THE GOVERNOR OF THE DEBTORS' PRISON IN WHITECROSS-STREET.

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parish so as to make a settlement, and that he continues to reside in a place where he has no residence. I think, therefore, the quarter sessions were wrong, and the order must be quashed.

SHEE, J.—I am of the same opinion. In the absence of any case which says that where a party has no residence in the parish there may still be no break of residence, I think the order of sessions bad.

*Order of sessions quashed.*

Wednesday, June 7, 1865.

REG. v. THE GOVERNOR OF THE DEBTORS' PRISON IN WHITECROSS-STREET.

REG. v. THE GOVERNOR OF NEWGATE.

*Prison—Poor-rates—Committal—Newgate and Whitecross-street prisons—52 Geo. 3, c. 209—12 Vict. c. 14.*

*The gaol of Newgate is the common gaol for the confinement of criminals only for the city of London and county of Middlesex, and the gaol in Whitecross-street is a gaol for the confinement of prisoners for such jurisdictions upon civil process. By the 12 Vict. c. 14, persons in default for nonpayment of poor-rates may, upon no distress being available for the amount, be committed by a justices' warrant to the common gaol or house of correction for any time not exceeding three calendar months, unless the sums be sooner paid. A. B. and C. D., defaulters as above, were committed respectively to Newgate and Whitecross-street:*

*Held, that such committals were upon civil, and not criminal process, and that the committal to Whitecross-street prison was good, and (Cockburn, C. J. dubitante) that the committal to Newgate was bad.*

In a former term this court made absolute, subject to a special case, rules calling upon the governor of the Debtors' Prison in Whitecross-street and the Governor of Newgate, to show cause why writs of *mandamus* should not issue, directed to them respectively, commanding them to receive into and detain in their said prisons the bodies of A. B. and C. D. respectively, pursuant to certain warrants under the hands and seals of certain justices of Middlesex, and there to imprison them for certain spaces of time unless certain sums of money should be sooner paid.

It appeared (from the statements in the cases respectively) that the said A. B. and C. D. had been committed, the one to the gaol of Newgate, and the other to the gaol of Whitecross-street, by certain justices of Middlesex, for the nonpayment of poor-rates, under the provisions of sect. 2 of the 12 Vict. c. 14, but that upon being tendered respectively to the governors of the said gaols, they refused to receive them: the governor of Whitecross-street prison upon the ground that such prison was neither the common gaol nor house of correction for the county; and the governor of Newgate upon the ground that he had been directed by the gaol committee of the Court of Aldermen not to receive any persons committed there for nonpayment of rates.

The case proceeded to set out the facts relative to the prisons in Middlesex, as given in the recent case of *Reg. v. the Prosecution of the Vestry of St. Mary, Islington, v. The Keeper of the House of Correction in Coldbath-fields: (Reg. v. Colvill, 12 L. T. Rep. N. S. 341.)* The case then proceeded to state that there is not now, and never was, a common gaol for the county of Middlesex locally situate in the said county of Middlesex, except it be one or the other of the gaols or prisons mentioned in this case; that the Queen's gaol of Newgate is situate in the city

of London; that the statutes of 7 Geo. 3, c. 37, and 18 Geo. 3, c. 48, are the statutes under which the gaol of Newgate was rebuilt, and are to be taken as part of this case, as are also the statutes of the 18 Geo. 3, c. 60, and the 52 Geo. 3, c. 209; that the Debtors' Prison of London and Middlesex was erected under the provisions of the said last-mentioned Act, and is situated in Whitecross-street, in the said city of London; that the governor of that prison refuses to receive persons committed for non-payment of rates; that the justices of Middlesex had always claimed the right to send Middlesex prisoners to the Queen's gaol of Newgate, as the common gaol of the county, and are now daily in the habit of committing them there under the 4 & 5 Will. 4, c. 36 (the Central Criminal Court Act), and before that Act they were in the habit of sending prisoners there for the purpose of being tried at the Court of Oyer and Terminer and general gaol delivery in the Old Bailey; that since the Debtors' Prison in Whitecross-street was built, the following classes of prisoners only have been received there, viz., debtors in custody of the sheriff; prisoners in contempt from the County Court, Mayor's Court, Small Debts Court and Bankruptcy Court.

In the year 1812 an Act was passed (52 Geo. 3, c. 209) entitled "An Act for building a new prison in the city of London, for removing thereto prisoners confined under civil process in the gaol of Newgate and the two compters of the said city," &c., which recites that

Whereas the gaol of Newgate is not only the common gaol both of and for the city of London, and of and for the county of Middlesex, for the confinement of felons and other offenders, but is also a prison for the confinement of other persons in the custody of the sheriffs of London and of the sheriff of Middlesex. . . . And whereas it is desirable that prisoners confined under civil process should not be confined in the same gaol with prisoners for felony and other offences . . . and whereas the building of a new prison of a sufficient extent in a commodious situation, and the removing thereto prisoners confined under civil process in the said gaol of Newgate . . . will be of great public utility, &c.

Power is then given to the corporation of London to build a new prison, which shall be divided into four separate and distinct parts, one for the confinement of prisoners confined under civil process in the custody of the sheriff of Middlesex; two other of the said four parts for the two compters of the city of London, &c.; and the remaining fourth part for the said prison of Ludgate.

Sect. 56 enacts, that

From and after such time as the prisoners confined under civil process shall have been removed from the said gaol of Newgate to the said new prison, in pursuance of this Act, the said gaol of Newgate, and every part thereof, shall for ever thereafter be appropriated exclusively to the confinement of such felons and other prisoners liable to be confined therein as are not by this Act authorised to be confined in the said new prison.

Sect. 57 provides,

That all prisoners by process of contempt for not paying any sum or sums of money, or costs, issuing out of any court of law, and all prisoners for contempt of any court of equity for not paying any sum or sums of money, or costs, ordered to be paid by any decree or order of any such court, shall for the purposes of this Act be considered as prisoners confined under civil process, and shall be accordingly removed to and confined in the said new prison.

Sect. 58 provides,

That nothing in this Act contained shall extend or be construed to extend to infringe, defeat, or affect the power or authority of any court, judge, justice, commissioner of bankrupts, or others to commit any person or persons whomsoever to the said gaol of Newgate, or to any other gaol or prison.

By sect. 2 of the 12 Vict. c. 14 (an Act to enable overseers of the poor and surveyors of highways to recover the costs of distraining for rates), it is enacted (*inter alia*) that

When to any warrant of distress for the levying of any sum or sums to which any person or persons is or are now or may hereafter be rated or assessed in or by any rate or assessment hereinbefore mentioned, it shall be returned by the com-

stable . . . that he could find no goods or chattels . . . whereon to levy such sum or sums . . . it shall be lawful for any two or more justices of the peace before whom the same shall be returned, . . . if in their discretion they shall so think fit, to issue their warrant of commitment against the person with relation to whom such return shall be so made as aforesaid, . . . and thereby order such person to be imprisoned in the common gaol or house of correction for any time not exceeding three calendar months, unless the sum or sums therein mentioned shall be sooner paid, &c.

*Bovill, Q. C. (Poland with him)* appeared for the parish authorities, and contended that Whitecross-street prison is the proper gaol to commit to for the nonpayment of poor-rates; for, although the 12 Vict. c. 14, directs defaulters to be committed either to the common gaol or house of correction, yet, as by the 52 Geo. 3, c. 209, prisoners on civil process are not to be committed to Newgate, and as the Legislature in passing the 12 Vict. c. 14 must be taken to have been aware of the provisions of that statute, it could not have intended that prisoners on civil process, as this is, should be committed to Newgate, but to that gaol which in such cases was made a substitute for it. He contended that a commitment in default of distress for nonpayment of a poor-rate was a civil process:

*R. v. Cope*, 6 Ad. & Ell. 226;

*Mather v. Egginton*, 2 Ell. & Bl. 717;

*Re Masters*, 88 L. J. 146, Q. B.; 9 L. T. Rep. N. S. 788.

*Keane, Q. C.* contended that Newgate, and not Whitecross-street, was the proper prison to which to commit in such cases, for that the subsequent statute of the 12 Vict. c. 14, in express terms directs such persons to be committed to the common gaol or house of correction; and moreover that the commitment for nonpayment of a poor-rate is in fact penal process and not civil process, the justices having a discretion to commit or not, and only committing where they believe that the party refuses from wilfulness to pay the amount. [*Cockburn, C. J.*—But if that were so, how is it that he has a right to be discharged immediately upon payment?] He is sent to prison because he will not pay the debt. His commitment does not discharge the debt. For not paying the amount he may be imprisoned for three months. Newgate is certainly still the common gaol. But Whitecross-street is neither a common gaol nor house of correction.

*Mellish, Q. C.*, the Recorder of London, and *Clarks* appeared for the corporation.

*Cockburn, C.J.*—I am of opinion that this order for the commitment of a person to prison for nonpayment of rates which he is liable to pay under the statute should be to Whitecross-street prison. I think there can be no doubt whatever that, under the Act of the 52 Geo. 3, c. 29, the gaol of Newgate being the common gaol of the county of Middlesex, that would have been the place to which a person committed under such circumstances would have been properly sent. Then, that Act of Parliament, practically speaking, divides the common gaol of the county of Middlesex (that is Newgate) into two departments, a civil department for persons in custody on civil process, and a department for persons in custody on criminal process. Then arises the question of whether this class of prisoners falls under the one or the other category, and I can entertain no doubt, having paid the greatest attention to all that has been urged by Mr. Keane, that this is a commitment on civil process. The liability is clearly a civil liability. Upon nonpayment, no offence is created, but process against the goods of the party failing to satisfy the statute is issued. In the event of no goods being found on which distress or execution may take effect, then there is an authority to the magistrates upon sum-

mons to commit the party to prison, but not to do so in the character of a punishment for the offence he has committed in not paying, but simply as a means of enforcing payment if by possibility the process of imprisonment can have that effect. As soon as the man pays he is entitled to liberation, and it is clearly shown that the whole proceeding is for enforcing payment of a civil liability, and not by way of punishment; and I think the true criterion is, whether or not an indictment would have lain in the event of the statute not providing the summary remedy which it has given, and I am of opinion it would not. The whole is a civil liability from beginning to end, the liability to pay money to enforce which the power is given; but as soon as it is discharged by payment the party is entitled to freedom, and his liability is at an end. Considering it therefore as a civil process, it seems to me the commitment must, by virtue of the 52 Geo. 3, c. 209, be to the civil department of the common gaol of the county of Middlesex, and not to the criminal department. The only difficulty which presents itself is created by the 57th and 58th sections; but when these come to be looked at the difficulty disappears. I doubt very much whether there was any necessity for the enactment of the 57th section. I cannot help thinking it was put in out of abundant—perhaps superabundant—caution. Whereas the division is made for two classes, persons in confinement under civil process, and persons in confinement under criminal process, it might be doubted whether contempt ranged itself under one class or another. The 57th section was intended to remove the possibility of a doubt by enacting that persons in custody on process of contempt for not paying any sum or sums of money or costs, shall be considered as prisoners in custody under civil and not under criminal process. And then comes the 58th section, which I own I have considerable difficulty in understanding or putting a construction which is at all satisfactory to my own mind. I cannot help thinking that this section was intended again to operate by way of distinction between the civil process of contempt for not paying any sum or sums of money, and any of those contempts of any court, judge, justice, commissioners of bankrupts, or others, for which, in the administration of justice, they have power to commit. But be that as it may, though I do not think it necessary on the present occasion to say whether or not by virtue of that 58th section any of the authorities in the administration of justice to which that section refers might commit to the gaol of Newgate, though I am very strongly inclined to think that it is limited to cases of contempt, as distinguished from contempt for nonpayment of money, I am bound to say (whether or not the power to commit to Newgate is or is not taken away) that it seems to me, looking at the scope and intent of this Act, and at what the Legislature evidently contemplated and meant, that a commitment in respect of a civil liability of this sort would be wrong; and the proper course to pursue is, to commit to the civil department of the gaol of the county of Middlesex, that is to say, to Whitecross-street prison. The question for us to determine is, whether a commitment or an order for commitment to Whitecross-street prison is proper or not? I entertain no doubt, on the whole view of the matter, such an order is right, and that the keeper of the gaol of Whitecross-street is bound to receive a prisoner under it. I think it is unnecessary to say whether the commitment to Newgate is legal or not; it is sufficient to say that the commitment to the county gaol is right, therefore the order must, of course, be considered as good.

*Crompton, J.*—I am of opinion this commitment

is in the nature of *civil* process, and, according to the true construction of the Act of 52 Geo. 3, there was no power to send to Newgate, but they were bound to send to Whitecross-street. Now, first, as to this being *civil* process. This is clearly process analogous to an execution. It is on a debt; it is on the return of *nulla bona*, and just like an ordinary *ca. sa*. It holds a man not for any punishment for contempt, or anything of that kind, but it is as purely civil as it can be. If he does not pay, there is the process against his goods, and, on the return of *nulla bona* for that, there will be an execution in the nature of *ca. sa*. till he pays the debt, *capias ad satisfaciendum* strictly. If the magistrate thinks there ought to be a *ca. sa*. under the circumstances, he should have the discretion to order it. It does not alter in my mind the nature of the process. The only question, as it appears to me, really is, is anything in the nature of punishment inflicted? It seems to me to alter and strain the enactment to say it is a punishment if he does not pay. It is no more a punishment than is an ordinary *ca. sa*. I am clearly of opinion it is in the nature of *civil* process, and I think more so than it was in the case of *Reg. v. Egginton*, which was for handing over books and accounts. That being so, where is he to go? The object of the Act is to divide the common gaol of Newgate into two—a gaol for London and Middlesex for criminals, and a gaol for the sheriffs of London and Middlesex in civil matters; and it seems to me on these enactments, without going through them, that no others but criminals, felons and misdemeanors are to be confined in Newgate, by reason of there not being room for others there, and that a new prison is to be built which is, in effect, the sheriffs' prison, as is so said in the section referred to by Mr. Bovill and Mr. Mellish, and which new prison is to be divided into four parts, one being for the confinement of prisoners under civil process in the custody of the sheriff of Middlesex, two other parts for the confinement of prisoners under civil process in the custody of the sheriffs of London, and the remaining part for the confinement of freemen of the city of London, or clergymen, proctors, or attorneys who would have been confined under some old enactment in Ludgate, I suppose. That being so, there is a clause expressly to say, "That from and after such time as the prisoners confined under civil process shall have been removed from the said gaol of Newgate to the said new prison in pursuance of this Act, the said gaol of Newgate and every part thereof shall for ever thereafter be appropriated exclusively to the confinement of such felons and other prisoners, liable to be confined therein, as are not by this Act authorised to be confined in the said new prison." Then some doubt might be raised, whether civil process extended to matters which are really of contempt, which this is not; because it is by a fiction of contempt we make an attachment against a person for not paying a sum of money, if he has not paid it under our rule of court. You may have a rule of court drawn up in form and served upon a person, and that would be merely a civil process, though there might be some doubt as to whether it is a process of contempt. This 57th section was to meet that. This case of contempt, which is for not paying money, is only a form, it is only a remedy for getting your money paid, and the man might be discharged after he had paid the money. It is very different in the case of contempts of court by its officers, or anything of that kind. They get into contempt, and must purge it, or answer it, or pay the money as the court or judge directs. That is the meaning, I think, of the 57th section. You must not have recourse to any quibble in saying this is not civil process in the case of ordinary

debt, but you must mind that it includes what is really the process of getting so much money by means of the fiction you may call it almost, of an attachment. Then, they seem to me to put in the 58th section, I do not think very necessarily, because I do not think it would have touched the power of the commissioners of bankrupts to commit a bankrupt for not answering them. They seem to have thought, "Oh, we must take care that no person gets into it for any other contempt besides what is mentioned." Therefore, where there is contempt of a court sitting, which I take to be a contempt of a criminal nature (and I think the Lord Chief Justice gave a good answer to that in saying that was a proviso of the 57th), they do not mean to take in cases of contempt of that nature. I have considerable doubt whether any justice exercising a duty of this kind ministerially, awarding execution, would come within that if it did not mean and was not confined to a real contempt; but I am inclined to think it means a real contempt. At all events, "Commissioners of bankrupts" seems to me to point to the nature of the crime. I think it means crimes of that nature and species. "Any court, judge, justice." "Justice" might mean what Mr. Mellish referred to, justices of any Superior Court. "Nothing in this Act contained shall affect the power or authority of any court, judge, justice, or commissioners of bankrupts, or others, to commit any person or persons whomsoever to the said gaol of Newgate, or to any other gaol or prison." I think that must allude to contempts of the nature that have been referred to. At all events, I do not think it can destroy the effect of the 56th section, because, if so, that would extend to the power to commit for debts of any kind. To my mind, that would upset the meaning of the whole Act of Parliament, and destroy in effect the great object of classification which the Act intended to enforce, confining what is strictly crime, or a contempt of court, or matters of criminal complexion, to Newgate, and what is really for payment of debt to Whitecross-street. That is the great object of the Act, and I think we should be frustrating it, if in so doubtful a clause as this 58th section we said there was this discretion in the magistrates, which it was the object of the Act to take from them. Therefore, I think the Whitecross-street prison is the right one, and Newgate is the wrong one.

BLACKBURN, J.—I am of the same opinion. The Act under which the magistrates have acted gives them power to commit to the common gaol or house of correction. The regulations of the justices of Middlesex provided for being received in the house of correction; but still it remains that they may be sent to the common gaol, and if matters had remained as they were prior to the 52 Geo. 3, there is no doubt that Newgate would have been the common gaol to which they would have been properly sent; and under those circumstances, having got to Newgate, they would have been in the custody of the sheriff of Middlesex; but then comes the Act of 52 Geo. 3, to build Whitecross-street prison, which by the 48th section enacts that, when the new prison is completed, one part shall be the prison for persons confined under civil process in the custody of the sheriff of Middlesex, and the 56th section says, "from and after that time Newgate, and every part thereof, shall be appropriated exclusively to the confinement of such felons and other prisoners, liable to be confined therein, as are not by this Act authorised to be confined in the said new prison." Stopping there, the thing would seem to be pretty plain, that those who were in the custody of the sheriff of Middlesex would thenceforth be detained in the Debtors' Prison, Whitecross-street, and those

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[C. P.]

who were not in custody under civil process would be confined elsewhere. I think there can be very little doubt that that is civil process which is process for the purpose of enforcing a civil liability to pay a sum of money, as much as that is civil process which is for the purpose of enforcing a debt. The difference between the two is a remedy for enforcing a civil right to pay money and a remedy for enforcing it from some person who is in the nature of a criminal. It would be in the nature of a civil or criminal process, according to the nature of the commitment. Where a person is attached for contempt and sent to prison for the purpose of enforcing payment, where it was a commitment for nonpayment of money or costs, it would be by civil process; where it is a commitment for something in the nature of a crime, for the purpose of punishing him, there it would not be civil process; and clearly, having that in their minds, the Legislature, by the 57th section, put in a proviso, saying, "Provided always, and be it further enacted, that all prisoners by process of contempt for not paying any sum or sums of money, or costs, issuing out of any court of law, and all prisoners for contempt of any court of equity for not paying any sum or sums of money, or costs, ordered to be paid by any decree or order of any such court, shall for the purposes of this Act be considered as prisoners confined under civil process." I think that was unnecessary, for it will be considered—at least, according to my construction of the Act—as intended for persons confined under civil process, even if this Act had not expressly so said. Nevertheless, the Legislature thought it safer to mention it. Then, immediately after that, comes the 58th section, which seems to me to be a proviso grafted on the other as to committing for crimes in the nature of punishment and other rights which may be saved. It may be a little obscure, but I do not think we can account for that proviso in the way Mr. Keane's argument would require if committal to Newgate under civil process was to be put an end to—that every committing justice might still send persons under civil process to Newgate, just as if the Act had not passed. I think no such construction as that can be put on the section, and consequently the only question in this case is, whether it was a commitment under civil process? I do not think it is necessary to repeat what has been said; but, taking the definition of civil process to be process to enforce payment of a liability to pay a sum of money, and criminal process for enforcing payment as punishment, I think, on the authority of *Egginton's* case, this was civil process and not in the nature of punishment; and that being so, I think by the true construction of this Act the keeper of Newgate is not bound to take him, and the keeper of Whitecross-street is bound to take him in, which is really the point raised.

SHEP, J.—I am of the same opinion. It seems to me perfectly clear, for the reasons already given by my Lord and my brothers, that this was civil process, and that the person arrested under the warrant was a person to be confined, within the words of the 56th section of the Act of Parliament, under civil process. Now it is also, as appears to me, quite clear that, previously to the passing of the 52 Geo. 3, c. 209, the gaol of Newgate was the common gaol for persons to be confined in, whether under criminal or civil process, and by the 56th and other sections of that Act of Parliament it was expressly provided that for the future the gaol of Newgate "shall be appropriated exclusively to the confinement of such felons and other persons liable to be confined therein as are not by this Act authorised to be confined in the said new prison." Now the persons authorised by this Act to be con-

fined in the said new prison are persons confined under civil process; therefore, as it seems to me, this person would be properly confined in the new prison as a prisoner under civil process. Then we are met with the suggestion of the difficulty arising upon the words of the 12 Vict. c. 14, under which this person was committed, the words being that the justices shall issue their warrant of commitment against such person, and order such person to be imprisoned in the common gaol or house of correction, and it is said that the Act of Parliament passing long after the Act of the 52 Geo. 3, must control any provisions in the 52 Geo. 3, and that therefore it is still open to the justices to order the commitment of the person being a defaulter under the provisions of this Act of Parliament to the common gaol of Newgate. But it seems to me, on the other hand, that this Act of the 12 Vict. c. 14 must be taken to have been passed with a knowledge of, and with some reference to, previous Acts of Parliament for the regulation of gaols and the classification of prisoners in them—this Act of the 52 Geo. 3, as respects London and Middlesex, and the Act of the 4 Geo. 4, c. 63, as to the classification of prisoners in other counties, and that we may well read this particular enactment of the 12 Vict. c. 14, authorising the justices to order such person to be imprisoned in the common gaol or house of correction, as meaning "order such person to be imprisoned in the common gaol for such persons, under the previous Acts of Parliament now in force." Therefore, I think, under the provisions of the 52 Geo. 3, this prison in Whitecross-street was the common gaol, within the meaning of this Act of Victoria, for persons imprisoned under civil process in the county of Middlesex, and that therefore the commitment was properly made to Whitecross-street.

*Judgment for the Crown in Reg. v. The Governor of the Debtors' Prison in Whitecross-street, and for the deft. in Reg. v. The Governor of Newgate.*

*Reg. v. The Governor of Whitecross-street: Attorneys for the Crown, James and Curtis; attorney for the deft., T. J. Nelson, City Solicitor.*

*Reg. v. The Governor of Newgate: Attorney for the Crown, E. G. Randall; attorney for the deft., T. J. Nelson.*

#### COURT OF COMMON PLEAS.

Reported by W. MAYN and LUMLEY SMITH, Esqrs., Barristers-at-Law.

Wednesday, May 3.

DAY v. PEACOCK.

COBB v. SAME.

BINDER v. SAME.

*Burial fees—Incumbents of districts—15 & 16 Vict. c. 85, s. 32.*

*Prior to 1831 the township of B. formed one parochial chapelry. The church of St. Mary's was the parochial chapel of the chapelry, and there was an ancient burial-ground belonging to it, in which the remains of the inhabitants of the chapelry were buried, and the incumbent of St. Mary's received the fees. In 1823 the church of St. George's was built within the chapelry, and a burial-ground was appropriated to it, together with a district, and the residue was called St. Mary's. The ancient burial-ground was enlarged forty years ago, and, since the formation of St. George's district, had been the burial-ground of St. Mary's, and the fees for burial have been paid to the incumbent of St. Mary's. In 1844 a district called*

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*St. John's was divided from St. George's, and in 1858 a church was built, but there never has been any burial-ground assigned to it, but the remains of persons dying within the district have been buried in the burial-ground of St. George's, whose incumbent has always received the fees of his own and this district. In Feb. 1857 an order was made, under 16 & 17 Vict. c. 134, for the discontinuance of the burial-grounds of St. Mary's and St. George's, and a fresh burial-ground was provided for the whole chapelry under 15 & 16 Vict. c. 85:*

*Held, that the incumbents of St. Mary's and St. George's were entitled to the fees for the burial of the remains of the inhabitants of their respective districts, and that the latter was also entitled to those of the St. John's district, as they were incumbents of the parish within sect. 32 of the above-mentioned Act.*

This was a case stated for the opinion of the court by order of the learned judge.

The township of Barnsley, in the county of York, forms a part of the parish of Silkstone. It has separate overseers of the poor, and separately maintains its own poor.

Up to the time of the making of the Order in Council of the 8th Aug. 1831, hereinafter mentioned, the said township formed one parochial chapelry, which had existed from time immemorial. The church of St. Mary's was the parochial chapel of the said chapelry, and there was belonging to the said chapelry, and within the said township, an ancient burial-ground in which from time immemorial the remains of the inhabitants of the said chapelry had been and were of right entitled to be buried, and for burials in this burial-ground, and for the erection of monuments therein, and in the said church of St. Mary, fees had always been paid to the incumbent for the time being of the said chapelry.

In or about the year 1823 an additional church, called St. George's Church, was built within the said chapelry by Her Majesty's Commissioners for building new churches under the provisions 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, and on or about the 16th June 1824, a burial-ground within the said township was, under the provisions of the same statutes, purchased and appropriated by the said commissioners as and for a burial-ground for the said church of St. George. This church and burial-ground were afterwards duly consecrated.

By an Order in Council, bearing date the 8th Aug. 1831, a district was divided from the said chapelry and assigned to the said church of St. George under the provisions of the statutes above referred to.

The district so assigned to the said church of St. George has, since the said Order in Council, been called St. George's district; the residue of the said township has, since the same Order in Council, been called St. Mary's district. In this latter district are situate the said church of St. Mary and the said ancient burial-ground belonging to the said chapelry. This ancient burial-ground was enlarged about forty years ago, and from the time of its being so enlarged until the formation of St. George's district as aforesaid was the burial-ground of the said chapelry, and since the formation of St. George's district as aforesaid has been the burial-ground of the said district of St. Mary, and for burials and the erection of monuments therein fees have always been paid to the incumbent for the time being of St. Mary's.

Since the formation of St. George's district, as aforesaid, the burial-ground so appropriated as and for the burial-ground of St. George's Church, as aforesaid, has been the burial-ground of the said district of St. George's, and for burials and the erection of monuments therein fees have always been paid to the incumbent for the time being of St. George's district.

By an Order in Council bearing date the 23rd May 1844, a district called St. John's district was divided from St. George's district under the provisions of the statute above referred to. From the making of this order until the year 1858 Divine service for St. John's district was performed in a schoolroom in that district, and in 1858 a church called St. John's Church was built for the same district, in which church Divine service has since been performed.

The district so assigned to St. John's church has, since the said last-mentioned Order in Council, been called St. John's district. The residue of St. George's district has, since the same Order in Council, been called St. George's district.

There has never been any burial-ground assigned to, or belonging to, St. John's district, but the remains of persons dying within the limits of this district have been accustomed to be buried in the burial-ground of St. George's district, of which St. John's district formerly formed part, and for such burials in the said burial-ground of St. George's district fees have always been paid since the formation of St. George's district as assigned to the incumbent for the time being of St. George's district.

By an Order in Council, bearing date the 2nd Feb. 1857, made under the provisions of 16 & 17 Vict. c. 134, it was ordered (amongst other things) that (with certain exceptions therein mentioned) burials should, after periods in that behalf appointed, be discontinued in the said burial-grounds of St. Mary's and St. George's districts.

Upon the last-mentioned Order in Council being made, it became necessary to provide a new burial-ground for the said township of Barnsley, and the vestry of the said township having refused to provide such burial-ground, the local board of health for the said township became, on or about the 3rd Feb. 1858, under the provisions of the 4th section of 20 & 21 Vict. c. 81, the burial board for the said township.

Which burial board afterwards duly provided a burial-ground for the said township.

The burial-ground so provided by the said burial board (except the portion thereof not intended to be consecrated, and upon which portion a chapel is erected and built) was, with a chapel erected thereon on or about the 6th Nov. 1861, duly consecrated, from which time it became the burial-ground for the said several ecclesiastical districts of the said township within the meaning and according to the provisions of the said last-mentioned statutes.

The plt. the Rev. Henry Josiah Day is the incumbent of the said district of St. Mary, and claims to be entitled to perform the duties and have the same rights and authorities for the performance of religious service in the burial-ground so provided by the said burial board of the remains of parishioners or inhabitants of the said district of St. Mary, and also to be entitled to receive the same fees in respect of such burials, which he has previously enjoyed and received for burials, in the said burial-ground of St. Mary's district, as if such burial-ground so provided by the said burial board were the burial-ground of St. Mary's district. He also claims to be entitled to fees for such monuments, gravestones, tablets and monumental inscriptions erected or placed in the consecrated part of the burial-ground so provided by the said burial board as assigned, in the chapel erected therein, as may be so erected or placed over the remains or in memory of parishioners or inhabitants of the said district of St. Mary, in lieu of the fees or sums which he would have been entitled to for the erecting or placing of such monuments, gravestones, tablets and monumental inscriptions in the said burial-ground of St. Mary's district, or in the said church of St. Mary.

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The plt. the Rev. Clement Francis Cobb made the same claim for the district of St. George's.

The plt. the Rev. William John Binder made the same claim for the district of St. John's.

If the court should be of opinion that neither the said C. Francis Cobb as the incumbent of St. George's district, nor the said Wm. John Binder as the incumbent of St. John's district, has any rights or title to fees as in the 15th and 16th paragraphs of this case is respectively mentioned, then the said Henry Josiah Day, as the incumbent of St. Mary's district, claims to have the same rights and to be entitled to the same fees in respect of parishioners or inhabitants of the whole of the said township, which before the said Order in Council of the 8th Aug. 1831 formed one parochial chapelry as hereinbefore mentioned, as he claims in respect of parishioners or inhabitants of the said district of St. Mary, as in the 14th paragraph of this case is stated.

If the court should be of opinion that the said C. Francis Cobb as incumbent of the said district of St. George has the rights and is entitled to the fees claimed by him, as in the 15th paragraph of this case is stated, but that the said Wm. John Binder as the incumbent of the said district of St. John has no rights or title to fees as in the 16th paragraph of this case mentioned, then the said C. Francis Cobb as incumbent of the said district of St. George claims to have the same rights and to be entitled to the same fees in respect of parishioners or inhabitants of the whole of the district of St. George as it existed before the said district of St. John was formed out of it, as he claims in respect of parishioners or inhabitants of the said district of St. George as now existing, as in the 15th paragraph of this case is stated.

The said burial board, who are the defts. in the said several actions, deny that the plts. or any of them have or has the rights, or are or is entitled to fees as above claimed by them respectively.

The questions for the opinion of the court are, whether the plts., or any and which of them, have or has any, and if any, what rights, or are or is entitled to any, and if any, what fees as above claimed by them respectively.

Judgment is to be entered for 1s. damages and costs of suit (including one-third of the costs of this special case and the argument thereof) in each of the said actions in which the court shall decide in favour of the plt. in such action; and judgment is to be entered for the defts., with costs of suit (including one-third of the costs of this special case and the argument thereof) in each of the said actions in which the court shall decide in favour of the defts. in such action.

*Lush, Q.C. (Kenplay with him) for the defts.*—As to the districts of St. Mary's and St. George's, the question turns upon the construction to be put on 15 & 16 Vict. c. 85, s. 32. That section provides that, "from and after the consecration, as aforesaid, of any burial-ground provided under this Act (except any portion therein not intended to be consecrated), such burial-ground shall be deemed the burial-ground of the parish for which the same is provided, and where the same is provided for two or more parishes such burial-ground shall be in law as if such parishes were one parish, and if such burial-ground were the burial-ground of such parish; and every incumbent or minister of the parish, or of each of the parishes (as the case may be) for which such burial-ground is provided, shall, by himself and his curate, or such duly qualified persons as such incumbent or minister may authorise, perform the duties and have the same rights and authorities for the performance of religious service in the burial-ground, or in the consecrated portion thereof, of the

remains of parishioners or inhabitants of the parish of which he is incumbent or minister, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received, and the parishioners and inhabitants of such parish, or of each of such parishes, shall have the same rights of sepulture in such burial-ground as they respectively would have had in the burial-ground in their respective parish." Neither St. Mary's district nor St. George's was a parish within the interpretation clause, which enacts that a parish shall mean every place having separate overseers of the poor and separately maintaining its own poor. That clause also enacts: "That an incumbent and minister shall in respect of any fee made payable to an incumbent or minister under this Act, mean the clergyman who would have been entitled to the fee had the body been buried in the churchyard or burial-ground of the parish from which it came, or in the burial-ground of the ecclesiastical district, in case such district had a burial-ground." Now, there is no incumbent of the whole parish, but the clause must mean the incumbent of any ecclesiastical district.

*Manisty, Q. C. (Maule with him).*—It is admitted that the incumbent of St. John's is not entitled to burial fees. As to the claims made by the incumbents of St. Mary's and St. George's, they are purely statutory. Each incumbent of a church with a burial-ground attached is entitled to have the fees for burying so long as the ground is used for the purposes of burial, but no longer; and under the Act, the burial fees are to be given to the incumbent of the whole parish, and therefore the incumbent of the whole parish is the only person to have the fees.

*ERLE, C. J.*—I am of opinion that the incumbent of St. Mary's and St. George's are both entitled to the burial fees of their districts, in respect of the corpee of every inhabitant over whom they have performed the burial service. Barnsley is a township maintaining its own poor, and so comes within the statute. Formerly there was one burial-ground for the whole parish, but before the burial board was created there were two burial-grounds, one for St. Mary's and the other for St. George's district, but there was no burial-ground for St. John's, whose people were buried at St. George's. Then the board of health established a new burial-ground for the whole of Barnsley, and we are to say who is to receive the fees in respect of the new ground. I think the 32nd section is capable of the construction put upon it by Mr. Lush; it says that "every incumbent of the parish for which such burial-ground is provided shall perform the duties and have the same rights and authorities for the performance of religious service in the burial in such burial-ground of the remains of parishioners or inhabitants of the parish of which he is such incumbent, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received." Now, reading that section with the interpretation clause, it seems to me to mean each incumbent of a district having a burial-ground. Mr. Manisty, however, says that the words of the 32nd section are, "every incumbent or minister of the whole parish," and that neither of the present plts. are incumbents or ministers of the whole parish, but that each is incumbent of part only, the parish having been divided into two districts; but, as my brother Byles says, these incumbents fall in some sense within the meaning of the Legislature; and, as I read the Act, every incumbent of a parish in which a burial-ground is provided is to perform the duties of burying the remains of parishioners, and to receive the same



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fees as he did before. The statute, in my opinion, casts the same duties on the incumbent as he had before, and entitles him to the same fees; and, looking at the 52nd section, I read the 32nd section thus, "every incumbent or minister of any ecclesiastical district in the parish, which district had a burial-ground at the passing of this Act."

BYLES, J.—I am of the same opinion. No one reading the Act can doubt that the Legislature wished that the clergymen should not be deprived of their emoluments, and that the public should have the burial services performed as before. The clergy have duties to perform and fees to receive, and they cannot be relieved of one or deprived of the other without the express authority of an Act of Parliament. A bishop of the province of Canterbury means a bishop beneficed in that province, and the words of this statute should receive the same literal construction, and then they are as consistent with the paramount intention of the Act as under any other construction which could be suggested.

KEATING and M. SMITH, JJ. concurred.

*Judgment accordingly.*

Attorneys for plt., *Brooksbank and Galland.*

Attorney for defts., *H. H. Poole.*

### BAIL COURT.

Reported by W. GRAHAM, Esq., Barrister-at-Law.

Monday, June 12, 1865.

REG. v. BACKHOUSE AND OTHERS.

*Quo warranto*—Election of local board—Absence of returning officer—Public Health Act 1848.

*By the Public Health Act 1848, the elections of members of local boards of health are to be conducted by the chairman, who is the returning officer, assisted by other persons appointed by the board, and a penalty is imposed on persons neglecting their duty in that behalf. The chairman having been absent during the election:*

*Held, that the election was absolutely void, though it was conducted by the other officers in the ordinary manner, and it was not suggested that the result would have been different if the chairman had been present.*

This was a rule for a *quo warranto*, calling on six members of the Darlington Local Board of Health to show cause why their election should not be set aside as void.

By the Public Health Act 1848, 11 & 12 Vict. c. 63, s. 20:

The chairman of the local board of health shall have the powers and perform the duties vested in or imposed on the chairman by this Act, and shall perform all other duties which it shall be requisite for him to perform in conducting and completing elections under this Act, and the local board shall appoint a competent number of persons to assist him.

By sect. 26:

The chairman shall cause the voting papers to be collected on the day of election in such manner as he shall direct, and if any voting paper has not been collected through the default of the chairman or the persons appointed, the voter may deliver the same to the chairman on the day of election.

By sect. 27:

The chairman shall, on the day immediately following the election, attend at the office of the board and ascertain the validity of the votes, and cast them up; and the candidates who have obtained the greatest number of votes shall be deemed to be elected, and shall be certified as such by the chairman under his hand.

By sect. 28:

If the chairman or other person charged with taking &c., the votes at any such election shall neglect or refuse to comply with the provisions of the Act, he shall be liable to a penalty of 50*l.*

In the case of the election in question the chairman had duly issued the required notices of the election, but before the day of the election he went to Ireland, having left word that the clerk of the board should conduct the election. The election was conducted in the usual way, the usual officers were present, and the list of candidates elected was sent to the chairman in Ireland and he signed it. It was not suggested that the election would have been different if he had been present, or that anything was done which ought not to have been done, but it was contended that the election was absolutely void as the returning officer was not present.

*Rew* showed cause, and contended that the election was not absolutely void, but it must be shown that if the chairman had been present there would have been a different result. [CROMPTON, J.—It is clear that if you had to plead to the *quo warranto* you could show no title. This is an election before no returning officer. The Act of Parliament says the election is to take place in one way, and you conduct it in another.] There was nothing done here that would not have been done if the returning officer had been present, and it did not become necessary for him to exercise his discretion. He certainly ought to be present, and he may be liable to penalties, but the question is if the election is void: (*Reg. v. Justices of Middlesex*, 17 Jur. 188.) This is a purely vexatious application, as they do not suggest that there would be any difference if there was another election:

*Reg. v. Trevelen*, 2 B. & AL. 479;

*Reg. v. Parry*, 6 A. & E. 810.

The affidavits do not show that there was any corrupt motive in conducting the election in this manner. [CROMPTON, J.—In *Reg. v. Parry* there were no duties to perform; here there were duties, and they were performed by another person. It is like the case of a reference to a barrister, who goes away and leaves it to his clerk.]

*Quain*, for the relator, was not called on.

CROMPTON, J.—This is an election carried on before a party who is not the returning officer, and I cannot see that it can be good in any possible way. The Legislature says, and I must take it for very good reasons, that the election is to be conducted by a particular officer, and then another person goes and conducts it. Even if I had a discretion, I should not exercise it in supporting such a practice. It is very much the same as if a cause was referred to a barrister, and he were to go away for his own pleasure, and leave it to his clerk, and then it was said that the award was good because it was made just as well as if it had been made by the barrister. Or if a case was to be heard by a judge, and he left it to one of the masters, he might conduct it just as well as the judge, but that would not do. For the reasons that I have stated I think the rule should be made absolute.

*Rule absolute.*

Attorneys for the relator, *Rogerson and Ford.*

Attorneys for the defts., *Lever and Son.*

Tuesday, June 13, 1865.

REG. v. THE JUSTICES OF THE WEST RIDING OF YORKSHIRE.

*Highway district—Waywarden—Several hamlets in one township*—25 & 26 Vict. c. 61, ss. 6 & 7.

By 25 & 26 Vict. c. 61, s. 5, justices may make orders for the formation of highway districts. By sect. 3, "parish" is to include any place maintaining its own highways. By sect. 6, the provisional order shall state

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the number of waywardens, such number to be at least one, to be appointed by each parish; and by sect. 7, if a parish consists of several hamlets, each maintaining its own highways, the justices may by their provisional order combine them. The justices in their provisional order named only one waywarden for the parish of E. which contains three hamlets each of which maintains its own highways, and no order was made combining them, it never having been brought under the notice of the justices that there were three hamlets:

*Held, that the provisional order was bad.*

This was a rule calling on the justices of the West Riding of Yorkshire, to show cause why a writ of *certiorari* should not issue to remove a provisional order constituting a number of parishes and hamlets a highway district, with a view to its being quashed.

By sect. 5 of the 25 & 26 Vict. c. 61, justices in quarter sessions assembled are empowered to issue provisional order for forming highway districts.

By sect. 6, clause 4:

The provisional order shall state the parishes to be united in each district, the name by which the district is to be known, and the number of waywardens (such number to be one at least) which each parish is to elect.

By sect. 8:

The word "parish" shall include any place maintaining its own highways.

By sect. 7:

The following restrictions shall be imposed with respect to the formation of highway districts in pursuance of this Act.

Where a parish separately maintaining its own poor is divided into townships, tithings, hamlets, or places, each of which separately maintains its own highways, it shall be lawful for the justices, if they think fit, in their provisional order to combine such townships, tithings, &c., and to declare that no separate waywarden shall be elected for such townships, &c.

The township of Easington, which is included in the provisional order, now proposed to be removed, consists of the hamlets of Lower Easington, Dale Head and Hamerton Mere, each of which maintains its own highways, but the township maintains its own poor. No objection was taken before the magistrates, and it did not appear that they were aware that the township was divided into three hamlets, and they had not combined the hamlets as provided by sect. 7.

*Mellish, Q. C.* and *Quain* showed cause.—They contended that if the facts had been brought under the notice of the magistrates they could have appointed the proper number of waywardens, or combined the hamlets under sect. 7, and that the parties had no right to wait till the order was made and then come to set it aside. How could the magistrates know that there were separate hamlets in this township? The township maintains its own poor, and has its own churchwardens.

*CROMPTON, J.*—They have not made an order combining the hamlets under sect. 7, and that throws me back on sect. 6, which says there shall be one waywarden for each.

*Mellish, Q. C.*—It is a great hardship, if the parties do not go before the magistrates and prove that there are separate hamlets, that the order should be set aside.

*Manisty, Q. C.* and *Prentice*, in support of the rule, were not called on.

*CROMPTON, J.*—I think the rule should be made absolute.

*Rule absolute.*

THE ASSESSMENT COMMITTEE OF THE UNION OF CHAULTON v. THE OVERSEERS OF CHAULTON.

*Union Assessment Committee Act 1862, s. 21—Re-deposit of valuation list—By whom to be deposited.*

By sect. 17 of the *Union Assessment Committee Act 1862*, a valuation list is to be made and deposited by the overseers where the rate-books are deposited, and notice is to be given of the deposit. By sect. 21 the assessment committee, when they have altered the list, shall cause it to be deposited, and notice to be given of the re-deposit; but it is not stated who they shall cause to deposit it. On a rule for a *mandamus* to compel the overseers to deposit, and give notice of the re-deposit of the revised list:

*Held, that they, and not the assessment committee, were the proper persons to do so.*

*Mellish, Q. C.* moved, on the part of the assessment committee of the Union of Chaulton, for a rule calling on the overseers of Chaulton to show cause why a *mandamus* should not issue commanding them to deposit the valuation list of the parish of Chaulton in the place where the rate-books are kept, and to give public notice of the deposit of such list pursuant to the *Union Assessment Committee Act 1862* (25 & 26 Vict. c. 103). By sect. 17 of that Act:

The valuation list for each parish shall be deposited by the overseers in the place in which rate-books are deposited or kept, and the overseers shall give public notice of the deposit of such list on the Sunday next following the deposit in the same manner as in the case of a poor-rate allowed by the justices.

By sect. 19:

The committee are required to hold meetings for hearing objections to the valuation lists.

By sect. 20:

The committee may, whether any objections be or be not made, make alterations in the lists.

By sect. 21, where the committee make any alterations in any such list,

They shall cause such valuation list, with such alteration or insertion, to be deposited for inspection in manner hereinbefore provided concerning the valuation list, made by, or delivered to the overseers, and shall cause the like notice to be given of such deposit as is required in the case of a valuation list so made or delivered as aforesaid, and shall appoint a day . . . for the hearing of any objections to the valuation list as so altered.

The only question raised on the present motion was, whether the assessment committee or the overseers of the parish were to deposit and give notice of the deposit of the revised or altered list.

*Mellish, Q. C.* contended that the persons who deposited the original list, viz., the overseers, were the persons to deposit the revised list, and that the only rational construction of the words "shall cause to be deposited," in sect. 21, was, that they shall cause the overseers to deposit the list.

*Bere* showed cause in the first instance.—By the 23rd section the list, when approved by the assessment committee, is to be delivered to the overseers, which shows that it was the intention of the Legislature that it should remain in the custody of the assessment committee from the time of the first deposit. By sect. 31 the committee shall cause a copy of the altered list to be deposited in their board-room, and it cannot be supposed that that is to be done by the overseers, and that explains the meaning of the word "cause." It is perfectly consistent with both sections that the clerk of the committee should deposit the list when altered. The cost of the deposit cannot be charged on the rates, and it could not be intended that the overseers should pay it out of their own pockets.

*CROMPTON, J.*—I do not entertain a doubt on this

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REG. v. CHARLOTTE SMITH.

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case. By sect. 17 a valuation list is to be made and signed by the overseers, or the committee may with the consent of the board of guardians of the union make a list and deliver it to the overseers of the parish to which it relates to be deposited. That is a duty which one would suppose the Legislature would throw on the overseers who have the control of the place where the rate-books are kept. Then the overseers are the persons who are to give notice on the Sunday, and the section goes on to say, "As in the case of a poor-rate allowed by justices," that is by the overseers. Then they are to transmit the list to the committee at the expiration of fourteen days, and the committee are to hear objections and may make alterations; and the Legislature requires them to hold another meeting when they have approved of the list, and by sect. 21 there is to be a re-deposit of the amended list, and an opportunity to the parishioners to come forward again and object. Then the question arises as to the mode in which the second deposit is to be made [The learned Judge read sect. 21 and proceeded.] Therefore it is to be done in like manner as by sect. 17, that is, as in the case of poor-rates. Then there is power to have a fresh meeting for objections. If then, it is to be done in like manner as in sect. 17, and sect. 17 says it is to be done by the overseers, I cannot suppose that the clerk to the committee is to go down and do what is essentially the function of the overseers. Therefore I think there is to be a re-deposit, and it is to be done in the same manner as the first, by the overseers. I think the word "cause" there means cause the overseers, and in another case they may cause some one else. I think the overseers are the persons who have and keep this list, and how the assessment committee are to come and put it in the parish depository, I do not know. It is said that the use of the word "cause" in sect. 31 makes an alteration, but there is no duty on the overseers to do anything in the committee-room. Then the only other argument was that the overseers were to be allowed certain charges, but they were confined to making out the list. But there is no great trouble, I suppose, in putting the list in the chest and on the church-door. I do not see that makes any difference here, as the same argument would apply to the original deposit as to the re-deposit. I think therefore that this is to be done by the overseers, and that this rule should be made absolute.

*Rule absolute.***CROWN CASES RESERVED.**

Reported by J. THOMPSON, Esq., Barrister-at-Law.

Saturday, May 6, 1865. -

(Before ERLE, C. J., CHANNELL, B., BLACKBURN, MELLOR and SMITH, JJ.)

REG. v. CHARLOTTE SMITH.

*Manslaughter—Master and servant—Neglect to provide proper food, &c.—Control and restraint—Dying declaration—Evidence.*

*When deceased was very ill (but there was no evidence that she was then under the belief of approaching death), she made a declaration which two hours afterwards was taken down in writing, the writer putting questions to the deceased as he went on writing. The next day, when deceased knew that she was dying, the declaration was read over to her by another person who put questions to her from the statement, sometimes in a leading form, which she answered:*

*Held, that it was a question for the judge whether the dying declaration ought to be received, and that under the above circumstances it was rightly admitted.*

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*A master is not criminally liable for the death of a servant not of tender years, although the death was caused by the insufficiency and badness of the food and lodging provided by him for her, unless the servant was of such weak intellect as to be helpless and unable to take care of herself, or was under such restraint as to be unable to withdraw herself from her master's dominion.*

Case reserved by Montague Smith, J.:

The prisoner was tried before me at the Spring Assizes 1865, at Norwich, for feloniously killing and slaying Martha Turner.

The prisoner kept a lodging-house at Great Yarmouth, and the deceased was her domestic servant.

The case on the part of the prosecution was opened by the statement that the deceased died in consequence of the insufficient food and unwholesome lodging provided for her by the prisoner, or of the combined effect of these things and of a course of ill-treatment of the deceased by the prisoner in beating and otherwise ill-using her. It was also opened that the deceased was a person of weak mind, and had been brought by the acts and threats of the prisoner under her dominion and control.

It appeared in evidence that the deceased Martha Turner entered the prisoner's service in Sept. 1863, remained in it until on or about the 21st Feb. 1865, and died on the 27th of the same month. The deceased was the daughter of a widow too poor to maintain her. She had already been in domestic service, but had for some time prior to her entering the prisoner's service been an inmate of the work-house of the Blofield Union, and left it to go to the prisoner's.

In Sept. 1863, when she entered the prisoner's service, she was twenty-three years old. She was then described to be "a big strong girl." She was described by some of the witnesses as a person of weak mind, by others as of very weak mind. She appeared from the evidence to be of a low order of intellect. There was evidence that the deceased was subjected to great privations and ill-treatment by the prisoner. She was insufficiently fed and badly lodged. She was beaten and otherwise ill-used. The prisoner also used threats of various kinds to intimidate her. She became thin, weak, and ill in the prisoner's service, and towards the end of the service, very thin, weak and ill, and, according to the medical witness, she died from disease of the lungs, produced by want of nourishment, to which damp and unwholesome lodging at night might have conduced.

It became a question on the evidence whether, towards the end of the service, the deceased was reduced to and in such a state of body and mind as to be helpless and unable to take care of herself, and was under the dominion and restraint of her mistress, and unable to withdraw herself from her control. I held there was evidence to go to the jury on these points.

When the deceased first went into the prisoner's service the prisoner was living in Brandon-terrace. At Michaelmas 1864 she removed to a house in Marine-terrace. There were usually lodgers and their servants in the prisoner's house, and the deceased occasionally went out of doors on errands and on other occasions.

The evidence of the witnesses relating to the conduct of the prisoner to the deceased extends from the summer of 1864 to Feb. 1865.

The prisoner's counsel having objected that there was no evidence to go to the jury to sustain the indictment, and the case being peculiar in its circumstances, I have thought it right to annex a copy of the evidence as it was given.

The evidence of the first two witnesses relates to

the dying declarations of the deceased. The prisoner's counsel objected to the admissibility of the evidence of these dying statements of the deceased proved by Mr. Jary, on account of the manner in which they were taken. I received the evidence and stated that the manner of taking the statements of the deceased by Mr. Jary might properly be considered by the jury in estimating the effect of the evidence.

The prisoner's counsel further objected that, having regard to the relation of mistress and servant which existed between the prisoner and the deceased, there was no evidence to go to the jury to support the indictment; that there was no evidence that the deceased was helpless from bodily sickness or weakness, or that she was under the physical restraint of the prisoner; and he contended that if the deceased were under moral restraint, or the fear of her mistress only, the prisoner would not be criminally responsible for the consequences of the neglect imputed to her. I drew the attention of the jury to the distinction between the cases of children, apprentices of tender years and lunatics under the care of persons bound to provide for their wants, and the case of a mistress and a servant of full age able to take care of herself, and to withdraw herself from the service of her mistress; and I told them that in the latter case the mistress, although bound by contract to provide food and lodging for the servant, would not be criminally responsible on this indictment for the consequences of the mere breach of the obligation to supply proper food and lodging, and I left the case to the jury with the direction in substance, that if they were satisfied upon the evidence that the prisoner had culpably neglected to supply proper and sufficient food and lodging to the deceased as her servant during a time when the deceased being in the prisoner's service was reduced to and in such an enfeebled state of body and mind as to be helpless and unable to take care of herself, or was under the dominion and restraint of the prisoner, and unable to withdraw herself from her control, and that her death was caused or accelerated by such neglect, the prisoner would be criminally responsible, and they might find her guilty; but if they were not so satisfied, to acquit the prisoner, and I told the jury that after the medical evidence the acts of violence proved could not be considered as having caused the death.

No objection was made by the learned counsel for the prisoner to my direction, but I was asked by him after the verdict to reserve for the opinion of the Court the objections above mentioned.

I beg leave to ask the opinion of the Court of Criminal Appeal on the following questions:

1. Whether the evidence of Mr. Jary of the dying statements of the deceased was admissible.
2. Whether, with the evidence of the dying statements, if admissible, or without it if inadmissible, there was evidence to support the indictment which ought properly to have been left by me to the jury.

The jury returned a verdict of guilty, and I passed judgment on the prisoner; but respited the execution of it, and detained the prisoner in custody.

MONTAGUE SMITH.

The following was the evidence on which the conviction was founded.

Richard Bipp, governor of Bifield workhouse.—Friday, 24th Feb., 4 p.m., I received Martha Turner. Coyne, overseer, brought her. She was taken to the sick ward. She had been previously an inmate. She left workhouse two or three years ago. She was then strong and robust. She was 5ft 6in. in height. I believe she was weak-minded. She looked vacant then. She was so bad when I received her on 24th Feb. that I sent at once for Mr. Kidd, the medical officer. The under part of the right wrist was bruised. There were several weals across the under part. They appeared to have been done some time. The left hand was swollen twice usual size, and two of the fingers quite black. A few hours after she came in she made a statement to me. I took it down in writing. The following day I communicated it to Mr. Jary, the chairman. Mr. Jary went to the workhouse. I heard Mr. Jary read over

the statement I had written. Mr. Jary asked the girl if she knew what state she was in. She said she knew she was dying. She appeared to understand the statement. An alteration was made at Martha Turner's instance. I believe she thought she was dying. She died Monday 27th, at 4 p.m.

#### Cross-examined:

She made the statement to me at eight o'clock. I wrote it down between two and three hours after she made it. The statement was read over to her on Saturday night, between eight and nine. She was gradually sinking from the time she came in. The statement was all read to her. Something was added in consequence of a question put to her. Usual in union to return persons of weak intellect. This girl was not returned as of weak intellect. She was not bad enough for that. She did not mention she thought she was dying until she said so to Mr. Jary. The mother was living in workhouse. She came in about a few months back. I cannot say whether the girl was in the house up to the time she went to service.

#### Re-examined:

The mother has been for some time in the house, off and on. Only one question asked by Mr. Jary before he quite read it through. I wrote the statement in the sick room from what she told me, and put questions to her as I wrote. I read it over the same night. She made no observation. After Mr. Jary read it she made no observation, but she did make an observation when he had read about half way, in answer to a question of Mr. Jary. What she said was entered. An interpolation was made.

William Jary, chairman of the Board of Guardians—Saturday, 26th, I saw Martha Turner. A statement was put into my hand. I first spoke to her to see if she was able to give a statement. I thought she was. I asked her whether she was aware of the state she was in. She said she felt she was dying, and she satisfied me she thought so. I sometimes put the questions from the statement in a leading way, and sometimes took the girl's words. I sometimes put a question to her, and sometimes she took as it were a step of her own. I put a question to her in the middle. It was, Why did you not run away? and she made an answer. With that exception she made no alteration. She appeared to understand the statement. I put a great many questions and I got a great many answers to those questions. I think she answered every question I put to her. I did not read the statement in its entirety at once. I made observations as I went on. I read it in substance. I read every word of it with observations. She said nothing to induce me to reject any part of it.

#### Cross-examined:

I read it over putting it partly in questions. She was not asked to make her mark. I tried to get as much of her own statement as I could. She could not make her mark. Her hands were very bad.

Metcalf proposed to read statement.

Bulwer objected.—It must be a voluntary statement, and not in answer to leading questions.

I consulted the Lord Chief Justice and then held that the evidence of Mr. Jary was admissible of what took place on the occasion of his interview with the deceased.

Mr. Jary further examined by prisoner's counsel as to the manner of his examining the deceased:

I asked if she had lived with Mrs. Smith (prisoner). She said she had. I believe I asked how long she lived there. I cannot say whether she said she was to have 1s a week and received 1s in all, or I read it to her. As to "boots, &c." I don't remember whether she stated these things without my putting it to her. I read to her: "I had no meat, pudding, or anything in the shape of food, only dry bread." I then said, Why did you not run away? She said her mistress locked the door.

The witness having been thus tested, it was agreed that the paper should be read, as the substance of what the witness would prove he obtained from the deceased; but Mr. Bulwer still objected to the evidence of the statements of the deceased being admissible at all, having regard to the way in which they were obtained.

The following is the paper:

I have been living at service with Mrs. Smith (of Brambert terrace, Great Yarmouth), lodging-house keeper. I have been in her service one year and six months. I was to have had 1s per week for my services. I have only received 12s, one pair of boots and two caps. My mistress gave me only half a slice of bread each day. I had no meat, pudding, or anything in the shape of food—only dry bread. I tried to get away, but my mistress locked the door. I have been sleeping in a damp cellar, with only a coverlid to cover me, and no bed. I slept on the bricks. My mistress, during my illness, only visited me once a day, and that was for the purpose of giving me my day's bread. I got the water I had from a tap in the cellar with a mug for that purpose. I was two

weeks lying on the damp bricks, and saw no one but my mistress. My mistress wanted me to work, and I could not. She has beaten me with a cane during the time I was sick in the cellar. I have never slept on a bed the whole time I have been with my mistress in the new house, say five months and upwards. Before going to the new house I slept on a straw bed on bricks. I made a bed-tick out of one of my old shawls and filled it with straw: that was my bed. All I had to cover me was an old counterpane. I have always been subjected to my mistress's ill-treatment from the time I first entered her service. My mistress pushed me on one occasion, and I fell against a piece of iron and bruised my eye. She has bruised me by striking me with her flat on the chin and other parts of my body. She would never let me leave the house when I wanted so to do. The charwoman took me to my uncle Williams, in Yarmouth. He would not take me in. He sent me to my uncle Bush's, at Freethorpe; from thence I was taken in a cart to the Union House at Longwood. I have not had my clothes off for two weeks.

Elizabeth Soames, Great Yarmouth, widow.—I go out as nurse. In September last I was sent for by prisoner. I went to her house in Brandon-terrace, and I have been to prisoner's in Marine-terrace. I went in as a visitor. I saw a Martha Turner there. I saw her several times. When I went the last time, a few days before the deceased left, I rang at the door and nobody answered. Whilst I stood there I heard deceased and prisoner talking. The deceased came to the door, and she said her mistress was not within; but I heard her voice. I had seen the girl about three weeks before she left. She looked in a weak state. I noticed her looking pale, not as she had looked before. She was not so fat as when I first knew her. She got thinner by degrees. I was at prisoner's to nurse prisoner three weeks to a month or five weeks before Michaelmas. I went one evening about nine. I found the prisoner ill; she had sent for me; I found her in bed. She slept in a room next the dining-room on ground-floor. On Saturday she was moved down to the kitchen in a shut-up bedstead. She could see store-room from there. She gave me keys and told me to give Martha Turner some dripping and bread. It was morning. She was to have it in the scullery. I gave her instead some tea and some bread and butter. The girl had no dinner. I don't know whether she had anything more. She was working hard all day. I did not say anything to it then. The girl could not take anything for herself, only what came off the drawing-room table. There were lodgers. Prisoner said deceased was a lazy old beast. I did not see the girl get anything next day, but what she got off drawing-room table by stealth. I don't know that the girl had any dinner on Sunday. I did not see whether she had anything. I was there from Friday night to Sunday morning. I know of nothing given her except the bread and butter I gave her and things from the drawing-room table. I did not go into scullery where the girl was. She only came into the kitchen on business. She slept in scullery on straw bed. An old counterpane on it. The floor was bricks and very damp. Things were washed up there. She was taking the bedding one day to the yard, and I told her not to do so. I did not notice bedding was damp, but it was a damp place. After they went to Marine-terrace, prisoner said "she had a nice low kitchen with a fire-place in it." On the Saturday after Martha Turner left, the prisoner came to me. She asked if I would go there to tea on Sunday. She said she would pay me what she owed. I did go to tea. She said I was to come again and she would settle with me. Prisoner said old Anne was gone, and she was afraid she should get into trouble; would I speak on her behalf. I said I could not speak anything on her behalf. I had not been there long. Prisoner being unwell whilst I was there could not get about to attend to the girl. She came again after that. The Tuesday after the girl died she said "the old beast Anne is dead." The prisoner said the police officer had been to say she was dead and asked me to go to speak for her, and I said I could not.

#### Cross-examined:

Prisoner had lodgers in the drawing-room with two servants. They had their meals at prisoner's. I, for prisoner, provided for these servants. They were in front kitchen. Martha was only servant of prisoner, she went out for beer. I went three times to Marine-terrace, &c. Martha opened the door every time. I only went in once. On the other occasions she said her mistress was not at home. On last occasion when I did not see her I heard prisoner's voice telling her to dust table.

Mary Chaplin.—I was in service of prisoner up to a week after Michaelmas last. I was at Brandon-terrace first, and then at Marine-terrace. At Brandon-terrace deceased slept in back kitchen on a straw mattress. The flooring was brick. There was no bedstead. The bricks were damp. She only had a counterpane. No sheets, blankets or pillow. The bedding in day-time was taken up to a knife house in the yard by Martha. That went on all the time at Brandon-terrace. She had bread and dripping to eat each meal. Sometimes two meals a day, sometimes three. She got the first at eleven—sometimes later. She commenced work at six. Sometimes nothing until two o'clock. The other meal just before going to bed at nine. She had only one half slice of bread off a quartern loaf. About as thick as the first joint of my finger. When she had three meals they were at eleven, three and nine. She always had meals at three and nine. Breakfast sometimes omitted. She might have as much dripping as she liked. She helped herself to it. Beef dripping. Prisoner cut the bread and then locked it up. Martha has had a cake

sometimes from prisoner made of flour, dripping and fish. Once or twice. The lodgers' servants brought down remains of dinners and gave to prisoner. Martha had no opportunity of getting that. I saw Martha cleaning a fender. Prisoner kicked her over, and then took her by her arm and chucked her up again. She cried, but I do not think she was hurt. That was at Brandon-terrace. I saw prisoner take hold of her hair in the kitchen and chuck her round. She screamed out very much. Prisoner was in a passion. I have not seen her do anything else. Prisoner asked Martha what she was going to say to her mother when she came. She said, "I shall tell her I have got a good mistress and a good house and home." Prisoner said, "If you do not I will give it you," holding up her finger. I heard her say that twice. I saw Martha cleaning fish. I had been there a fortnight. She took out gills and eat them raw. Her legs were swollen up to the knees. She wore slippers, nothing else. She was always at work, from morning till night. Almost always on her feet. She slept at Marine-terrace, in the cellar leading out of the kitchen. A very small place. Brick floor. Very damp. She had the same mattress as at Brandon-terrace. She was a girl of very weak mind, I think. The prisoner used to say she was silly. Her age was twenty-four. She was called "Old Anne."

#### Cross-examined:

There was no tap in the cellar at Marine-parade. Martha cleaned the door-step outside the door. I got the same to eat as she did, and at the same times. I left because I did not like the place. Things were in confusion at Marine-parade. It was an ordinary straw mattress for the girl. I slept in butler's pantry on the dresser. Prisoner slept two nights in the back kitchen. Martha was not of dirty habits. Prisoner was always angry and talking.

#### Re-examined:

When I went away I was not thinner. My legs began to swell. We were not allowed soap. I had a sheet to lie on, and one blanket to cover me. There was a tap in the back kitchen at Brandon-terrace.

Caroline Harvey.—I lived in prisoner's service at Brandon-terrace six weeks from June 1864. I have many times seen the prisoner with a whip in her hand. I have seen her whip deceased very much on the arms, back and shoulders many times. She used both ends of the whip. Hiding whip. I have seen her arms black and blue. I have heard her cry out. I saw Martha cleaning the knives. Prisoner took a knife and dashed it on deceased's wrist, and made a bad wound. I got sticking plaster and put it on her wrist. Prisoner pulled off the plaster. It was then worse. I stayed three weeks. The wound was not healed when I left. Deceased's hands were chapped, and I got glycerine and the prisoner took the bottle and broke it. She whipped her, and the girl screamed. The prisoner said she would not use her hands for a workhouse girl. I told prisoner I would tell of her conduct. She said she did not give her half as much as she deserved. Martha had bread; half-slice or slice of a quartern loaf. She had none for three days, except what I gave her from the lodgers' table. On one occasion I saw prisoner pull her to the ground by the hair. The girl was weak-minded. I left because I could not bear to see the treatment.

#### Cross-examined:

There were lodgers in the house. Sir Thomas and Lady Seaton and servants, and Mr. Miller and other lodgers. I mentioned to Mr. Miller's servant that prisoner ill-treated Martha. I was upper servant and lived with prisoner. The girl sometimes went out for beer.

Elizabeth Motts, wife of a baker.—I knew Martha. Martha used to come to my shop very frequently from August to November last. In consequence of information I have given her pieces of bread and remains of what my family had, such as rind of bacon or potatoe peelings, and she would eat them up as a cat or dog would.

#### Cross-examined:

She often came to my house. Three or four times a week and sometimes every day.

#### By me:

I used to talk to her. I never advised her to go away.

Elizabeth Goodwin.—I live at No. 1, Brandon-terrace. Last summer, latter part of July, I heard a shriek of murder. Martha shrieked murder. I saw prisoner with a small stick, or a piece of iron, or a poker. I saw her strike Martha twice on the arms. She shrieked out murder. I heard prisoner distinctly say, "Get in, you old vermin." She pushed her into the house. I saw Martha the next morning. Her arms were bruised in two places.

#### Cross-examined:

I think Sir Thomas Seaton was lodging there. I live at No. 1, prisoner at No. 6. Three houses between. Sunday, noon, people coming from church.

Charlotte Cooper, widow of Thomas Cooper.—We lived at No. 4, Brandon-terrace, next door to prisoner. Latter end of July, on a Sunday, I heard noise in prisoner's. I was in scullery. I knocked at the grate. I heard a fall down stairs as if some one had fallen or been pushed. I knocked twice

at back of grate and got no answer; but heard a voice very like prisoner's say, "Oh, you varmint you." I saw the girl on the following morning cleaning steps. I asked why she screamed. She shook her head and looked hard into the hall. In consequence of being sent for I went to prisoner. She asked why I interfered with her or her servant's business. I said I was justified in so doing by hearing screams of murder. She said it was a mistake of mine. I said I would be on my oath I did. She said the girl was in a shrieking fit. I said that altered the case. She then asked the girl if she did scream murder. I said, What's the use of your asking her if she was in a shrieking fit? The girl shook her head as if she answered no. Prisoner said the mistress with whom she lived before had beaten her for same thing, and so had her father. I said if I heard it again I should send for the police. The girl had every appearance of weak intellect.

Charlotte Elizabeth Vallina, dressmaker.—I lived at Leicester-terrace. I worked for prisoner from October to April in dressmaking. The deceased was then healthy. She was a very weak-minded person. I saw her at my mother's house in latter part of July or August. She walked up to table and took herring bones and refuse off table and ate them hurriedly. She appeared very hungry. 13th Feb. last I went to prisoner's and saw the girl. She had her hand tied up. Prisoner saw me looking, and said she had fallen down and cut it; that she had been stealing, and in her hurry to get away fell and cut it. Prisoner said she tied it up for her. Prisoner asked me why I did not come and do her work (dressmaking). I said I did not like the way she treated the girl. She said it was very rude to take notice of anything she did to her servants. The said the girl was a great thief. She showed me a book in which she had entered the things the girl had stolen. Prisoner said, if the girl had been worth anything she would have been dead long ago. I called up the girl. She came up some steps from some place under ground. She was very much bent. It was quite dark. She stumbled. I had heard prisoner say some time previously that she would have deceased transported for stealing the things. On the 13th Feb. prisoner said she was going to send the girl home with a note and that book to tell the governor the things she had stolen, and have her put to gaol for it. She said this in Martha Turner's presence. The deceased rubbed her hands and said she did take the things. She appeared to be alarmed about it.

#### Cross-examined:

I should not call deceased very silly. She was not so clever as some people. She waited upon people, answered in a reasonable manner, and appeared to understand pretty well. Martha let me in and out on 13th Feb. Among the things mentioned as stolen were six pairs of sheets. Prisoner said deceased had taken the sheets to her mother and her mother had made them into petticoats. I went on 13th Feb. for my bill, 1s. 6d.; I have never got it.

Frances Turner, mother of deceased.—Sept. 1863 she left union to live with prisoner. She was a stout girl. She had been in service before in two or three places. She was always weak-minded. A month before Michaelmas last I went with Mrs. Bush to prisoner's. I gave prisoner a month's warning. Prisoner said if I let her stay the month she would pay her wages up. At Michaelmas I went to take the girl away. Prisoner told me the girl was old enough to arrange for herself, that I had no place to take her to but the union, and she was fit for her service, and my daughter consented to stay. I thought she did not look in good health, but she said she was, in prisoner's presence. She was not looking so stout, she was looking thinner. My daughter never made any complaint, she was not allowed. I never saw her without the prisoner being present.

#### Cross-examined:

I heard prisoner had been ill-treating her. Mrs. Bush lives in Yarmouth. There was nothing to prevent my taking her away. I did not take her away because she had no place to go to but the union, and I thought she had better remain with prisoner. She had been in service in two or three places and always able to do her work, but she wanted some one to show her about her work. I lived at Freethorpe, in a small cottage, with three young children. It was too small to take her in, two small rooms. She had a bad thumb (right hand) before she went to prisoner's. She was obliged to leave her place, Mrs. Carver, on New Year's Day, 1863. She was very ill when in union. She was at Mrs. Carver's, and Mrs. Bligh's, and Mrs. Howard's. She was ill when living with Mrs. Bligh, her first place. She left Mrs. Bligh's because of ill-health. She left Mrs. Carver's because of bad thumb. She left Mrs. Howard's because she did not like the place. She looked after a woman who was dying for five weeks. I did not like to take her because I was afraid I should have to go to union.

#### Re-examined:

She was well when she went to prisoner's. Prisoner said she would write to the governor to say she was fit for her service.

Mary Ann Bush, the aunt.—The deceased was in health when she went to prisoner's. A stout, big girl. In August I met her in Jetty-road. She showed me her arm. She showed me two marks on her left arm, wells as if done by a stick. She made a complaint. Hand was not then swollen. The mother and I went to the house. I told prisoner we had come to take girl away, because she had kept her without food and

beaten her. She said, "Oh, Mrs. Bush, do you think I did such a thing?" I said, "We are come to take her away." She said she had lodgers and could not spare her then. I gave her a month's warning. The girl said, "Aunt, look down (pointing to bricks) to where I sleep." At end of month I went. I saw the girl. I told prisoner we were come to take her away. Prisoner said the girl had made an agreement to stop. The mother took it up. I said, "If she is going to stop, I hope you are not going to beat her or keep her without food." About a month after Michaelmas I went again. I saw the girl. She was looking thin. I told prisoner she was getting thinner. I said, "You remember the remarks I made." The deceased got gradually thinner. I can't say whether she was getting weak. 21st Feb. she was brought to my place. She was then much thinner. She looked very dirty and was very weak. Mrs. Huggins brought her. I could not take her in, and prisoner had been down and said she had stolen a quantity of things and I had taken them in.

#### Cross-examined:

I lived half-a-mile from prisoner. The deceased once came to tea. I understood Mrs. Huggins was going to take her back to prisoner. When I saw her in Jetty-road she looked dirty—no bonnet—but not ill.

This witness was afterwards recalled by me, and said that when the deceased was brought to her by Mrs. Huggins they were both on foot.

George Berry, police constable.—I went to prisoner's. I told her she must go with me to police-office, on suspicion of having caused the death of Martha. Prisoner said, "I did not cause it." Sunday, 5th March, I went to see cellar of prisoner's. It was about 5 feet 8 inches high; about 9 feet long and 7 feet wide. Brick flooring, very wet. I found an old mattress, two old sheets and a counterpane. They were very damp. No door. The entrance is under the staircase. About fourteen steps down. There was a bin. There were ashes and refuse in it. There was a window two feet square with glass in it looking into the yard.

#### Cross-examined:

There was nothing to prevent any one going from cellar to door of house. There was no tap in cellar. There was in the kitchen.

George Tewesley, superintendent of police.—1st March, I went to prisoner and asked if Turner had left. She said she had in consequence of illness. She said she had a bad hand in consequence of chilblains, which she had stupidly put into a pail of cold water. I asked her if she knew if Turner was dead or alive. She said, "No." I told her she was dead, and that she had made a statement before death, that she had slept in a cellar. She said that was false; she was a great liar and a thief, and had no idea where her soul was going to. I asked if she had had sufficient food. She said always sufficient food whilst with her. I asked her to show me the cellar. On examining the cellar I found a camp bedstead leaning against wall of cellar; on a chair an old mattress folded up, two dirty sheets and a counterpane. The whole very dirty. Some saucepans on shelf over. I asked prisoner if that was the bed and bedding of Turner. She said, "Yes." She said she had occasionally slept in the cellar, but against her (prisoner's) will. She wished her to sleep in the kitchen. She was a very dirty girl, and she was compelled to let her sleep in the way I had seen.

#### Cross-examined:

She said the camp bedstead was the deceased's. That she had always told her to sleep in the kitchen. That the bedstead was to be put in the cellar during the day, and her directions were, that in the night the deceased was to bring it up and sleep in the kitchen, but she was too lazy to do so. I heard Mr. Costerton promise coroner that she should appear before him on following Thursday to give her explanation of what had happened. Tuesday night I took her up and had her taken before justices. She was deprived of opportunity of appearing before coroner. Mrs. Gaze, Mrs. Huggins and her daughter gave evidence before coroner. I am conducting prosecution.

Mrs. Huggins was not called.

William Cufande, Surgeon, Acle.—24th Feb. I saw Mr. Turner at Rampant Horse, Freethorpe. She was in a most enfeebled emaciated state, in bed in a back room, without a fire. I examined her. I noticed her left hand was swollen and in a gangrenous state. Mortification had set in. The fore-arm and arm even to shoulder much swollen. Back of the left hand was more discoloured. On right hand the skin was chapped and cracked. I observed she was very thin, and her bones prominent. I directed her to be removed to the workhouse with every care. She died 27th Feb. 23th. I assisted at post mortem examination. On opening the chest the right pleural cavity contained a pint and a half or two pints of serum. The right lung was hepatic (rendered more like liver than lung), and rendered impervious to air. The upper lobe of the left lung contained two tubercles. Consumptive deposits hard and uninfamed. Remainder of the lung was inflamed. The heart was thin, pale and flabby. No appearance of fat about heart. On opening the abdomen the stomach was greatly distended by gas; containing beef tea and port wine. The intestines

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were flat, collapsed, and their coats very thin. The kidneys had no fat surrounding them. The bladder small, empty, and the coats thin. Brain was healthy in appearance. The appearances indicated that the deceased died from the state of lung described. The gangrenous hand showing a low type of inflammation conducted and produced by innutrition—insufficient nourishment. Insufficient nourishment would produce the peculiar state of inflammation of the lung from which she died, as any exhaustive disease would produce it. Every other organ being healthy, especially those connected with the digestive functions, convinces me that she suffered from insufficient nourishment. The appearances when alive and the *post mortem* examination satisfied me she had for some considerable time suffered from insufficient nourishment. Exposure to cold and wet would conduce to the state in which I found the lungs. Sleeping in a damp place would so conduce.

#### Cross-examined :

Congestion is the first onset of an inflammatory disease. In one lung there were tubercles, which were consumptive symptoms. She died of inflammation of the pleura and of the substance of the lung. Both the pleura and the lungs may be implicated and cause death from taking a violent cold. This has been a very trying season. Yarmouth is cold and trying. Chilblains proceed from slow circulation. A neglected chilblain may become gangrenous. Gangrene might arise from many causes. Mr. Kidd made the examination.

#### Re-examined :

The tubercles were hard and innocuous. She did not therefore die of consumption. In a common cold I should have expected to find both lungs inflamed. I think the symptoms are not consistent with death from a cold, and that they are all consistent with insufficient nourishment.

*Bulwer, Q. C.* for the prisoner.—First, the dying declaration of the deceased was not admissible in evidence. It was improperly obtained; and many parts of it are not evidence at all. The admissibility in evidence of a dying declaration is an anomaly. It rests on the presumption that the solemnity of the approach of death impels the party to speak the truth and supplies the obligation of an oath: (Taylor on Ev. 587, 8rd edit.) In 2 Hume's Com. Laws of Scotland, 407, it is said "Such a declaration is admissible also, although not authenticated in the same full and formal way as a panel's declaration, if it is proved by credible witnesses to have been freely given and fairly taken down, and to have come from a person who was in his sound senses and knew the serious nature of what he was engaged in." Applying that test, the declaration here was not freely given and fairly taken down. It does not appear that when deceased made the declaration she knew that she was dying, and the answers she gave to Mr. Jary were to leading questions suggested by the previous statement; in short, the answers were extracted, not given voluntarily. A dying declaration stands on a similar footing to the deposition of a deceased witness in this respect, that the declaration is liable to any objections that the deposition of the deceased witness is, and, therefore, any answers to illegal questions may be objected to: (*Hutchinson v. Bernard*, 2 Moo. & Rob. 1.) Secondly, the case for the prosecution was not made out. The cause of death was the insufficient supply of food and the bad lodging. That is not sufficient in this case, for the deceased was a girl of full age, and it is only in the case of a child of tender years that a master or mistress is criminally responsible for neglect to supply proper and sufficient food and lodging:

*Rez v. Ridley*, 2 Camp. 660;

*Friend's case*, Russ. & Ry. 22;

1 Russ. on Crimes, 46, 489;

*Smith's Master and Servant*, 180.

It was said that the deceased was a girl of weak intellect under the control of the prisoner, and that she was under such restraint and terror that she could not exercise her free will. The evidence does not bear this out. Before Michaelmas 1864 she complained to her mother and friends; but still she remained. She also was allowed to answer the door, and on the 21st Feb. visited her aunt. She was therefore not confined to the house. Threats

are not sufficient (*Reg. v. Pitts*, Car. & M. 264); there must be personal restraint:

*Biffin v. Bignall*, 81 L. J. 189, Ex.

*Metcalf* for the prosecution.—The conviction is good. The deceased was so under the coercion and control of the prisoner as to be unable to withdraw herself. Coupling the threats and the beating they establish the coercion. And from her dying declaration it appears that the deceased was so ill during the latter part of her time as to be unable to withdraw.

*ERLE, C. J.*—I am of opinion that this conviction was wrong. The prisoner was indicted for feloniously causing the death of her servant, and the unlawful act relied upon was neglecting to supply proper and sufficient food and lodging to the deceased at a time when the deceased, being in the prisoner's service, was so enfeebled in body and mind as to be helpless and unable to take care of herself and unable to withdraw herself from the prisoner's control and dominion. The law is undisputed that, if a person having the care and custody of another who is helpless, neglects to supply him with the necessities of life and thereby causes or accelerates his death, it is a criminal offence. But the law is also clear, that if a person having the exercise of free will chooses to stay in a service where bad food and lodging are provided, and death is thereby caused, the master is not criminally liable. The question therefore is, whether the deceased Martha Turner was so helpless in mind and body as to be unable to take care of herself and to withdraw herself from the prisoner's dominion. It is clear on the evidence that the deceased was not in a literal sense so helpless and enfeebled in body and mind as to be a prisoner of the debts., for she was accustomed to go out of the prisoner's house on errands, to act as servant and perform all the ordinary services required of her. She had sense enough to act as servant, and was not a prisoner or under any physical restraint. We come to the last question. Was she by reason of threats and ill-treatment of the prisoner deprived of the exercise of her free will? The jury found that she was under the dominion and restraint of her mistress and unable to withdraw herself, and there is much evidence of maltreatment by beating. Now, her death occurred in Feb. 1865, and the latest evidence of beating is in the summer of 1864; and after that the deceased gave notice on Michaelmas 1864 that she was going to leave, but subsequently continued voluntarily in the prisoner's service. I do not, therefore, think that what took place in the summer of 1864 is proximately connected with the death, and the prisoner is not responsible in law, except for matters proximately connected with the death. The deceased could have left her mistress's service and returned to the workhouse, but she did not choose to do that; or it may be that her mistress had threatened to inform against her for stealing if she left her service, and in that way it may be said her mistress had control over her; but beyond that I can see no evidence that she was so under her mistress's control, or unable to withdraw, as to make her mistress criminally liable for the neglect. I therefore cannot say that the deceased had so lost the exercise of her own free will as to be under the dominion and restraint of her mistress, so as to make her mistress criminally responsible. The conviction, therefore, cannot be sustained.

*CHANNELL, B.*—I am of the same opinion. Two points are reserved for our decision. The first is, whether the dying declaration of the deceased was properly received in evidence. *Prima facie*, a declaration not on oath is not admissible in evidence;



but the law has allowed it to be admitted when it relates to the cause of the death, if made by a person in a dying state and who believes himself to be dying. It is a question for the judge, and not for the jury, whether the declaration was made by a dying person in the belief of his impending death. What the declaration is, is a distinct question, and that is for the jury. I do not think that the learned judge could have come to any other conclusion, than that the deceased, at the time she made the declaration, was well aware of the condition in which she was. The next question arises upon the merits. The summing-up of the learned judge was, I think, strictly correct; but he did not sufficiently define in what sense dominion and restraint were to be understood—whether moral or physical restraint was intended. It became necessary to distinguish whether the neglect took place when the deceased, being in the prisoner's service, was reduced to such an enfeebled state of body and mind as to be unable to take care of herself, or whether she was under the dominion and restraint of the prisoner and unable to free herself from her control. The question for us is, whether there was evidence proper to be left for the jury to support the verdict, and I am of opinion that there was not. There was an entire absence of evidence to support the first alternative; and upon the second I think that there was not evidence of that degree of dominion and restraint which could have prevented the deceased from leaving the service of the prisoner had she been so disposed. Nor can I see that there was any evidence of such influence as would compel her to return, when she left the house on errands or for other purposes. I think, therefore, that this conviction cannot be sustained.

BLACKBURN, J.—I am of the same opinion. I agree with my brother Channell on the first point, and think that the learned judge could not have come to any other conclusion than that the deceased knew of her dying state at the time she made the declaration. The question then arises on that declaration, what is it the deceased states was the cause of her death, and whether that was the cause. Now, it appears on the evidence that, though active violence was used, it was not the cause of the death, but that the death was caused by insufficient food and bad lodging. It cannot be denied that the direction of the learned judge was right. The contract of the master to supply his servant with sufficient and proper food and lodging makes him civilly, but not criminally, liable for the breach of it. In order to make him criminally responsible for neglecting to do so, it must appear that the master has got the servant so under his control and dominion as to be helpless, like a lunatic or infant, and consequently unable to take care of himself. Now, was there in this case sufficient evidence that the deceased stood in such a relation to the prisoner that, although there were no bars, locks, or bolts, she was so terrified by the prisoner that she was in effect as much restrained from withdrawing herself as if she had been so confined? If there had been such evidence, I think that it would support the conviction. But though there is some scintilla of evidence, that ought not, especially in a criminal case, to be left to the jury; and I think the evidence, upon the whole, does not amount to more than a mere scintilla.

MELLOR, J.—I agree that the conviction cannot be supported. I think that there was some evidence to support the direction of the learned judge, but, on full consideration, I think that it was not sufficient to be left to the jury. Having regard to the circumstances of the case, and its importance, I think the learned judge was right in not stopping it.

SMITH, J.—I reserved the case for this Court because I felt great doubt whether the evidence was sufficient to sustain the conviction. I thought there was very little on the only ground on which the conviction can be supported, namely, that the deceased was entirely under the dominion and control of the prisoner, so as to be unable to withdraw herself from her service. I thought then, and think now, that I could not have withdrawn the case from the jury. I am, perhaps, more impressed with the evidence than my learned brothers are, but I do not dissent from their decision.

*Conviction quashed.*

## BAIL COURT.

Reported by W. GRAHAM, Esq., Barrister-at-Law.

Wednesday, June 14.

REG. v. REYNOLDS.

*Indictment found at sessions—Felony—Certiorari.*

*The court will not remove an indictment for felony found at the quarter session on the grounds of local prejudice and difficulty in obtaining a jury, the proper course being for the recorder to send the case to the assizes.*

An indictment against the deft. for embezzlement had been found by the grand jury at the quarter sessions for the borough of Tewkesbury, but in consequence of the number of challenges by the deft. the panel was exhausted and a jury could not be procured.

J. J. Powell, Q. C., now moved on behalf of the prosecutor for a certiorari to remove the indictment into this court on the grounds of local prejudice and the difficulty in obtaining a jury in consequence of the number of challenges.

CROMPTON, J.—In any case of difficulty the recorder can send the case to the assizes. We have power to remove anything, but we do not generally remove felonies, as there is an entirely different course of procedure on the Nisi Prius side, and there is no means of taking the opinion of the Court of Criminal Appeal. I think it would be much better if the recorder were to send the case to the assizes.

J. J. Powell, Q. C. thereupon withdrew his motion.

## HOUSE OF LORDS.

Reported by JAMES PATTERSON, Esq., of the Middle Temple, Barrister-at-Law.

Tuesday, June 13, 1865.

BLADES v. HIGGS.

*Game — Property — Right of owner of soil — Wild animals — Right of trespasser.*

*The doctrine of Holt, C. J., in Sutton v. Moody, 1 Ld. Raym. 250, confirmed, first, that if P., a trespasser, start and capture a hare or wild animal on the soil of A., the property in the animal continues all the while in A., who can recover it by an action of trover; secondly, that if P. start game in the forest or warren of A., and hunt it into the soil of B., and kill it there, the property also continues in A. ratione privilegii; thirdly, that if P. start game on the soil of A., and pursue and catch it on the soil of B., then the property is neither in A. nor B., but in P., the trespasser.*

*Semble, the reason why poachers are not indictable for larceny is, that the game, while alive, is in the same category as fruit, and is part of the soil, which is not at common law the subject of larceny.*

William Blades, the plt., was a fishmonger and

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licensed dealer in game at Stamford, in the county of Lincoln, and the defts., William Higgs and Thomas Percival, were, the former the steward, and the latter a servant in the employ of the Marquis of Exeter. Between seven and eight o'clock in the morning of the 16th Oct. 1860 the plt. bought of a man named Yates two bags, containing about ninety rabbits, and ordered them to be consigned to him at the Midland station at Stamford. The plt., upon the purchase, paid 4*l.* 15*s.* for the rabbits. A few minutes before nine the same morning the plt. went to the Midland station with a barrow, for the purpose of bringing the rabbits away to his shop. The bags arrived, directed to the plt., with one of his own printed labels, and the plt. paid 4*s.* for the carriage of them to Stamford, and they were delivered to him. As he was proceeding to put the two bags in the barrow, and before he had got them on, the deft. Higgs came up to the plt. and said he wanted to see what was in the bags, to which the plt. said he should not allow him, and with the assistance of a porter the plt. lifted the bags on the barrow. The deft. Higgs remained there until two policemen came, and then he directed them to see what the bags contained. The plt. said he might. One of the policemen looked into them, and seeing that they contained dead rabbits he allowed the plt. to take them, and assisted him in putting them back on the barrow. The other deft., Percival, then came up and said, "I shall take these rabbits, they are mine;" and the deft. Higgs said also, "They are the Marquis of Exeter's." The defts. then attempted to get possession of the bags, and the plt. resisted for some time, until at length, one of the policemen saying to him it was no use his struggling any longer, he discontinued his resistance, and the defts. took possession of the bags and their contents. Another game-dealer in the town, called Pollard, was fetched to the spot to buy the rabbits, and they were sold to him by the defts., the plt. protesting against the sale of his property. The two bags were directed to the plt., and had been sent from the Ketton station on the Midland Railway.

The counsel for the defts. proposed to prove, on their behalf, that the persons who transmitted the rabbits to the plt. went upon the Marquis of Exeter's land and took the rabbits, and killed them and put them into the bags there, and then carried them to the railway-station at Ketton, and contended that the property in the rabbits was in Lord Exeter, and that the defts., acting under his authority, were justified in the course they adopted.

The learned Judge, Willes, J., who presided at the trial, after observing that a man's property in the land does not give him any right of property in animals of a wild nature upon the land after they have become old enough to escape off the ground proceeded as follows: "According to the old passage in the Institutes (Coke's Institutes), you have no possession in a wild animal when it is no longer in your power to restrain it. There are a great many curious decisions on that branch of the law, as for instance—whether you have your hawks so long as you can use them, you must have power to get them back. As to young animals, you have greater property in them, for they cannot escape, and you may take them out of the nests. But when they grow up and can run away into other people's land, you cannot follow them and bring them back. You have no more right to a rabbit than to a sparrow—you cannot follow it and bring it back. He might kill it, of course, on his own land. It is, I own, very difficult to make a distinction, and for myself, I never could see the distinction between a pheasant and a fowl which I choose to encourage and rear on my land. I never could see the distinction between the pheasant preserved and fed on my land and the barn door family, but there is that dis-

inction in the law, and I am bound to administer the law as it is. The whole theory of the game laws is founded on there being no permanency in property of this description. The doctrine has been followed as laid down in Coke upon Littleton. A person entering on your land is a trespasser no doubt, and on his taking the thing out of or off the land he is a trespasser. The proofs may be as large as the defts. wish, but if a person goes into a close and kills a rabbit, or ninety rabbits or Lord Exeter's grounds, which comes to the same thing, and goes off and sells them to a fishmonger, then Lord Exeter's people have no right to go to the fishmonger's, and take them from him, as coming out of Lord Exeter's grounds; the right would be in him though taken by trespass, and he is only subject to the game laws, and not to the ordinary rules of property. Suppose he kills the ninety rabbits and puts them into his bag, it is not like felling a tree and coming back for it: it is all done there and then." The learned judge then directed the jury as follows: "If the rabbits were the property of Lord Exeter at the time, the defts. would have had a right to take them, but were they Lord Exeter's? The learned counsel for the defts. says he takes them to have been so, and that he would show that certain poachers were in Lord Exeter's grounds, and took the ninety rabbits and sent them away from Ketton to Stamford, and therefore they were that nobleman's property, and that he had a right by the hands of his servants to take them back. That depends upon this, whether persons going on the property of another and taking rabbits there, not taking them in a hutch, but wild, and killing them, are they to be recovered back? I think not. The learned counsel for the defts. suggests the law is the other way, and he has suggested a passage from a book of repute by which he thinks he is supported, but certainly the bent of my opinion is too strong, and has existed too long a time to enable me to come to that conclusion, or to induce me to have any doubt about it. My notion is, that a person who kills wild animals, such as rabbits, is liable to a trespass at the instance of the owner of the ground where he kills the game, under what are called the game laws. I repeat, I never could understand why such a law should exist, because, if a man has land and chooses to rear pheasants and what not upon it, and goes to the labour and expense of having them preserved, and of feeding them at much more cost than a farmer's barn-door fowls, I never could understand why the law as to larceny did not apply as to that. According to all principle and reason they should belong to the man who created the property just as much as the cock and hen. The sum and substance of it is, in point of law I rule that plt. was entitled to the rabbits and that the defts. were not entitled to take them from him.

The jury found a verdict for the plt. with 6*l.* 10*s.* damages.

The Court of C. P. afterwards made absolute a rule for a new trial on the ground of misdirection, inasmuch as the judge had told the jury that the facts relied on by the defts. did not constitute evidence of the right of possession being in the Marquis of Exeter.

On appeal the Court of Ex. Ch., consisting of Pollock, C. B., Martin, B., Wilde, B., Blackburn, J. and Mellor, J. affirmed the judgment of the court.

The present appeal was then brought.

*Hayes*, Serjt. and *Beasley*, for the app., contended that the courts below had wrongly held that the right of possession to these rabbits was in the Marquis of Exeter. By the civil law, and the law of nature, which was of universal application, whoever first caught a wild animal was entitled to the property in it: (Sand, Just. 172; Instit. ii. 1, 12.) Here it was a fact in the case, that the app.

had obtained the rabbits lawfully from those who had caught or reduced them into possession. Whatever right the captors had was thus transferred to the app. It is said that the owner of the soil is entitled to the wild animals caught thereon, but it was impossible to discover any reason for that doctrine. It is true that Holt, C. J. delivered a *dictum* to that effect, in *Sutton v. Moody*, 1 Ld. Raym. 250; 5 Mod. 375; 2 Salk. 556; 12 Mod. 145, which, he said, was to be found in the Year-books or old authorities: (48 Edw. 3, p. 23, pl. 2; 2 Bract. 1; Fitz. N. B. 87; Case of the Swans, 7 Rep. 26; Com. Dig. "Biens" F.) But no such doctrine was there to be found, and even if it were there found it was contrary to sound principle. Holt's doctrine was, moreover, inconsistent, for while he says a trespasser who starts and kills a hare on A.'s land has no right to the hare so caught, because it belongs to A., Holt also said that if the trespasser started the hare on A.'s land and hunted it into the land of B. and there killed it, it then belonged neither to A. nor to B., but to the trespasser. It was impossible to discover any reason for holding the trespasser to be entitled in one case to the hare and not entitled in the other. Therefore, as the doctrine was a *dictum*, and is unfounded in reason and inconsistent, and also at variance with the law of nature, it ought to be overruled. This may now be done, for the House has never recognised the doctrine, though the courts below had to some extent recognised it in

*Churchward v. Studdy*, 14 East, 249;

*Graham v. Ewart*, 11 Ex. 346;

*Rigg v. Earl of Lonsdale*, 11 Ex. 671; 1 H. & N. 923.

Holt's doctrine was also inconsistent with principle, because, if the wild animal belongs to the owner of the soil on which such animal is at the moment, then it must be larceny to take it. But no case ever decided that a poacher was guilty of larceny. On the contrary, the theory on which the whole of the game law was founded is, that larceny is not committed by the poacher; but he is punishable summarily for the trespass merely, because there is no other mode of punishing him. And the game laws do not alter the right of property in game, except in some exceptional circumstances which do not affect the present case. The general rule still remains that a poacher is entitled to the property of the wild animals he catches, even though he incur several penalties in catching them. If the game caught belonged to the owner of the soil there would have been no need of game laws at all, for in each instance the poacher might have been indicted:

2 Russ. Crimes, 84;

2 East Pl. Cr. 607.

*Macaulay, Q.C.* and *Field, Q.C.*, for the resps., contended, that whatever may have been the civil law on this subject, the law of England was clear that the property in all wild animals, so long as they are on the soil, is in the owner of the soil. This is especially the case with regard to animals which are fit for food. The property is always in some one. It is true the property is not absolute, but qualified, for it may be divested by the animal voluntarily quitting the soil. At all events a trespasser acquires no title. This has been the law of England from the time of the Year-books. It was clearly laid down by Holt, C. J., and has often been acted on since. These authorities are as follows:

Year-book, 12 Hen. 8, p. 10; 22 Hen. 6, p. 54;

11 Hen. 7, c. 17;

Manwood's Forest Laws, 198, edit. 1741;

*Huddesden v. Gryssel*, Cro. Jac. 195;

*Case of the Swans*, 7 Rep. 17;

*Sutton v. Moody* (*supra*);

*Kebble v. Hickinghill*, 11 Mod. 74;

*Churchward v. Studdy* (*supra*);

*Graham v. Ewart* (*supra*);

*Rigg v. Earl of Lonsdale* (*supra*);

*Case of the Coney*, Godb. 122.

It is said that if the property in the game caught belong to the owner of the soil, it necessarily follows that the poacher must be liable to an indictment for larceny. This is not a necessary consequence, for there are several instances of the property of things being in an individual, and yet the party who takes such things is not indictable for larceny. Such instances are taking fruit from trees, or trees from the soil, or fixtures from a freehold. Whatever, therefore, may have been the principle on which Holt, C. J. laid down the *dicta* in *Sutton v. Moody*, it is too late now for the courts to alter it, as it has been so often acted upon.

*Hayes*, Serjt. replied.

*Cur. adv. vult.*

The LORD CHANCELLOR said:—When it is said by writers on the common law of England that there is a qualified or special right of property in game—that is, in animals *fera natura*, which are fit for the food of man—while they continue in their wild state, I apprehend that the word "property" can mean no more than the exclusive right to catch, kill and appropriate such animals, which is sometimes called by the law a reduction of them into possession. This right is said in law to exist *ratione soli* or *ratione privilegii*, for I omit the two other heads of property in game which are stated by Lord Coke—namely, *propter industriam* and *ratione impotentiae*—for these grounds apply to animals which are not, in the proper sense, *fera natura*. Property *ratione soli* is the common-law right which every owner of land has to kill and take all such animals *fera natura* as may from time to time be found on his land, and as soon as this right is exercised the animal so killed or caught becomes the absolute property of the owner of the soil. Property *ratione privilegii* is the right which by a peculiar franchise anciently granted by the Crown, by virtue of its prerogative, one man may have of killing and taking animals *fera natura* in the land of another; and, in like manner, the game, when killed or taken, by virtue of this privilege, becomes the absolute property of the owner of the franchise, just as in the other case it becomes the absolute property of the owner of the soil. The question in the present case is, whether game found, killed, and taken upon my land by a trespasser becomes my property as much as if it had been killed and taken by myself or my servant by my authority. Upon principle there cannot, I conceive, be much difficulty. If property in game be made absolute by reduction into possession, such reduction must not be a wrongful act; for it would be unreasonable to hold that the act of the trespasser—that is, of a wrong-doer—should divest the owner of the soil of his qualified property in the game, and give the wrong-doer an absolute right of property to the exclusion of the rightful owner. But in game, when killed and taken, there is absolute property in some one, and therefore the property in game found and taken by a trespasser on the land of A. must vest either in A. or the trespasser; and if it be unreasonable to hold that the property vests in the wrong-doer, it must of necessity be vested in A., the owner of the soil. This view of the case is supported by a series of decisions. In the case of *Sutton v. Moody*, 1 Ld. Raym., Holt, C. J. deduced several conclusions from the Year-books on the subject of the property in game. Among them are the following propositions: "If A. starts a hare on the ground of B. and hunts and kills it there, the property continues all the while in B." In this case, thus put, it must, of course, be taken that A. has hunted and killed the hare without the leave or licence of B., and there-

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fore that it is a wrongful act by A., which enures for the benefit of the true owner, viz., the owner of the soil. Another proposition is, that if A. starts game in the forest or warren of B., and hunts it into the ground of C., and there kills it, the property remains all the while in B. the proprietor of the chase or warren, because the privilege continues, and, consequently, B. is entitled to the absolute property in the dead game so chased and killed by A., who, from the statement of the case, must be taken to have acted without the licence of B., and therefore to have been a trespasser. A third proposition is, that if A. starts a hare in the ground of B., who is entitled *ratione soli* only—for that is plainly implied—and hunts it into the ground of C., and there kills it, the property is in the hunter, for it cannot be in A., who is entitled *ratione soli* only, and not *ratione privilegii*, for the hare is not killed upon his land, and it cannot be in C., for the game was not originally found in his possession, but was driven upon his ground by the chase and pursuit of the hunter. These propositions appear to me to prove clearly that game found and killed by a trespasser under such circumstances as that it would be the absolute property of the owner of the soil or of the owner of the right of free warren if it had been found and killed by such owner instead of by the trespasser, does in law become the absolute property of the proprietor of the soil or privilege immediately on its being so caught and killed by the trespasser. The law so laid down in *Sutton v. Moody* is consistent with several cases decided subsequently to the Year-books, of which I will mention one, *Coney's case*, Godb. 122; and it has been recognised and acted upon in several subsequent decisions. Of these I may mention *Churchward v. Studdy* (14 East, 249), *Graham v. Ewart* (1 H. & N. 7; H. L. C. 331), and *Earl of Lonsdale v. Rigg*, in the Court of Q. B. and Ex. Ch., on which so much reliance was placed by the Courts of Q. B. and Ex. Ch. in their decision of the present case. With respect to this case of *Lonsdale v. Rigg*, I entirely concur in the observations of Blackburn, J., and consider the case as a conclusive authority upon the point before us, which it is not desirable to question or disturb. The case, when condensed, amounts to this, that grouse were shot and taken away by a trespasser upon and from the land of the plt., who brought trover for the dead grouse, and it was clearly held by the judges of the Court of Ex., and afterwards by all the judges in the Court of Error, that the grouse, as soon as they were killed and fell upon the land of the plt., became and were his absolute property in respect of his ownership of the soil. This conclusion would not be affected, even though it be true that an indictment at common law will not lie against the trespasser for killing and carrying away of game if it be one continuous act, inasmuch as the ownership of the game is considered as incident to the property in the land; but this consequence is the result of a peculiarity in the law of larceny, which holds that the act of severing and taking away things attached to the freehold is not a felonious taking, a result which does not affect the existence of the right of property. I am, therefore, of opinion that the learned counsel for the defts. on the trial at Nisi Prius were right in requiring the evidence to be admitted which they proposed to give, in order to prove that the property in the rabbits was in Lord Exeter, and that the learned judge was wrong in his direction to the jury that such evidence was immaterial, and ought not, therefore, to be admitted. I am, therefore, of opinion that the order for making the rule *nisi* for a new trial absolute was right, and that the present appeal ought to be dismissed with costs.

Lord CRANWORTH.—My Lords, I think it is safe

and just to adhere to the law as laid down by Lord Holt. He had evidently considered the subject carefully, and according to his view of the law the rabbits killed by a trespasser on the lands of Lord Exeter certainly belonged to his Lordship. Lord Holt's opinion was followed in *Churchward v. Studdy*, 14 East, 250. There the hunter (who was a poacher) was eventually held to be entitled to the hare, but that was because he started it on the land of a third person and followed it on to the ground of the deft. and there caught and killed it. It was in strict conformity with Lord Holt's view of the law to hold that in these circumstances the hare belonged to the poacher. The rule *nisi* was granted by the Court of K. B. on the supposition that the hare had been caught on the land of the deft. by his servant acting as his agent, in which case the Court clearly thought it would have been the property of the deft., whereas in fact the deft.'s servant was assisting the hunter and his dogs. This case was followed by that of *Lord Lonsdale v. Rigg*, 11 Ex. 669, afterwards affirmed in the Ex. Ch., where the subject was carefully considered. It was there decided that grouse killed by a poacher belong to the owner of the soil on which they are killed, strictly following Lord Holt's doctrine. There was not a formal plea in that case traversing the property in the birds; but it was agreed to waive that objection in point of form, and to dispose of the case as if such an issue had been expressly raised. It was argued before this House that if game killed by a poacher is the property of the owner of the soil, then every poacher is guilty of larceny. But this is a fallacy. Wild animals whilst they are living are not his personal chattels, so as to be the subject of larceny. They partake, while living, of the quality of the soil, and are, like growing fruit, considered as part of the realty. If a man enters my orchard and fills a wheelbarrow with apples which he gathers from my trees, he is not guilty of larceny, though he has certainly possessed himself of my property, and the same principle is applicable to wild animals. It was further said that the late Game Act, which authorised the stopping of a poacher having game in his possession, and the selling of the game for the benefit of the parish, shows that the Legislature could not have understood the game to be the property of the person on whose land it was killed, for in that case it was said it would have been an unjust appropriation of the property of another. But this arrangement was probably made because it might often be impossible to know on whose land every particular head of game had been killed, and was considered to be on the whole an arrangement beneficial to the landowner. On the whole I see no reason for disturbing the decision of the court below, and think that there ought to be a new trial.

Lord CHELMSFORD.—My Lords, the question to be determined on this appeal is, whether animals *feræ naturæ*, killed or reduced into possession by a trespasser on the land of another, become the property of the owner of the land. The case was very learnedly argued on both sides, and all the authorities with respect to property in wild animals, either in a state of nature or reclaimed, were fully examined, and both the civil and the common law were referred to for doctrine on the subject. By the civil law the person who took or reduced into possession any animal *feræ naturæ*, although he might be a trespasser, in so doing acquired the property in it. This appears from the following passage in the Institutes, cited in the argument: "*Feræ igitur bestię et volucres et pisces, id est omnia animalia quę mari et terrę nascuntur simul atque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt quod enim ante nullius est id naturaliter ratione occupanti con-*

ceditur, nec interest feras bestias et volucres utrum in suo fundo quisque capiat an in alieno." If the same rule prevails in our law, then the rabbits in question were not the property of Lord Exeter, but of the poacher who took and killed them upon his land. This doctrine, however, as to the right of property in wild animals captured seems never to have prevailed in our law to its full extent. With respect to animals in a wild and unreclaimed state there seems to be no difference between the Roman and the common law. A distinction was suggested in argument between wild animals, which are unprofitable and regarded as vermin, and those which are fit for food, and therefore profitable; and it was said of the latter, that by the law of England there is always a property in game, whether alive or dead, in somebody. But this is not reconcilable with the authorities. In the case of *The Sicans*, 7 Co. Rep., Lord Coke says: "A man had not absolute property in anything which is *feræ naturæ*. Property qualified and possessory a man may have in those which are *feræ naturæ*; and to such property a man may attain in two ways, by industry, or *ratione impotentie et loci*. But when a man hath savage beasts *ratione privilegii*, as by reason of a park, warren, &c., he hath not any property in the deer, or coney, or pheasants, or partridges; and therefore in an action *quare parcum, warrennum, &c.*, *fregit et intravit et tres damna, lepores, cumculos, phasianos, perdices cepit et asportavit*, he shall not say "*suos*," for he hath no property in them; but they do belong to him *ratione privilegii*, for his game and pleasure, so long as they remain on the privileged place." *A fortiori*, therefore, where a person is merely the owner of land, without any other privilege attached to it than that which the ownership confers, he can have no property in the wild animals upon the land so long as they are in a state of nature and unreclaimed. Indeed, this notion of the existence of property in wild animals is inconsistent with the whole current of the authorities from the Year-books downwards, which almost invariably show that no action lies merely for taking away hares, coney, pheasants, and partridges, and that where the taking animals of this description is stated in the writ in addition to the trespass upon the land, the plt. shall not say "*lepores, &c., suos*." With respect to wild and unrestrained animals, therefore, there can be no doubt no property exists in them so long as they remain in the state of nature. It is also equally certain that when killed or reclaimed by the owner of the land on which they are found, or by his authority, they become at once his property, absolutely when they are killed, and in a qualified manner when they are reclaimed. So far everything is clear, and the only difficulty which arises upon the subject of property in wild animals is that which the present case presents. As animals *feræ naturæ* when killed or reduced into possession by the owner of land where they are found, or by his authority, become instantly his property, does the unauthorised act of a trespasser by the very act of killing them convert them at once to the use of the owner of the land? To this question Lord Holt, according to the case which he puts of *Sutton v. Moody*, would have given a distinct answer, that provided the game was both started and killed on the ground of the same owner, the property would be in him. I think Lord Holt must have been of opinion that as long as the game continued upon the land there was a species of property, or rather, perhaps, a right to take it, existing in the owner of the land which was sufficient to make it his, the instant when by being killed or taken it became the subject of property. But I cannot so easily discover the principle upon which he proceeded when he said that, "If A. starts a hare in the

ground of B., and hunts it into the ground of C. and kills it there, the property is in A. the hunter, but A. is liable to an action of trespass for hunting in the grounds as well of B. as of C." I have some difficulty in understanding why the wrong-doer is to acquire a property in the game under the circumstances here supposed. If the animal had left the land of B. and passed into the land of C. of its own will, and had been, immediately it crossed the boundary, killed by C., it would unquestionably have been his property. Why then should not the act of a trespasser to which C. was no party have the same effect as to his right to the animal as if it had voluntarily quitted the neighbouring land? And why not only should B. lose his right to the game, and C. acquire none, but the property, by this accident of the place where it happened to be killed, be transferred to the trespasser? It would appear to me to be more in accordance with principle to hold that the trespasser, having deprived the owner of the land where the game was started of his right to claim the property by unlawfully killing it on the land of another, to which he had driven it, converted it into a subject of property for that owner and not for himself. But the first proposition stated by Lord Holt with respect to game started and killed on the land of the same owner is free from all difficulty, and is sufficient to dispose of the present question. The case of *Sutton v. Moody* has always been regarded as an authority upon this point, and, as far as I can ascertain, has never been questioned. It was recognised in *Churchward v. Suddy*, 14 East, 249; in *Graham v. Ewart*, 11 Ex. 346; by Martin, B., in *Rigg v. Lord Lonsdale*, 11 Ex. 671. And in this last case, when before the Court of Error (1 H. & N.), Coleridge, J. said, "The grouse shot on the land of the plt." (*i.e.*, shot by the deft., a wrong-doer) "belonged to him, according to all the authorities." It certainly would not be right to disturb a principle of law so long established, unless it could be clearly shown to be erroneous. And it appears to me not only to be well founded, but that very strange consequences would follow from adopting the view contended for by the app. If he is right in saying that the owner of the land has no property in game unless it is killed by him or by his authority, it will necessarily follow that a poacher reducing the game into possession, and thereby as possessor, though a wrong-doer, having a right to it against all the world but the true owner, there being no owner to challenge his possession, might maintain an action against the owner of the land for taking the game from him, even upon the land itself where it was killed. It is much more reasonable to hold that the trespasser having no right at all to kill the game, he can give himself no property in it by his wrongful act; and that as game killed or reduced into possession is the subject of property, and must belong to somebody, there can be no other owner of it, under these circumstances, but the person on whose ground it is taken or killed. This view of the case will render the distinction suggested in the course of the argument between killing and carrying away the rabbits as parts of one and the same continuous act, and killing them and leaving them upon the land, and coming back for them, wholly immaterial. For the act of killing being at once that which made the rabbits the subject of property and reduced them into possession, whether they were for an instant or for hours upon the land, they equally belonged to the owner of the land. For these reasons I think that the judgment of the Court of Ex. Ch. affirming the judgment of the Court of C. P. was right, and ought to be affirmed.

*Judgment affirmed.*

H. OF L.] JONES v. MERSEY DOCKS AND HARBOUR BOARD. MERSEY BOARD v. CAMERON. [H. OF L.]

Thursday, June 22, 1865.

JONES v. MERSEY DOCKS AND HARBOUR BOARD.

MERSEY BOARD v. CAMERON.

*Poor-rate—Meaning of beneficial occupation—Public statutory trustees—Charity trustees—Crown and servants of Crown—Exemption from rateability.*

A beneficial occupation sufficient to render the occupier liable to poor-rate means an occupation of property that yields, or is capable of yielding, a net annual value above the average annual cost of repairs, insurance and other expenses necessary to maintain the property in a state to command such rent. The property need not be beneficial to the occupier, provided it is beneficial to some one. The Crown (occupying by itself or its immediate servants), not being named in the Poor-Law Acts, is alone exempt, but mere trustees of charitable or public funds, though bound to apply the proceeds to certain specific purposes, are not exempt though having no personal interest.

Hence, when valuable property capable of yielding a net rent above what is required for its maintenance is sought to be exempted on the ground that it is occupied by bare trustees for public purposes, the public purposes must be such as are required and created by the government of the country, and are therefore to be deemed part of the use and service of the Crown.

There is nothing in the words or in the spirit of the Act of Elizabeth exempting from liability the occupier of valuable property merely because the profits of the occupation are not to be enjoyed by him or by any one in whose behalf he is occupying, but are to be devoted to the benefit of the public.

The courts in the time of Lord Kenyon, if not in that of Lord Mansfield, and subsequently in the time of Lord Ellenborough and Tenterden, made the mistake of confounding occupation for what are called public purposes with occupation by the Crown, but those decisions are henceforth overruled.

JONES v. MERSEY BOARD.

Error on a special case.

The action was replevin brought by the Mersey Docks and Harbour Board against William Jones, and others, the churchwardens and overseers of the poor of the parish of Liverpool, for the taking and detaining of certain goods and chattels of the pits.

The Mersey Board was assessed to the poor by a rate made on the 2nd June 1858 in a sum of 20,580*l.* 18*s.* 8*d.* in respect of the annual value of the dock estates. There was no appeal against the rate, and the distress was levied for nonpayment of the rate. The pits entered into the usual replevin bond, and then brought the present action.

The dock estates were originally vested in the mayor, aldermen, and common council of the borough of Liverpool as trustees of the docks and harbour by several Acts of Parliament. The corporation had voluntarily granted part of the estates to the trustees. The statutes from the time of Queen Anne were twenty-two in number. Before the construction of the docks part of the land was shore, but the greater part consisted of lands and buildings then in the occupation of individuals, and assessable to the poor-rate.

The statutes describe the estate of the docks as a public trust. The board was bound by statute to apply the moneys received by them in defraying conservancy and pilotage expenditure, and save as the statutes provided, no moneys receivable by the board were to be applied to any purpose, unless the same conduced to the safety or convenience of ships frequenting the port of Liverpool, for facilitating the shipping or unshipping of goods, or in discharg-

ing debts contracted for such purposes. The board managed the whole estates by means of its servants. The dock duties were to be applied to building and repairing and maintaining the docks and paying off debts, and when all debts were paid the rates were to be reduced as far as could then be done.

The board was bound to apply its funds as the statutes directed, and no member of the board derived any private advantage or emolument from the execution of the trusts.

All the dock sheds, &c., were used solely for the purposes of the dock business.

By the 4 Vict. c. 30, s. 52, the trustees were empowered to build certain new warehouses, and by a section of that Act these were expressly made subject to the parochial and other rates.

But as to other property the statutes were silent.

The question for the opinion of the court was, whether the Mersey Board was rateable to the poor in respect of its property generally.

The Court of C. P. held that the board was not rateable. That decision was affirmed by the Ex. Ch.

MERSEY BOARD v. CAMERON.

In this case the action was also replevin, by Cameron and others, overseers of the township of Birkenhead. The Mersey Board now represented the original Birkenhead Dock Commissioners and the Birkenhead Dock Company, which two bodies transferred their powers and estate to the Liverpool Corporation; but in 1857 an Act consolidated the dock estates on both sides of the Mersey in one body, called the Mersey Docks and Harbour Board. Previously to the consolidation the docks on the Birkenhead side of the river were rated to the poor.

The questions for the opinion of the court were, whether the Mersey Board was now rateable in respect of these Birkenhead Docks.

The Court of C. P. gave judgment for the defendants, holding the Mersey Board rateable in respect of the Birkenhead Docks; and the Ex. Ch. affirmed this judgment.

The point involved was substantially the same as that in *Mersey Board v. Jones*.

The following learned Judges attended the argument to assist the House: Pollock, C.B., Williams, Byles, Blackburn and Mellor, JJ., and Pigott, B.

Sir F. Kelly, Q.C. and Quain (with them Parker), for the appellants, the Mersey Board, contended that the point was *res judicata*, that the Mersey Board was not rateable in respect of the Liverpool Docks, it being so decided in *R. v. Liverpool*, 7 B. & C. 61, and that the law exempting public statutory trustees from rateability where the statutes made it obligatory on the trustees to apply the funds to specific purposes, and no power was given to apply the funds towards payment of poor-rates, had often been acted on and cannot now be overturned.

Bovill, Q. C., Mellish, Q. C. and C. Hutton for the overseers.

The following cases were referred to and commented upon:

*R. v. St. Lukes*, 2 Burr. 1058;

*R. v. Commissioners of Salter's Load Stairs*, 4 T. R. 780;

*R. v. St. Bartholomew*, 4 Burr. 2485;

*R. v. Mayor of London*, 4 T. R. 21;

*R. v. Woodward*, 5 T. R. 79;

*R. v. Liverpool*, 7 B. & C. 61;

*R. v. Trustees of Weaver Navigation*, 7 B. & C. 70;

*Governors of Bristol Poor v. Waite*, 5 A. & E. 1;

*R. v. Mayor of Liverpool*, 9 A. & E. 495;

*R. v. Guardians of Wallingford*, 10 A. & E. 259;

*R. v. Exminster*, 12 A. & E. 2;

*Tyme Commissioners v. Clinton*, 1 E. & E. 516;

*R. v. Badcock*, 6 Q. B. 787;

*R. v. St. George, Southwark*, 10 Q. B. 867;

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*R. v. Longwood*, 18 Q. B. 116;  
*R. v. Harrogate Commissioners*, 15 Q. B. 1012;  
*Overseers of Birkenhead v. Trustees of Birkenhead*,  
 2 E. & B. 148;  
*Crease v. Saul*, 2 Q. B. 885;  
*R. v. Baptist Missionary Society*, 10 Q. B. 884;  
*R. v. Ponsonby*, 3 Q. B. 14;  
*Lord Amherst v. Lord Somers*, 2 T. R. 372;  
*Smith v. Birmingham*, 7 E. & B. 483;  
*R. v. Stewart*, 8 E. & B. 860;  
*Justices of Lancashire v. Shelford*, 2 Q. B. & E. 280;  
*Hodgson v. Local Board of Carlisle*, 8 E. & B. 280;  
*R. v. Manchester*, 3 E. & B. 886;  
*R. v. Shepherd*, 1 Q. B. 170;  
*R. v. Stapleton*, 33 L. J. 17, M. C.; 9 L. T. Rep. N. S. 322.

At the conclusion of the arguments the House put the following questions to the learned judges:

First, Are the Mersey Docks and Harbour Board "occupiers" of the docks vested in them within the true meaning of the word "occupier," in the stat. 43 Eliz.?

Secondly, If they are occupiers within the statute are they exempted from liability to be rated for relief of the poor by the operation or effect of the stats. 4 Vict. c. 30, 9 & 10 Vict. c. 119, 11 Vict. c. 10, 18 & 19 Vict. c. 174, and 21 & 22 Vict. 92, or any of them, or by reason of the purposes for which they occupy the same, or on any other ground appearing in the special case?

Thirdly, Does the Act of 20 & 21 Vict. c. 162 (the Act of 1857) impose upon the board a liability to poor-rate in respect of the docks, estate, and property vested in the board, or any and what part thereof, by virtue of the 26th and 27th sections of the last-mentioned Act?

*Cur. adv. vult.*

After time taken to consider, the learned Judges differed in opinion, Byles, J. dissenting from the rest. The opinion of the majority was delivered as follows by

BLACKBURN, J.—My Lords, the opinion which, with your Lordships' permission, I am about to read, contains the joint answers to your Lordships' questions of the Lord Chief Baron, Williams and Mellor, JJ., Pigott, B. and myself. To the first question put to us by your Lordships in these causes we answer, that in our opinion the Mersey Docks and Harbour Board are occupiers of the docks in question within the true meaning of that word as used in the stat. 43 Eliz. c. 2. Our reasons for that opinion are as follows:—Stat. 43 Eliz. c. 2, s. 1, requires the overseers of every parish to raise by "taxation of every inhabitant, parson, vicar, and other, and of every occupier of" various kinds of real property, and *inter alia* of "lands in the parish, in such competent sum as they shall think fit," a stock for setting the poor of the parish to work, and for the relief the poor of the parish. Though the words of this enactment might seem to give the overseers a discretion to tax each inhabitant in such arbitrary sum as they might think fit, it has long been settled that the taxation of the different persons must be equal and in proportion to the value of their respective means. It would appear, from the passages cited at your Lordships' bar from Dalton's Country Justice, that this was determined very shortly after the statute was passed. It has always been so held, and the Legislature, by the Parochial Assessment Act (6 & 7 Will. 4, c. 96), has affirmed this principle by enacting that no rate shall be valid unless made "upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs,

insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." In order, therefore, that a valid rate may be imposed, it is essential that the occupation be of value beyond what is required to maintain the property; for if the occupation be of so little value that the hypothetical tenant (under the Parochial Assessment Act) would either give no rent, or a rent which, after deducting the average annual expense of the maintenance, would leave no overplus, there is nothing to rate. The question whether replevin lies has been waived, and therefore it is not necessary further to consider whether in such a case the more proper expression would be that the person in possession of the property was not any occupier at all within the meaning of the statute of Elizabeth, so that the overseers had no jurisdiction to make the rate, and consequently that the levying of it might be resisted in replevin of trespass, or whether, as seems to have been the opinion of the Court of Q. B. in *Overseers of Birmingham v. Shaw*, 10 Q. B. 868; and *Reg. v. Bradshaw*, 29 L. J. 176, M. C., he is an occupier, whom as such the overseers have jurisdiction to tax, though on appeal the rate must be reduced to nothing. But that question having been waived, this is now immaterial. Whichever may be the true mode of enunciating the position, it is clear that there can be no valid rate unless the occupation be such as to be of value, and if the words "beneficial occupation" are to be understood as merely signifying that the occupation is of value (which is obviously the sense in which the phrase is used in many of the cases cited at the bar), it is clear that a beneficial occupation is essential as the foundation of the rate; but it is equally clear that, if the phrase be understood in this limited sense, the Mersey Docks and Harbour Board have a beneficial occupation, for they actually occupy land as docks, and in virtue of that occupation receive payments from the shipping using the docks; at present greatly in excess of what is necessary to maintain the docks. Hereafter the charges on shipping may be reduced so as greatly to diminish the revenue derived from this occupation; possibly at some future time to render it no greater than the sum requisite to maintain the docks; but whilst the dues on shipping are maintained at their present rate, it is clear that the hypothetical tenant would give for the occupancy of the docks as at present enjoyed by the Mersey Docks and Harbour Board a rent greatly in excess of what would be necessary to maintain the docks in a state to command that rent. Where there is an actual demise of property to an occupier who pays rent to the owners of the property, the tenant, if a subject, is rateable, without any regard to the purpose to which the rent is applied. It is immaterial whether the landlord enjoys the rent himself, or is obliged to pay it away as interest to mortgagees, or even (as is the case with tenants of Crown property) pays it into the Consolidated Fund, or the privy purse of the Sovereign. The occupier in each case is rateable. And if the matter were now for the first time to be determined without reference to the decisions, it would seem that where the owners of the property are themselves in occupation and receive the value, the amount of which is measured by the rent which the hypothetical tenant would give, the purposes to which that amount is applied ought to be as immaterial as if there had been a real demise at that rent; and the occupiers, if subjects, ought to be rated, whatever be the object for which the property is occupied, unless some special enactment exempted them. But the decisions have now settled that there is an exemption; and the important question in the present case is, what is the nature of the occupation and of the purposes which bring the occupiers' case within that exemption. And on this



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question the decisions are to some extent inconsistent, and it is necessary to examine them. The Crown, not being named in the statute of Elizabeth, is not bound by it; and consequently the overseers cannot impose a rate on the Sovereign in respect of lands occupied by Her Majesty, nor on those occupied by her servants for Her Majesty. The exemption depends entirely on the occupier and not on the title to the property. The tenants of Crown property, paying rent for it, are rateable like all other occupiers; and it has even been determined that where apartments in Hampton Court, a Royal palace, were gratuitously assigned to a subject, who occupied them by the permission of the Sovereign but for the subject's benefit, the subject was rateable in respect of her occupation of this royal property: (*R. v. Lady E. Ponsonby*, 3 Q. B. 14.) On the other hand, where a lease of private property is taken in the name of a subject, but the occupation is by the Sovereign or her servants on her behalf, the occupation being that of Her Majesty, no rate can be imposed: (*Lord Amherst v. Lord Sommers*, 2 T. R. 372.) So far the ground of exemption is perfectly intelligible, but it has been carried a good deal further and applied to many cases in which it can scarcely be said that the Sovereign or the servants of the Sovereign are in occupation. A long series of cases have established that where property is occupied for the purpose of the government of the country, including under that head the police, and the administration of justice, no one is rateable in respect of such occupation. And this applies not only to property occupied for such purposes by the servants of the great departments of state, such as the Post-office (*Smith v. Birmingham*, 7 Ell. & Bl. 483), the Horse Guards (*Lord Amherst v. Lord Sommers*, 2 T. R. 372), or the Admiralty (*R. v. Stewart*, 8 Ell. & Bl. 360), in all which cases the occupiers might strictly be called the servants of the Crown; but also to property occupied by local police (*Justices of Lancashire v. Shelford*, Ell. Bl. & Ell. 230), to county buildings occupied for the assizes, and for the judges' lodgings (*Hodgson v. Local Board of Carlisle*, 8 Ell. & Bl. 230), or occupied as a County Court (*R. v. Manchester*, 3 Ell. & Bl.), or for a gaol (*R. v. Shepherd*, 1 Q. B.) In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty; but the purposes are all public purposes, of that kind which, by the constitution of this country, fall within the province of Government, and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the sovereign, might be considered in *consimili casu*. And the decisions are uniform, and were not disputed at the bar, that the exemption applies so far; but there is a conflict between the decisions as to whether the exemption goes further. There are several cases relating to charities which were mentioned at your Lordship's bar, but were not much pressed, nor, as it seems to us, need they be considered now; for, whatever may be the law as to the exemption of property occupied for charitable purposes, it is clear that the docks in question can come within no such exemption. There is, however, one case on this subject, that of *Rex v. St. Luke's*, 2 Bur. 1053, which it is necessary to notice on account of the effect which in *Rex v. Commissioners of Salter's Load Sluice* 4 T. R. was attributed by Lord Kenyon to part of what fell from Lord Mansfield in that case. In *Rex v. St. Luke's* the question before the court was, whether Joseph Mansfield was rateable as occupier of St. Luke's Hospital; but the court entered into the larger question, whether there was any one who could be charged as occupier, saying very truly that unless there was some one who could be so charged no rate could be im-

posed. Lord Mansfield as to that is reported to have said, "As to the lessees, mere nominal trustees cannot be esteemed occupiers or rated as such." In the subsequent case of *Rex v. St. Bartholomew*, 4 Bur. 2435, Lord Mansfield says that the corporation of London "are not *de facto* the occupiers of St. Bartholomew's Hospital; the poor are the occupiers, but they are not rateable." This may perhaps show that Lord Mansfield only meant to lay down the position that those in whom the legal estate is vested are not necessarily the occupiers; which is no doubt true. No one could contend that the person in whom a term assigned to attend the inheritance had vested, could be rated as occupier, in point of law, of the estates *de facto* occupied by his *cestui que trust*. But if Lord Mansfield meant (as it rather seems that Lord Kenyon thought he did), that the persons in actual valuable occupation of property are not rateable if they occupy in a merely fiduciary character, it is a position which cannot be maintained. The counsel for the Mersey Dock and Harbour Board at your Lordships' bar did not attempt to maintain any such general position, they limited themselves to contending that such was the law where it was a public trust; for which they cited authorities which they said must be overruled unless that position was maintained. And we think they were justified in so saying; but we also think that there are conflicting decisions which must be overruled if it is maintained. The first case in which the position was advanced that trustees occupying valuable property, but prohibited from taking any individual benefit from it, were not rateable, seems to have been *Rex v. Mayor of London*, 4 T. R. 21., decided in 1790. There Buller, J., in his judgment, says: "Now it has been objected that they are not liable to this rate, because they hold it on a public trust; but, in the first place, it does not appear to be the case of a trust at all; and if it did, perhaps the consequence contended for would not necessarily follow." It certainly seems that the doctrine contended for was not at that time, 1790, considered as established: *Rex v. The Commissioners of Salter's Load Sluice*, 4 T. R. 736, was decided in 1792. In the argument the clauses of the Act under which the commissioners held were referred to and argued on; but Lord Kenyon's judgment does not appear to have proceeded on the ground that their effect was to prohibit the payment of poor-rate. He says: "The trustees have a bare naked trust, not coupled with any interest. If any interest resulted either to the commissioners or to the owners of the adjoining land after the public purposes of the Act were answered, these tolls might have been rated. But it is admitted that all the money which is collected under this Act of Parliament must be expended for the purposes of the Act, and therefore, upon the ground upon which the court proceeded in *Rex v. St. Luke's Hospital*, namely, that there was no occupier, these commissioners are not liable to be rated." The counsel for the parish and township in the cases at your Lordships' bar did not attempt to deny that this decision was in favour of their opponents; they admitted (and we think quite properly admitted) that the decision was against them, but they denied that it was law. The counsel for the Mersey Board were fully justified in relying on this case, as entitling them to the benefit of Lord Kenyon's judgment; but we think that when they proceeded to argue that the decision acquired additional authority because it was acquiesced in, they fell into a fallacy. When the Court of Q. B. has decided in favour of a rate, those who are rated may, if they are so advised, bring replevin, and (subject to the question whether replevin lies in such case) may carry the case up to the H. of L.; and, therefore, where a decision in favour of a rate is not disputed further, it may pro-

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perly be said to be acquiesced in. But when the Court of Q. B. has decided against a rate and quashed it, there is no way whatever in which the parish officers can raise the question again; and acquiescence in a decision cannot add any weight to it, when there is no possible way of disputing it. The next cases to be found in the reports in which any similar point arose were those of *Rex v. Liverpool*, 7 B. & C. 61, and *Rex v. Weaver Navigation*, 7 B. & C. 70, in 1827. It appears from the papers in the appendix to this special case (Appendix, p. 38) that in 1806 the Liverpool sessions made an order excluding the Liverpool docks from a rate for the relief of the poor of the parish of Liverpool, subject to a case intended to obtain the opinion of the K. B. on the question whether the Corporation of Liverpool were rateable as occupiers of the docks; and that in 1808 the order of sessions was confirmed, but under what circumstances does not appear. The late Lord Abinger was counsel for the parish, both in that case and in the case of 1827; and the attorneys of the Corporation of Liverpool in 1827 could not be ignorant of the circumstances attending the confirmation of the order of sessions in 1806. Yet on the argument in the case reported in 7 B. & C. neither side alludes to what, if a decision at all, must have been precisely in point. It seems, therefore, probable that, though the rule confirming the order in 1808 is not drawn up as by consent, the former case was compromised, and that there was no decision of the court in 1808. However this may be, there can be no doubt that the Court of K. B. in 1827 acted upon the authority of *Rex v. Salter's Load Sluice*, 4 T. R. 730; Lord Tenterden saying, in *Rex v. Liverpool*, "Here the trustees were not occupiers in the ordinary 'sense of the word, and no profit was received for the use of any person,'" and Bayley, J. saying, "The principle of this decision is applicable to the case of *Rex v. Trustees of the River Weaver Navigation*. There the surplus tolls remaining over and above the expenses of supporting the navigation were to be applied to the repairing and maintaining of bridges and highways. Those were public purposes; and as no part of the moneys received could be applied to private purposes, those moneys were not rateable in the hands of the trustees." There is no dispute that those two decisions, if they are to be followed, are decisive in favour of the Mersey Docks and Harbour Board, at least in the first of the cases at your Lordships' bar, and reduce the case of the overseers of Birkenhead to that point mentioned in your Lordships' third question. The next case to which it is necessary to call attention is that of the *Governors of the Bristol Poor v. Waite*, 5 A. & E. 1, decided in 1836. In that case the governors of the Bristol poor had taken property for the purpose of putting out their poor there. A rate had been imposed on them in respect of this occupation and was levied by distress. The governors of the Bristol poor brought replevin for the purpose of questioning the validity of this rate. In the judgment of the court the point raised is said to be "whether the p'ts. were such occupiers of the property as to be rateable to the poor." And the decision was that they were. The judges who decided this case probably did not suppose that they were deciding anything inconsistent with the decisions in *Rex v. Salter's Load Sluice*, and *Rex v. Liverpool*, and *Rex v. Trustees of the Weaver Navigation*, which appear not to have been cited on the argument or brought to their notice. But we do not see how the cases can stand together. The governors of the poor of Bristol were as much bare naked trustees having no personal interest in the occupation of this property as the commissioners of *Salter's Load Sluice*, and if the one set of trustees were on that ground not occupiers, we do not see how the others could be occupiers; and if the application of

the surplus funds of the Weaver navigation to the bridges and highways of Cheshire, so as to be in relief of the county rate, was a public purpose rendering the trustees of that navigation not rateable, it is difficult to see why the application of whatever value was derived from the lands occupied by the governors of the Bristol poor to the maintenance of the poor of Bristol, and so in relief of the poor-rate of the city of Bristol, was not a public purpose also. We think that in this case the Court of K. B., probably without being aware of it, came to a decision inconsistent with, and therefore shaking the authority of, *Rex v. Salter's Load Sluice*, *Rex v. Liverpool*, and *Rex v. Weaver Navigation*. The decision in *The Governors of Bristol Poor v. Waite* has been repeatedly acted upon, and never questioned that we know of. As the decisions in this case and those which followed it were decisions in favour of the rate, and consequently might have been questioned in replevin, the acquiescence in them does add something to their authority. The Municipal Corporation Act (5 & 6 Will. 4, c. 76) restricted the power of the municipal corporations named in schedules A. and B. to that Act over what had been their private estates, and compelled them to pay the net proceeds into the borough fund, which was applicable first to the payment of the existing debts of the corporation, and then to the corporation expenses, and the surplus (if any) for the public benefit of the inhabitants and the improvement of the borough. The Court of Q. B. in *Reg. v. The Mayor, &c. of Liverpool*, 9 A. & E. 485, decided in 1839 that the effect of this enactment was to render the corporations no longer liable to be rated in respect of any property occupied by them. The reason given by the court for this decision was that they found "the principle settled by the decisions already made, and felt it to be their duty to act upon them, and not upon the apprehension of any inconvenient or unforeseen consequences, to question or weaken their authority." They proceed to state the cases of *Rex v. Liverpool*, 7 B. & C. 69, and *Rex v. Trustees of Weaver Navigation*, and say that "We feel it to be impossible substantially to distinguish these cases, and especially the latter from the present. The extent and approximation to something like national benefit are in kind, and almost in degree, the same. The public in the one case is the same town of Liverpool, in the other, the county of Chester." The court do not explain why the same argument did not avail in *Governors of Bristol Poor v. Waite*, where the city of Bristol was held not to be the public; but they did not intend to depart from that decision, and in the same year acted upon it in *Reg. v. Guardians of Wallingford*, 10 A. & E. 259, in which latter case an attempt, but, as it seems to us, not a successful one, is made to reconcile the decision with that in *Reg. v. Mayor, &c. of Liverpool*. Crompton, J. in *The Tyne Commissioners v. Chirton*, 1 E. & E. 516, stated that the decision in *Reg. v. The Mayor, &c. of Liverpool* created at the time great surprise. We think, however, that the conclusion came to by the court in that case does logically follow from the decisions in *Rex v. Liverpool*, and *Rex v. Trustees of the Weaver Navigation*, and that the court in that case had to choose whether they would consider it a *reductio ad absurdum*, and say that decisions leading to such a conclusion must be wrong in principle, or to say that the decisions being binding on them, they must hold that the conclusion was not wrong. They adopted the latter course, apparently not at that time perceiving that it was inconsistent with the principle of their own decision in *The Governors of the Bristol Poor v. Waite*. A few years later the Court of Q. B., in several cases to be presently cited, adopted the former course, and

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the question now pending in your Lordships' House seems to us to be in substance which set of decisions are to be followed in future? The effect of the decision in *Reg. v. The Mayor of Liverpool* was immediately nullified by the Act 4 & 5 Vict. c. 48; but that enactment did not declare the decision erroneous. On the contrary the Act was couched in language which, though not declaring the decision to be law, indicates that the framers of the Act thought that it was law; and the fact that an Act couched in such terms was passed by the Legislature affords an argument of more or less weight, that the error of the court, if it was one, was acquiesced in and had become *communis error*. This is, we think, the latest authority in point of date relied on by the counsel for the Mersey Docks and Harbour Board. The next case in order of date was *Reg. v. Badcock*, 6 Q. B. 787, in 1845. In the judgment of the court, the conflicting cases are cited. The court does not attempt to reconcile them, but observes that in all the cases where the occupation was held to be of such a public nature as to exempt the property from rateability, "the public, as such, unlimited by the bounds of county, borough, or parish, had a direct interest in the benefit which the application of the funds produced," and that the case then before them did not come within that principle. The passage here cited has been repeatedly quoted with approval as giving the true principle of exemption. It does include all the cases already cited, in which the occupation was for the purposes of government. But the principle thus laid down cannot be made to embrace either *Rex v. The Trustees of the Weaver Navigation*, where the funds were applicable to the relief of the county rate of Cheshire, or *Reg. v. The Mayor of Liverpool*, where the funds were brought into the borough fund in relief of the borough rate in that particular borough. In *Reg. v. Longwood*, 18 Q. B. 116, in 1849, the Court of Q. B., acting upon the principle laid down in *Reg. v. Badcock*, held that the commissioners of the Huddersfield Waterworks were rateable to the relief of the poor. All the cases which we have hitherto cited were decided before Lord Campbell took his seat upon the bench. It is right to notice this, for it has often been supposed, and indeed was said in the argument at your Lordships' bar, that the decisions in his time, on the subject of the exemption from rates, were innovations introduced in consequence of his strong individual opinion that the exemptions from rateability had been carried further than was warranted by law or reason; but we think that the cases which we have cited show that before he came upon the bench that opinion had been entertained and acted upon, and that in consequence the decisions had got into such a state as to be inconsistent with each other; so that it had become necessary to overrule one set of the inconsistent decisions, unless the law was to be administered without any reference to principle, deciding each case as it arose, according as the facts might be supposed to approximate more nearly to those in the one set of decisions or the other. Several cases were decided in Lord Campbell's time which closely resembled that of the Huddersfield commissioners (*R. v. Longwood*), and which were decided in the same way without rendering it necessary to go further than had been done in that case, until, in 1852, the case of *The Overseers of Birkenhead v. Trustees of Birkenhead*, 2 E. & B. 148, arose. Crompton, J. was a party to that decision, and in *The Tyne Improvement Commissioners v. Chirton*, 1 E. & E. 516, he has given some account of the deliberations on that case (though his observations were misunderstood by the reporter), and he repeated it during the argument in the Ex. Ch. of the case at bar. It appears that this learned judge was at first startled at being called upon to

act on a principle in direct opposition to the considered decision of the Court of Q. B., in *Reg. v. Mayor, &c. of Liverpool*, 9 A. & E. 435, though he had always thought that decision wrong; and that he was the more unwilling to act in direct contradiction to that case, because the Legislature in 4 & 5 Vict. c. 48, when enacting that the decision should no longer be practically operative, did not express any disapprobation of the principle of the decision, but rather used language seeming to assume that it was good law; and he doubted whether the case should not be followed though not approved of, leaving it to the Legislature to correct it. The rest of the court thought that the time had come when the court could no longer halt between two sets of decisions, but must follow that which was law; and Crompton, J. ultimately agreed with them. Lord Campbell in his judgment (perhaps out of deference to the doubts which Crompton, J. had at first entertained), seeks to avoid expressly overruling the previous decisions; and suggests that, perhaps, *Rex v. The Commissioners of Salter's Load Stairs*, T. R., and *Rex v. Liverpool*, 7 B. & C., may be distinguishable on the ground that the private Acts in those cases were construed by the courts as amounting to a prohibition to pay poor-rate. But the counsel on both sides at your Lordships' bar agreed that no such distinction could be maintained, and we think that neither Lord Kenyon nor the Court of K. B. in Lord Tenterden's time proceeded on any such ground. And in the subsequent cases of *The River Lea Navigation*; cited in the Appendix, x, and *The Tyne Improvement Commissioners v. Chirton*, 1 E. & E. 516, in 1859, no such distinction was made. The Court of Q. B. in that last case acted upon the broad principle that though, where the property was occupied for public purposes, "such as," says Lord Campbell, "a post-office or a military store dépôt, where the purposes for which the property is occupied are purposes created by the Government of the country," there was no rateable occupier, the occupation of a public dock was not an occupation for such public purposes, and that the commissioners occupying such a dock were rateable in respect of the value of that occupation, estimated according to the rule laid down in the Parochial Assessment Act, unless an exemption was conferred by some subsequent statute: and that the enactments in the Tyne Improvement Acts as to the applications of the rates received (which are in substance the same as those in the Liverpool Acts), did not amount to such an exemption; and Crompton, J., after stating his former doubts when the *Birkenhead* case was argued, said that he now thought that case laid down the proper rule. This, we think, must be considered as the rule now acted upon in practice in the Court of Q. B. Such being the state of the authorities, it seems to us no longer possible to support the decisions relied on by the counsel for the Mersey Docks and Harbour Board. We quite agree that it is very desirable to adhere to decided cases, though this principle may be carried too far. It has been forcibly remarked by an American author of repute (1 Phillips on Insurance, 393, note 9), that where the objection to the decisions "is inconsistency with admitted fundamental principles, it is an adhering to an inconsistency and contradiction, and tends to reduce jurisprudence from a science to an aggregation of dogmas." Still the inconvenience caused by the unsettling the law and disturbing what was quiet is so great, that we agree that even a court of error should be slow to reverse decisions which, though originally wrong, have long been uniform. When such is the case, it may often be proper to persevere in the error and leave the remedy to the Legislature. It may be that, if the attention of the Court of K. B. had in 1836 been

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called to the case of *Rex v. Liverpool* and *Rex v. Weaver Navigation* before they decided *The Governors of the Bristol Poor v. Waite*, this principle, which is strongly laid down in *Crease v. Saul*, 2 Q. B., would have led them to decide *The Governors of the Bristol Poor v. Waite* otherwise than they did. But all this inconvenience has been already incurred, the recent decisions have been such as to disturb the quiet state of things, and a decision of your Lordships' House affirming *Rex v. Liverpool* and the non-rateability of the Liverpool docks must reverse the decision in *Tyne Commissioners v. Chirton*, and render the docks in the Tyne rateable. And such a decision, though not necessarily reversing the numerous decisions based on *The Governors of the Bristol Poor v. Waite*, by which poor houses and gas-works and waterworks in the hands of public trustees have been held rateable, must greatly shake their authority and disturb a principle of rating now generally adopted throughout the country. The balance of convenience, if that be a legitimate consideration, is now in favour of adhering to the more recent decisions. And if we view the case on principle, without regard to the decisions either way, it seems to us clear that the Mersey Docks and Harbour Board ought to be rated. The counsel referred to many expressions in the local Acts, showing that the Mersey docks were thought likely to confer great public benefit, and to be very advantageous to the commerce of this country; and there is no doubt that that expectation has been realised, and that these docks are of great public benefit; but not more so than the docks in the river Thames, all of which are in the hands of private companies, and are undoubtedly rateable. The rate is imposed, not in respect of the value of the benefit conferred on the public, or that portion of it which uses the dock, but is on the occupiers of the docks in respect of the value to them derived from the payments taken for that use. And we think it impossible to point out any real distinction in this respect between the occupation of a dock formed by a company under an Act of Parliament incorporating the Companies Clauses Act and the Harbours, Docks and Piers Clauses Act 1847, and the occupation of the Mersey Docks by the Mersey Docks and Harbour Board. A company forming a dock under an Act of Parliament incorporating these Acts is bound to maintain the docks, and to keep harbour masters and other officers there, and to allow the public to use the dock on payment of the rates, and to allow Her Majesty's vessels to use it without making any payment; and by these means they confer a benefit on the public. The company, by virtue of its occupation, receives the rates on shipping using the docks, and the amount thus received is applicable to keeping up the docks, and then to paying interest on the loans, the amount of which is limited, and then in paying dividends on the share capital, and it is common to have a maximum limit put on the rate of the dividend; when that maximum dividend is reached the rates must be lowered. It is indisputable that a company thus occupying a dock is an occupier, and rateable as such. Now if, without in any way altering the mode in which the docks are enjoyed by the public, or altering the rates leviable, or changing the harbour masters and others who manage it, we change the name of the body who occupy it from that of "the company" to that of "the board," and if, instead of "the company" paying to the shareholders a maximum dividend on their capital, the "board" pay to the same individuals the same identical sums, but call them "interest on bonds," instead of "maximum dividend on share capital," what difference does this make? If *Rex v. Liverpool*, 7 B. & C., 69, is to be supported, it makes this difference, that what was formerly an occupation in respect of which the

company was rateable has by this change of name, without any change in the thing, become an occupation for public purposes, for which the board is not rateable. If the decision in *The Tyne Commissioners v. Chirton*, 1 E. & E. 516, is to be supported, the change in name makes no difference in the rateability. We think the latter the correct view of the law, and therefore we answer your Lordships' first question in the affirmative. We now proceed to answer the second question put by your Lordships. And we are of opinion that there is nothing in the matters referred to in your Lordships' question to exempt the board from being rated in respect of their occupation. We have already, in answering your Lordships' first question, given our reasons for thinking that the purposes to which the rates are applicable are not such as to exempt them from rateability; and we are further of opinion that the effect of the statutes applicable to the Liverpool docks is not such as to exempt them from the payment of poor-rate. There are no negative words prohibiting the application of the rates to payment of the poor-rate. And we think, in conformity with the decision in *The Tyne Commissioners v. Chirton*, 1 E. & E. 516, that enactments directing that the revenue shall be applied to certain purposes and no others are directory only, and mean that, after all charges imposed by law on the revenue have been discharged, the surplus or free revenue, which otherwise might have been disposed of at the pleasure of the recipients, shall be applied to these purposes. We have only, therefore, to consider the reasons on which the Court of Ex. Ch. based their decision in the second of the present cases; and, with very great respect for those who concurred in that judgment, we think that they acted on a principle sound in itself, but not applicable to the case before them. Where an Act of Parliament has received a judicial construction putting a certain meaning on its words, and the Legislature in a subsequent Act *in pari materia* use the same words, there is a presumption that the Legislature used those words intending to express the meaning which it knew had been put upon the same words before; and, unless there is something to rebut that presumption, the Act should be so construed, even if the words were such that they might originally have been construed otherwise. And if the decision in *Rex v. Liverpool*, 7 B. & C. 69, had been that certain words used in the former Acts had amounted to an exemption from poor-rate, and those same words had been repeated in the subsequent Acts, it would, on this principle, have been a fair inference that the Legislature intended by using the same words to give the exemption. But this is not the case here. The Legislature had by former Acts conveyed to the trustees the docks to be held for certain purposes. The Court of Q. B. had decided that, as an incident of law, those who held land for such purposes were not rateable to the relief of the poor. When the Legislature again in fresh Acts used the same language, it showed that they intended to convey the land to be occupied for the same purposes; and that if the law did annex non-rateability as an incident to such an occupation the Legislature had no objection. But it did not afford any argument that the Legislature intended to annex that incident in case it should be discovered that it was not annexed by law. And the clauses enacting that the warehouses should be rated carry this argument no further. During the course of the argument at your Lordships' bar the L. C. put the case of an express recital in the Act, to the effect that it had been decided in *Rex v. Liverpool*, that the dock trustees were not liable to poor-rate in respect of land occupied by them, and that it was expedient that no such exemption should be given to them in respect of the occupation of new ware-

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houses acquired under the new Act, and then after that recital an enactment in the terms in which it is now expressed. And he asked the counsel at your Lordships' bar two questions. First, whether such a recital could be construed to amount to a declaratory enactment that the decision in *Rex v. Liverpool* was good law? Secondly, whether the Acts framed as they were could have a greater effect than they would have had if framed with such an express recital? The counsel for the Mersey Docks and Harbour Board were not able to give any answer to those questions that would support the decision of the Court of Ex. Ch. Blackburn, J. (the only judge who, being a party to the decision in the Ex. Ch., was also present at the argument at your Lordships' bar) admits that he cannot answer them, and his inability to do so has led him to change the opinion which he entertained when in the Ex. Ch. We have no reason to believe that the other judges who joined in that judgment have changed their opinion. We have most sincere deference for their judgment, and as we have had no opportunity of hearing what answer they would have made to the way the case has been put in your Lordships' House, it is with diffidence that we have formed our opinion that they have misapprehended the ground of their decision; but, entertaining that opinion, we are bound to express it. We therefore answer your Lordships' second question in the negative. The answers which we give to the first and second questions put by your Lordships in effect answer the third question. In our opinion the liability to poor-rate is imposed on the board by the general law, and not by virtue of the sections of the Act referred to. We therefore answer your Lordships' last question in the negative.

Cur. adv. vult.

THE LORD CHANCELLOR.—My Lords, the questions raised in this appeal depend in a great measure on the inquiry, what is the occupation of real property which is liable to be rated under the 1st section of the Act of 43 Eliz. c. 2, independently of the decided cases, several of which are irreconcilable with each other. It would seem to be easy to answer this inquiry, and having regard to the Parochial Assessment Act, 6 & 7 Will. 4, c. 96, it may be said in answer that occupations to be rateable must be of property yielding, or capable of yielding, a net annual value, that is to say, a clear rent over and above the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain the property in a state to command such rent. It is in this sense that I understand the words beneficial occupation, wherever it is said that to support a rate the occupation must be a beneficial one. For on principle it is by no means necessary that the occupation should be beneficial to the occupier. It is sufficient if the property be capable of yielding a clear rent over and above the necessary outgoings. The only occupier exempt from the operation of the Act is the King, because he is not named in the statute. And the direct and immediate servants of the Crown whose occupation is the occupation of the Crown itself also come within the exemption. But this ground of exemption does not warrant many decisions which have held that property used for public purposes is not rateable. So also trustees who are in law the tenants or occupiers of valuable property upon trusts for charitable purposes such as hospitals or lunatic asylums are in principle rateable notwithstanding that the buildings are actually occupied by paupers who are sick or insane. If the matter were *res integra* I could not concur in the decision of Lord Mansfield in the case of *St. Luke's Hospital*, in which he is reported to have said that mere trustees cannot be esteemed

occupiers, or rated as lessees, or with his conclusion in the case of *Rex v. St. Bartholomew's*. But with a slight verbal alteration, I entirely agree with the remark of the learned judges in the present case, that if Lord Mansfield meant that the persons in the legal occupation of valuable property are not rateable if they occupy it in a merely fiduciary character, it is a position which cannot be maintained. To these observations and decisions of Lord Mansfield, that which appears to me to be the erroneous doctrine of several subsequent decisions is to be attributed. This is plain on an examination of Lord Kenyon's judgment in the subsequent case of *Rex v. The Commissioners of Salter's Load Sluice* as reported in 4 T. R. Lord Kenyon refers to the decision in the case of *St. Luke's Hospital*, and adopts the position that trustees who have a bare naked trust not coupled with any interest are not liable to be rated, and he uses language which, with the decisions of Lord Mansfield, has introduced the notion that if valuable property be in the possession of trustees who are bound to apply the whole of the proceeds to public but not government purposes, that is, in works or purposes for the better accommodation or use of the public, they are not liable to be rated. There is nothing in the Act of Elizabeth or in the reason of the thing to warrant this conclusion. No exemption is thereby given to charity or to public purposes, beyond that which is strictly involved in the position that the Crown is not bound by the Act. And it is a remarkable fact that whenever these opinions of Lord Mansfield and Lord Kenyon have not been presented to the Court of Q. B., the judges have adopted the correct view of the statute. Thus, in *Rex v. Liverpool*, decided in the year 1823, and the case of *Rex v. The Trustees of the Weaver Navigation*, decided in 1827, the *Salter's Load Sluice* case was cited and relied on, and the Court of Q. B. adopted the language of Lord Kenyon and followed his decision. But in the case of the *Governors of the Bristol Poor v. Waite*, decided in 1836, the *Salter's Load Sluice* case does not appear to have been referred to; and the Court recurred to the correct view of the statute of Elizabeth, and held that the governors of the Bristol poor who have taken some buildings and land on lease for the occupation of their poor, although they were bare trustees, and held for a public purpose only, were such occupiers of property as to be liable to be rated to the poor. This case in its turn has been followed in other decisions as an authority, and it might have been supposed that the authority of the *Salter's Load Sluice* case and its two satellites, *Rex v. Liverpool* and *Rex v. The Trustees of the Weaver Navigation*, had come to an end. But in the year 1839 the Court of Q. B., in the case of *Reg. v. The Corporation of Liverpool*, returned to its old allegiance, and again set up the authority of *Rex v. Liverpool* and *Rex v. The Weaver Navigation*. This last case of *Reg. v. The Corporation of Liverpool* was decided on the principle, that since the Municipal Corporation Act the property of a municipal corporation is held upon trust for the purposes of the borough fund, and therefore, that the Corporation of Liverpool were bare trustees for the property in question for public purposes. The mischief of this decision was remedied by the Act of 4 & 5 Vict. c. 48, but unfortunately that Act did not declare the law. Some subsequent decisions of the Court of Q. B. have been marked with much timidity. They have in effect departed from the grounds of the decisions in the *Salter's Load Sluice* case and its attendant cases, but have at the same time attempted by very questionable distinctions to save whole the authority of those cases. Thus in the cases of *Reg. v. Badcock* and *Reg. v. Longwood* there is an attempt to distinguish between the interest of the unlimited public and the interest of

the public limited by the bounds of a county, borough, or parish. At last, in the case of the *Tyne Improvement Commissioners v. Chirton*, the Court of Q. B. recurred to that which is, in my opinion, the true principle, namely, that the only ground of exemption from the statute of Elizabeth is that which is furnished by the rule that the Sovereign is not bound by that statute, and that consequently when valuable property capable of yielding a net rent above what is required for its maintenance is sought to be exempted on the ground that it is occupied by bare trustees for public purposes, the public purposes must be such as are required and created by the Government of the country, and are therefore to be deemed part of the use and service of the Crown. If this be the true criterion of exemption from rateability where the property is valuable, it is clear that the Mersey docks are liable to be rated. In this country many works tending greatly to the convenience and benefit of the public—and, in that sense, public works—are the result and creation of private enterprise, being made or performed by money subscribed by the public on the terms or in the hope of receiving such interest out of the proceeds of the works as will in the judgment of the subscribers make the investment a profitable one. Such is the condition of the Mersey docks, which are in truth property used and occupied for the profit and benefit of a number of persons, and it is the same thing in substance as if the docks had been demised by the subscribers to the trustees on the terms of maintaining the docks and paying to the subscribers a rent equivalent to the interest on their bonds. I am, therefore, clearly of the same opinion with the majority of the learned judges, that the Mersey Docks and Harbour Board are occupiers of the docks and harbour within the true meaning of the word "occupier" in the Act of Elizabeth. The answer to the second question put to the learned judges is in effect a mere consequence of the answer to the first question, for it cannot be pretended that the statute of Elizabeth has been repealed, either expressly or impliedly, by any of the statutes which apply to the Liverpool docks, or that the liability of the trustees or occupiers, which is the result of the true interpretation of the Act of Elizabeth, has been discharged or altered by anything contained in the local statutes. On this head it is unnecessary to say more than that I concur with the observations of the majority of the judges in their elaborate opinion delivered by Mr. Justice Blackburn. The result is, that I humbly move your Lordships to reverse the order of the Court of Ex. Ch. in the case of *Jones v. The Mersey Docks and Harbour Board*, but to affirm it in the case of *The Mersey Docks and Harbour Board v. Cameron*.

Lord CRANWORTH.—My Lords, I concur with my noble and learned friend in thinking that judgment ought to be given for the plts. in error. I have given full attention to the opinions of the learned judges who assisted us at the hearing, and concurring as I do in that delivered by Blackburn, J., on behalf of himself and four of the other five judges, I do not feel it necessary to go into the question at length. That very able opinion seems to me to exhaust the subject. By the statute of Elizabeth the overseers are directed to raise the money necessary for the relief of impotent poor by taxation of (*inter alios*) every occupier of lands in the parish. That the defts. in error are occupiers of land in the parish of Liverpool cannot be doubted, and so, unless there be something to exempt them, they are rateable. The argument on their behalf has been, that though they are occupiers their occupation is not a beneficial occupation, and the statute, it was contended, contemplated only such an occupation as is

beneficial to the occupier, or to some other person or persons for whose behoof the occupier is occupying. If by beneficial occupation is meant any occupation of something valuable—something in its own nature beneficial to some one—I think it is fair to consider that word is impliedly included in the statute. It was not meant to impose the duty of contributing to the relief of the poor on any one merely because he might be the occupier of a barren rock neither yielding nor capable of yielding any profit from its occupation. But I can discover nothing either in the word or in the spirit of the Act exempting from liability the occupier of valuable property merely because the profits of the occupation are not to be enjoyed by him or by any one in whose behoof he is occupying, but are to be devoted to the benefit of the public. In the opinion of the five judges delivered by Blackburn, J., that learned judge has traced with great care and accuracy the progress of the decisions on this subject, and I should be merely wasting the time of the House if I were to proceed to go over again what has been so well done by him. The court seems to me to have fallen into error in the time of Lord Kenyon, if not in that of Lord Mansfield, in proceedings which unfortunately were incapable of being questioned in a court of error. The decisions so made were followed in similar proceedings in the time of Lord Ellenborough and Lord Tenterden. The doctrine on which they rested was shaken in some cases which occurred when Lord Denman was Chief Justice, and eventually were in substance overruled when Lord Campbell presided in the Court of Q. B. In these circumstances, thinking as I do that there is nothing in the statute of Elizabeth expressly or impliedly exempting from rateability the occupiers of valuable property merely because the benefit of the occupation is to go to the public, I think your Lordships ought not to consider yourselves fettered by any decisions of the court below, but that you ought to lay down the law as you think it ought to have been laid down if this question had arisen before any of those decisions had been pronounced. I therefore concur in the motion of my noble and learned friend on the woolsack. To avoid all misconception I wish to add, that there are certain cases to which the observations I have made do not apply. The Crown not being named is not bound by the Act. It follows, therefore, that lands or houses occupied by the Crown, or by servants of the Crown for the purposes of the Crown, are not liable to be rated; and I conceive that it is from confusion between property occupied for public purposes and property occupied by the Crown or servants of the Crown that the mistake has arisen. This principle exempts from rates not only Royal palaces, but also the offices of the Secretaries of State, the Horse Guards, the Post-office, and many similar buildings. On the same ground, police-courts, County Courts, and even county buildings occupied as lodgings at the assizes for the judges, have been held exempt. These decisions, however, have all gone on the ground, more or less sound, that these might all be treated as buildings occupied by servants of the Crown, and for the Crown, extending in some instances the shield of the Crown to what might fitly be described as the public government of the country. In none of these cases was exemption conceded on the ground contended for in the present case. And I cannot but think that the error which has crept into the decisions has arisen from confusing cases like the present with those in which the interests of the Crown or its servants were concerned.

Lord CHELMSFORD.—My Lords, it is impossible, in entering upon the consideration of these appeals, to refrain from an expression of surprise that there



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should arise at the present day, after more than two centuries and a half from the time of the passing of the Act, a necessity for interpreting any part of the 43 Eliz., and yet, from the numerous cases which have been cited in argument at your Lordships' bar, it is evident that the exact meaning of the important word "occupier" in the rating clause of that Act must be regarded as hitherto an unsettled question. Those who have to establish the liability of the docks to be rated to the poor-rate have, with respect to the Liverpool docks, to contend against the authority of a decision probably in 1808, but certainly in 1827, upon the very subject in question. In one of the appeals the latter decision was expressly founded upon a case determined more than thirty years before, and which has since been regarded and acted upon as an unquestionable authority. Under these circumstances the counsel for the parishes might expect that the House would feel the same reluctance to disturb these decisions as was expressed by Tindal, C. J., in *Crease v. Saul*, 2 Q. B. 885, and would say with him, "It would be extremely inconvenient, and, indeed, mischievous, to overrule a class of cases which have been much discussed and sanctioned by many eminent judges, and which are now constantly acted upon, because we might not feel perfectly satisfied with the reason assigned for their decision. If we could permit ourselves to disregard these authorities on that account, we might feel disposed on the same ground to reject others which have put a construction on the 43 Eliz. c. 2, which we were by no means sure it ought to bear if we were now for the first time called upon to explain the meaning of its language. Crompton, J., in delivering the judgment of the Court of Ex. Ch. in the case of *The Mersey Docks and Harbour Board v. Jones and others*, said, with reference to the former decisions, "I think that neither a court of co-ordinate jurisdiction nor a court of error ought to interfere in such a case. If there is any hardship it must be left to the Legislature." By this last observation the learned judge seems to have considered that this House, as well as the courts of original and appellate jurisdiction ought to yield implicitly to the authority of long-established decisions. But, the same reasons for acquiescence did not apply to the different tribunals. The courts rightly abstain from overruling cases which have been long established, because, if they did so, they would only disturb, without finally settling, the law. But, when an appeal from any judgment is made to this House, however they may be warranted by previous authorities, the very object of the appeal being to bring those authorities under review for final determination, the House cannot, upon the principle of *stare decisis* refuse to examine the foundation upon which they rest. It would, in my opinion, have been the duty of your Lordships, even if the current of the decisions had been uniform; but as various cases have been decided, which, with all the endeavours to reconcile them, must still be regarded as conflicting and contradictory, it is absolutely necessary to determine what for the future shall be considered to be the law with reference to rating docks and works of a similar character. The 43 Eliz. c. 2, enacts that the overseers are to raise by taxation of every inhabitant, &c., and of every occupier of lands, houses, &c. in such competent sums as they shall think fit, according to the ability of the parish, the requisite fund for the purposes of the Act. The words, "to rate in such sum as they shall think fit," do not mean, as Tindal, C. J. says in *Marshall v. Pitman*, 9 Bing. 601, that they are to have a power to rate arbitrarily, but to rate the occupier according to the value of his occupation, the inhabitant according to his visible personal property, or as was said in *Early's case*, 2 Bule. 354, the

overseers are to make their taxations and assessments well and truly, and in an equal manner, according to the visible estates, real and personal, of the inhabitants within their town. *Prima facie*, therefore, a liability to the rate would seem to attach upon every occupation from which benefit is derived, and no occupier can claim an exemption unless he can find it in the Act itself, or it arises from some principle of law applicable to all cases. With respect to exemption arising from the Act itself, it is obvious that as the occupier is to be assessed according to his ability, if he derives no benefit of any kind from his occupation, he has no ability in respect of it, and consequently cannot be rateable. The other exemption, which does not arise from the Act itself, but which is found on a general principle of law, applies only to the Crown, which, not being named in the Act, is not bound by it. I am unable to find any ground of exemption from liability to the poor-rate either in the Act itself, or in any principle of law apart from the Act, except the two which I have mentioned; and there is nothing to indicate the intention of the Legislature, that lands and houses occupied for what in some of the cases is rather loosely called public purposes, as contradistinguished from private benefit, should not be liable to the rate. Lord Campbell, in the case of *The Birkenhead Dock Trustees v. Birkenhead Overseers*, 2 El. & Bl. 157, says that the exemption on the ground of public purposes takes its origin from the marginal note of the report of the case of *Rex v. Commissioners of Salter's Load Sluice*. If this is so, it is a remarkable fact, that in following that case as an authority, the courts should have been misled, by confining their attention to the marginal abstract, which certainly conveys a very imperfect if not inaccurate idea of the grounds of the decision. The term "public purposes" is only employed by Lord Kenyon in the *Salter's Load Sluice* case incidentally. The reason given for the judgment is the absence of beneficial occupation. His Lordship says, "the commissioners have a bare naked trust not coupled with any interest." And again, upon the ground upon which the court proceeded in *Rex v. St. Luke's Hospital*, there was no occupier, by which he must have meant no beneficial occupier, for he adds, "the commissioners were mere trustees to superintend the execution of the act without any personal advantage. This reference to the case of *St. Luke's Hospital* shows that the leading idea in the mind of the court was the want of a beneficial occupier, although there does not seem to be a very close analogy between the case of an hospital supported by voluntary subscriptions from which no person who could be regarded as an occupier derived any pecuniary benefit, and the receipt of tolls as a compulsory incident to the occupation by the commissioners of the *Salter's Load Sluice*. The first case in which an occupation for public purposes was expressly stated as the ground of exemption from liability to poor-rate is *R. v. Trustees of the River Weaver Navigation*, 7 B. & C. 70, n., to which the principle of the decision in the case of *R. v. Inhabitants of Liverpool* (the judgment brought into question by this appeal) was held to be applicable. In the case of *R. v. Liverpool Lord Tenterden* proceeded upon the ground of there being no beneficial occupation with respect to which he said the case of *R. v. Commissioners of Salter's Load Sluice* is decisive. But in *R. v. Trustees of Weaver Navigation*, Bayley, J. said, "the surplus tolls remaining over and above the expenses of supporting the navigation were to be applied to the repairing and maintaining of bridges and highways. Those were public purposes, and as no part of the moneys received could be applied to private purposes, these moneys were not rateable in the hands of trustees." In *R. v.*



*Mayor of Liverpool*, 9 B. & E. 435, the Court followed the cases of *R. v. Liverpool* and *R. v. Weaver Navigation*, without expressing any opinion as to the grounds of these decisions, observing "that they felt it to be impossible substantially to distinguish the case before them from those cases, and especially from the latter, and that if they found the principle settled by decisions already made, they felt it to be their duty to act upon them, and not, upon the apprehension of any inconvenient or unforeseen consequences, to question or weaken their authority. In the case of *R. v. Ecmminster*, 12 A. & E. 2, the Court adhered to the decision in *R. v. Mayor of Liverpool*, without any further explanation of the grounds of their judgment. But in a more recent case, *R. v. St. George's, Southwark*, 10 Q. B. 864, Lord Denman said, whether a person is rated as occupier, holder, or possessor of the premises, or as using them, the occupation, holding, possessing, or using them must be beneficial to the parties so rated. It has been settled by several cases that the possessors or occupiers, as trustees of property otherwise rateable, the profits of which they were bound by Act of Parliament to apply to public or charitable purposes, were not rateable to the poor in respect of such property. Now, although Lord Denman, in the case of *R. v. The Mayor of Liverpool*, seems to hint at some distinction between the cases of *R. v. Liverpool* and *R. v. Weaver Navigation*, yet it would appear (especially from his last-mentioned observations) that he considered them to rest upon the same foundation, and that the counsel on both sides at your Lordships' bar were correct in saying that there was no case decided upon the ground of public purposes which was not resolvable into beneficial occupation. But if this is so, it will be impossible to accept the explanation by which decisions apparently inconsistent with the judgment in *R. v. Salter's Load Sluice* and the cases which followed it have been attempted to be reconciled with them. To these cases it is necessary now to turn. The first of them which broke in upon the series of decisions hitherto considered is the case of *The Governors of the Poor of Bristol v. Waite*, 5 A. & E. 8. In deciding the case as they did the judges were probably not aware that they were disregarding the authority of previous decisions, as the *Salter's Load Sluice* case and the other cases founded upon it are not noticed in the argument or in the judgment. But in *R. v. Guardians of Wallingford Union*, 10 A. & E. 259, where those cases were cited, the Court followed the case of *The Governors of the Poor of Bristol v. Waite*, without any attempt to reconcile it with what had been previously decided. In the case of *R. v. Badcock*, 6 Q. B. 787, however, Lord Denman in giving judgment reviewed the authorities which appeared to be conflicting on the one side, the series which followed *Reg. v. The Inhabitants of Liverpool*, and on the other that which commenced with the *Governors of the Poor of Bristol v. Waite*, and observed that in all the first class the public as such, unlimited by the bounds of county, borough, or parish, had substantial and direct interest in the benefit which the application of the funds produced; in the latter the ratepayers, or at most the inhabitants of certain parishes, were alone concerned in the benefit direct or indirect. The distinction was afterwards approved of and adopted by Coleridge, J., in the case of *R. v. Harrogate*, 15 Q. B. 1020. The attempt thus to reconcile the discordant decisions will be regarded as having been completely unsuccessful when it appears that in the first class, instead of all the cases being instances in which the public at large unlimited by the bounds of county, borough, or parish, had an interest, there are found the cases of *R. v. Trustees of the Weaver Navigation*, in which the surplus funds were applied

for the general purposes of the county of Chester, and of *R. v. Mayor of Liverpool*, and *R. v. Ecmminster*, in which the public beyond the bounds of the borough had no interest in the benefit produced by the application of the funds. And the distinction fails altogether if the term "public purposes" as distinguished from private purposes is to be resolved into the question of beneficial occupation, because it would then appear to be immaterial whether the public purposes which exclude the idea of private benefit were of a local or of a general character. The desire of the court, however, not to be bound by the former decisions and yet not to be compelled expressly to overrule them is exhibited in a very striking manner in the case of *R. v. Commissioners of Harrogate*, 15 Q. B. 10, where it was held, that in order to exempt property from liability to poor-rate on the ground of its occupation for public purposes, the benefit must be exclusively public, and that if the occupation was in some degree beneficial to the whole public, yielding additional benefit also to a limited district or community, the property was rateable; as if it could make any difference in point of principle when the occupation is for public purposes, that one portion of the public derived a greater benefit from the application of the funds produced than the rest. After these fruitless endeavours to reconcile the decisions a case arose in which it seemed absolutely necessary to determine whether *R. v. Inhabitants of Liverpool*, and the cases which followed it, were to be submitted to as authorities for the future, or were to be set aside and disregarded. In the case of *The Trustees of the Birkenhead Docks v. The Overseers of Birkenhead*, 2 E. & B. 143, the question to be decided was, whether the commissioners of the Birkenhead docks were liable in respect of their occupation to be rated to the poor-rate. It certainly requires some ingenuity to discover any difference between the Birkenhead docks and the Liverpool docks, the latter of which had been decided, in the case of *R. v. Inhabitants of Liverpool*, not to be rateable. But Lord Campbell held that the cases were distinguishable. He said that the decision in *R. v. The Commissioners of Salter's Load Sluice* could be rested only on the clause in the local Act, which directed the tolls to be applied and disposed of for the several uses and purposes of the said Act, and to no other use and purpose whatsoever. The question was, whether this amounted to a prohibition to apply the tolls to the payment of the poor-rate. And adopting this construction, he added, "We think that the decision in the Liverpool case can only be supported by similar reasoning." It is clear, however, that the cases in question were not decided on any such ground, and it could have been assumed by Lord Campbell only from his desire to escape from the necessity of submitting to them by suggesting a distinction without denying their authority. That distinction was, that in the Birkenhead case the obligation to lower the tolls, which was much relied upon in the Liverpool case, was entirely wanting. It might have been supposed that the decision of the Birkenhead case having proceeded upon this ground, when the subsequent case of *The Tyne Improvement Commissioners v. Overseers of Chirton*, 1 E. & E. 516, was brought before Lord Campbell and the Court of Q. B., in which case the local Acts for making a dock expressly required the commissioners in the event of any surplus remaining after the appropriation of the rates to the purposes of the Act to lower the rates to the extent of such surplus, he would have adhered to the distinction and have held the case to be governed by the authority of *R. v. Inhabitants of Liverpool*. But instead of taking this course, he said that, to hold the dock exempt from rateability, they should have to overrule *Birkenhead Dock Trustees v. Birkenhead Overseers*, and that the

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only distinction between the cases was that in the Birkenhead case the commissioners had power to raise the rates again after having reduced them. In this unsatisfactory state of the authorities, it is evident that the two classes of decisions which have been subjected to this examination cannot stand together, and that it is necessary for your Lordships to determine which of them is agreeable to law. It must not be overlooked that in favour of the exemption of the docks from liability to poor-rate, there is the recital in the Act of 4 & 5 Vict. c. 48, which strongly indicates the opinion of the Legislature that the cases which had held the property of municipal corporations not to be liable to poor-rate had been rightly decided. But, as Lord Campbell said in *Reg. v. Inhabitants of Houghton*, 1 E. & B. 516, a mere recital in an Act of Parliament either of fact or of law is not conclusive, and we are at liberty to consider the fact or the law to be different from the statement in the recital. The question of course depends upon the true meaning of the word "occupier" in the 43 Eliz. c. 2. The words of the Act are as general as possible, "every occupier according to his ability." And Lord Denman, in the case of the *Governors of the Poor of Bristol v. Waite*, 5 A. & E. 1, seems to give a correct description of the effect of those words when, after adverting to the meaning of the term "beneficial occupation," he says, without affecting the precision of an exact definition, it would probably be nearer the truth to say that a presumptive liability arising from occupation is to be explained away in each case. It is impossible not to agree with the observations made by his Lordship in *R. v. Sterry*, 12 A. & E. 92, that no one can review the numerous decisions (which cases somewhat like the one then before him had occasioned) without regretting that the court was ever induced to depart from the simple test which the subject-matter of occupation would in every case have afforded. Whether the occupation was in respect of private or public, or charitable purposes, it would have been wiser to have disregarded, and whenever the subject-matter was found productive to any one to have rated the actual occupant in respect of that produce, I cannot help thinking that the test here suggested was the one intended by the Legislature. By the Act the taxation is to be on every occupier "according to the ability of the parish." The productive occupation of the several occupiers within the parish make up its aggregate ability. If an occupier derives no benefit of any description from his occupation, it forms no part of the general ability of the parish; but if it is productive (although not profitable), there is nothing in the Act which requires the overseers to follow the produce in its subsequent application. The receipt of it constitutes the visible ability of the occupier. As was said by Lord Tenterden in *R. v. Inhabitants of St. Giles, York*, 3 B. & A. 579, if any profit be made the application of it when made is immaterial as to the question of rateability. This seems to be the true distinction which ought to have guided the decisions, and not that between private benefit and public purposes, from the adoption of which all the contrariety in the cases on the subject of beneficial occupation has arisen. It is to be observed that the term beneficial occupation is nowhere to be found in the Act of Elizabeth, and it must have been used in the different cases as synonymous with ability. In this sense, the decisions with regard to St. Luke's and St. Bartholomew's Hospitals, and to chapels and rectory houses, where no pew rents are received, are perfectly intelligible. In none of them could any person in the character of occupier be said to derive any benefit from the occupation. But that the absence of private benefit is no ground of exemption

appears from the cases in which trustees of chapels, who received profit from letting the pews, although they applied it entirely to the purposes of the chapel, were held rateable. And in the recent case of *R. v. Sterry*, 12 A. & E. 84, the trustees of a school, purchased from funds raised by charitable subscriptions and bequests, were held rateable in respect of the school, because no child was admitted to the school without an annual payment of 12*l.*, although the average annual expense with respect to each child was 20*l.* The case of *Salter's Load Sluice* gave the key-note to all the subsequent decisions, which held that the *prima facie* liability of an occupier no longer existed when it was shown that the profits connected with his occupation were applicable to public purposes. Lord Kenyon, in founding his judgment upon *R. v. St. Luke's Hospital*, must have intended to decide that in the case before him there was no beneficial occupier, although he did not advert to the distinction that in the case of St. Luke's there was nothing received by any one by reason of the occupation, while the commissioners of the Salter's Load Sluice were empowered to take tolls for the navigation, which was vested in them. The exemption of an occupier, whose occupation is applicable to public purposes, was thus almost identically introduced, and having been so, it was accepted without much consideration in the subsequent cases. At last, some decisions having taken place which were hard to be reconciled with each other, it became necessary to define with some precision the true principle which ought to govern cases of this description. The distinction was then proposed between general and local public purposes. The difficulty, not to say the impossibility, of reconciling the cases by a distinction of this sort has been already shown. If, as before observed, the ability of the occupier means the personal benefit derived from his occupation, it is as much excluded where the profits of his occupation are applicable to limited public purposes as where they are to be applied to the benefit of the public at large. I am of opinion that, under the words of the 43 Eliz., every occupier of a tenement yielding profit is within the rating clause of the statute, although the tenement be a public work for the general good of the realm, and the profit be directed to be applied exclusively to its maintenance. Having thus expressed my opinion that the Mersey Docks and Harbour Board are liable to be rated for the Liverpool as well as for the Birkenhead docks, it is unnecessary to consider the effect of the different Acts of Parliament by which the trustees were expressly made liable to parochial rates in respect of warehouses to be built, in like manner as the same are or would be payable in respect of warehouses the occupancy of which is beneficial. The provisions of these Acts certainly appear to indicate the opinion of the Legislature that, without them the warehouses would have been exempt from liability to poor-rate as part of the docks enjoying that exemption. But if this liability existed before, the Acts cannot have the effect of taking it away (not by express enactment, but) by mere implication. It is quite true, as Byles, J. has said, that the Act of 20 & 21 Vict. having consolidated the docks at Liverpool and Birkenhead into one estate, and vested the control of them in one public trust, it would be singular if one portion of the property should be rateable and one not rateable under precisely similar circumstances. This undoubtedly would be the result if the decisions of the two cases appealed against were to stand. And the remark exhibits in a striking manner the impossibility of reconciling the decisions which, on the one hand, have exempted the Liverpool docks from liability to poor-rate, and, on the other, have rendered the Birkenhead docks liable to it. By reversing the judgment in the case of the Liverpool

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docks, and by affirming the judgment in that of the Birkenhead docks, the decisions will at last be brought into uniformity, and the statute 43 Eliz. will, in my opinion, receive its proper construction and have its consistent effect and operation.

Lord KINGSDOWN.—My Lords, I concur with my noble and learned friends in the opinions they have expressed.

*Judgment for app. in Jones's case.*

*Judgment for resp. in Cameron's case.*

Solicitors for Mersey Board, *Wright and Venn.*

Solicitors for Jones, *Swift, Wugstaff and Blenkinsop.*

Solicitors for Cameron, *Chester and Urquhart.*

### V. C. WOOD'S COURT.

Reported by W. H. BENNET and R. T. BOULT, Esqrs.,  
Barristers-at-Law.

June 2, 9, 10 and 13, 1865.

THE ATTORNEY-GENERAL at the relation of THE CONSERVATORS OF THE RIVER THAMES v. THE MAYOR, ALDERMEN AND CORPORATION OF KINGSTON-ON-THAMES.

*Injunction—Nuisance—10 & 11 Vict. c. 34—Drainage into a public river.*

*The corporation of Kingston-on-Thames having adopted a new scheme of drainage, whereby a largely increased amount of sewage would be poured into the Thames :*

*Held, on a suit by the Thames Conservancy Board, that the court, having regard to the Towns Improvement Clauses Act 1847, ought not to grant an injunction where there was not evidence of the actual existence or immediate probability of a nuisance, and the suit was dismissed without costs, without prejudice to any future bill when a sufficient case should arise.*

This was a suit by the Attorney-General on the information of the Conservators of the Thames to restrain the defts. the Mayor and Corporation of Kingston-on-Thames from emptying an increasing quantity of sewage into the Thames, so as to create a nuisance to the persons navigating the river or dwelling near it.

By the Thames Conservancy Act 1857 twelve conservators of the Thames were appointed, and all the estate and interest of the mayor and corporation of London in the bed, soil and shores of the river Thames from Staines to Teddington, and all the estate and interest of Her Majesty in the bed, soil and shores of the river Thames from Teddington to Yantlett Creek in Kent (except certain portions) were vested in the conservators.

The 54th section of the Act declared that it should not be lawful for any person to erect, build, or make any embankment, or any erection, building, or work in or upon the bed or shore of the river Thames, or to drive any piles thereon or in the said river, without the permission of the conservators.

The 93rd section gave the conservators authority to cut the banks for the purpose of making and enlarging sewers, and for other purposes, and to permit other persons so to do under such restrictions as the conservators should think proper to impose.

The 166th section enacted that nothing in that Act contained should extend to prejudice, diminish, alter or take away any of the rights, power, or authorities with respect to the regulation of sewers vested in the Commissioners of Sewers within the limits of the Act, or in any person under or by virtue of any Act of Parliament, or to render any person liable to any penalty under the Act for allowing ordinary sewage to flow into the river

Thames; but all such rights, powers, and authorities vested in such commissioners, or person, should be as good, valid and effectual as if the Act had not been passed.

By a lease dated the 26th Dec. 1861, the Mayor and Corporation of Kingston demised to the conservators a slip of ground, therein described as a towing-path, adjoining the river Thames, situate in the parish of Kingston, and containing 858 yards or thereabouts, for the term of seven years from the 20th March 1860, at the yearly rent of 80*l.*, with a covenant by the corporation for the quiet enjoyment.

At the date of the lease, and for some time previously, there had been a drain which (after passing under a part of the towing-path demised by the lease) discharged its contents into the river. The drain (where it passed under the towing-path) was a barrel drain, about two feet only in diameter, and its outfall did not extend into the bed of the river, but was in the bank.

According to the statements in the bill, the drainage of Kingston was, up to April 1864, collected in cesspools, which were from time to time emptied, and only a small quantity of sewage found its way into the Thames through the above-mentioned drain.

On the 31st March 1864 the secretary of the conservators received notice from Mr. Wilkinson, town clerk of Kingston, that the corporation proposed to make certain alterations in the outfall of the drain.

On the 7th April 1864 Mr. Wilkinson sent to the conservators a plan of the proposed alterations: and on the 11th April 1864 four of the members of the conservancy board, with their engineer, went to Kingston, and by appointment met some of the members of the corporation, with their engineer, and received from them a verbal statement of what the corporation proposed to do.

It appeared from the plan sent to the conservators, and from what passed at the meeting of the 11th April, that the corporation proposed to lower the outfall of the drain, and to extend it thirty feet further into the bed of the river, and also to increase the capacity of the drain and outfall, and that they proposed, by means of the drain and outfall (as so enlarged), to discharge into the river a very large quantity of sewage.

The scheme (as determined upon at a meeting of the corporation in April 1864) was to remove the existing cesspools and construct nine miles of new sewers, to connect these sewers with the above-mentioned drain, and so to discharge all the sewage of Kingston into the river.

It appeared from the statements in a schedule to the deft.'s answer, that there were, in April 1864, 1345 houses in the whole of the borough, that 685 of these were drained exclusively by cesspools, without overflow drains, and that 225 were drained exclusively by cesspools with overflow drains into the public sewers; and that 435 houses only were drained exclusively by means of drains that ran into the Thames, or into a stream called Hog's Mill River (also running into the Thames), either directly or by means of the public sewers in the borough.

It appeared also that there were twelve public sewers carrying sewage from the borough into the Thames, but that of these five had been made within the last twenty years, and that there were also a number of private sewers, and that only 110 houses were drained into the river exclusively by means of the above-mentioned drain under the towing-path.

On the 15th April 1864 a meeting of the conservators was held, for the purpose of considering the application made to them on behalf of the defts. as to the alteration of the outfall of the sewer. The conservators considered that the plan of drainage

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proposed by the defts. would be very injurious to the public, and determined to refuse to allow them to alter and extend the outfall as proposed.

Accordingly, on the 19th April, the secretary of the conservators wrote to Mr. Wilkinson, in reference to the proposed new scheme, as follows:

I am instructed to inform you that as the conservators are of opinion that such a discharge would be most damaging to that part of the river, making it rather a filthy drain than a means of healthy enjoyment to a large portion of the public, they will feel it their duty to offer the proposed measure every opposition in their power.

No reply was sent to this letter, but the bill alleged that on the 20th May the conservators were informed for the first time that a large number of men were employed by the defts. in deepening and enlarging the drain near the spot where it passed under the towing-path comprised in the lease of the 26th Dec. 1861, and that thereupon the conservators instructed their solicitors to take such proceedings as might be necessary to prevent any alteration in the banks of the river, or of the towing-path, or any increase in the discharge of sewage into the river.

Although the corporation did not appear to have used the compulsory powers given them by sect. 35 of the Towns Improvement Clauses Act 1847, in constructing drains for all the houses in the borough, yet junctions were placed in the new services opposite nearly every house, so as to give the owners every facility for connecting their drainage with them, and the following notice was placarded about in July 1864:

House Drainage.

All owners of property desirous of draining into the main sewers or otherwise improving the sanitary arrangement of their property as the work proceeds, will oblige by giving the contractor an early intimation thereof, in order that he may provide the necessary junction and arrange for such drainage.

(Signed) S. SHREWSOLE, Contractor.

The bill alleged, that owing to the weir at Teddington, the current of the river was very sluggish, and that the increased quantity of sewage, discharged into the river by the enlarged drain, would, in time, cause an offensive deposit in the river near Teddington, and would also seriously pollute the water of the river, and would be injurious to the health of persons navigating or using the river at or below Kingston, or dwelling on or near the banks of the river at or below that place, and would destroy the fish in the river, and in this and other respects be a great and serious nuisance.

The prayer of the bill was, that the defts. might be restrained from cutting through any portion of the towing-path comprised in the lease of Dec. 1861, or of the banks, bed, or soil of the river Thames, and from erecting or making any sewer, outfall, or other works upon the bed or banks of the river, and in particular from deepening, or enlarging, or extending into the bed of the river Thames, the outfall of the drain, without the permission of the conservators.

That the defts. might be restrained from connecting the new sewers, intended to be constructed by them, with the outfall of the existing drain, and from causing or permitting any sewage which had not theretofore been discharged into the river Thames by means of the aforesaid outfall, to drain or pass into the river Thames by means of the aforesaid outfall or otherwise.

The defts., in their answer, admitted that they proposed, by means of the said new system of drainage, to collect into one sewer (being the drain in question) the sewage which had before been discharged by different sewers, but they stated that by means of flushing, they intended so to dilute and decolorise the sewage, that it would not be a nuisance, and they denied that they intended to enlarge the outfall drain, or to interfere with the towing-path.

The defts. also submitted that, under the Towns Improvement Clauses Act 1847, they had a right to drain the sewage of the borough into the river, that if it was collected and emptied by one sewer into the river as proposed, it would not be a nuisance to the conservators or any other persons.

They also maintained that the corporation of Kingston had for the period of twenty years next before the commencement of the suit, enjoyed as of right, and without interruption, the right as occasion required of their own free will of discharging into the river by means of the outfall of the drain in question all such sewage as they thought fit so to discharge from all or any of the houses within the limits of their borough, as it existed previous to the enlargement thereof by the Kingston-upon-Thames Improvement Act 1855, and that they had enjoyed the like right for the period of forty years next before the commencement of this suit, and that they had a right to discharge into the river by means of such sewers, drains, or openings as they thought fit from time to time to use or make for that purpose, all such sewage as they thought fit so to discharge from all or any of the houses within the aforesaid limits of the borough as it existed previous to the enlargement thereof by the Kingston-upon-Thames Improvement Act 1855.

The defts. also urged the heavy loss which would result to them from any interference with the contract entered into for the construction of the new sewers for 8300*l.*, and stated that the only mode in existence of draining the town was by using the river.

Evidence was adduced on the part of the conservators to show that, owing to the weir at Teddington, the current of the river was very sluggish at and above the place where the outfall drain entered the river, particularly in summer; that the population of Kingston was upwards of 16,000; that at Walton (where the population was only 4000) the stench from the sewer was very offensive; that the population of Kingston was rapidly increasing, showing an increase of 50 per cent. between 1851 and 1861; that the whole of the land in the borough was building land; and that the demand for houses exceeded the supply.

Dr. Letheby, the analytical chemist, stated, in his affidavit, his opinion that, if the proposed scheme were carried out, it would be attended with serious consequences to the quality of the water above Teddington Weir; that it would cause the accumulation of a large quantity of highly offensive mud; that in summer it would render the surface of the water in all probability from the outfall to the weir extremely offensive, and that the emanations from the putrefying mud might have a serious effect on the health of those exposed to its influence; that it would render the water of the river entirely unfit for domestic purposes; that it would most likely destroy the fish, and that the discharge of sewage from the proposed works would become a great public nuisance.

There were also affidavits from gentlemen living on the banks of the river, stating that the proposed new sewage scheme would be a serious nuisance to themselves and those of their neighbours residing on the banks.

Dr. William Odling, in his affidavit, stated that it was his opinion that the proposed discharge of sewage would lead to a large accumulation in the river of highly putrescible mud, which becoming heated by the sun would evolve most offensive emanations prejudicial to the health and comfort of the neighbourhood.

Evidence was also adduced to show that the springs relied upon by the defts. for flushing the sewers were land springs of no great extent, and inadequate for the purpose, and that most probably

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the refuse of gasworks and other manufactures would be discharged into the river, and that, if so, it would have a very prejudicial effect; and that, in consequence of the sewage being discharged in one volume by one sewer outlet, instead of by a number of small drains, the nuisance would be considerably greater than at present; and that the sewer already existing at Surbiton (about a mile above Kingston) rendered the water offensive.

The affidavits filed by the defts. went to show that the greater part of the drainage of the town already went into the river by the public sewers; that owing to the depth of water and the rapidity of the stream, no nuisance would arise from the new scheme of sewage; that the quantity of sewage discharged would, even in the summer months, amount only to 1-400th part of the volume of the river; that the drainage at Surbiton had not created any nuisance; and that many old sewers had been discovered during the recent works, and these were relied upon as showing that the corporation had a prescriptive right to drain into the river.

Dr. Letheby, in his affidavit in reply, stated that he had examined the condition of the river at and below the Surbiton sewer on the 20th July 1864; that where cesspools were used, they retained the most offensive part of the sewage, namely, the solid sedimentary matters which formed the deposits in rivers; that by the proposed plan, more than two tons and a half of solid excrementitious matter would be discharged into the Thames daily, besides the whole of the trade and kitchen refuse of the borough, the drainage from the stables, and the washings of the streets; that the effect would be to cover the stream with such of the excrement as floated, and to form a deposit of black matter which had a tendency to ferment; that the practice of making the rivers of England the receptacle of all the filth of the towns was becoming a monstrous evil, and would be, if not checked and corrected, a national disgrace; for that, although the effect at first was not very marked, yet little by little the solid part of the excrementitious matters accumulated, and in a longer or shorter time became excessively offensive, killing the fish of the stream and destroying the vegetation.

He referred to the diminution of water in the Thames in recent times, in consequence of improved drainage, and said that it was not impossible that, in a dry season, there would be no water to flow over Teddington weir; and that, if this were to occur, the whole of the water at Kingston and Surbiton would soon become a mass of putrefying filth. That he had traced the course of the sewage from the outfall of the Surbiton sewer to a considerable distance below it, and that the effect was to render the water black and turbid, to deposit a large quantity of fœtid mud, and to cover the aquatic plants with the well-known sewer-fungus.

The material clauses of the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34) were

#### Sect. 24 :

The commissioners shall from time to time, subject to the conditions herein contained as to the notice to be given and the plans and estimates to be prepared, cause to be made under the streets such main and other sewers as shall be necessary for the effectual draining of the town or district within the limits of the special Act, and also all such reservoirs, sluices, engines and other works as shall be necessary for cleaning such sewers; and, if needful, they may carry such sewers through and across all underground cellars and vaults under any of the streets, doing as little damage as may be, and making full compensation for any damage done; and if, for completing any of the aforesaid works, it be found necessary to carry them into or through any inclosed or other lands, the commissioners may carry the same into or through such lands accordingly, making full compensation to the owners and occupiers thereof; and they may also cause such sewers to communicate with and empty themselves into the sea or any public river, or they may cause the refuse from such sewers to be conveyed by a proper channel to the most convenient site for its collection and sale for agricultural or other pur-

poses, as may be deemed most expedient, but so that the same shall in no case become a nuisance.

Sect 35, which empowers the commissioners to construct drains from houses where such houses are not

Drained by a sufficient drain or pipe communicating with some sewer, or with the sea, or some public river to the satisfaction of the commissioners.

#### Sect. 36, which directs that

No house or building within the limits of the special Act shall be built upon a lower level than will allow of the drainage of the wash and refuse of such house or building into some sewer belonging to the commissioners . . . or into the sea, or some public river into which the commissioners are empowered to empty their sewers.

#### Sect. 107 :

Nothing in this Act contained shall be construed to render lawful any act or omission on the part of any person which is, or but for this Act would be deemed to be, a nuisance at common law, nor to exempt any person guilty of nuisance at common law from prosecution or action in respect thereof, according to the forms of proceeding at common law, nor from the consequences upon being convicted thereof.

Sir H. Cairns, Q. C. and Cotton, in support of the information, said that the plts. appeared in two capacities. First, as lessees under the corporation of Kingston they asked the interference of the court to protect their property; secondly, on behalf of the public they asked the court to prevent the defts. from polluting the river. They contended that it was shown by the evidence that the increased amount of sewage from the additional number of houses intended to be drained into the river, and the concentration of the sewage and the discharge of it in one place would be most injurious to the river, and cause the greatest discomfort to those navigating the river and dwelling on its banks, even if it did not result in actual danger to their health. As Lord Mansfield observed in *Reg. v. White*, 1 Burr. 337: "It is not necessary that the smell should be unwholesome, it is enough if it renders the enjoyment of life and property uncomfortable." As to the prescriptive right asserted by the corporation to drain into the river whatever sewage they pleased, there was no evidence that the drains in question were made by the corporation, and at any rate there could be no prescription for a nuisance: *Fowler v. Saunders*, 2 Coke, 446.

They also cited

*Calcr v. The Lewisham District Board of Works*, 34 L. J. 74, Q. B.; 10 L. T. Rep. N. S. 235;  
*The Attorney-General v. The Town Council of Birmingham*, 4 K. & J. 528;  
*Elliot v. The North-Eastern Railway Company*, 10 Il. of L. Cas. 333; 8 L. T. Rep. N. S. 337.

*Rolt*, Q. C., *Giffurd*, Q. C. and *Ramadge* for the defts.—The question as to the rights of inhabitants on the banks of navigable rivers to discharge their sewage into them was a most important one, and was now raised for the first time. In all cases where the court had interfered with the powers vested in the commissioners for draining towns, it had been on the ground of some private nuisance. Here there was no nuisance. But assuming that the discharge of sewage into a navigable river was a nuisance, they contended, first, it was a nuisance expressly authorized and directed by the Towns Improvement Clauses Act, 10 & 11 Vict. c. 34, which directs the construction of sewers to empty themselves into the sea or into some public river, and that no house should be built without drainage into such sewers, or into the sea, or into some public river. It was the business of the corporation to see that this was done. The discharge of sewage into a river was no nuisance at common law—the right of discharging sewage into the sea, or into a navigable river, was universal. There was a conflict of evils upon the sewage question, but the health of the inhabitants of the towns must be considered; it would be seriously injured

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unless proper drainage was provided for the town. Secondly, that a right of sewage is a thing which may be prescribed for, and evidence had been given of their prescriptive right to discharge sewage into the river. Thirdly, that no act was done or threatened by the defts. which would create such serious mischief as would entitle the plts. to the interference of the court. The evil, both actual and prospective, was greatly exaggerated in this instance; the amount of solid sewage poured into the river, when compared with the volume of water in the river, was almost infinitesimal in amount. At any rate, the court ought to allow time for ascertaining the actual effect of the proposed scheme before granting the application, which at present was altogether premature. They cited

*Attorney-General v. The Luton Board of Health*,  
2 Jur. N. S. 180;

*The Wandsworth District Board of Works v. London and South-Western Railway Company*, 8 Jur. N. S. 691;

*Biddulph v. The Vestry of St. George's, Hanover-square*, 8 L. T. Rep. N. S. 544; 9 Jur. N. S. 431;

*The Trustees of the Birkenhead Docks v. Laird*, 4 De G. M. & G. 732;

*Wood v. Sutcliffe*, 2 Sim. N. S. 163;

*Earl of Ripon v. Hobart*, 3 My. & K. 169;

*Haines v. Taylor*, 2 Phill. 209;

*Hale De Jure Maris*, c. 8.

*Cotton in reply.*

The VICE-CHANCELLOR said the question raised was whether a system of drainage like that contemplated by the defts. could be an annoyance which the Attorney-General had a right to complain of on behalf of the general public. He thought it was the first time such a question had been raised with regard to a river of the magnitude and importance of the Thames. Large navigable rivers were not formerly recognised with much interest by the Legislature, except for the purpose of navigation, and as the means of draining the surrounding country and thus preventing inundations. These were the two great objects to carry out which the Commissioners of Sewers were established, and so very little could be found with reference to the subject of nuisance that it would be necessary to look to usage to find out to what other uses large navigable streams were adapted. There was the use made of it by individuals for domestic purposes and manufacturing operations, and some of these operations requiring water in a great degree of purity. Then the river was used for watering cattle, and persons living on the banks used the water for drinking. Then the river was used for fishing. As to the right of the public to have the river kept in a fit state for bathing it was not very material to consider that, as it never could be injurious to bathing without being at the same time injurious to much higher rights. Not only had the drainage of the surrounding country been carried into the river, which might have had, to a certain extent, the effect of silting up the bed of the river, but persons had for all time *de facto* used the water for the purpose of carrying off the filth which must be got rid of for the benefit of human health. In saying this he did not intend to imply that the corporation had established any such prescriptive right to discharge the sewage into the river as that set up by their answer. There was no evidence of any such right. On the other hand, there was the fact that the inhabitants of Kingston had been in the habit of getting rid of their superfluous filth by draining it into the river. What, then, was to be done in a case where that filth would be multiplied at least twofold, with an aggravation of the evil from the circumstance that, instead of its being carried into the river by numerous outlets, it would all be collected together

in one sewer. He had no hesitation in saying that if it had been established before him by sufficient evidence that the water had been rendered unfit for cattle to drink or for domestic purposes, then, notwithstanding the Act of 1847, a nuisance would have been created which ought to be arrested by injunction. His Honour then read the 24th section of the Towns Improvement Clauses Act 1847, and said he could not accede to the argument that the words "become a nuisance" were to be confined to the latter alternative of collecting the sewage for sale. Two alternatives were pointed out, discharge into a river or the sea, or collection and sale for agricultural purposes; and in neither case was a nuisance to be created. The effect, therefore, of sect. 24 was, that the commissioners were not to be permitted to drain into a navigable river or the sea so as to create a nuisance. Having stated thus much, what he had to consider was, whether there was in the present case evidence of an actual nuisance committed, or evidence of the extreme probability of a nuisance if that which was being done was allowed to continue. He felt that the difficulty in the way of the plts. was that it was necessary for them to establish the existence of an actual immediate nuisance, and not a mere case of injury some hundred years hence, when chemical contrivances might have been discovered for preventing the evil. Here there was a river which had been used for a variety of purposes, for drainage, for land drainage, for navigation, for domestic purposes and for watering cattle. In a large public river everybody had a right to employ the water as he thought fit for any or all of these purposes. There must necessarily be annoyance to the inhabitants on the banks, which was distinguishable from legal nuisance, and must be submitted to a certain extent. Steamers, for instance, no doubt caused great inconvenience to persons in wherries, but no one thought that that constituted a nuisance. So with respect to bathing or fishing, though persons might be inconvenienced in particular parts of the river, yet such inconvenience would not amount to a nuisance. The question was one of degree, and some slight degree of inconvenience in navigable rivers would not justify the interference of the court. [The V.C. then referred to *Wood v. Sutcliffe*, 2 Sim. N. S. 163; *The Attorney-General v. Sheffield Gas Consumers Company*, 3 De G. M. & G. 804, which showed that where the nuisance was continual, though small, the court would interfere.] Of course, where the evil was of such a magnitude that it affected the health of the inhabitants, as in the case before the court of the river Lea, where sewage equal in amount to the volume of water in the river was being daily poured into the river, and scarlet fever had actually broken out, everything of that kind would be a nuisance, whether the river was navigable or not, and he should at once have interfered: (*The Attorney-General v. The Metropolitan Board of Works*, 9 L. T. Rep. N. S. 130.) His Honour then commented on the evidence, and said that there was nothing very definite as to the present injury, and that what injury there was seemed to be of a slight character. With regard to the Surbiton sewer, the evidence only went to show that for 300 or 400 yards a discolouration of the water could be traced, but not extending over the whole river, as the other side still remained bright and clear. The grievance that was pointed to in the evidence, particularly that of Dr. Letheby and Dr. Olding, was one that was likely to occur hereafter. If the case was really one of immediate danger, what important evidence might have been given. But here there was none of the usual evidence which was always forthcoming in cases of river nuisance, as to death of fish, cattle refusing to drink the water, or bottles

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of water produced in court. Nothing of this kind had taken place. There had been considerable exaggeration on both sides, but looking at the great interests of the water companies, who drew their supplies from the Thames at Kingston, in having the water of the river pure, what important evidence on the subject, if the case was really one of immediate danger, might have been looked for from them. Not a single witness, however, from any one of the water companies had come forward to say that he anticipated any injury. No one said that the water had been rendered unfit for cattle to drink, no one had said that he had been unable to use the water for domestic purposes. When it was found that what had been done at Surbiton was very like what would be done here, and that it had not produced any of those ordinary descriptions of nuisance in which the court had been in the habit of interfering, he should hesitate very much before coming to the conclusion that what had been done at Kingston would produce a nuisance which ought to be interfered with by this court. Though he wholly put aside any idea of prescriptive right in the corporation of Kingston, yet he thought there was evidence of a usage by a considerable portion of the town of draining some of their filth into the Thames. The provisions of the Act of 1847 showed that the mere fact of draining into a navigable river was not in itself to be considered a nuisance, since it was authorised to be done provided no nuisance was thereby occasioned. Besides some means of defecating or deodorising the sewage might be applied before the nuisance actually arose. The Court could not look forward to a lengthened prospective period as to when a possible nuisance might arise. The most he could have done on the present occasion—but he did not think it right to do it—would have been to let the case stand over till Hilary Term, and then have seen whether what was being done would create the evil anticipated. But he did not see any probability of the evil being created in that time, and the court would have full power to deal with the matter when any case of actual nuisance arose. On the present occasion he should dismiss the information, but without costs, as the corporation had set up a strange claim of prescription, and had, or threatened to, cut through the towing-path, and had declined to give any satisfactory answer as to their intention when written to by the plts.' solicitor. He should make the following order:—"The Court, being of opinion that the evidence does not establish the existence of any nuisance with respect to the works executed, or intended to be executed, by the defts., or any case for the interference of the court in respect to nuisance to be apprehended if such works be carried into effect, let the information be dismissed, without prejudice to any proceedings on the part of the Attorney-General or the plts., in the event of such works occasioning a nuisance.

Solicitors: *Frere, Cholmeley and Co.; Wilkinson and Matthews.*

### COURT OF COMMON PLEAS.

Reported by W. MAYD and LUMLEY SMITH, Esqrs.,  
Barristers-at-Law.

Monday, June 5, 1865.

JEFFREYES v. EVANS.

*Game—Right of sporting—Cutting down underwood—Quiet enjoyment.*

*The plt. leased a farm to R. with a reservation to himself of the right of "hunting, shooting, fishing, and sporting" over it, and subsequently granted "the exclusive right of shooting and sporting over, and taking the game, rabbits, and wild fowl upon it," with the quiet enjoyment of such right to the plt.:*

*Held, that this grant included all the animals which were by ordinary usage the subjects of shooting and sporting, and therefore that R., in killing the rabbits, committed a wrongful act, for which the deft. was not liable in an action for breach of covenant for quiet enjoyment.*

*R., whose occupation consisted of between 300 and 400 acres, cut down and grubbed up about forty acres of furze and underwood on his farm:*

*Held, that although the tenant did cut down and grub up the underwood, nevertheless there was no extinction of the plt. from his right of shooting over the land, and therefore that the deft. was not liable for a breach of covenant for quiet enjoyment.*

The declaration set out an indenture, whereby the deft. demised to the plt. a dwelling and lands for a term of seven years (unexpired at the time of action brought), and also the exclusive right of shooting and sporting over, and taking the game, rabbits and wild fowl upon the said premises and upon other lands, with a reservation to the deft., his heirs and assigns, all timber and other trees, underwood, thorns and bushes growing on the premises, with liberty of entering upon any part of the lands, and doing all necessary and convenient acts for the preserving, pruning, felling and carrying away the said timber, &c., making reasonable compensation for all consequential damage or loss to the plt., the plt. paying a certain rent for the same; and the deft. covenanted that the plt. should peaceably and quietly enjoy the said premises without any interruption by the deft. or any persons whomsoever lawfully claiming by or from him. Whereupon the plt. entered, &c.

#### Breach:

That during the said term one Mr. Rees, then lawfully claiming the right to shoot the rabbits in and upon the said manors and lands, through and under the deft., and having a good title to the same through and under him, entered into and upon the said lands, and shot and killed and carried away large quantities of rabbits there, and evicted the plt. from the enjoyment of the said exclusive right of shooting and sporting, and taking the said rabbits, so to him demised and granted as aforesaid; and the plt. further says that the said Mr. Rees, then also lawfully claiming, and, in fact, having, through and under the deft., the right to cut down divers farms, coverts, woods, and plantations in and upon the said manors and lands, over which the plaintiff had, under and by virtue of the said indenture, the exclusive right of shooting and sporting as aforesaid, cut down and carried away and destroyed divers quantities of the said furze, coverts, woods, and plantations, and thereby evicted the plt. from, and disturbed him in, the enjoyment of the said right of shooting and sporting in and over the manor and lands.

#### The pleas were:

1. To first breach, that Rees did not enter the lands and kill the rabbits and evict the plt. from the enjoyment of the said exclusive right of shooting and sporting and taking the rabbits, as alleged. 2. That Rees did not lawfully claim the right, nor had he a good title to shoot the said rabbits upon the manor, as alleged. 3. To second breach, that Rees did not cut down and carry away and destroy the furze, coverts, &c., and thereby evict the plt. from, and disturb him in, the enjoyment of the said right, as alleged. 4. That Rees had not, through and under the deft., the right to cut down the furze, coverts, &c.

#### Issue thereon.

The cause was tried before Blackburn, J., at the Pembrokeshire assizes, when the learned judge left the following questions for the jury:

1. Did the plt. suffer damage in consequence of Rees having exercised the right to shoot the rabbits; and, if so, how much?

2. Did Rees injure the plt.'s right of shooting by cutting furze and underwood; and, if so, what were the damages?

The jury answered in favour of the plt. on both questions, with 18*l.* damages.

The verdict was then entered for the plt. on the first issue, and for the deft. on the second, leave being reserved to move to enter the verdict for 18*l.* on that issue, if, on the true construction of the



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lease, Rees had from the deft. the right to shoot the rabbits; and on the third and fourth issues for the deft., with leave to enter the verdict on them for 18l. if the court should be of opinion that the issues in fact were proved.

A rule having been obtained to set aside the verdict on the second issue, on the ground that, on the true construction of the lease from the deft. to Rees, Rees had the right to kill rabbits; and to set aside the third and fourth issues, and enter them for the plt. for 18l., with leave to move on the ground that the issues were in fact proved, and that on the construction of the said lease Rees had the right to cut furze and underwood, the deft. being at liberty to contend, if necessary, upon the argument of the rule, that the second breach was bad, on the ground that the acts complained of did not amount to any breach of the deft.'s covenant, the final judgment therein should be stayed.

*Hardinge Giffard, Q. C., H. G. Allen, and G. B. Hughes* showed cause against the rule; and

*Bowen and C. Coleridge* appeared in support of it.

The following cases were referred to in the course of the argument:

*Wickham v. Hascher*, 7 M. & W. 633;

*Hawman v. Mockett*, 2 B. & C. 934;

*Birkbeck v. Paget*, 81 Beav. 408;

*Graham v. Ewart*, 11 Ex. 326;

*Spicer v. Barnard*, 1 E. & E. 874;

*R. v. Yates*, 1 Ld. Ray. 151;

*R. v. Thompson*, 2 T. R. 18;

*Padwick v. King*, 7 C. B., N. S., 60; 1 L. T. Rep. N. S. 98;

*Thomas v. Fredericks*, 10 Q. B. 775.

ERLE, C.J.—I am of opinion that this rule should be discharged. The action is brought for breach of a covenant for quiet enjoyment, extending to the shooting which the plt. was to have over the deft.'s farm in the occupation of Rees. The declaration states that Rees held the farm by a lease prior to the grant to the plt., and had a right under that lease to kill the rabbits, which he did, and therefore that the plt. had not quiet enjoyment of his right of shooting. The great point made by the plt. is, that Rees had a right to shoot the rabbits, which right is traversed. Now, I am of opinion that he had no such right; the demise to him was of the farm, with a reservation to the deft. of the exclusive right of hunting, shooting, fishing, and sporting over it; and the deft. has granted that right to the plt. The reservation was in absolute and unqualified terms, and it can hardly be contended that the deft. under it had no right, as he went over the farm, to shoot a rabbit, and I think the ordinary usage in sporting and shooting must be taken to have been granted and reserved to the deft. The question in dispute is, whether the reservation extended beyond what is strictly called "game." That is a word capable of various extensions and restrictions; it is an indefinite word, and has had different meanings at different times, in the earlier statutes including rabbits, but excluding them in the later ones. Had this been a reservation of "game," we might have construed it by the light of the later statutes, which exclude rabbits; but the word "game" is not mentioned in the lease. I would add, that when a tenant takes a farm, with a reservation of game to the landlord, and the landlord increases it to too great an extent, the keeping it down must be a matter of arrangement between him and the landlord. Here there was no such stipulation, and no evidence that the rabbits had increased to any extent. The other point is, whether the deft. has committed a breach of an implied covenant, that his tenant should not cut down the underwood or grub up the furze, such implied covenant being said

to be comprised in the covenant for quiet enjoyment of the shooting. Rees certainly cut down and grubbed up the furze, but that did not, to my mind, constitute an eviction of the plt. from his right of shooting over the thirty or forty acres so dealt with, over which he has the same right as before. It would be absurd to say that there was a breach of such a covenant, if a farmer, who had been in the habit of growing turnips, clover, and other things suitable for partridges, were to give them up and change the nature of his crops. I limit this, however, to the case of a tenant turning thirty or forty acres out of 300 or 400 into cultivation, because if a lessor planted a wood, and stipulated that the lessee should have the shooting in that wood, and then cut it down, it seems to me that there would then be a breach of covenant.

WILLES, J.—I am of the same opinion, and I can see no reason why the words of the reservation should not be understood as applying to all things which generally come within its terms, and shooting rabbits does generally come within them. With regard to the judgment in *Graham v. Ewart*, I have spoken to my brother Martin, in whose words it is expressed. "Game commonly so called" there applies to such things as are usually sported after in contradistinction to animals and small birds, not of that description, such as sparrows, &c. It is clear, therefore, that Rees had not the right to kill the rabbits, and, consequently, on the first point, the plt. fails. Then, as to the other point, the argument for the plt. would have had much weight if the grant had been of wood or underwood, though even then, as at present advised, I should say that the tenant might cut the underwood in the ordinary way. This, however, is only a simple grant in general terms to take such game, rabbits, and wild fowl as might be from time to time on the land, and that does not hinder the landowner from using the land in the ordinary way, and changing from time to time the use to which he puts it. I think, therefore, the cutting of the underwood was not a breach of any covenant implied in the deed of 1860. On both points, therefore, I am of opinion that our judgment should be for the deft.

BYLES and MONTAGUE SMITH, JJ. concurred.

*Rule discharged.*

Friday, June 23, 1865.

THE VESTRY OF MARYLEBONE (apps.) v. VIRET (resp.)

*Sewers—New sewer—Cost of constructing house drains—Metropolis Local Management Act (18 & 19 Vict. c. 120), ss. 69, 73.*

*By sect. 69 of the Metropolis Local Management Act, where the vestry alter any sewer, or provide a new sewer in substitution for one discontinued or closed up, they may close up the private drains and provide new drains in lieu thereof. By sect. 73, if a house be found not to be drained by a sufficient drain communicating with some sewer to the satisfaction of the vestry, and if a sewer of sufficient size be within 100 feet of any part of such house, on a lower level than such house, the vestry may give notice to the owner of the house to construct a drain and such works as shall appear to the vestry requisite, and if the owner of such house neglect or refuse during twenty-eight days after such notice to begin to construct such drain, &c., the vestry may cause the same to be constructed, and recover the expenses incurred thereby from the owner.*

*Several houses drained into an old sewer, there being a new sewer within 100 feet, and the vestry passed a resolution that they were not drained by sufficient*

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*drains communicating with a sewer to their satisfaction, and served notices requiring the owner to construct drains to the new sewer. The owner of one of the houses having refused to do this, the vestry constructed the drains and summoned the owner to show cause why he should not pay the expenses.*

*On a case stated by the magistrate, it was*

*Held, that the alteration of the drains was an alteration in the system of drainage which fell within sect. 69, and that the vestry were liable for the expenses and not the owner of the house.*

This was a case stated by the Marylebone police magistrate. After setting out a summons commanding the resp. to appear and show cause why an order should not be made under the provisions of the Metropolis Management Act 1855 and 1862, for the payment by him to the vestry of the sum of 17*l.* 7*s.* 4*d.*, the case proceeded as follows:

On the hearing of the summons the following facts were proved. John Stephen Viret was the occupier of the said house and premises. Complaint having been made to the vestry of the parish of St. Marylebone as to the drainage of the house and premises, No. 17, Edgware-road, the surveyor of the said vestry, by their direction, examined the drains of the said house and premises, and made a report to the vestry, and the vestry, on the 30th July 1863, after duly considering the matter, came to the following resolution, which was duly entered on their minutes:

Resolved, that the premises Nos. 13, 14, 16 and 17, Edgware-road, and Nos. 33 and 34, Upper Seymour-street, not being drained by sufficient drains communicating with a sewer, and emptying themselves into the same to the satisfaction of the vestry, notices be given to the owners of the respective premises, 13, 14, 16 and 17, Edgware-road, requiring them, pursuant to the 73rd section of the Local Management Act, to drain their premises by separate drains into the front sewer in Edgware-road; and that like notices be given to the owners of the respective premises Nos. 33 and 34, Upper Seymour-street, to drain by separate drains into the sewer in Upper Seymour-street; and that the old drain or sewer at the rear of the above premises in Edgware-road, and under the houses 33 and 34, Upper Seymour-street, be discontinued.

On the 21st Aug. 1863 the following notice was duly served on the said J. S. Viret.

(As nothing turned on the form of the notice, it is not necessary to set it out at length. It gave the resp. notice that his house and premises, No. 17, Edgware-road, were not "drained by a sufficient drain, communicating with a sewer and emptying itself into the same, to the satisfaction of the said vestry, and that there was a sewer within 100 feet of some part of his house and premises on a lower level than the same;" and required him within twenty-eight days to make a covered drain from his house into the sewer in Edgware-road, to the satisfaction of the vestry.)

This notice not having been complied with, the builder, with other persons employed by the vestry, went to the premises in Dec. 1863 for the purpose of doing the work, and the said J. S. Viret refused to allow them to enter such premises.

The following correspondence then took place between the said J. S. Viret and Mr. Greenwell, the vestry clerk:

(The case then set out the letters; the first was from Viret to the vestry, stating that he declined giving them permission to enter his house to make any alterations as to his present mode of drainage, unless the vestry would hold him harmless from all expenses attending the execution of such works. Mr. Greenwell, in his answer, stated that the payment of the expenses the vestry might be put to, in consequence of his non-compliance with the notice, would be required from him as the occupier, pursuant to the provisions of the Metropolis Management Act 1862.)

Shortly after the said J. S. Viret withdrew his opposition, and allowed the agents of the vestry to

enter, who in the said month of December did the work mentioned in the said resolution and notice.

On the 1st Jan. 1864, and also on the 19th Jan. 1864, the following demand was duly served on the said J. S. Viret:

(The notice stated that the drainage works at the resp.'s premises had been completed by the vestry, and that the expense incurred amounted to 17*l.* 7*s.* 4*d.*, and pursuant to the Metropolis Management Act 1862, s. 96, the vestry required the immediate payment of such amount from him.)

The said J. S. Viret refused to comply with the said demand, although there was sufficient rent due to the owner of the said premises No. 17, Edgware-road, out of which he might have deducted the same; he also refused, on application being made to him under the 25 & 26 Vict. c. 102, s. 96, for the same, the name and address of his landlord and the amount of the rent due.

The sum of 17*l.* 7*s.* 4*d.* was a reasonable charge for the work done.

The house and premises in question, No. 17, Edgware-road, together with eighteen other houses, form a block of buildings, seventeen of which drain into a sewer, being a main sewer for the purposes of this case, called the Edgware-road sewer, running in front of the said block of houses along the Edgware-road, and constructed by the Commissioners of Sewers in the year 1839. At the time of the said resolution and notice, and thenceforward until the completion of the work by the vestry as aforesaid, two of such houses, the said house No. 17 being one, did not drain into the Edgware-road sewer, but into an old drain or sewer, for the purposes of this case called the "old drain," which ran at the back thereof and under two of the houses forming such block, and then discharged itself into one of the main sewers.

This old drain was sixty or seventy years old, and decidedly objectionable; it was formerly used for carrying off the drainage of the whole block of houses before mentioned, and in 1859 one Butcher drained into it from a tenement in Adam's-mews at the back of the said block of houses, with the permission of the vestry. It had also been cleansed and flushed by the Commissioners of Sewers in the years 1849 and 1850 upon the representations made by their surveyor.

The effect of the said works of the vestry was to drain the said house and premises No. 17 by a sufficient covered drain, having the branches, the size, the level, the fall and the other properties and incidents required by the 73rd section of the 18 & 19 Vict. c. 120, communicating with and emptying itself into the said Edgware-road sewer, which is of sufficient size within the meaning of the said section, and within twenty-six feet of the front wall of the said house, and is on a lower level than such house and premises.

The vestry also removed and filled up all the drains leading from the interior of the said house and premises, No. 17, Edgware-road, to the old drain, and then cut off all communication therewith from the said premises by bricking up the same.

It was contended before me on behalf of the resp.:

1. That the alteration in his drains was an alteration in the system of drainage, and did not come within the 18 & 19 Vict. c. 120, s. 73, but under sect. 69 of that Act, and that such alteration ought to have been executed at the expense of the parish and not of the resp.

2. That under the 73rd section the vestry is only authorised to require the resp. to make sufficient drains communicating with the old drain or sewer at the back of the said house and premises, that being, as he contended, a sewer, and being nearer to his house and premises than the sewer in the

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Edgware-road. The apps. contended that the old drain was not a "sewer" within the meaning of the statutes, and that if it was, the vestry had nevertheless the right to make the alterations.

3. It was contended, on behalf of the resp., that I had jurisdiction to review the decision of the vestry, and to determine whether or not, before the alterations, the resp.'s house was drained by a sufficient drain communicating with some sewer.

I was of opinion that I had no power to review the decision of the vestry. I also held, that the "old drain" running behind the block of buildings in which the resp.'s house is comprised is a sewer within the meaning of the interpretation clause, 18 & 19 Vict. c. 120, s. 250. That the Commissioners of Sewers had exercised control over it. That the rights of the said commissioners passed to the vestry by the operation of sect. 68 of the same Act, and that in one instance the vestry had used such rights. That the apps. were bound by sect. 69 of the same Act to supply private drains necessary to enable the resp.'s house to drain into the sewer in Edgware-road, and that the app.'s having so done, the resp. was not liable to them for the expenses thereby incurred.

All formal matters were duly proved, and it was solely on the last-mentioned ground that I refused to make the order for the payment of 17l. 7s. 4d.

The apps., being dissatisfied with my decision as being erroneous in point of law, duly gave the notice in writing to state a case, &c.

I have therefore to pray the judgment of the court upon this case.

(Signed)

J. S. MANSFIELD.

*Keane, Q. C. (Poland with him)* for the apps.—The earlier parts of sect. 73 of the Act (18 & 19 Vict. c. 120) are satisfied by the facts of this case. The vestry have found that this is not "a sufficient drain communicating with some sewer and emptying itself into the same" to their satisfaction, and the magistrate cannot review that decision, as it is on a matter which is left to the vestry by the statute, which gives an appeal to the Metropolitan Board of Works. It is said that this is an alteration of the system of drainage, and comes under sect. 69; but where a house is not sufficiently drained and there is a sewer within 100 feet, and on a lower level than such house, then the vestry under sect. 73 may require the owner of such house to make a drain. Sect. 73 proceeds on the assumption that some one responsible for the drains, as distinct from the sewers, does not attend to them. Sect. 69 applies to a case of sufficient drainage interfered with by the vestry, and sect. 73 to insufficient drainage.

*Macnamara* for the resp.—The primary object of the vestry was to substitute a sewer in front of the house for one at the back, and the drains were only altered so as to substitute one sewer for another. They have not required the owner to make his drains sufficient, but to alter his system of private drains for the purpose of the primary object, viz. a change of sewers.

*Keane, Q. C.* in reply.

*WILLES, J.*—I am of opinion that the decision of the magistrate was right, and ought to be affirmed. The question arises on the construction of the 18 & 19 Vict. c. 120, and the question is, if Viret is bound to pay the expense of making certain drains into a new sewer. It appears that the house, in respect of the ownership of which it is attempted to make the resp. liable, was drained for a considerable period into the old sewer and would have continued to do so. The vestry considered the drainage of the house into that sewer unsatisfactory and passed a

resolution under sect. 73 of the statute, that the house was not drained to the satisfaction of the vestry. It further appears that under the direction of the vestry, in whom the drains of the district are vested with very large powers of superintendence, the drains by which this house was formerly drained were destroyed and new drains made into the new sewer, and it is in respect of the expense of the new drains that the question arises. The vestry found under sect. 73 that the house was not drained by a sufficient drain communicating with some sewer and emptying itself into the same to their satisfaction, and they gave notice to Mr. Viret to make a sufficient drain, and the case does come literally within the terms of that section. It further appears, however, that the resolution of the vestry that the house was not sufficiently drained into some sewer was accompanied by a resolution that the old drains and the old sewers should be discontinued, and that which was the object of the vestry was not merely that the drainage of the particular house should be altered, but that the drainage of that house and others should be taken from the old sewer, and so far as that sewer is concerned put an end to. The question arises on sect. 69, which is the section applicable to that state of things, and before I state that section and the opinion to which I have arrived it is right to draw attention to the provisions of the Act, by which we see that while one body has the superintendence of both the drains and the sewers, there is a marked distinction between the former and the latter. The drains are the property of the owners of houses, and the expenses where there were none before, or where they are insufficient, ought to fall on the private individuals who have an interest in the houses. But with respect to sewers, properly so called, which do not relate to private houses, but drain the district generally, the expense of altering them should fall on the rates which are in the nature of a tax on the district; and looking at the statute in that way, no one can doubt but that sect. 73 relates to cases in which the drainage of a particular house is insufficient, and if we look back to sect. 72 the expense of keeping the system of drainage clear is cast upon the vestry, and when that is established we see at once the propriety of vesting in one body the superintendence and power over individual drains and the sewers. The section for doing that is sect. 69; by sect. 69 the vestry of each parish are to repair and maintain the sewers vested in them, and are to cause to be made and maintained such sewers and works as may be necessary for effectually draining their parish or district; then comes a power which I may pass over with the remark that it is a power such as is proper for preventing flooding and effectually draining the district; then the section goes on to enact that it shall be lawful for the vestry to carry such sewers through or across any turnpike-road, or any lands whatsoever, making compensation for any damage done thereby, and then there is a proviso that no new sewer shall be made without the approval of the Board of Works, which superintends the district boards, and there is to be no discontinuance or alteration of any sewer so as to create a nuisance, and if by reason thereof any person shall be deprived of the use of any covered sewer, it shall be the duty of the vestry or district board to provide some other sewer or drain as effectual for his use as the sewer of which he is so deprived. The object of the inquiries which I made in the course of the argument with reference to whether the old drain was closed up was to ascertain if the case fell within that last proviso, as if so, the vestry must make a new drain to the new sewer; but it was agreed that it was not so, and that what was meant by the vestry was not that it

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should be closed up, but that it should be discontinued so far as these houses used it for carrying off their drainage. Then we come to the next proviso, "That where the vestry or district board alter any sewer or provide a new sewer in substitution for a sewer discontinued, closed up, or destroyed, they may contract or otherwise alter the private drains communicating with the sewer so altered, or with the sewer so discontinued, closed up, or destroyed, or may close up or destroy such private drains and provide new drains in lieu thereof." Therefore in the case of the alteration of a sewer such alteration imposes on the vestry the obligation to provide any private individual whose drainage is interfered with an altered or substituted drain as effectual as that previously used. Then we come to the question on which the magistrate decided, was the alteration an improvement of the drains by reason of the existing drains not being sufficient, or was it what the vestry were bound to do as a substituted drain? This is a mixed question of fact and law, and there is no finding upon it, but it does not appear that the drain by which the house formerly drained into the old sewer was an insufficient drain. The finding is, that it was old and unsatisfactory, and one must assume that the new sewer was a benefit; but the reason of that was that the system of drainage was improved—that the new sewer, properly so called, was better than the old one. But to make the owner of the house liable it must be shown that his drain was a bad drain. So much with respect to what is not found. What is found is, that the vestry did do away with the old drains into the old sewer, and did close up those drains so that the house could not drain into the old sewer, and the question is, if that is an alteration within sect. 69? There is in fact an alteration in the drains which would render necessary that which by the proviso the vestry must provide, and I hold that this is an alteration of the old sewers, and there is an obligation on the vestry to substitute a new drain. I consider that what the magistrate decided amounts to a decision in point of fact which I should approve, and which, so far as it is a decision of law, I conceive to be unobjectionable; it was the substitution of a drain for a drain which was altered by the alteration of the old sewer. It was a work rendered necessary by changing the drainage of a number of houses from the old sewer to the new sewer substituted by the vestry. Is it the discharge of an obligation to establish a sufficient drain, or is it an improved system of drainage? Clearly the latter. Looking at the statute I can entertain no doubt on the merits that the work ought to be paid for by the vestry, and not by Mr. Viret. There is one circumstance that the vestry have insisted on through Mr. Keane, that the drains were insufficient drains; assuming that to be so, it must first be considered if it is competent for the magistrate to go into the conclusion of the vestry; the magistrate thought that he could not, and I am far from thinking that he was wrong. If this was an alteration of the sewers, the obligation is on the vestry and not on the owners of the houses.

BYLES, J.—I am of the same opinion, and I think that the magistrate was right and the vestry wrong. The vestry had made a new sewer when there was an old sewer, and to make a connection with the new sewer it was necessary to make drains, and the question is, if the expense of the alteration ought to fall on the vestry or on private individuals. It seems to me that the case falls in every respect within sect. 69. They have made a main drain, and then they have to make drains from every house, and they say, "We cannot put the expense of that on the public, as we have acted under sect. 73;"

but before they could do that they must show that there was not a sufficient drain communicating with "some" sewer. That is not done; the finding is that it does not communicate with "a" particular sewer, but the Act says, "communicating with some sewer." Independent of that, though the vestry have a general jurisdiction, we are bound to see that they had a particular jurisdiction in this case; therefore in every view, with the finding of the magistrate and without, the district should pay.

MONTAGUE SMITH, J.—I am of the same opinion. I think the district should pay, and not the resp. It is said that the resolution of the vestry is conclusive on the facts, but I think that it is not, and on two grounds: it is not conclusive that this is a work under sect. 73, as the finding is not that there was not a sufficient drain to the old sewer, but it condemns the old sewer, and therefore as a necessary consequence the drains connected with it. It cannot be conclusive where the question arises if the facts bring the case within sect. 69 or sect. 73, and it could never be conclusive when the question is if the vestry is to pay or an individual, as then the vestry would by their own finding conclude the question; therefore on those grounds I think that the magistrate was right. Mr. Keane contended that this is a house drain communicating with some sewer, and that though it is a sufficient house drain, yet, if the sewer is insufficient, and there is a sufficient sewer near enough, the vestry may direct a new drain to the new sewer. I think that is not the construction of the Act, but that the construction is, that where there is no house drain or an insufficient drain, the vestry may direct a new house drain to be constructed at the expense of the owner. For these reasons I think our judgment must be for the resp.

*Judgment for the resp.*

Attorney for the apps., *Randall.*

*Monday, June 26, 1865.*

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*Sewers—Compensation for land affected—Transfer of liabilities of Commissioners of Sewers—11 & 12 Vict. c. 112, s. 69—18 & 19 Vict. c. 120, s. 145.*

*By the 11 & 12 Vict. c. 112, s. 38, the Commissioners of Sewers were empowered to construct sewers under any lands whatsoever, making compensation for any damage done thereby. By sect. 69 it was enacted that full compensation should be made out of such rates as the commissioners should direct. By the 18 & 19 Vict. c. 120, s. 145, it was enacted that from and after the commencement of that Act all the duties, powers and authorities vested in the commissioners should cease. By sect. 146, that no action, suit, prosecution, or other proceeding commenced by or against the commissioners should abate, but should continue by or against the Metropolitan Board of Works. By sect. 148 all property, &c., of the commissioners was vested in the Board of Works, and all moneys then due and owing by or recoverable from the said commissioners were made payable by or recoverable from the Board of Works.*

*In 1841, Lady H. being tenant for life of the land in question, leased the same for twenty-one years. In 1864 the Commissioners of Sewers constructed a sewer under the land, having given notice to the tenant, but Lady H. never had notice or knowledge of the construction of the sewer. At the expiration of the lease the plt., then tenant for life, entered into possession of the land, and in the same year commenced building upon it, when he for the first time became aware of the existence of the sewer.*

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*The question raised by this case was, whether the plt. was entitled to compensation from the Metropolitan Board of Works:*

*Held, that he was so entitled.*

This was a special case stated by an arbitrator.

## CASE.

Roger Pettiward, deceased, was in the year 1832, and thence until his death, seised in fee of certain land used as orchard and market garden, situate in the parish of St Mary Abbott, Kensington, in the county of Middlesex.

By his will, dated the 13th May 1833, he devised (*inter alia*) the land in question to trustees, to settle the same in manner by the said will directed.

The said Roger Pettiward died shortly after making his said will. In 1835 the trustees of the will of Roger Pettiward executed a settlement in pursuance of the said will, and Lady Hotham, under and by virtue of the said settlement, became and was tenant for life of the land in question, with power of leasing the same for not more than twenty-one years.

On the 6th Aug. 1841, Lady Hotham, in pursuance of the said power, granted a lease of the land in question to John Poupart for twenty-one years from June 1841.

On the 14th Dec. 1854, the Metropolitan Commissioners of Sewers served upon Mr. Poupart, then in occupation of the land, the following notice.

The notice was to the effect, that the commissioners had ordered certain works, necessary for the drainage of the district, and that for that purpose it was necessary to construct a sewer along and under the land in question, and that certain persons therein named had been authorised by the commissioners to enter upon the said lands for the purpose and object aforesaid.

In pursuance of this notice the said Commissioners of Sewers, acting in execution of the powers vested in them by the 11 & 12 Vict. c. 112, by their servants and agents, entered upon the land in question and constructed under it a sewer, which was completed the 9th Sept. 1856, and having done so restored the surface of the land to its former condition.

Lady Hotham never had notice from any one, or knowledge of the intention to construct this sewer, or that it had been constructed.

Lady Hotham died on the 30th Nov. 1855, and upon her death, the claimant, Robert John Pettiward, became, under the settlement hereinbefore mentioned, tenant for life of the land in question, and at the expiration of the lease to Poupart in 1862, he entered into possession of the said land.

Mr. Pettiward thereupon determined to apply the said land to building purposes, and he accordingly caused to be prepared a plan for the erection of several houses on the property.

After this plan was completed, namely, in Oct. 1862, it became for the first time known to Mr. Pettiward that the sewer had been constructed under the surface of the land. The existence of this sewer rendered it necessary to alter the contemplated scheme for building, and, in fact, diminished the value of the land to the extent of 1500*l*.

Mr. Pettiward now claims from the Metropolitan Board of Works the sum of 1500*l*., as compensation for the damage occasioned to the said land by the construction of the sewer.

By the 11 & 12 Vict. c. 112, s. 38, power was given to the Metropolitan Commissioners of Sewers to construct sewers under any lands whatsoever, making compensation for any damage done thereby, as hereinafter provided.

By the 69th section of the same Act it is enacted that full compensation shall be made out of such rates to be levied under the said Act as the commissioners should by their decree direct to all per-

sons sustaining any damage by reason of the exercise of any of the powers of the said Act, and in case of dispute as to amount the same shall be settled by arbitration in the manner provided by the said Act.

By the Metropolis Local Management Act (18 & 19 Vict. c. 120), sect. 145, it is enacted that from and after the commencement of the said Act all duties, powers and authorities vested in the Metropolitan Commissioners of Sewers shall cease to be so vested.

By sect. 146 it is enacted as follows:

No action, suit, prosecution, or other proceeding whatsoever commenced or carried on by or against the said commissioners shall abate or be discontinued or prejudicially affected by the determination of the powers of such commissioners, but shall continue and take effect in favour of or against the Metropolitan Board of Works in the same manner in all respects as the same would have continued and taken effect in relation to the said commissioners, if this Act had not been passed, and the powers of the said commissioners had continued in full force, and all decrees and orders made and all fines, amercements and penalties imposed and incurred respectively previously to the commencement of this Act shall and may be enforced, levied, recovered and proceeded for, and all administration proceedings commenced previously to the commencement of this Act shall and may be continued, proceeded with and completed, the Metropolitan Board of Works being, in reference to the matters aforesaid, in all respects substituted in the place of the said commissioners.

By sect. 148, it is enacted as follows:

All property, matters and things whatsoever vested in the Metropolitan Commissioners of Sewers, except such sewers as are hereby vested in any vestry or district board, and except such sewers as are not within the limits of the parishes and places mentioned in the schedule to this Act, shall be vested in the Metropolitan Board of Works; and all persons who then owe any money to the said Commissioners of Sewers or to any person on behalf of such commissioners, shall pay the same to the Metropolitan Board of Works or as they may direct, and all moneys then due and owing by or recoverable from the said commissioners shall be paid by or recoverable from the Metropolitan Board of Works, and all contracts, agreements, bonds, covenants and securities theretofore made or entered into with or in favour of or by the said commissioners; and all contracts, agreements, bonds, covenants, and securities made or entered into with or in favour of or by any former or other commissioners which under the said Act of the 11th and 12th years of Her Majesty were to take effect in favour of or against and with reference to the said Metropolitan Commissioners of Sewers and are now in force, shall take effect and may be proceeded on and enforced, as near as circumstances admit, in favour of, by, against and with reference to the Metropolitan Board of Works as the same would have taken effect and might have been proceeded on and enforced in favour of, by, against and with reference to the said Commissioners of Sewers if this Act had not been passed and the powers of such commissioners had continued in full force, and any retiring pension or allowance granted under sect. 27 of the said Act of the 11th and 12th years of Her Majesty shall continue payable on the like terms by the said Metropolitan Board of Works.

By sect. 225 it is enacted, that the amount of any compensation to be made under the said Act by the said Metropolitan Board shall, unless therein otherwise provided, be settled in case of dispute by, and shall be recovered before, two justices, unless the amount of compensation claimed exceed 50*l*., in which case the amount thereof shall be settled by arbitration, according to the provisions of the Lands Clauses Consolidation Act 1845, which are applicable where questions of disputed compensation are authorised or required to be settled by arbitration.

By the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102, s. 106), it is enacted that no writ or process shall be sued out against or served upon, and no proceeding shall be instituted against the Metropolitan Board of Works for anything done or intended to be done under the powers of such board, under the Acts therein mentioned, or the said Act, until the expiration of one calendar month next after notice in writing shall have been served on such board, and every such action and proceeding shall be brought or commenced within six months next after the accrual of the cause of action or ground of claim or demand, and not afterwards.

Mr. Pettiward in Feb. 1863 gave notice to the Metropolitan Board of Works that he desired to

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have his claim settled by arbitration, and as the parties did not concur in the appointment of a single arbitrator he appointed Mr. Charles Leo as the arbitrator to whom the said dispute should be referred and requested the said board also to appoint an arbitrator to whom the said dispute should be referred.

The said board by an instrument under their seal appointed under protest Mr. J. Oakley to act as arbitrator in the matter of the said claim.

The said arbitrators before they entered upon the matters referred to them duly nominated and appointed me as umpire to decide on such matters on which they should differ or which should be referred to me under the provisions of the Lands Clauses Consolidation Act 1845.

It was agreed between the parties that I should state my award in the form of a special case, and I have accordingly done so.

It was also agreed between the parties that if the court should be of opinion that the said Robert John Pettiward is entitled to have any sum of money awarded to him as compensation for the damage occasioned to the land in question by the construction of the said sewer, the amount of such compensation should be 1500*l.* together with the costs of and incident to this arbitration.

If the court shall be of opinion that I have the power under the circumstances above stated to award that the said Robert John Pettiward is entitled to have such compensation awarded to him in this arbitration, I award the sum of 1500*l.* as such compensation, to be paid by the board to the said Robert John Pettiward, together with the costs of and incident to this arbitration.

If on the other hand the court shall be of opinion that the said Robert John Pettiward is not so entitled, I award accordingly.

*Watkin Williams*, for the claimant, contended that the words of the Act were sufficiently comprehensive to transfer all the liabilities of the Commissioners of Sewers to the Metropolitan Board of Works. The only objection to the present case was, that it involved a retrospective rate, but that was provided for by the Act. In *Harrison v. Stickney*, 2 H. of L. Cas. 108, it was held, that there was no rule of law which prohibits retrospective rates, and that the only question was, if the Act under which the rate was made either expressly or impliedly prohibited such a rate. The Act in that case (2 Will. 4, c. 50) used words very similar to those in this Act. He also cited the case of

*The Level of Hull*, 2 Str. 1127.

*Mellish*, Q.C. (*Raymond* with him) for the Board of Works, contended that the Act only applied to causes of action where proceedings were commenced at the time of the passing of the Act, or to liquidated demands. It would be unjust that an entirely different body of ratepayers should have to pay this claim. There was no clause in the Act which transferred any general rights of action, and the words appeared to apply only to moneys and contracts which could be calculated and put down at the time of the passing of the Act, and any persons having claims for unliquidated damages ought to have commenced their actions before the Act came into operation.

*W. Williams* in reply was not called upon.

*WILLES, J.*—I am of opinion that the judgment of the court ought to be for the plt. The only difficulty suggested may arise out of the fact of the powers of the Commissioners of Sewers, under the 11 & 12 Vict. c. 112, having been transferred to the Metropolitan Board under the 18 & 19

Vict. c. 120, but that transfer was not in consequence of any change in the general policy of the Legislature with respect to the subject-matter. From the earliest time it has been an object of interest to the Government of this country, and it has from time to time attracted the attention of the Legislature, that the country should be preserved by an effectual draining and protection from floods and inundations, and commissions have from very early times been issued for the purpose of effecting those beneficial objects, in the interest of the public and at the expense of those of the public who have derived benefit from the works of the sewers. That was the object of the Legislature in the passing of the 11 & 12 Vict. and 18 & 19 Vict. As it was an object which the Legislature did not think fit to accomplish at the expense of private individuals, any special damage which was done to a private individual in the course of making the system of sewers effectual, it was enacted by the 38th section of 11 & 12 Vict. c. 112, should be made good to him by the Commissioners of Sewers exercising the powers of the Act. They were to make improvements, and in the course of doing so to carry their sewers through, across, or under any turnpike roads or any street or place laid out as or intended for a street, or through or under any cellar or vault, which may be under the pavement or carriage way of any street, and (if upon the report of the surveyor it should appear to be necessary) into through or under any land, whatsoever; therefore at the sacrifice so far of private individuals, and of their land. The language is with this qualification, "making compensation for any damage done thereby as hereinafter provided." Now I think it is perfectly well established, that the meaning of the condition "making compensation for any damage done thereby" is, that the making of the compensation should be a condition precedent. The act may be done, and upon the doing of the act, the making of the compensation becomes an obligation, call it a liability or a debt, or what in this case may be considered a more usual term "obligation." Now the compensation is dealt with, and was made more distinctly the subject of obligation, or the part of the Commissioners of Sewers by the 69th section: "full compensation shall be made out of such rates to be levied under this Act as the commissioners shall by their decree direct to all persons sustaining any damage by reason of the exercise of the powers of this Act; and in case of dispute as to amount the same shall be settled by arbitration in the manner provided by this Act." If there be no dispute the damage is to be ascertained, and if the damage can be ascertained, whether by a surveyor or the opinions of skilled persons, the obligation would be to pay the sum in moneys numbered. The obligation is a debt incurred by the commissioners by reason of their exercising the powers of the Act whereby they become liable to make the compensation, but they are not to be personally liable. The compensation is to be paid "out of such rates to be levied under the Act as the commissioners shall by their decree direct." That is to say, the 69th section charges the amount of compensation upon the sewers which it gives the commissioners authority to make. And by the 76th and 77th sections conjointly it should seem, that if the Commissioners of Sewers, under the 11 & 12 Vict. c. 112, were now in existence and capable of exercising their powers, they might make a rate in discharge of the obligation which they incur. The fact that a considerable time has gone by is merely an argument of convenience. It is inconvenient for the debtor who is called upon at a time when he might suppose that claim forgotten. It is also inconvenient to the creditor, because it is more

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difficult for him to establish the existence and the extent of the claim which he makes. Then, as to the absence of any statute of limitations, we can attach no importance to it. The only value of it is that which Mr. Mellish, in his argument, attributed to it, that it was probable that of debts the existence of which might be known, there should be a copy left with the Commissioners of Sewers, or the new board substituted in the year 1855 for the Commissioners of Sewers, who are liable to those, but not to unliquidated liabilities. But that argument, with deference, is not *ad rem*, because the liability might have arisen the very day before the Metropolitan Board stepped into the shoes of the Commissioners of Sewers. The objection would only be dealing with the unliquidated character of the demand, not with the staleness of it. We are dealing with a matter which ought to receive the same consideration in 1865 as it would the day after the Act of 1855 came into force. Now we have to put a construction upon the Act of 1855, and say whether or not the liability has lapsed with the Commissioners of Sewers whom that Act displaced, or whether it has been kept alive against the board which was put in their place. I have already stated that it was a mere transfer for convenience of administering the powers of the Commissioners of Sewers, and not by reason of anything in the principle. There was no reason, therefore, why the metropolitan board, or rather the public whom they represent, should be absolved from any liability to which they were exposed while the direction was in the hands of the Commissioners of Sewers. There is nothing, therefore, in the nature of the case, is there anything in the character of the Act, to induce us to come to such a conclusion; or rather is there anything in the language of the Act, read by the light of these probabilities, to show that it was intended that the obligation should not continue? Now, the first section which appears to be material is sect. 145, by which the Metropolitan Commissioners of Sewers are put an end to. Then, by sect. 146, the new board is to stand in the place of the commissioners. Under sect. 147, they may recover all rates made by the commissioners. By sect. 148, all property vested in the Commissioners of Sewers, except minor sewers vested in the vestries and district boards, is transferred to the new Board of Works, and all persons who owe any money to the Commissioners of Sewers, or to any person on behalf of such commissioners, shall pay the same to the Metropolitan Board of Works, or as they may direct, and all moneys then due and owing by or recoverable from the said commissioners shall be paid by or recoverable from the Metropolitan Board of Works. Stopping at sect. 148, and reading it with its kindred sections, it would seem to be clear that it was the intention of the Legislature that the new board should, with the exception of the minor sewers transferred to minor bodies, stand in the same position as the Commissioners of Sewers. Then comes the section expressing more at large the intention of the Legislature, and inasmuch as the language of sect. 181 is precisely applicable to this case, I do not intend to make further observation on sect. 148. Now, by sect. 181 all mortgages, securities, annuities and other debts, and liabilities, which at or immediately before such determination or expiration may be charged on or payable out of all or any of the rates authorised to be levied thereunder, shall continue in full force and be a charge on the same districts on which they were charged before. Here we have words to express the conclusion which, I think, the justice and good sense of the case would incline one to arrive at. We have the large word "liabilities," and we have that word coupled with a provision

which, as I have shown, is strictly applicable to the obligation of the Commissioners of Sewers to make compensation for the private property which they had taken away or injuriously affected. Then, two arguments have been advanced for the purpose of showing that such might not be the construction of the statute. One of them I have already adverted to; the other is founded upon the doctrine or rule of construction, which may be shortly expressed, *noscitur a sociis*. It is said you find this accompanied by provisions applicable to debts for fixed sums of money, and with machinery that can only be applied to the gradual discharge of such debts; therefore it is said that the word "liabilities" ought to be read liabilities *ejusdem generis*. I felt rather disposed to accede to that argument, but to deny that the liability imposed upon the Commissioners of Sewers by this obligation was of a different character from any other debt which was due by reason of a contract being entered into by them. Suppose a contract for the construction of a large sewer, in which there necessarily must be large expense, for the payment of which the contract provided, but the exact price of which was not determined, you would say the claim for such extras was not a claim in moneys numbered; the contractor might claim 40,000*l.* for that in respect of which he might not get 20,000*l.*, and so the board might well be in doubt as to what sum they should lay by for a sinking fund, as is mentioned in the latter part of the section. It is impossible to confine the section to the case of a debt which had to be precisely ascertained; it would exclude all debts of that character, and debts which were likely to accrue against commissioners of sewers. Therefore I must reject the clause for the sinking fund. I cannot help thinking that which struck my brother Byles' mind is a strong argument the other way; that the section deals distinctly with debts of a liquidated character and all liabilities, because it provides in respect of mortgages, annuities, or debts, leaving out liabilities, that they should have priority as before; that they should be marshalled against one another as before, and the section resumes the word "liabilities" when it comes to give power to the Metropolitan Board to raise from time to time the sums becoming payable under or required for the payment of the said mortgages, annuities, securities, debts and liabilities which it gives power to raise and pay in like manner as the expenses of the board in the execution of the Act. There seems to be, therefore, no reason why this obligation of the commissioners should be extinguished, and there is a reason why it should be kept alive. There is the language of the Act which says so, or at all events is large enough to meet it; and, therefore, I think the right of Mr. Pettiward is not lost, and that he is in a position to claim compensation against the Metropolitan Board of Works for whatever might be the amount of his claim.

BYLES, J.—I am of the same opinion, and I say nothing with respect to the rights of those who represent Mr. Pettiward's estates against the old Commissioners of Sewers. The only question before us is whether the liability of the Metropolitan Commissioners is transferred to the Metropolitan Board. Now, one cannot but approach the consideration of the question with a strong sense of the justice of the claim. The district which would eventually have to pay for the sewer has taken a portion of Mr. Pettiward's estate, or a portion of the value of it. The estate has lost it, and the district has got it. One would look anxiously to see whether there be not in the Act of Parliament some transfer of this liability to the succeeding body. Sect. 148, it is plain, strips the Commissioners of Sewers, the predecessors of the present debts, of all property in



possession or action, all claims of any sort or kind which they may have had, and transfers them to their successors. Now, are not the liabilities transferred? I entirely agree with every word which my brother has said about the construction of sect. 148, which I suppose it is not necessary to enlarge upon. Whatever the effect of those words may be, the general words of sect. 181, which uses the word "liabilities" twice, apply to this case. With respect to the objection of Mr. Mellish, that the power of paying off the principal does not apply to liabilities, with great deference to him it seems to me it does apply to liabilities, for it is a power which is to be exercised from time to time. In the ordinary course of proceedings those liabilities would be turned into debts as they now are. There will be then time for the board to apply the machinery to pay off the principal debt; therefore, I agree that the claimant in this case is entitled to the judgment of the court.

*Judgment for the plt.*

Attorneys for the plt., White and Co.

June 25 and 26, 1865.

PEARSON (app.) v. TAZEWELL (resp.)

*Turnpike Act—Exemption from more than one payment of toll on the same day—Exception—Stage coach—"Public carriage"—Carrier's cart—3 Geo. 4, c. 126, s. 55—16 & 17 Vict. c. 90, schedule D.*

*A local turnpike Act imposed certain tolls on horses drawing (1) any coach, barouche, &c., or other such light carriage (except stage coaches); (2) any stage coach licensed to carry not more than nine passengers; (3) any stage coach licensed to carry more than nine and less than sixteen passengers; (4) any stage coach licensed to carry more than sixteen passengers; (5) any caravan, tilted waggon, tilted cart, or other carriage employed in carrying passengers for a fare; and (6) every stage coach or other public carriage having more passengers than the same is licensed to carry, or having a greater weight of luggage than authorised by law, or having passengers riding on the top of such luggage, double the toll otherwise chargeable. All persons were exempted from payment of toll more than once on the same day, except in respect of "stage coaches and other such public carriages." The resp. was a common carrier passing to and fro from A. to B. three days a-week, with a light covered tilted van on four wheels, drawn by one horse, using it principally and bona fide for the carriage of goods, but, as occasion offered, for the conveyance of passengers also at fixed rates. The resp. did not travel more than four miles an hour, and his cart was not licensed, but paid a duty of 2l. 6s. 8d. under 16 & 17 Vict. c. 90, schedule D.:*

*Held, that, although the resp.'s cart was a "public carriage," it was not principally employed for the conveyance of passengers, and, therefore, not such a public carriage as a stage coach, and therefore it did not come within the clause rendering "stage coaches and other such public carriages" liable to pay successive tolls on passing and repassing through the turnpike-gate.*

*This was a case stated by justices under 20 & 21 Vict. c. 48.*

At a petty sessions holden in and for the borough of Bridgwater, in the county of Somerset, on Monday, the 24th April 1865, before us, the undersigned, &c., two of Her Majesty's justices of the peace in and for the said borough, an information preferred by Jesse Tazewell (hereinafter called the resp.) against Wm. Pearson (hereinafter called the app.), under sect. 55 of the statute 3 Geo. 4, c. 126, charging;

for that he the said app., then being collector of the tolls at the Bridgwater Eastern Turnpike-gate, in the said borough of Bridgwater, did, on the 18th April then inst., demand and take from the said resp. a greater toll, viz. 4½d., than he was authorised to do under the powers of any Act of Parliament, was heard and determined by us the said justices respectively being present, the said app. being also represented by his attorney. And upon such hearing the said app. was duly convicted before us of the said offence, and we adjudged him to pay the sum of 4½d., being the toll excessively taken, the sum of 2s. 6d. to be paid and applied according to law, and also to pay to the said resp. his costs in that behalf. And whereas the said app. being dissatisfied with our determination upon the hearing of the said information as being erroneous in point of law, hath, pursuant to sect. 2 of the statute 20 & 21 Vict. c. 48, applied to us in writing within three days after the said determination to state and sign a case setting forth the facts and the grounds of such our determination as aforesaid, for the opinion thereon of Her Majesty's Court of Common Pleas at Westminster. Now, therefore, we the said justices, in compliance with the said application of the said app. and the provision of the statute, do hereby state and sign such case aforesaid as follows:

At the hearing of the aforesaid information it was proved on the part of the informant, the resp. in this appeal, that he was a common carrier living at Ashcott, about nine miles from Bridgwater, and travelling to Bridgwater and back three days in each week with a light covered one-horse spring tilted van on four wheels, having two movable seats which could be put up and down as occasion required, with a small entrance in front, and which was principally and bona fide used for and in the carrying of goods, wares, or merchandise, whereby he sought his livelihood, but occasionally only used in conveying passengers for hire. And on cross-examination he stated that the said tilted van was capable of conveying as many as six passengers, but the average taken was not more than two. He charged a fare of 9d. to each passenger from Ashcott to Bridgwater, and vice versa, and smaller fares varying with the distance for passengers over shorter portions of his route. That he did not travel more than four miles an hour. That on the 18th April then instant he passed through Bridgwater Eastern gate, kept by app., on his way to Bridgwater with the said tilted van and one horse, and produced a ticket denoting payment of the toll of 4½d. at another gate which clears the app.'s gate. On his return the same day with the same tilted van and the same horse, and having no passenger, the app. demanded of him a back toll of 4½d. on the ground that the said tilted van was a stage coach, or other such public carriage within the meaning of the proviso in the local Act hereinafter mentioned, and the resp. paid it under protest. The resp.'s van is not licensed as a stage coach, but he pays a duty of 2l. 6s. 8d. under schedule D of 16 & 17 Vict. c. 90, which enacts that tolls shall be paid

For every carriage used by any common carrier principally and bona fide for and in the carrying of goods, wares, and merchandise, whereby he shall seek a livelihood, where such carriage shall occasionally only be used in conveying passengers for hire, and in such a manner that the stage coach duty or any composition for the same shall not be payable under any licence by the Commissioners of Inland Revenue, where such last-mentioned carriage shall have four wheels, 2l. 6s. 8d.

The tolls imposed by the Local Turnpike Act, 3 Geo. 4, c. lxx., s. 34, are as follows:

1. For every horse or other beast drawing any coach, barouche, saddle, berlin, landau, chaise, calash, chair, phaeton, caravan, taxed cart, hearse, litter, or other such light carriage (except stage coaches), a sum not exceeding the sum of fourpence halfpenny.

2. For every horse or other beast drawing any stage coach licensed to carry in the whole inside and outside not more

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than nine passengers, a sum not exceeding the sum of fourpence halfpenny.

3. For every horse or other beast drawing any stage coach, licensed to carry on the whole inside and outside more than nine and not exceeding sixteen passengers, a sum not exceeding the sum of sixpence.

4. For every horse or other beast drawing any stage coach licensed to carry in the whole inside and outside more than sixteen passengers, a sum not exceeding the sum of eightpence.

5. For every horse or other beast drawing any caravan, tilted waggon, tilted cart, or other carriage employed in carrying passengers for a fare, a sum not exceeding the sum of fourpence halfpenny.

6. For every stage coach or other public carriage having more passengers than the same is licensed to carry, or having a greater weight of luggage upon the top of the same than is authorised by law, or having passengers riding upon the top of such luggage, double the toll otherwise chargeable upon the horses drawing such coach or other carriage.

By the 39th section it is provided,

That no person shall be subject to the payment of toll more than once in any one day for passing and repassing with the same horse or horses through the same turnpike, except as hereinafter mentioned, such person or persons producing a note or ticket denoting the payment of such toll, and which note or ticket the collectors of the toll are hereby required to deliver gratis on payment of the tolls as hereinafter mentioned.

By the 40th section it is enacted as follows :

Provided nevertheless, and be it further enacted, that the tolls shall be payable for or in respect of all stage-coaches and other such public carriages, licensed or not licensed, for every time of passing and repassing through the same turnpike on the same day, and that the said tolls shall be payable for or in respect of all postchaises and other carriages travelling for hire, for passing and repassing through the same turnpike on the same day upon every time of a new hiring of such post-chaise or carriage last mentioned, on a ticket being produced denoting a new hiring.

It was contended on the part of the deft., the app. in the present appeal, that the back toll was legally chargeable on the ground that the 40th section of the local Act must be held to refer to the tolls imposed by the 2nd, 3rd, 4th, and 5th paragraphs of the 34th section, and not to the 2nd, 3rd, and 4th only, inasmuch as those three paragraphs contemplated only the case of carriages licensed to carry passengers, and that to confine the liability to back toll to such carriages only would render the words "licensed or not licensed" meaningless. The app. further contended that the resp.'s carriage came clearly within the 5th paragraph of the 34th section as a carriage employed in carrying passengers for a fare, and relied on the case of *Eatwell v. Richmond*, 12 L. T. Rep. N. S. 52, as an authority that the tolls were chargeable upon that which is the habit of the carriage, and that as this was a carriage running regularly at stated times, not only for goods, but also for the conveyance of passengers, it was immaterial whether, on any particular occasion, there chanced to be a passenger in the carriage at the time of its passing through the gate, provided, in fact, it was performing one of its regular journeys.

It was also contended that the part of the 40th section referring to postchaises, which were only to be liable to toll upon a fresh hiring, supported the same view. And that the 40th section did not (as had been suggested) apply exclusively to the tolls imposed by the 6th paragraph, which was in the nature of a penal clause. We, however, being of opinion that the resp.'s tilted van was not a "stage coach or other such public carriage licensed or unlicensed" within the meaning of the said 40th section of the said local Act, that it was *bond fide* a carrier's cart used principally for and in the carrying of goods, whereby the said resp. sought his livelihood, and only occasionally used in conveying passengers for hire, and travelling less than four miles an hour, and being assessed as such under 16 & 17 Vict. c. 90, and having no passenger on the occasion in question, was not liable to pay back toll, but was entitled to return free on the same day with the same horse under the 39th section of the local Act; and that the assessment of the resp.'s tilted van under 16 & 17 Vict. c. 90,

and the restriction of travel to four miles an hour, by the Stage Coach Act, prevent it from being classed as a "stage coach or other such public carriage, either licensed or unlicensed." That the term "licensed" applies to coaches properly licensed under the Excise Act, and the term "unlicensed" to coaches defrauding the revenue by not obtaining such licence; whilst in this case the resp. has only a modified licence to carry passengers occasionally with his goods, and the Excise authorities being satisfied, the toll keeper ought to be satisfied also. And that the double toll imposed by the 40th section being on the vehicle, must have reference to the 6th paragraph of the 34th section. That the evidence given before us brought the case within the operation of the statute 3 Geo. 4, c. 126, s. 55, and we gave our determination against the app. in the matter before stated. The question of law arising on the above statement therefore is, was the resp. liable, or not, to pay a second or back toll in respect of his tilted van with the same horse returning the same day without any passenger, under the terms of the said 40th section of the said local Act?

Whereupon the opinion of the said Court of C. P. is asked on the said question of law, whether or not we, the said justices, were correct in our said determination as aforesaid, and as to what further should be done or ordered by the said court in the premises. Given under our hands, &c.

*Campbell Foster* appeared for the apps., and explained and distinguished the two cases recently decided in this court respecting the payment of back toll by vans occasionally carrying passengers, viz.,

*Eatwell v. Richmond*, 12 L. T. Rep. N. S. 52;  
*Comley v. Carpenter*, 1b. 458.

No counsel appeared for the resp.

The Court reserved their judgment till the next day.

*Cur. adv. vult.*

June 26.—WILLES, J. stated shortly the facts of the case.—The court reserved its judgment in order to take time to consider the two cases decided in this court. In the first of them it was decided that a clause imposing double toll on any "stage coach, stage waggon, van, caravan, cart, or other stage carriage for the conveyance of passengers for payment, hire, or reward," applied to licensed stage coaches proper, but not to vans or carts like the resp.'s. In the other case it was decided that a clause imposing double toll on any "stage coach, diligence, van, caravan, or stage waggon, or other stage carriage conveying passengers or goods for pay or reward," did include such a van or cart as the resp.'s. In the latter case the judgment of the court turned on the words "conveying passengers or goods;" and the question was said to be whether the principal object of the employment of the cart was the conveyance of passengers or goods. In the present case the clause imposing double toll applies to "all stage coaches and other such public carriages, licensed or not licensed." It was insisted for the app. that the words "not licensed" included carriages not requiring a licence. On the other hand the argument is that the word "such" restricted the clause to carriages of the same sort as stage coaches—that is to say, carriages the principal object of the employment of which is the carrying of passengers. The magistrates yielded to the latter argument. It must be taken that they held that the resp.'s cart did not require a licence; that it was a cart intended to carry goods, and occasionally passengers; and that on those grounds they held that it was not "such" a carriage as a stage coach. On consideration, we think that that was not an in-

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correct construction of the statute, and therefore their judgment must be affirmed.

BYLES, J.—I am of the same opinion. The 39th section of the local Act exempts all persons from a second payment of toll "except as hereinafter mentioned." Therefore all are exempt except those clearly specified. The only exception is that of "all stage coaches, and other such public carriages, licensed or not licensed." This is not a stage coach, but it is a public carriage. Then is it "such" a public carriage within the words of the Act? It is a carriage used by a common carrier, principally for the carriage of goods and merchandise, and occasionally for carrying passengers. A stage coach is principally used for carrying passengers. Therefore, looking at this exemption, it seems to me that this is not "such" a public carriage as a stage coach. It seems to me that this is a reasonable construction, for if a number of people go each way on the same day, it seems right that they should pay toll, and the toll is charged in the fare.

*Judgment for the resp.*

### COURT OF EXCHEQUER.

R.ported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

June 6, 7, and 9, 1865.

PEARSON v. THE LOCAL BOARD OF HEALTH OF KINGSTON-UPON-HULL.

*Repeal of sect. 53 of the Public Health Act 1848 (11 & 12 Vict. c. 63) by sect. 34 of the Local Government Act 1858 (21 & 22 Vict. c. 98).—Effect of on sect. 101 of the Hull Improvement Act (17 & 18 Vict. c. ci).—Offence under sect. 99 of the latter Act.—Meaning of "back yard or other vacant ground or area" in that section.*

*The 101st section of the Hull Improvement Act 1854 (17 & 18 Vict. c. ci.) requiring certain particulars to be furnished to the local board of health in addition to the particulars required to be stated for the approval of the board by sect. 53 of the Public Health Act 1848 (11 & 12 Vict. c. 63), is not repealed or at all affected, so far as such additional particulars are concerned, by sect. 34 of the Local Government Act 1858, which repeals sect. 53 of the Public Health Act 1848.*

*Seemle, that sect. 99 of the Hull Improvement Act 1848, which enacts that "every house to be constructed shall have a back yard or other vacant ground or area open from the ground upwards of not less than eight feet, extending from the main building for the whole length of such building," points to a yard at the back, and not to an open space at the side of the house; and that the leaving an open space of the requisite width at the side of the building was not a compliance with the terms of sect. 99.*

Special case stated by the stipendiary magistrate of Kingston-upon-Hull, under 20 & 21 Vict. c. 23.

The app. Pearson on the 3rd Feb. 1865 was charged by resp. upon information or summons before the said magistrate with having on the 22nd Nov. 1864 committed an offence under sect. 101 of the Hull Improvement Act 1854 (17 & 18 Vict. c. ci., local and personal), by attempting to carry his plan into execution, and commencing the buildings referred to in such plan, before the plan had been approved by the local board, and upon the hearing of such information the app. was duly convicted of the said offence and adjudged to forfeit and pay 40s. and also 14s. for costs to be levied by distress, if not paid forthwith, with imprisonment for twenty-one days in default of sufficient distress,

unless such sum should be sooner paid. And the app. being dissatisfied, the following case was stated and signed by the said stipendiary police magistrate on the 18th April 1865, for the opinion of the Court of Ex.

The app. was charged with having committed two offences. The offence charged in the first summons was the offence last mentioned in contravention of the provisions of sect. 101 of the Hull Improvement Act 1854, which enacts as follows:

That in addition to the particulars required to be stated for the approval of the local board, by sect. 53 of the Public Health Act 1848, there shall be furnished to such board, by the person intending to build or rebuild any house, or construct any building, a correct plan or plans of the proposed building, drawn to a scale, &c., showing the particulars required by the said Act and this Act, and which plan shall not be carried into execution, nor the building commenced, until the said plan shall have been approved by the local board.

The second summons (to which it is necessary to refer) was for an offence against sect. 99 of the same Local Improvement Act, and charged the app. with having neglected to provide yards or areas of the dimensions required by that section, at the back of the houses built by him, being the same houses, &c., mentioned in the first summons. The words of sect. 99 of the Local Improvement Act 1854 are as follows:

Every house to be hereafter rebuilt, and every house to be hereafter built, at the corner of any street or place, shall have a back yard, or back area thereto, if the local board shall in such case deem it right that any such back yard or back area should be made, and in that case such back yard or back area shall be of such dimensions as the local board shall determine, and every house to be hereafter constructed on vacant ground (not being situate at the corner, &c., or not being the site of any other house erected thereon immediately previous to such construction) shall have a back yard, or other vacant ground and area, open from the ground upwards of not less than eight feet extending from the main building, for the whole length of such building, provided that within that space or area the pantry, coal-house, and privy, not exceeding nine feet in height, and not covering more than forty-eight superficial feet of the above area, may be there constructed.

A plan (annexed to the case) was deposited by the app. at the office of the local board's surveyor on the 20th Oct. 1864, and was laid before the works committee on the 21st, and was not approved by them; and on the 22nd Oct. the surveyor gave notice in writing to the app. that his plan had been presented to the works committee, by whom it was resolved that, as it appeared there would be no open space of eight feet behind such houses, such plan be not approved, but referred to the streets and lighting sub-committee. On the 27th Oct. the proceedings of the works committee were confirmed by the local board, and on the 19th Nov. notice, under the seal of the board, was given by the surveyor to the app. that the decision of the works committee of 21st Oct. that the plan be not approved, was confirmed. Notwithstanding the notices of the 22nd Oct. and 19th Nov. the app., on the 22nd Nov. commenced building, and legal proceedings were, on the 2nd Dec., authorised by the works committee against him for so doing before approval of the plan by the board, which proceedings were subsequently confirmed by the local board on the 29th Dec.

The app. contended before the magistrate that he had received such approval, and it was alleged, on his behalf, that sect. 101 of the Improvement Act 1854 must be read as part of sect. 53 of the Public Health Act 1848 (11 & 12 Vict. c. 63), which latter section had been expressly repealed by sect. 34 of the Local Government Act 1858 (21 & 22 Vict. c. 98), providing, in lieu of procedure under the repealed section, that the local board may make bye-laws, and that the local board had made such bye-laws; that a copy of them was delivered to the app. by authority of the local board to guide him in reference to his said buildings, and that by No. 6 of such bye-laws the local board must, within a certain period, long since elapsed without their doing so, either approve or alter the plan deposited

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as they think necessary for the purpose of the Public Health Act 1848, and the statute incorporated therewith; and that any plan not altered during that period must be considered as approved, and that the local board did not make any alteration, and the fourteen days in the bye-law No. 6 having elapsed, the app. was justified in believing his plan approved.

The local board, contra, contended, that sect. 34 of the Local Government Act 1858 cannot affect sect. 101 of the Hull Improvement Act, for the latter section states that the requirements of it are *in addition* to the particulars required to be stated for the approval of the local board by sect. 53 of the Public Health Act 1848, and are independent of and cannot be read as a part of that section, so as to be affected by a repeal of sect. 53. That by sect. 4 of the Hull Improvement Act, the provisions of sect. 53 of the Public Health Act are incorporated with and to be read as part of the Improvement Act, and so its provisions are reserved to the local board, notwithstanding its repeal. That the power to make bye-laws given by sect. 34 of the Local Government Act 1858, being only given in lieu of the powers contained in the repealed 53rd section of the Public Health Act 1848, and not in cases where recourse may still be had to the exercise of powers in a local Act identical with those in sect. 53, it may be doubted whether the bye-laws relied on by the app. were made under valid authority. But if operative, they could not supersede sect. 101 of the Improvement Act, which was independent of sect. 53 of the Public Health Act, and not repealed, and the local board had the option by sect. 29 of the Local Government Amendment Act 1861 of proceeding thereunder.

The bye-laws annexed to the case were made by the local board in 1860, and confirmed by the Secretary of State, and on certain occasions buildings may have been authorised by the board to be made in accordance therewith, but it did not appear that any such authority had been given within a considerable period now last past. A person calling on behalf of the app. at the surveyor's office, prior to the buildings being commenced, received from the clerk there a paper copy of such bye-laws, but was expressly told that they were not the "regulations of the board" which must guide the app. in his buildings, but such copy was not furnished by or by the authority of the local board.

The printed regulations of the board as to buildings, which are entirely distinct from the bye-laws had been delivered to the app.'s agent, and such printed regulations are in accordance with the provisions of the Hull Improvement Act, sect. 101, and not in accordance with No. 6 of the bye-laws. The local board proceeded in this case solely, in pursuance of the said sect. 101, and not, and never had any intention of acting, under the bye-laws. App. was aware when he began building that his plan was objected to by the local board, because it did not show there would be a back yard or other vacant ground or area *behind* such building, such area being alleged by the local board to be necessary under sect. 99 of the said Improvement Act. There was no evidence before the magistrate indicating that app. believed when he commenced building that the course to be pursued by him as to the depositing and approval of his plan was regulated by the bye-laws. The magistrate found as to the offence under sect. 99, that the buildings had no back yard or back vacant ground or back area of any kind, but a vacant space at the side of each house 16 feet by 8, the depth of the houses being 16 feet, and that such open space was covered by buildings to the extent of 40 feet, such buildings not exceeding 9 feet in height. He found, therefore, that the app. had left the full open space named in the Act

at the *side* of each house, but *none at the back*. In the latter part of sect. 99 the words are "back yard or other vacant ground and area," &c., which may well admit of the construction that it may be at the side, and not at the back. The magistrate found the app. guilty of having committed an offence under sect. 101 of the Hull Improvement Act as first hereinbefore mentioned, but as to the offence under sect. 99, he was not satisfied that the app. had not complied with the literal requirements of the Act, and therefore he found him not guilty on that charge.

The questions for the court are: First, whether, upon the above facts, the magistrate came to a right decision upon the construction of the said 99th section? Secondly, whether upon the above facts (whether right or not in his decision as to the 99th section), he is right in deciding that in point of law the app.'s plan was not approved by the board, and that the app. may be legally convicted under the said 101st section for commencing the buildings before his plan had received the board's approval.

In addition to the sections of the Hull Improvement Act set out in the case the following sections of the Public Health Act 1848, the Hull Improvement Act 1854, and the Local Government Act 1858 were cited and relied on in the arguments, and referred to in the judgment.

The Public Health Act 1848 (11 & 12 Vict. c. 63) s. 53:

Fourteen days at least before beginning to dig or lay out the foundation of or for any new house, or to rebuild any new house pulled down, &c., the person intending so to build or rebuild shall give to the local board of health written notice thereof, together with the level or intended level of the cellars or lowest floor, and the situation and construction of the privies and cesspools to be built, &c. or used in connection with such house, and it shall not be lawful to begin to build, &c. such house or to build, &c. any such privy, &c. until the particulars so required to be stated have been approved by the said local board. And in default of such notice, or if any such house, &c. be built, &c., as aforesaid, without such approval, or in any respect contrary to the provisions of this Act, the offender shall be liable to a penalty not exceeding 50*l.*, and the said local board may, if they shall think fit, cause such house, &c. to be altered, pulled down, or otherwise dealt with as the case may require, and the expenses incurred by them in so doing shall be repaid by the offender, and be recoverable from him in the summary manner hereinafter provided. Provided always, that if the said local board fail to signify their approval or disapproval of the said particulars for the space of fourteen days after receiving such notice, it shall be lawful to proceed according to such notice, if the same be otherwise in accordance with the provisions of this Act.

The Hull Improvement Act 1854 (17 & 18 Vict. c. ci.) sect. 4, enacts,

That the Public Health Act 1848, and the several Acts supplemental thereto, save so far as any of the clauses and provisions thereof respectively are expressly varied, or are repugnant to, or inconsistent with, any of the powers, provisions, or purposes of this Act, and except sect. 1 and sects. 4 to 34, both inclusive, 50, 105, 121, 138, 141, 142, and 152 of the Public Health Act 1848, and except the last proviso with respect to exemptions from rating of sect. 88 of that Act, are incorporated with this Act.

SECT. 103:

That, if any sewer, drain, privy, cesspool, ashpit, building, or other work, be made or suffered to continue contrary to any of the provisions of this Act, or if any person, without the consent of the local board, make, rebuild, clear out, &c., any sewer, &c., which has been ordered by them not to be so made, or (as the case may be) to be demolished, stopped up, or amended, every person so offending shall for every such offence forfeit a sum not exceeding 5*l.*; and for every day after the first during which the offence continues, a sum not exceeding 10*l.*, &c. &c.

The Local Government Act 1858 (21 & 22 Vict. c. 98) sect. 34:

The 53rd and 72nd sections of the Public Health Act 1848 shall be repealed, and in lieu thereof be it enacted as follows: Every local board may make bye-laws with respect to the following matters (that is to say)—1. With respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof. 2. With respect to the structure of walls of new buildings, for securing stability, and the prevention of fire. 3. With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings. 4. With

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respect to the drainage of buildings, to water-closets, privies, ashpits, and cesspools in connection with buildings, and to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation. And they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to giving notices, deposit of plans, &c., by persons intending to lay out streets or construct buildings, as to inspection by the local board, and as to power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws.

The following were the bye-laws on which the app. relied :

2. During the said period of one month the local board shall either approve the said plan and section or alter the same as they think necessary for the purposes of the Public Health Act 1848, and the statutes incorporated therewith, and any plan or section of which notice has been so given, which is not altered during that month, shall be considered as approved by the local board.

3. Fourteen days at least before beginning to dig, &c., foundations of any new buildings, &c., notice thereof with a plan, &c., showing the structure of the walls and space about the building for securing a free ventilation of air, &c., to be given to the local board under penalties for default.

6. During that period of fourteen days the local board shall either approve the plan, &c., or alter the same as they think necessary, &c., and any plan, &c., which is not altered during that period shall be considered as approved by the local board.

*Mellish, Q.C. (with Philbrick) for the resps.*

*P. Thompson, contra, for the app., citing*

*Dwarris on Statutes, 2nd edit. p. 621;*

*Sandeman v. Breach, 9 B. & C. 96; 5 L. J. 298, Q.B.;*

*Whitmore v. Bedford, 5 M. & G. 9; a.c. nom.*

*Whitmore v. Wenlock, 18 L. J. N.S., 56, C.P.;*

*Powell v. Thomas, 11 L. T. Rep. N. S. 786; 84 L. J.*

*71, C.P.;*

*Re v. Manchester Waterworks, 1 B. & C. 680; 8*

*D. & R. 20; in error, nom. Re v. Mosley, 2*

*B. & C. 226; 3 D. & R. 385;*

*Brown v. The Local Board of Health of Holyhead,*

*7 L. T. Rep. N. S. 332; 1 H. & C. 601; 82 L. J.*

*25, Ex., was also referred to.*

The scope and substance of the arguments are contained in the judgments, and therefore it is not necessary to set them out here.

*Cur. adv. vult.*

June 9.—*MARTIN, B.*—With respect to this case, which was argued before my brother Channell and myself on Tuesday and Wednesday last, I believe we are both of opinion that the justice was right, and that the conviction should be affirmed. Now, the charge against the deft. was, that he had commenced a building before a plan which he had submitted to the local board had been approved of by them, which is a matter enacted by the 101st section of the Kingston-upon-Hull Improvement Act 1854. For the purpose of understanding that Act of Parliament, recourse must be had to the Act for promoting public health, passed in the year 1848, the Hull Improvement Act having been passed in the year 1854. This Act of 1848 seems to be the first of these Acts, and amongst other sections contained in it there is the 58rd section, which enacts that "Fourteen days at the least before beginning to dig or lay out the foundations of or for any new house," a certain notice shall be given to the local board of health of the level or intended level of the cellars or lowest floor, and the situation and construction of the privies, &c., to be built or used in connection with such house, and a variety of other matters, and the local board may, if they think fit, cause the house to be altered or pulled down, &c. &c. That Act having been passed in the year 1848, the 101st section of the Hull Improvement Act 1854 enacts that, in addition to the particulars required to be stated for the approval of the local board by the 58rd section of the Public Health Act 1848, there shall be furnished to such board, by the person intending to build or rebuild any house or construct any building, a correct plan or plans of the proposed

building, drawn to a certain scale, "and which plan shall not be carried into execution, nor the building commenced, until the same plan shall have been approved of by the local board." Now, that section being contained in the Hull Improvement Act which passed in 1854, by the 34th section of another and public Act, namely, the Local Government Act 1858 (21 & 22 Vict. c. 98) it was enacted that the 58rd section of the Public Health Act 1848 should be repealed, and in lieu thereof it was enacted as follows: "That every local board may make bye-laws with respect to the following matters, that is to say, the level and width of streets, the structure of walls of new buildings, the sufficiency of the space about them so as to secure proper ventilation, and the drainage of buildings;" and then it enacted, "that they (the local board) may further provide for the observance of the same by enacting therein such provision as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or construct buildings and as to inspection by the local board, provided that no such bye-law shall affect any building, which shall be erected before the date of the Act." The local board of Hull acted upon that power, and made bye-laws which were approved of by Sir George Lewis, the Secretary of State, on the 14th Aug. 1860. They made bye-laws with respect to the giving of notice and the deposit of plans by the person intending to make such streets or to construct buildings. The fifth of such bye-laws directed that fourteen days at least before the beginning to dig or lay the foundation of any new building, &c., the person intending so to build shall give to the local board of health written notice thereof, together with a plan and section of the intended building showing the structure of the walls and space about the building for securing the free circulation of air, and the proposed arrangements for ventilation together with the intended drainage of the building, and the water-closets, privies, ashpits, and cesspools in connection with the building; and whoever offends against this bye-law shall forfeit to the local board a sum not exceeding 5*l.*"; and the sixth bye-law declared that "during that period of fourteen days the local board shall either approve the plan and section, or shall alter the same as they think necessary for the purposes of the Public Health Act 1848 and the statutes incorporated therewith; and any plan or section which is not altered during that period shall be considered as approved by the local board." Now what took place in this case was, that upon the 21st Oct. Mr. Pearson, who proposed to build certain houses within the jurisdiction of the Hull Improvement Act 1854, laid a plan before the local board, which plan showed four houses proposed to be erected, and spaces which were sufficient within the 99th section of the same Act, provided it was not obligatory upon him to have those open spaces at the back. They were of a size sufficient, but they were at the side. Now, that being done upon the 21st Oct., upon the 22nd Oct. a letter was written to him by the surveyor of the Hull local board, dated from the surveyor's office of the local board of Hull, to this effect: "Sir,—I beg to inform you that your plan for the erection of four houses in Villa-place was presented to the works committee yesterday, and it appearing there would be no open space behind such houses, it was resolved that such plan be not approved of, and be referred to the sub-committee." It is also found in the case that the proceedings of the works committee were confirmed by the local board on the 27th Oct. 1864, which was within the fourteen days. What the result of the watching and lighting sub-committee, in opposition to the committee who caused the letter to be written on the 22nd Oct.,

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was we do not know; but, after the expiration of fourteen days, what was done by the first committee (that is, the works committee) was approved of, and that was again approved of by the local board itself. Mr. Pearson thought fit, notwithstanding the communication to him, to proceed to build; and the question is, has he committed an offence within the 101st section of the Hull Improvement Act 1854? We are of opinion that he has. Now, it seems to me, with respect to this matter, that the points made by Mr. Thompson were, first, that the 101st section of the Hull Improvement Act was gone entirely. We think clearly that that is not so, for that section expressly says that, "in addition to the particulars required to be stated for the approval of the local board by the 53rd section by the Public Health Act 1848, the local board shall be furnished with such and such particulars." It seems to me that the repeal of this 53rd section by the 34th section of the Local Government Act 1858 does not at all effect the absolute enactment of the 101st section of the Hull Improvement Act 1854. That 34th section says that the 53rd section shall be repealed, but that bye-laws may be made in lieu thereof; and such bye-laws were made. At first it was supposed that those bye-laws had not been complied with by the local board. I own it seems to me that they have been complied with, almost to the letter. The plans were shown and submitted to the committee and to the local board of health. It has been contended that it was necessary that the local board of health should within fourteen days state that they approved of the plan, or that they ought to have altered it. Now how, by possibility could they alter it? It was impossible to do that. It seems to me it was quite sufficient for them to say, "We disapprove of your plan, and we insist that your open space should be at the back of the house, and not at the side of it; and inasmuch as you have no means of giving an open space at the back, when we tell you that, we tell you not merely that the thing is to be altered, but that it cannot be altered, no alteration can be made in it; and in our judgment, if this house is permitted to be erected in the way you propose, it would be a contravention of the Act of Parliament, by reason of its not having this open space at the back of the house." It seems to me that they have complied with this bye-law in the only way in which, by possibility, they could have complied with it. If they could have altered the plan so as to have shown an open space at the back, it may be they ought to have done that, although it would have left the intermediate space between the two sets of houses, the two proposed buildings, unoccupied at the time. I think the bye-law was substantially complied with, and that within fourteen days of the deposit of the plan they have altered it by stating, "We disapprove of this open space to be at the side, and we will insist upon its being at the back." Mr. Thompson argued, and he seems to have argued to a considerable extent to the satisfaction of the justice, that the 99th section of the Hull Improvement Act does not enact that the yard or open space shall be at the back. My own impression as to the true construction of this section (although one would desire in a matter of this kind that everything really should be enacted in such language that those who run may read, and that there should be no discussion about it) is, that it is unfortunate that there were any words introduced such as the words, "or other vacant ground and area," which raise this discussion. I think, construing this Act of Parliament (as I have more than once said I think it ought to be construed) with a view of ascertaining what is the real meaning of the Legislature, taken with the circumstances ascertained, that the open space should be at the back of the house because it was to extend "from the

main building for the whole length of the building;" and that, coupled with the 97th section, shows that what the Legislature really desired was, that there should be an open space of twenty feet in front, and an open space to that extent at the back, so that there should be a thorough ventilation for the use of the inhabitants of houses of this character and description. In my judgment, therefore, I think that there was an offence against the 101st section, and that it was a building made contrary to the provisions of this Act, for it was made contrary to a provision which enacted that before anything was done it should be approved of by the local board. I think, when the local board has the jurisdiction, which is clearly given to them in this case, to exercise a judgment with respect to the matter, that the deft. had no right in the face of that disapproval to take the matter into his own hands, and in direct defiance of the disapproval of the local board to proceed with his building. If, in reality, the local board were wrong, I imagine the app.'s proper mode would have been by a proceeding in the Court of Q. B. to compel the local board to act in pursuance of the Act of Parliament. For these reasons, I think the conviction of the justice was correct, and that we ought to answer sufficient of the questions which he proposes in the affirmative, and in support of his conviction. It is not, I think, necessary for us, as I have before said, to give an absolutely conclusive judgment upon the 99th section, and I own it would require much argument to convince me that Mr. Mellish's argument is not right, viz., that the "vacant ground and area" must be at the back of the building.

CHANNELL, B.—I also agree with my brother Martin in thinking that the conviction in the first case should be affirmed. The information charges that the deft., being a person intending to build certain houses described in the information furnished to the local board of health a correct plan of such proposed building, as required by the statute; but that he unlawfully commenced such building before the said plan was approved by the said local board. That is the offence which is charged in the information. The question is, whether the deft., on the facts before us, can be said to have been guilty of that offence so as to render himself liable to a penalty. Now the penalty is imposed by the 103rd section of the Hull Improvement Act, if it is imposed at all. I will consider presently the argument which has been addressed to us upon the question, whether the words of the 103rd section are large enough and distinct enough to hit the offence which the information charges against the deft. I will consider that question presently and secondly. But the offence under the Act is a different question from the one whether the penalty clause (sect. 103) is large enough to include it. The offence charged in the information under the Act, is the offence of commencing the building before the plan which the deft. had submitted to the board of health had been approved of by them. That seems to me to render it necessary to consider the two sections of the Act together, the 101st section and the 99th section. Now it was said with reference to the 101st section that it had dropped altogether. The argument was, if I understood it, that the machinery contemplated by the 101st section could no longer be carried out, and that the section must be considered as one that was now to be excluded from our consideration; and the ground on which we were asked to come to that conclusion was, that the 101st section provided that, in addition to certain particulars required to be stated by the 53rd section of the Public Health Act 1848, there should be also furnished such other particulars as are required by the Kingston-upon-Hull Improvement Act. Then it

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was said that by an Act which passed in the year 1853, the 53rd section of the Public Health Act had been repealed, and that the necessary and unavoidable consequence of the repeal of that 53rd section was to render entirely nugatory the 101st section of the Hull Improvement Act, so far as that Act required additional particulars to be delivered. I cannot accede to that argument. It appears to me that, of the particulars which were delivered, the plan required to be delivered by the 101st section was one which the board of health had not approved of; then the case is so far an offence under the Act, although a doubt may arise how far the provisions of the Board of Health Act are preserved and continued stringent and operative by virtue of the bye-laws that were made. Now then we must consider the 99th section and, if I were called upon to give a decisive opinion upon that point, I should adopt the argument which Mr. Mellish has suggested, namely, that this pointed to a yard *at the back* of the house, and not to an open space *at the side*. I agree with respect to the words "shall have a *back yard*," that there, "yard" is associated with the word "back;" but when we come to the next words, "*or other vacant ground and area*," it does not say "*vacant ground and area at the back*," and, so far as that goes, it gives rise to the doubt that has been forcibly pressed upon us by Mr. Thompson. But, although those words, so far considered, let in a little doubt and difficulty, they are to my mind considerably, if not entirely, cleared up by the other words to be found in the next line, "*extending from the main building for the whole length of such building*." I therefore agree that, when we look at the other clauses of the Act which seem to throw some light upon the subject, it was intended to provide for a yard or open space *at the back*, and not one at the side. This is giving a construction to the Act which would tend to carry out its main object, which contemplates the erection of many houses in the same line fronting what may be called a street, houses adjoining and contiguous to each other, and the object of the Act will be best attained, as I think, by holding it to apply to the area or yard *at the back*. Supposing that to be the construction of the Act, it seems to me that the offence which this information charges is established as against the deft., because the matter was one over which and upon which the board of health had a right to express their opinion. It was not, as it appears to me, a matter entirely foreign to their official duties, and if they had a right to take this matter into their consideration and to disapprove of the plan, then it appears to me that the offence charged in the information is sufficiently established to call upon us to support the conviction. Then comes in the still further question, namely, was the plan in point of fact disapproved of? Now, I think the plan was disapproved of. I do not propose to repeat what my brother Martin has said upon the subject; but it appears to me, upon the facts stated in this case, that there was, in point of fact, a notification by them to the app. that the plan which he had so sent in for consideration to the board of health was one which they would not approve of. The argument was that, applying the provisions of the bye-laws, the plan was not disapproved of within fourteen days, but it was taken and approved of. Now I think there is sufficient evidence to show that a competent body, of competent authority, did within fourteen days disapprove of the plan that was submitted to it. Although it was sent to another committee to consider, the concurrence of the second body in the disapproval of the first could not, in my opinion, render the disapproval communicated by the first body other than a disapproval within the section. There is only one other question to be considered, namely, whether, sup-

posing an offence upon these facts is made out contrary to the provisions of the Act, there is any section in the Act which enables a magistrate summarily to convict in the penalty in which the magistrate has here convicted. I am not at all blind to the force of the argument which has been addressed to us by Mr. Thompson as to the meaning which, ordinarily would be attached to the word "building" in the 103rd section. I concur in the view thrown out early in the course of the argument of the second case by the Lord Chief Baron (although his Lordship did not hear the argument on the first case, he did hear the argument on the second, but both cases involve points common to both), when his Lordship intimated, at first, that looking at the 103rd section alone, the word "building" could not properly receive that construction which the resp. contended for in order to support this conviction. If I were limited to the view to be gathered from the 103rd section only, I should certainly feel the force of the first impression upon the subject, and of the argument which Mr. Thompson has pressed upon us. Admitting the maxim of *nosctur a sociis* in construing words of this description, such as the word "building," I feel myself quite at liberty to go into the earlier sections of the Act of Parliament, and not to limit the word "building" simply to that interpretation which ought to be put upon it if I looked only at the words which precede it in the 103rd section. I think the sects. 96, 97, and 98 fully entitle us, without infringing the ordinary rule of construction, to put a larger construction upon the word "building" than in the 103rd section Mr. Thompson has admitted. I think there is a good deal in the argument suggested by Mr. Mellish, that in a given order the statute proceeds to deal with the different matters, "sewers, &c.," in one, "drains" in another, "privies" in another, "cess-pools" in another, "ashpits" in another, and last "buildings," buildings being a much more comprehensive term, and involving sects. 96, 97, and 98; and therefore we are clearly entitled to hold that the word "building" in sect. 103 carries with it that meaning which would support the information. I come to this conclusion more satisfactorily to myself, believing that it does not infringe upon any well-known settled rules of law, and that we are carrying out what I cannot in my own mind doubt was the intention and the policy of the Legislature in passing this Act. I think, therefore, that the conviction should be affirmed.

MARTIN, B.—If we are to give a formal answer to the questions, the answer to the first is, that we decline to give any answer to it; but that upon the above statement we think, whether the justice was right or wrong in his decision as to the construction of the 99th section, that his decision that the deft.'s plan was not approved by the board is in point of law right, and that the app. was legally convicted under the 101st section for commencing to build without the consent of the board.

POLLOCK, C. B. and BRAMWELL, B. were not present during any part of the argument.

— Judgment for the resp.

June 7 and 23, 1865.

SAME v. SAME.

*The Hull Improvement Act 1854 (17 & 18 Vict. c. ci.) ss. 97 and 103—Construction of—Offence under sect. 97, whether within the penalty clause, sect. 103.*

*To constitute an offence within the penalty clause (sect. 103) of the Hull Improvement Act 1854 (17 & 18 Vict. c. ci.), which enacts that "if any building be made or suffered to continue contrary to any of*



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*the provisions of this Act, every person so offending shall for every such offence forfeit a sum not exceeding 5*l.*, and for every day after the first during which the offence continues, a sum not exceeding 10*s.*, the building must have been made, as well as continued, contrary to the Act; and therefore the offence, under sect. 97 of the Act, of using as a dwelling-house, without the previous consent of the local board, a house without the requisite street or clear open space in front thereof, is not comprehended within the penalty clause, sect. 108.*

*So held by Pollock, C. B., Bramwell, and Channell, BB. (dissentiente Martin, B.)*

Subsequently to the charges contained in the previous special case, the app. on the 17th March 1865 was charged by the resps. with an offence against sect. 97 of the Hull Improvement Act, by having, on the 9th March, unlawfully caused to be used as a dwelling-house a certain building without the previous consent of such board, there not being, or adjoining or belonging thereto, or occupied therewith, either a street or a clear open space in and to the full extent of the front thereof, not less than twenty feet in width; and upon hearing of the information the app. was duly convicted before the said magistrate and adjudged to forfeit and pay 1*l.* 1*s.* and 6*d.* for costs to be levied by distress, &c., with imprisonment, &c., as in the previous case, in default of sufficient distress, &c., whereupon at the app.'s request the following case was stated and signed by the said magistrate on the 27th April 1865.

Upon the hearing of the above charge the whole of the evidence affecting the two former summonses in the previous case was, at request of the app. and by consent of the resps., agreed to be taken as proved. The magistrate expressed his opinion that the evidence adduced in reference to the charges under sects. 101 and 99 could not affect the legal liabilities of the app. under sect. 97, as the plans furnished by him under sect. 101 related only to buildings then intended to be erected, and in no wise affected the use of such buildings, the legal provisions as to which are contained in sect. 97. But if the court should consider such course desirable or proper, it may be assumed that the magistrate finds all the facts found by him in the previous case as to the offence under sect. 101 as facts also found in the present case.

The facts found by him as to the present case are as follows:

The words of sect. 97 of the Hull Improvement Act are as follows:

That any building after the commencement of this Act built, or any building after, &c., rebuilt (except on the site of a building used immediately before the pulling down thereof as a dwelling-house, or any part thereof respectively, or any building before the commencement of this Act built and not then used as a dwelling-house, or any part thereof, shall not, without the previous consent of the local board, be used as a dwelling-house, except only during such time as there is adjoining or belonging thereto, or occupied therewith, either a street or a clear open space in and to the full extent of the front thereof, and of not less than twenty feet in width, and no building not at present occupied as a dwelling-house shall be converted into a dwelling-house without previous notice and plan being deposited and approved by the local board precisely as required for the construction of new houses and buildings.

App. had recently built four dwelling-houses in Villa-place, not on the site of any dwelling-house previously pulled down. Legal proceedings have recently been taken by the local board against app. for commencing the same before approval of his plan. Subsequently to the conviction of app. in such proceedings he completed his houses, and has since caused them to be used as dwelling-houses without the previous consent of the local board. There are houses in Villa-place opposite to app.'s four houses, which were built prior to the passing of the Hull Improvement Act, 17 & 18 Vict. c. ci., and have been

continuously and now are occupied by different tenants.

Villa-place is entered from the Hessele-road, such entrance, for the space of fifty-six feet being 10 feet 6 inches wide, and bounded west by a dead wall, east by west end of a dwelling-house facing the Hessele-road. Villa-place commences at the end of such fifty-six feet from the Hessele-road, and previously to the erection of app.'s four houses consisted on the west of a row of ten houses, east of open palisadings, which were boundaries of gardens belonging to houses in a parallel line to, but sixty feet and upwards from the said row west of Villa-place. From the palisades to the said row, west of Villa-place there was a space of seventeen feet. There are no houses east of that space seventeen feet in a line with the palisades, except those recently built by app. Such seventeen feet space is bounded west by the row of ten houses, east by the palisades and boundaries, and by the app.'s four houses which are in a continuation of the line of such palisades. Part of such seventeen feet is appropriated as gardens or inclosures in front of the row of ten houses west of Villa-place, of the width of four feet, which gardens are bounded east for the whole length of the ten houses by an iron railing set in stone; and part of such seventeen feet is appropriated as a flagged footway, two feet wide, adjoining such railings, for the whole length of the ten houses, and the remainder of such space of ten feet six inches, bounded east in part by the palisades in front of the gardens east of such road, and in other part by the app.'s four houses. At the end of the ten houses farthest from Hessele-road, there is a wall built partially across such space of seventeen feet to the extent of (the said small four gardens and flagging) six feet or thereabouts, leaving a gateway ten feet wide or thereabouts (in continuation of the said road ten feet six wide), through which carts, &c. can pass to the parts beyond, which at present are not built upon on the west side, and carts, &c., passing through such gateway can turn so as to go back to the Hessele-road. But there was no evidence as to the ownership of such parts beyond, nor as to the right of carts, &c. having business at any of the houses in Villa-place to pass through such gateway for the purpose of turning as aforesaid.

The magistrate found on these facts that there was never a street nor a clear open space adjoining or belonging to the app.'s four houses, or occupied therewith, in and to the full extent of the front thereof, and of not less than twenty feet in width; the only space in front thereof, including garden, flagging, and roadway, being only seventeen feet from app.'s houses to the opposite houses.

The questions for the court, upon the facts, are:

1. Whether there is, in point of law, adjoining or belonging to the said four houses or occupied therewith, a street.
2. Whether it is necessary that such street to the full extent of the front of such four houses should be of not less than twenty feet wide.
3. Whether the magistrate was right in deciding that, in point of law, an offence has been committed by app. by causing his houses to be used as dwelling-houses without the previous consent of the local board.

The penalty clause, sect. 108, of the Hull Improvement Act 1854 is as follows:

If any sewer, drain, privy, cesspool, ashpit, building, or other work be made or suffered to continue contrary to any of the provisions of this Act, or if any person without the consent of the local board make, rebuild, clear out, &c., any sewer, &c., which has been ordered by them not to be so made or, as the case may be, to be demolished, stopped up, or amended, every person so offending shall, for every such offence, forfeit a sum not exceeding 5*l.*, and for every day after the first during which the offence continues a sum not exceeding 10*s.*, &c.

[Ex.]

CATOR v. THE BOARD OF WORKS FOR THE LEWISHAM DISTRICT.

[Ex. Ch.]

*Mellish, Q.C. (with Philbrick)* argued for the resps.

*P. Thompson, contra*, for the app., citing the cases which he had cited in the previous case.

*Cur. adv. vult.*

June 23.—The Court differing in opinion, the following judgments were now delivered *seriatim* by the learned judges:

**BRAMWELL, B.**—In this case, my Lord Chief Baron, my brother Channell, and myself are of opinion, I believe I may say upon the same grounds, that our judgment should be given for the app.; that is to say, that the conviction cannot be sustained. I may say that every point was disposed of upon the hearing, except that one point upon which we think judgment should be given for the app.; and really the matter may be very shortly stated. It is this: that the offences under sect. 97 of the Kingston-upon-Hull Improvement Act are not comprehended in the penalty clause, sect. 103. The offence under sect. 97, which the app. has committed, is the offence of using as a dwelling-house, without the previous consent of the local board, a house without a street or clear open space to the full extent in front thereof of not less than twenty feet in length. Of that he has been convicted, and we think the penalty clause does not apply to it, and for this reason: the penalty clause says, "Any sewer, drain, privy, cesspool, ashpit, or building" (which we think would apply to a house) *to be made or suffered to continue* contrary to any provision in this Act, then the person shall be subject to a penalty. Still we think that the expressions there show that there can be no *suffering to continue* contrary to the Act except where there be a *making* contrary to the Act, and if a person could not be liable to the penalty of 5*l.* "for every such offence," neither can he be liable to forfeit "every day after the first during which the offence continues a sum not exceeding 10*s.*" In other words, we think there is no offence within this section, unless it is an offence where the building has been made contrary to the Act, as well as continued; and where the offender, or some offender, would be liable for an original making, as well as the same offender, or some other, for a continuing. We think, I was going to say with some confidence, that the *using* of a building as a dwelling-house without this prescribed space is certainly not a making—it could not be a making—within the 103rd section, and therefore neither can the continuing to use it be a continuing contrary to the provisions of that Act or of sect. 103. We think, therefore, that the penalty clause does not apply to that offence of which the app. has been convicted, and the only proceedings that can be taken against him are those which can be taken in the case of a man infringing an Act of Parliament where no specific penalty is provided for the offence.

**CHANNELL, B.**—I concur in the judgment just delivered as the judgment of Pollock, C. B., Bramwell, B., and myself. I wish only to add this, that I have given the case great attention, and it has been one to me of a very anxious kind; but, having decided, as we did upon the argument, that the party had committed an offence against the Act, I was, as I always am, extremely desirous, if I possibly could, to concur in the view which my brother Martin has taken; because, having decided the party to be guilty of the offence under the Act, it would be most desirable to do so under the 103rd section, and to hold him liable to the penalty, and not to leave him, as he is now left, to the process of an indictment because it is not under the 103rd section, the language of which, I confess,

is not in my judgment large enough to include this case. I am therefore obliged to concur in the judgment of Pollock, C. B. and my brother Bramwell.

**MARTIN, B.**—I own I very much regret this decision, as it seems to me it is the result of a most astute verbal criticism upon the clause of the Act of Parliament, which was clearly intended by the Legislature to cover this case. It is merely held not to do so in consequence of an alleged defect of language in it. The facts are these: the Act of Parliament is a Hull Improvement Act, and it is made an offence by the 97th section to use as a dwelling-house, without the consent of the local board, a house which has not adjoining to it a street or open space of not less than twenty feet. That is what is the offence, and the statement of the learned justice, which was admitted to contain his adjudication, shows clearly that this was a house of that character, and it is directly and admittedly contrary to the plain enactment of the Act of Parliament. The question is, whether or not the building and using this house as a dwelling-house is a building "made or suffered to continue" contrary to the terms of the section. The section imposing the penalty contains the words I have just read. It seems to me that, if it was used as a dwelling-house, it was thereby made a building for dwelling in contrary to the Act, and that if a part had been an office or an outhouse, or anything of that sort, if it had been converted into this dwelling-house, and had not this required space of twenty feet before it, it would be thereby made a building, that is to say, a building for dwelling in, which would be contrary to the Act of Parliament; and that is what the facts are. As I say, the objection taken is the result of a most astute verbal criticism, and as I am satisfied that the Legislature intended to impose a penalty upon all offences contrary to the provisions contained in the sections from 88 to 102 inclusive, in my judgment it would be mercy to the app. and to others similarly circumstanced, so to hold it, rather than subject them to the peril of indictments to be preferred and to be carried on at the expense of the town of Hull. I am quite prepared to hold, and thereby, in my judgment, to do a very great act of mercy, that it was within the 103rd section with reference to persons in Hull who have houses similarly circumstanced. It appears to me, therefore, that I should affirm the conviction.

*Judgment for the app.*

Attorneys for the app. (in both cases), *Hampton and Burgin*, 8, John-street, Bedford-row, agents for *Pettingell and Ayre*, Hull.

Attorneys for the resps. (in both cases), *Cutliffes and Beaumont*, Chancery-lane.

## EXCHEQUER CHAMBER.

Reported by JOHN THOMPSON, Esq., Barristers-at-Law.

### ERROR FROM THE QUEEN'S BENCH.

Monday, Nov. 28, 1865.

(Before ERLE, C. J., POLLOCK, C. B., BRAMWELL and CHANNELL, BB., BYLES and KEATING, JJ., and PIGOTT, B.)

CATOR v. THE BOARD OF WORKS FOR THE LEWISHAM DISTRICT.

*Metropolis Local Management Act—18 & 19 Vict. c. 120, s. 86—Works causing damage out of the district—Remedy.*

*A local board of works, in executing drainage works in their district, polluted a stream, which in its onward*

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course flowed through the plt.'s land out of the district, and by such pollution caused an injury to the plt. :

*Held* (reversing the judgment of the Q. B., 10 L. T. Rep. N. S. 235), that the plt.'s remedy was by action, and not under the compensation clauses of the Metropolis Local Management Act; the local board not having any power to foul a stream belonging to other persons (*Pollock, C.B. and Pigott, B. dissentientibus.*)

Writ of error upon a judgment of the Court of Q. B. in favour of the defts.

A special case was stated for the opinion of the Court of Q. B. in pursuance of an agreement at the trial, when a verdict was formally directed for the plt.

#### Declaration :

That lands of the plt. were in the occupation of certain persons as his tenants, the reversion thereof belonging to the plt., and that a stream called the Poole River and County Bridge Stream did flow and ought of right to flow without being fouled and polluted near to and through the said lands; that the plt. and his tenants were entitled to the benefit of the water of the said stream, and to have the said stream flow and run without being so fouled and polluted. That defts. wrongfully caused and permitted large quantities of filth, soil, &c. to flow permanently into the said stream, whereby the same became and was permanently fouled and polluted, and impure and unfit for domestic or other necessary purposes, &c.

#### Fourth plea :

That the several acts, matters, and things whereof the plt. complains were lawfully done and caused and permitted to be done by the defts. under and in exercise of the powers contained in and given by the 18 & 19 Vict. c. 120 (the Metropolis Local Management Act).

The other pleadings in the action are immaterial.

The following case was stated for the opinion of the Court of Q. B.

The plt. is owner of the reversion of certain lands through which flow a stream called the Poole River, and of a watercourse which is known by the name of the County Bridge Stream. The defts. are the Board of Works for the Lewisham District, constituted on the 1st Jan. 1856, under the Metropolis Management Act 1855 (18 & 19 Vict. c. 120).

The Poole river is a natural stream of considerable width and depth. The County-bridge stream flows in a deep dyke or ditch, and except in wet weather is narrow and shallow. The plt.'s lands are not within the defts.' district, nor within the area to which the Metropolis Local Management Act applies. The injury of which the plt. complains is, the pollution of the County-bridge stream and the Poole river by the discharge through the sewers constructed by the defts., of large quantities of filth into the said watercourse called the County-bridge stream, which joins the Poole river at a point about 400 yards from the outfall of the sewers. It is admitted that the flow of filth into the plt.'s watercourse and stream is such an injury to the reversion as would entitle him to maintain this action if the remedy by action be not taken away by the Metropolis Management Act 1855. Prior to the year 1852 but few houses had been built in the district over which the jurisdiction of the defts. as a board of works now extends. The sewage from some of these houses escaped either by open drains cut for the purpose or by percolation through the soil into open watercourses. These watercourses had a common outfall through a culvert, which has existed for more than twenty years, into the County-bridge stream, and a small quantity of the sewage which escaped into the watercourse was carried into the County-bridge stream, and thence into the Poole river, but without fouling either to any appreciable extent.

In the year 1852 the erection of the Crystal Palace at Sydenham was commenced, and in that and the following years a great number of new houses were built within the defts.' district. A great portion of the sewage from the Crystal Palace

and from the new houses was carried off in the same manner as the drainage of the houses previously built, i.e., through the open watercourses, and thence through the culvert before mentioned into the County-bridge stream. The flow of sewage into the County-bridge stream was consequently increased, and the effect was to pollute the latter, and also the Poole river, to an appreciable but not to a serious extent. The open watercourses continued to be used for the drainage of a large number of buildings within the defts.' district down to the year 1859. About that time the condition of the watercourses had become a serious nuisance to the inhabitants of the district. Large quantities of filth accumulated in them, the effluvia from which was of the worst description, and in many places the adjacent soil was overflowed and saturated with offensive matter. In order to put an end to the further use of the open watercourses for purposes of drainage, and to provide efficient means for the drainage of the whole district, the defts. in the years 1859 and 1860, caused a number of underground sewers to be constructed, the operation of which as regards the plt.'s stream and watercourse is the subject of complaint in this action.

In many instances the defts.' sewers run in the same direction, and follow nearly the same course as the old watercourses. The outfall of both is the same, i.e., through the before-mentioned culvert into the County-bridge stream. The mouth of the culvert is within the area of the defts.' jurisdiction, but is very close to the boundary. In addition to the sewers constructed by the defts., the defts. further adopted into their plan of drainage, and took under their control, certain underground sewers, which had been constructed for the drainage of houses built by the Anerley Building Society, on an estate within the defts.' district called the Anerley Building Estate. They had been originally constructed in the year 1856, with an outfall into one of the open watercourses before mentioned. In the year 1859, the defts.' provided a new outfall for them into a sewer which the defts. had substituted for the watercourse. The new system of sewers adopted by the defts. has prevented the accumulation and flow of filth in the open watercourses, and has effectually provided for the drainage of the defts.' district, but the quantity of filth carried into the County-bridge stream, and thence into the river Poole, was when this action was brought, and still is, vastly in excess of what had reached it before the sewers were constructed. The effect of the increased discharge from the sewers into the County-bridge stream and the Poole river as aforesaid, is to render them foul, stinking, and wholly unfit for cattle, or ordinary domestic purposes.

The question for the opinion of the Court of Q. B. was, whether, under the circumstances of this case, the plt. could maintain this action against the defts., and that court held that he could not, and thereupon gave judgment for the defts.

To reverse that judgment the plt. brought a writ of error.

*Bovill Q.C. (Lush, Q. C. and Murphy with him) for the plt. in error.*

*Mellish (Raymond with him) for the defts. in error.*

The arguments and the authorities cited will be found in the report of the case in the court below, 10 L. T. Rep. N. S. 235.

*Cur. adv. vult.*

*Pigott, B.*—This was an appeal from the judgment of the Court of Q. B. upon a special case. The material facts stated by the case are, that the plt. was the owner of lands through which flowed

the Poole river, and a watercourse called the County-bridge stream. The defts. are the Board of Works of the Lewisham district, constituted on the 1st Jan. 1856, under the Metropolis Local Management Act 1855. The plt.'s lands are not within the defts.' district, nor within the area of the Metropolis Local Management Act. The plt. complains of the pollution of the County-bridge stream and the Poole river by the discharge, through sewers constructed by the defts., of filth into the watercourse which joins the Poole river four hundred yards from the outfall of the sewers. Prior to 1852 there were few houses in the district of the defts.' board, and only a small quantity of sewage found its way, by open watercourses through a culvert (which had existed for more than twenty years), into the County-bridge stream, and thence into the Poole river, but without fouling them to any appreciable extent. In 1852, and subsequently, the houses have greatly increased, and the sewage was carried off in the same way, through the same open watercourses and culvert, and, being increased, the effect was to pollute the County-bridge stream and the Poole river to an appreciable, but not a serious, extent. But in 1859 the open watercourses had become a serious nuisance to the inhabitants of the district. Large quantities of filth accumulated in them, the effluvia from which were of the worst description, and in many places the adjacent soil was overflowed and saturated with offensive matter. To put an end to the further use of the open watercourse, and to provide efficient drainage, the defts., in 1859 and 1860, executed the works mentioned in the case, availing themselves of the County-bridge stream to carry off the sewage. For the drainage of the houses of the Anerley Society, which since 1856 had been drained into one of the open watercourses, the defts. had also made an outfall into a sewer which was by them substituted for the watercourse. The effect of the new and additional drainage made by them has been to cause a quantity of offensive matter to pass into the County-bridge stream and Poole river to an extent to cause a substantial injury to the plt.'s streams, but has effectually provided for the drainage of the defts.' district. For the injury so caused the plt. brought his action, which resulted in the statement of this special case. The defts. contended that the plt. is not entitled to maintain an action, but must proceed for compensation for the injury under the 86th section of the statute 18 & 19 Vict. c. 120. It cannot be disputed that he is entitled to be compensated in some way, and the question which we have to determine really depends on the proper construction which should be put upon that statute. In my judgment the effect of the 86th section of the statute is to throw upon the district board the duty of draining and covering the open watercourses which are above described, and gives them power to do so by such works to be constructed in their own district as are necessary for the abatement of the nuisances. The mode of doing the work is not pointed out; but the board are left to do what is necessary by "draining, cleansing, covering, or filling up." I think also that the works for draining the new houses of the Anerley estate are not distinguishable from the rest. They are within the district, and were previously drained by means of one of the open watercourses, and which was a nuisance there. So far as the works which have been constructed within their district are concerned, it appears to me that they are authorised by the statute. I now come to consider the question of the outfall into the streams of the plt., the lawfulness of which depends on the language of the proviso. The language appears to me large enough to include every mode in which water rights may be prejudicially affected by sewerage works; and I cannot

distinguish between streams within or without the local district. It is true there is no express permission given to use watercourses for outfalls, nor, in my opinion, was it to be expected that there would be. But, on the other hand, there is no prohibition on the subject, although the Legislature must be taken to have been well aware of the universal custom to drain towns by these outlets. I therefore think that I am justified in construing the provisions of this legislation (so far as the language used will admit of it) with reference to the existing and well-known state of things at the time; and, in my opinion, the terms used in the proviso include cases of polluting water by throwing sewage matter into it. The 150th section rather supports this view by empowering district boards to contract for the removal of any weirs or other obstruction to the flow of water "whereby sewage is impeded." Mr. Lush argued that the proviso would be satisfied by our holding that the interference meant to include obstructions, but not the polluting of water. I cannot, however, see any reason for such a distinction, or that we are justified in putting an arbitrary limit to the plain language employed. Indeed, it seems to me that, bearing in mind that sewerage is the subject-matter of the legislation, when the statute contemplates water rights as being prejudicially affected thereby, it would be more likely to point to pollution as the prejudicial cause than to obstruction or other interference. The proviso does in fact contemplate that the works authorised to be done would cause injury to private rights, and therefore the Legislature, having authorised the parties to proceed in this form, provides for compensation. I further think that, to adopt Mr. Lush's argument would be a virtual repeal of this section, for even without increasing the area of the drainage the board would by merely converting an open watercourse into a barrel-drain so confine the sewage matter and prevent percolation that the nuisance at the outfall would be increased and the liability to an action thus incurred. In fact it is to this as one cause in connection with the increase of new houses in the district, that the plt.'s injury is attributable; for the board have not changed the course of the sewage or point of outfall. The case does not state that the defts. could have sent the outfall in any other direction. By the view I take I believe I am only giving effect to the provisions of the Legislature, who have taken care that no private right shall be affected without ample compensation. The plt. may be deprived of the private enjoyment of his property to some extent, but he is only in the condition, now daily acted upon, of being called on to yield a private right for the public benefit for as full a compensation as a jury may please to give him. The judgment of the Court of Q. B. ought therefore, in my opinion, to be affirmed; but I speak with diffidence on the subject, finding so many of my learned brethren take a contrary view.

BYLES, J.—I am of opinion that the plt. is entitled to the judgment of the court. The question is, whether the defts. below can pour off any amount of sewage from their own land, including the sewage of any district above them, into a private stream situated beyond the limit of their district; and I may add, to any distance below. The consequences of such interference with the water, as has been pointed out in the argument, would be not only the pollution of the stream, but the total annihilation of the value of the adjoining land for building purposes, and it might subject the owner of the soil to the danger of an action or to a prosecution for a nuisance. To test the interference of the defts. by a strong case, the power now claimed by the defts. would justify the district adjacent in

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pouring the sewage of confluent districts, or much more important districts, into the New River, from which a large portion of the metropolis derives its supply of water. One would expect that such a power as this, if conferred on a district board or vestry, would be at least given by express words, but no such words are to be found in the statute. Then, if the power exists, it exists by inference if at all. It is now urged that the statute is imperative to compel the vestry or board to do the drainage, and that the drainage in this case cannot otherwise be effected. Therefore it is said that by inference the power is given. The necessity does not appear in this case; nor indeed can it be said that the necessity exists in the strict sense of the word. Absolute physical necessity there cannot be. As was however observed in the course of the argument, the sewage might be removed in carts, or other suitable vehicles, however expensive. Nor does necessity in the lowest sense of the term exist, that is, of doing the thing, or an alternative so expensive as to be commercially impossible. By sect. 89 the district board have the option of turning over the drainage to the general board, who have the power to cut an artificial drain which may effectually dispose of the sewage in the common stream. It is further alleged that the power to give compensation for interference with a stream, and the right to the use of the water, implies a power to pollute the water to any extent, and to any distance. Those provisions may well apply to cases where there has been an interference with the use of the water, rightly or wrongly, with or without licence, because the power to take a mill and employ the water are both alike made the subject of purchase, not indeed of compulsory purchase, but where the contract is the voluntary act of the party. The Act confers no compulsory power on these district boards to purchase land. These reasons might go far to negative an inference that the board could turn this sewage into a stream, even within their own district, but they are stronger to show that they cannot do so beyond their own limits.

CHANNELL, B.—I am of opinion that the judgment of the Court of Q. B. should be reversed, and that the *plt.* in error is entitled to our judgment. I was not aware that it was intended to dispose of the case to-day, or I should have prepared myself a written judgment, as some of my learned brethren have done; but I do not entertain any such doubt on the case as would justify me in delaying to express the opinion I have formed. We are not called on to determine what power the Metropolitan Board might have with reference to such a case as is now before us, but to consider simply whether the district board have this power, and I am of opinion they have not. The case for the *defts.* in error has been principally based on the 86th section, and the judgment that we are called on to review is founded on that section; and I think the question mainly depends on the interpretation we should put on that section. I have looked carefully through the other sections of the Act, and I find, if we divest the case of the power given by the 86th section, there is nothing in the statute that would warrant the proceedings which the *defts.* in error have taken. It does not appear to me that the introductory words of the 86th section give any sanction to the *defts.*, or justify them in the act which they have done. But great stress has been laid on the proviso, and I am of opinion that neither the one proviso nor the other can apply to any case which is not met by the introductory words of the section. The two provisos may well stand upon the construction, which, I think, is the true one, with respect to the proceedings which are justified by the enacting

part of the 86th section; according to which there are two courses open to the board: to do the act, making compensation to the party injured after the act is done; or to take another course (which in a variety of cases would be the better course to take), to endeavour to contract with the party whose water right is interfered with, and so to purchase the option of doing the act in question. It was necessary to introduce such a power as that, for the board would have no right to apply the rates in the purchase of anything, except to the extent that the Act justified. I was much struck by the observation of my brother Bramwell in the course of the argument, that one would expect such a power as that which is claimed, if intended to be conferred, have been conferred by express or direct words. I cannot see any such words here, or any equivalent words, which call on me to suppose that such a power was intended to be implied. For these reasons I am of opinion that the *plt.* was entitled to maintain his action, and was not driven to demand compensation, and that our judgment should be in his favour.

BRAMWELL, B.—I was not aware that the judgment would have been given to-day, or I would have prepared a written one. As my opinion differs from that of the court below, it would have seemed more respectful if I had done so. I think the judgment of the court below should be reversed, and my opinion proceeds on the grounds taken by my brother Channell. In express words, no power is given to do what the *defts.* have done to the *plt.*'s property, and one would not expect to find the power to do such an act given to the local board by implication only, when we find that in express terms they cannot buy land by compulsion. It would be singular if, although they cannot take a man's land, they might by implication foul and spoil it. It is manifest that, whatever reasons may be given for doing what they have done to the *plt.*'s stream, the same could be given for doing it to any pond that he might have in his field. They claim the right to do it simply on the ground of convenience; and if they have a right to do this, I cannot see why they should not have a right to direct the sewage to one of the *plt.*'s fields that might lie low, there to find its way out as it might. Still, it may be there is a power given to them by implication to do what they have done. It is said the power is given by sect. 69, by which they are directed to cause to be made and cleansed, and maintain, such sewers and works as are necessary for effectually draining their parish or district. In the first place, it does not appear that they could not do this in some other way. In the next place, if, because they could not, they have a right to divert it into a brook, they have a right to divert it into any other piece of land or place where they may find it convenient to send it. Thirdly, they may go to the Metropolitan Board, if they cannot otherwise do it. Fourthly, if they cannot do it at all, and no one can do it, then the Legislature does not order an impossibility to be done; they must do so as far as they can. Therefore I cannot see that the section which directs that it is to be done, by implication directs that they should have a power either of taking land, or fouling land, or spoiling land, or a pond or a stream, in the way in which it has been done in this case. I am certainly very much confirmed in my own mind by these words in sect. 69: they may carry sewers "through, across, or under." I am not blaming any one who drew this Act; but one cannot help observing on the loose way in which this, like other Acts of Parliament, is drawn. "Through, across, or under any turnpike-road or street laid out, or intended to be a road or place; or through or under,"

leaving out "across," "any cellar or vault, which may be under the pavement or carriage-way of any street, and into, through, or under any lands whatsoever," introducing the word "into," leaving out the word "across." The expression, "into, through, or under," manifestly does not mean to take it *into* and there to leave it. It must be read therefore, "into and through or under," that is to say, you may take it in, and you must take it out, either by "through or under." That this is the meaning is obvious. Now, the argument of the defts. is, that they have a right to take it into and leave it there, except so far as it may find its way out by the laws of gravitation or otherwise. I confess that confirms my notion that by implication, in this section, the power is not given; therefore, in the section which expressly directs them to do things of that character, in sect. 86, I find nothing to warrant the contention that power is given them by implication to send this sewage into a man's stream. Then by sect. 86, on which great reliance is placed—more reliance by my brother Pigott than by the learned counsel for the defts.—it appears where there is an existing nuisance they may abate it. It says, in so many words, "every vestry and district board shall drain, cleanse, cover, or fill up, or cause to be drained, all ponds, pools, open ditches, sewers, drains, and places, used for the collection of drainage, filth, water, matter, or thing of an offensive nature, or likely to be prejudicial to health," and may cause notice to be given to the persons causing such nuisance, or to the owners or occupiers of premises on which the same shall exist, requiring them to abate it, and if he does not, they may. That section manifestly applies itself to a case where there is an existing nuisance, and gives the local board power to abate it. It was said there was an existing nuisance here, and that these ditches and sewers were nuisances forbidden by the Act. So be it. The defts. had a right to abate it, but they must abate it in some way or other without infringing on the rights of property which the plt. was possessed of, unless power is given to them to do so expressly or impliedly. There is nothing in the introductory part of the section to authorise the defts. to do what they have done. Further, they do not say they have done it for the purpose of abating the nuisance, nor have they given any notice to anyone. Clearly, therefore, that part of the section would not justify them in what they have done. Then comes the proviso, which I agree is more extensive than the introductory part of the section, that is, that the proviso includes things which are not in the introductory part of the section: "Provided also that where any work by any vestry or district board, done, or required to be done, in pursuance of the provisions of this Act," &c., affect any right of water—(now, I admit that does not mean in pursuance of the immediately preceding provisions, but generally the provisions of this Act)—then compensation is to be made as a matter of right to the person whose right of water is affected. It is said that the proviso shows that the local board may do things which would prejudicially affect water right, and consequently by implication shows they have got this power. I do not desire minutely to criticise these words, "done, or required to be done." Does that mean done when not required, or required to be done when it is not done? There is a looseness of language. Probably the original intention of the draftsman was to put a mere proviso on the introductory words of the section; then it occurred to him, or to some one else, why do you not say generally, that for whatever damage is done under the powers of this Act compensation shall be given? I do not know that there is any necessity to interpolate words, but one may fairly read this proviso as though it had said that,

"Where any work is done, or required to be done by any vestry or local board in pursuance of the provisions of the Act"—if any can be done except as aforesaid, compensation shall be given. To hold that this, which is a mere proviso saying they shall give compensation where they do what they may do, imports that they may do something which otherwise they could not do, is contrary to all the ordinary principles of construction. I think, therefore, the proviso neither itself confers the power, nor shows it is conferred by any of the other preceding sections. I am not aware that it has been suggested that on any other ground the local board possess this power. It seems they cannot have it unless it is given to them. Therefore I am of opinion that the judgment must be reversed. I will make this one remark on the judgment of the court below, that they seem to have assumed that this point was what I may call generally speaking against the plt.; that is to say, they had such a power, provided the injury was in their district, and the court seem mainly to have directed their attention to this, whether the fact of its being out of the district made any difference. Mr. Lush has told us that this point on which he now relies, if made at all, was very faintly made in the court below; therefore, in expressing my opinion that the judgment should be reversed, I do not think that I am differing from the opinion given by the court below, if their mind had been directed to this question.

KEATING, J.—I am also of opinion that the judgment of the court below ought to be reversed. It is to be observed that there is nothing in the case which is stated to us which raises at all the ground of necessity for the execution of the works, and Mr. Mellish, though not exactly relying on that as an argument, did certainly press it as a reason why it was extremely probable that the Legislature should have given the power contended for. I entirely agree with the observations made by the other members of the court, who are for reversing the judgment in reference to the construction of the 86th section. It seems to me clear, if I may be allowed to say so, that the proviso in that section does not extend the power beyond the earlier part of the enactment, therefore, so far as the 86th section is concerned, it does not in any way confer this power. I may say, that I think it would be a strong thing to put on the Act a construction, in the absence of express words, which should enable the board to deal with the property of an individual, as the plt.'s property appears to have been dealt with, because, if they have a right to discharge the sewage into the stream to which reference is made in the case, they might have poured it over his land under the same power. No doubt it is said, that whatever injury they may do they are bound to make compensation for; but it seems to me that it is not a case in which compensation could properly redress the injury which has been done to the plt. in this case. That, of course, does not affect the construction of the statute. I was much struck with the observation of Mr. Lush in the course of the argument, that the defts.' power is to abate a nuisance, and it is under their power for the abatement of a nuisance that they seek to exert the power which they have exerted on the present occasion; and it does seem rather anomalous that they, having the power to abate a nuisance, should exercise it in such a manner as to create a nuisance in the plt.'s land, and one which the plt. might possibly be called on by some one else to abate. It is said that compensation might be given which would enable them to abate the nuisance, but it seems to me never to have been contemplated by the Legislature to attribute com-

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pensation to an injury of this kind. Under these circumstances it seems to me, for the reasons which have been given by the other members of the court, that the judgment of the court below ought to be reversed.

POLLOCK, C. B.—I am of opinion that the judgment of the court below ought to be affirmed. It is certainly true that in giving that judgment the Court of Q. B. expressed that they delivered their judgment not without some hesitation. They had taken considerable pains in order to arrive at the conclusion which at last they delivered, for it appears that the case was argued in Hilary Term 1862, and the judgment was not given until the 9th Feb. 1864. I certainly am not prepared to reverse that judgment, and I own it appears to me, with most humble deference to the rest of the court, that the view which the court below has taken on the subject is the correct view. With respect to what fell from my brother Byles as to the New River, it appears to me to be entirely beside the question. The New River is absolutely and strictly private property. The New River Company is not a public board, and the New River, so far as I know, has not a single drain running into it from the fountain-head in the town of Ware down to the reservoir in Islington, whence the water is diffused all over London. Now, that is the very reverse of what was the foundation of the judgment of the court below. It substantially is this, that the streams in question, namely, the Poole river and the County-bridge stream, had been used as drains; that the drainage of this very district actually flowed into them, but it was under circumstances which at the time rendered the drainage into those streams not appreciably a nuisance. But that the fact was so is expressly found by the special case, and is expressly the foundation of the judgment of the court below. And I think it cannot be much doubted that if, instead of obeying the Act of Parliament, as I think the commissioners have done, they had allowed the houses to increase, and the quantity of nuisance and filth to accumulate until it actually ran down, time would have done that which the commissioners, I think, have done in obedience to the Act. Where there is the drainage of the surplus water of a brook into a stream which flows into another stream, and so at last into the ocean, if the neighbourhood becomes more populous, of necessity, by the multiplication of inhabitants, the various sources of nuisance which arise out of the necessities of social life will make the drains a nuisance which originally were harmless, as the drainage of a farmhouse into a rural stream which finds its way into the river Thames. Now what I consider the commissioners to have done is only this: there were streams which conveyed the water, and which conveyed offensive matter at times, but not in a quantity sufficient to make it appreciably a nuisance. What the defts. have done has been so to construct the drains as to enable them to carry off not merely that which heretofore was carried off, but that which ought to be carried off in order that the defts. may obey the Act, and render the district healthy, which otherwise would become unwholesome. The effect of this has been not to do any new act, but merely to increase that which was done before, and to make that appreciably a nuisance which before was not so. That is the foundation of the judgment of the Court of Q. B. I think they were perfectly right, and that their judgment ought to be affirmed.

ERLE, C. J.—In this case the declaration was for fouling two streams of the plt. The defts. pleaded that the acts complained of were done in the exercise of the powers given to the defts. by the

Metropolis Local Management Act. The facts were, that before 1852 the houses in the district were few, and the sewage from those passed into open watercourses which joined to these streams, but did not foul the water to an appreciable extent. If sewage there was, it probably soaked away. After 1852 the Crystal Palace increased the quantity of sewage, and it passed in the same watercourses and fouled the water of the streams to an appreciable but not to a serious extent. Between 1852 and 1859 the houses increased, and the watercourses became a serious nuisance from the accumulation of filth therein. The defts., both to put an end to these nuisances, and also to provide efficient drainage for the whole district, and for the Anerley Building Society's land, caused a number of underground sewers to be made, and arranged so that the outfall for the sewage of the whole district should be at the same place where the old watercourse came. This new system of sewers has prevented the accumulation of filth in the open watercourses, but the quantity of filth carried into the stream is greatly in excess of what had reached it before the newer sewers were constructed, and has rendered those streams foul, and wholly unfit for cattle or domestic use. The outfall of the watercourse is not the boundary of the defts.' district; the fouling of the stream takes place out of the district. The defts. in covering the watercourse acted in pursuance of the powers given by the 86th section, and if any damage arises from such covering it would be a subject of compensation under that section. But the question arises in respect of the deposit in the plt.'s stream of a large quantity of sewage brought there by the new system of sewers for the district made by the defts., as to which it is admitted that an action lies unless the defts. were empowered by the Act to make the deposit. Then does the Act give that power? Sect. 86 empowering the defts. to cover open watercourses which are a nuisance, gives no power to use the land or water of other persons for the purpose of receiving sewage except by agreement. It is clear from the facts stated, that no prescriptive right of fouling the water by twenty years' usage had been gained by anybody. The defts., therefore, had no right of outfall for the sewage there collected into the plt.'s stream, unless the Act created it; and I can find no such right given either by this or any other section of the Act. Sect. 86, after requiring drains to be covered so that the nuisance shall be removed, goes on to provide that when any work by any district board done, or required to be done in pursuance of the provisions of this Act, prejudicially affects any right to the use of water, full compensation shall be made in the manner hereinafter provided, or the board may purchase such right in the manner provided for the purchase of other rights. If the defts. had done no more than covering the open watercourse, and so removing the existing nuisance, they would have acted in pursuance of the powers given by sect. 86, and the remedy for the plt. would have been compensation merely; but as they have made a new system of sewers, and thereby collected a much larger quantity of sewage than reached the stream before, and caused that quantity to fall into the plt.'s stream, they have exceeded their powers, and are liable to an action. The other sections of the Act are framed in accordance with that construction. Sect. 69 gives the general power over the sewers in the district, whereby the district board are required to repair and maintain the sewers vested in them, and to cause such alterations of sewers to be made as will be necessary for effectually draining their district, and it is made lawful for the district board to carry any sewers under any houses, or any land whatever, making compensation for any damage



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done thereby in manner hereinafter provided. Sects. 150, 151, and 152 provide for the compensation to be made if any land, or any right or easement in or over any land, is to be taken. Sect. 150 enables the Metropolitan Board, and every district board, to take any land or any rights or easement in or over any land which may be necessary for the formation or protection of any works which they are authorised to execute under this Act. Sect. 151 enacts that the provisions of the Lands Clauses Act 1845 shall, subject to the provisions in this Act, be incorporated therewith for the purpose of enabling the Metropolitan Board and every district board to take land or any rights or easements in land. Then sect. 152 provides that the provisions of the Lands Clauses Consolidation Act, with respect to the purchase and taking of land otherwise than by agreement, shall not be incorporated with this Act save for the purpose of enabling the Metropolitan Board to take land, or any right or easement in or over any lands. From those provisions it is clear that the district board cannot take land or any right or easement in land by compulsion. They can take only by agreement. Thus they could not acquire the easement of depositing sewage in the plt.'s stream unless by agreement with him as proprietor of the stream. We are confirmed in this construction of the Act by considering the other sections to which Mr. Lush referred as sections containing provisions for the vesting trunk sewers in the Metropolitan Board with the proper outfalls, and enabling district boards to connect branch sewers with the trunk sewers; and also provisions enabling any district board to give up to the Metropolitan Board the branch sewers in their district, if they think right, and the Metropolitan Board has power both in and beyond their district to take lands both by compulsion and by agreement, so as to dispose of the collection of sewage. If the defts. could maintain the right they have claimed, the plt. would probably be liable at his own expense to cover the stream so as to prevent a nuisance; in other words, to be at the expense of making a sewer to carry off the sewage from the plt.'s district. Also, if the defts. can maintain their right, they would permanently deteriorate the value and enjoyment of the plt.'s property for residential and agricultural purposes, and would, in effect, produce a sale by compulsion which the statute has expressly excluded. The power to purchase streams, which is given by sect. 86, is subject to the provisions with respect to the purchase by the district board above mentioned; that is, they can purchase by agreement only, and not by compulsion, when damage has been caused by a work done in the exercise of the powers given by this Act. For these reasons I am of opinion that the defts. in doing the act complained of were not acting in pursuance of the powers given by the statute, and therefore the plt. has a right of action, and is not restricted to a right to compensation. In this judgment I consider the point relied on in the court below, namely, that the damage done to the plt. out of the district of the defts. was immaterial. The ground of my judgment is on the point on which Mr. Lush relied, as above explained, and which does not appear to have been pressed on the attention of the court below. With respect to that point the place of damage makes no difference.

PROGOT, B.—I wish to add, that the Chief Justice has called my attention to the 152nd section, which says that land may be taken for the drainage of the metropolis. I have not adverted to the interpretation clause, which says what constitutes the metropolis; that it is to include so many sections or districts, of which Lewisham is one. That would

entitle them to take these lands: therefore, so far as my judgment went, I should be in error in saying that they had not the power to take it. That would remove one of the difficulties, but only a little further off; still they would have to take it into the sea, or somewhere else, to get rid of it. I wish to correct that part of my judgment in which I assumed that they had not the power to take the land compulsorily.

*Judgment reversed.*

May 13 and 14, 1865.

ERROR FROM THE QUEEN'S BENCH.

(Before ERLE, C. J., POLLOCK, C. B., KEATING, BYLES, and SMITH, JJ., BRAMWELL and CHANNELL, BB.)

LEATHAM v. THE VISITORS, &C., OF THE POOR OF THE UNITED PARISHES, &C., OF BOLTON-LE SANDS, &C.

*Lunatic pauper—Order of maintenance—Gilbert Union—22 Geo. 3, c. 83—16 § 17 Vict. c. 97, s. 97.*

*Where a pauper lunatic's settlement is in a parish, part of a Gilbert Union, an order of maintenance under 16 § 17 Vict. c. 97, s. 97, should be made on the guardians of the parish and not on the guardians of the union.*

*Reg. v. The Inhabitants of Bramley, 31 L. J., N. S., 11, M. C., to the contrary overruled.*

This was a writ of error from the Court of Q. B., on a judgment for the plt. on demurrer, given for the plt. without argument, on the authority of *Reg. v. Bramley*, 31 L. J., N. S., 11, M. C.

Declaration:

Leatham, the treasurer of the lunatic asylum at Stanley, in the West Riding, being an asylum erected under 45 Geo. 3, c. 96, for the reception of lunatics within the riding, was the visitor and guardians of the poor of the united parishes, &c., of Bolton-le-Sands, Tatham, &c., in the county of Lancaster, incorporated under and according to the provisions of the 22 Geo. 3, c. 83. For that the overseers of the poor of the township of Bramley, in the borough of Leeds, on the 22nd June 1860, complained in pursuance of the Lunatic Asylums Act 1853 to two justices of the borough, that E. W., a pauper lunatic, had been sent to and received in the said asylum at the instance of the overseers of Bramley on the 3rd Sept. 1859 under an order made by a justice having jurisdiction, and that the said E. W. had been chargeable to the said township whilst she had been confined and was still chargeable, and that the said E. W. had been maintained in the said asylum at the costs and charges of the said township; and thereupon the said two justices having inquired into the premises and the last legal settlement of the said E. W., by an order under their hands and seals on the 22nd June 1860 adjudged the last legal settlement of the said E. W. to be in the said township of Tatham, and recited that she had, in accordance with the provisions of the last-mentioned Act, been duly received into the said asylum under the before-mentioned order; and the said justices by their said order adjudged that the expenses incurred by and on behalf of the said township of Bramley in and about the examination of the said E. W. and her conveyance to the hospital amounted to 17. 15s., and that the moneys paid by the township of Bramley to the treasurer of the asylum for lodging, maintenance, &c., amounted to 16l. 4s. 4d., and ordered the defts. by the name and style of the Guardians of the Poor of the Caton Union, being the name by which the said united townships there were and are commonly known, within which union the said township of Tatham was comprised, and being a union formed according to law, out of any moneys which might be in or come into their hands by virtue of their offices as such guardians, to pay to the overseers of the poor of Bramley aforesaid the said sum of 17. 15s., being, &c.; and also the further sum of 16l. 4s. 4d., being, &c.; and out of any moneys, &c., to pay weekly and every week to the treasurer of the asylum aforesaid, so long as E. W. should live and continue therein, &c., &c. for her future lodging, maintenance, &c.

The declaration then went on to aver that the overseers of Bramley caused a copy of the order to be delivered to the guardians, &c. of Tatham, and to the defts. pursuant to the last-mentioned Act, and that thereupon an appeal against the said order was had and tried on behalf of the said guardians, &c., of Tatham, and that at the hearing a case for the

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Court of Q. B. was granted, which was heard by that court, and the said order was, on the 9th Nov. 1861, adjudged to be good and valid. The declaration then alleged that the defts. never appealed, that E. W. had continued in the asylum in confinement, that all things were done, &c. to entitle the plt. as such treasurer to have the defts. pay to him under the order 188 weekly sums of 8s. each, amounting to 55*l.* 4s., as and for, &c.; that the defts. had neglected to pay, &c., whereby, &c. an action had accrued to the plt. as such treasurer to demand and have of the defts. the amount, &c., to wit, the said sum of 55*l.* 4s. Yet the defts., &c.

## Fourth plea :

That the defts. were not commonly called or known by or under the name of the Guardians of the Poor of the Caton Union, nor was the Caton Union the name by which the said united townships were commonly called or known.

## Fifth plea :

That the parishes, &c., of and for which the defts. were visitors, were before and at the time when the defts. became incorporated as heretofore mentioned, and thence hitherto have been and are, separate and distinct parishes, &c., each maintaining its own poor separate and distinct from the others, except according to the provisions of the Act of Parliament heretofore mentioned, since the time when the defts. became so incorporated; and all things required by the said Act and necessary in that behalf having happened, &c., the said parishes were before, &c., and at the times of the making of the several orders in the declaration mentioned, and still are, united under the provisions of the 22 Geo. 3, c. 83, s. 4, for the relief and employment of the poor, and not otherwise, and the defts. became and still are incorporated by and under the said Act of Parliament for the purposes therein mentioned, and not otherwise.

## Sixth plea :

That the defts. never were, nor are they guardians, &c., entitled to act in the ordering of relief to the poor from the poor's-rates.

Issues were joined on all the pleas, and the fifth and sixth pleas were also demurred to.

At the trial, all the issues were found for the plt. except that on the fifth plea, on which the verdict passed for the defts.

The points for the defts. were:—That the defts. being incorporated under the 22 Geo. 3, c. 83, were not the parties on whom the order should have been made. That Tatham was a parish maintaining its own poor within the meaning of the 16 & 17 Vict. c. 97, s. 132, and that the defts. were not guardians within the meaning of that section. That the order of justices on which the declaration purports to be founded was not made on the defts. by their proper corporate name, and that the declaration was bad in substance, showing no liability on the part of the defts.

The points for argument on behalf of the plt. were:—That the order is properly made on the defts., and is a good order under the 16 & 17 Vict. c. 97, s. 97. That unions established under the 22 Geo. 3, c. 83, are by the interpretation clause of 16 & 17 Vict. c. 97, s. 132, unions within the meaning of that Act. That any want of form in the order is cured by the 16 & 17 Vict. c. 97, s. 121.

*West (Huddleston, Q. C. with him), for the defts. (the plts. in error).*

*Temple, Q. C. (Maule and Hannay with him), contra.*

The following authorities were referred to in the course of the argument :

22 Geo. 3, c. 83, ss. 2, 24; and schedules, 4, 15, & 16;

33 Geo. 3, c. 35, s. 3;

41 Geo. 3, c. 9, s. 2;

4 & 5 Will. 4, c. 76, s. 28;

9 & 10 Vict. c. 66;

12 & 13 Vict. c. 103, s. 5;

16 & 17 Vict. c. 97, ss. 64, 96, 97, 99, 102, and 132;

24 & 25 Vict. c. 55, s. 6;

*Reg. v. The Justices of the West Riding*, 26 L. J. 41, M. C.; 4 L. T. Rep. N. S. 809;

*Reg. v. Bramley*, 31 L. J. 11, M. C.;

*Reg. v. Priest Hutton*, 20 L. J., N. S., 226, M. C.

*May 17.*—*ERLE, C. J.*—This is an action brought by the treasurer of the county against the visitors and guardians of what is called a Gilbert Union, for the nonpayment of the expenses of maintaining a pauper lunatic in a county asylum. It is brought by the treasurer of the county, and brought in effect to enforce payment, under an order of justices, for the expenses of a pauper lunatic, those justices acting under the 16 & 17 Vict. c. 97, s. 97. The order on which the action is brought requires the defts., visitors and guardians of a Gilbert union, by the name of the Guardians of the Poor of the Caton Union, that being the name by which they are commonly known, out of any moneys which might be in their hands by virtue of their office as such guardians, to pay the expenses of maintaining the pauper lunatic. The declaration alleges that this order was served, both on the visitors and guardians (the defts.), and also on the guardians for the parish of Tatham, and that they have not paid. The plea which raises the point for adjudication is the fifth plea, and it states that the defts. are a corporation under what is called Gilbert's Act, for the Gilbert unions, and that this order upon a corporation and the guardians under a Gilbert union is void, unless it is authorised by the 16 & 17 Vict. c. 97, s. 97. That statute in the preceding section had made a certain provision with respect to lunatic paupers, and then in sect. 97, when a lunatic pauper is sent from a parish where he is not settled, it makes a provision for justices to ascertain the place of settlement and then make an order upon the parish or place liable for the expenses of that pauper to pay them; and as we read it, the 97th section empowers justices to make an order upon four classes of persons who are to pay. The words of the statute are "to pay," and it refers to the settlement, and orders the guardians of the union to which the settlement parish belongs, or the guardians of such parish in case such parish be in a union, or the guardians of such parish if it be under a board of guardians—there are three kinds of guardians referred to, then comes the fourth class—and if not, then the overseers of the parish. In the present case the order has been made upon the defts. as if they were the guardians of a union incorporated under the Poor Law Amendment Act, 4 & 5 Will. 4, and it is an order calling upon the corporation of guardians to pay the expenses which are the subject of the order. Now we are of opinion that the order ought to have been made on the guardians of the parish, it being a parish in a union under Gilbert's Act. The second clause, applying to two clauses, is that the order shall be on the guardians of such parish, in case such parish be in a union. I think it is clear that the clause meant, in case such parish be in a Gilbert union, as it provides specifically for guardians under a poor-law union and for the guardians of the parish in case such parish be in a union. I know of no officers that would be correctly described to be guardians of the parish liable to have the claim made on them specifically, except in the case of the guardians of a parish in a Gilbert union, or the guardians of a parish where the parish is under a board of guardians by the 4 & 5 Will. 4, being too big a parish to require to be united to any other parish. There being, therefore, according as I read the words of the statute, provision made for an order upon the guardians of the parish, when that parish is in a Gilbert union, I think we are bound to give effect to those words, and to hold an order made on the guardians of the union as if it was a corporation within the 4 & 5

Will. 4, to be a void order. If there was nothing of substance in the objection, I would certainly use every power that I could to prevent an objection merely in point of form, with no importance attached to it whatever, from prevailing. But on giving the best attention that I can to these statutes, particularly to Gilbert's Act, the 22 Geo. 3, c. 83, that appears to me to have created guardians of the parishes united, having duties to perform specifically in their respective parishes, and to have authorised such guardians of the united parishes to meet at monthly meetings; but then to have affixed specifically on the guardians limited and specific duties while they are acting together at the monthly meetings, and giving them a limited authority as to the specific sources of money, neither of which sources of money would be applicable to the charges of a lunatic pauper as expenses, and the future expenses of the costs of litigation. I have looked through the stat. 22 Geo. 3, c. 83. It is an advance towards a union created in a much wider degree and to much greater effect under the Poor Law Amendment Act, but it provides that the parish by itself may have the advantages of this statute in respect of guardians, visitors, and workhouse regulations, which we have nothing to do with. Then, from sect. 2 onwards, there is a provision for the creation of a guardian for each parish; three persons qualified to be guardians are to be nominated and recommended to the justices by each parish, who are to appoint one of the three as the guardian, and then there is a power for the creation of visitors and for churchwardens. The great purpose of this statute was to ameliorate the condition of the poor, in providing employment for them and stock for them to manufacture, and a union-house in which they might live and be maintained. Then sect. 24 points out how the poor are to be maintained, and the funds out of which the expenses are to be paid. It enacts in the earlier part of the section provisions for the general expenses which are to be contributed by the contributing parishes in proportion to the average amount they have paid for the poor-rate in the three years preceding their adopting this statute: the rate of contribution is to be applied, if I may say so, to the more permanent expenses, namely, to the case of repairs of the house, and providing the stock that is to be manufactured in the house, the salaries of the officers, and the like. Then, in respect of the current expenses of the house, maintaining paupers therein, they are to contribute in proportion to the number of paupers sent from each of the parishes. The guardians have no power at all to order the parishes of the union to contribute, except in accordance with one of those two proportions, and then payment is to be made by each parish in respect to the demand, and the demand is to specify the ground on which it is made, so that the parish may know in which of the two proportions it is to contribute. The schedules 15 and 16 give most specific directions for ascertaining those two parts. Schedule 15 is as to the mode of adjusting the first amount mentioned in respect of the utensils, materials, furniture, rent, &c., and it is to be on the average of three years; and then they take the average of the expenses always in that ratio. Schedule 16 is as to the mode of adjusting the second amount, respecting the victuals, beer, firing, and other necessaries, and then they are to be paid in proportion to the number of persons admitted into the workhouse at that time. Now, if the order were made according to the Lunatic Asylums Act, if it ever was to be made, it would have to be made upon the parish, and to be provided for by the parish, whatever it be. Such an order has no application to the guardians meeting at

their monthly meeting at the poor-house or the union-house, and making provision for these two sources of expenditure; and it is an order that has no general application to the general body of guardians, who, under the 22 Geo. 3, cannot properly pay the order out of any funds in the nature of a union fund which they have control over. And I take this to be matter of substance and not a matter of form, because, if the judgment were given against the defts., we are bound to see how the defts. could get funds at a meeting of guardians of different parishes under the Gilbert Act, to pay the costs of this litigation and the costs of the future maintenance of the pauper belonging to the parish of Tatham. What fund is there for the guardians of all these different parishes to pay these expenses out of? They cannot call for them as permanent expenses of the house; they cannot call for them as permanent expenses of the pauper in the house according to the ratio of pay for those paupers in the parishes themselves; and there is no fund from which the guardians of the different parishes are to take the money, and we ought not to make them by a judgment, and couple the consequences with the judgment, for there is no property they can take except the union-house and the beds of the paupers, and the like of that. It is, I think, impossible to suppose that they would be liable to an execution. Other funds there were none at the time the 22 Geo. 3 passed, and other funds I see none created by any of the subsequent statutes. Is that objection answered on the part of the plt.? Suppose an execution goes, how are these expenses provided for? The cases referred to by Mr. Temple appear to me to very much confirm the view which we have formed upon the argument of Mr. West. We were asked to give judgment against the corporation of the guardians to pay for the expenses of a lunatic pauper belonging to one of the parishes in a union. The difficulty all along has been, there is no fund out of which they can be paid. Now, the 33 Geo. 3, c. 85, following this statute, determined that there should be, if I may say so, something in the nature of a union fund; and having by sect. 3 directed that casual poor, having no settlement, taken ill in different parishes, should be entitled to relief by the nearest guardians, it then specifically created for the first time a union fund because it ordered the casual poor to be relieved by all the parishes conjointly in the same respective proportions as they shall be directed to contribute to the general purposes of the Act 22 Geo. 3. General purposes are taken to be repairs of the house, and for obtaining a stock to work upon, and other matters of that sort; and I think the Legislature recognise this when they bring upon the union as a body, for the first time, the one charge, and direct them to create a union fund in respect of the one charge between the different parishes in proportion to their liability at the time when they adopted the Gilbert Union Act, to find out how they stood on an average of three years before, to see how the payments to the poor-rate should be charged to casual poor divisible amongst those parishes, and make the contribution they were liable to contribute to the maintenance of the workhouse; and so, to my mind, showing there was no union fund known at the time, no Act creating a union fund; for the funds of the Gilbert Act were appropriated to the house and to the sustenance of the paupers—two specific charges. By the 33 Geo. 3 “casual poor” has become a new charge, a charge upon the union specifically provided, and the Act says the union shall meet that charge. The object of the 12 & 13 Vict. c. 103, s. 5, is, that the costs of irremovable paupers should be paid for out of the union fund. I take that to mean the union fund that had been enacted by the 33 Geo. 3, c. 85, s. 3,

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the union fund that the parishes are to contribute as their liability to the common and permanent expenses of the house; and I am confirmed in that view of the 12 & 13 Vict. c. 103, because it was repealed by the 16 & 17 Vict. c. 97, and sect. 102 of that statute provides that the expenses of the irremovable pauper lunatic shall be paid by the guardians of the parish in such union where the pauper shall have acquired such irremovability, if such parish was subject to a separate board of guardians, or by the overseers, where the sum is not subject to such separate board, and where such parish shall be comprised in any union the same shall be paid by the guardians and charged to the common fund of such union. Sect. 102 is specifically applicable to the case of pauper lunatics, not generally, but irremovable pauper lunatics. The tendency of the legislation has been to recognise a wider area in respect of the general charges, and in particular in respect of the charge of irremovable paupers. Now sect. 102 recognised that principle in respect of irremovable pauper lunatics; and the costs of the irremovable pauper lunatics are to be paid by the guardians wherever any parish is in a union from which the pauper lunatic is removed. Now "union" may comprise a poor-law union, or a Gilbert union; but here it is used without any limitation: "any union" that has irremovable pauper lunatics. Sect. 97 is the one for providing for a pauper lunatic assumed not to be irremovable, and there the words are, "the costs of his maintenance shall be ordered to be paid by the guardians of the union to which the parish belongs, or the guardians of such parish in case such parish be in a Gilbert union." I insert there the words "Gilbert union," because it makes it a sensible provision for the general costs of the pauper lunatic who is irremovable; they fall upon the parish to which he belonged, and the meeting of the guardians at the union-house had nothing to do with it. Having provided for the pauper lunatics to be paid by the guardians of the parish to which he belongs, the costs of the irremovable pauper are to be paid by the guardians of the parish to which he belongs. I think that the Legislature contemplated that there should be for these purposes a union fund created in the manner pointed out and enacted by the 33 Geo. 3; and the change in the language of sects. 97 and 102 indicates a different purpose in the mind of the Legislature, appropriately expressed by the change in the language of these sections. Therefore I come to the conclusion that this order was not authorised by the statute, and that the action founded upon it cannot be sustained, and the judgment must be for the debts. on the demurrer.

The rest of the Court concurring,

*Judgment for the debts.*

## COURT OF COMMON PLEAS.

(IRELAND.)

Reported by J. FIELD JOHNSTONE, Esq., Barrister-at-Law.

Saturday, Nov. 14, 1865.

GRAHAM (app.) FORDE (resp.) (a)

*Tippling beer*—Case stated—Construction of 27 & 28 Vict. c. 35, ss. 6, 8.

*The app. was summoned to answer a complaint that, he being a person licensed to sell beer by retail to be consumed off the premises, persons were found harboured in his house and place of business who appeared to be, or to have been, recently drinking or tippling beer therein, contrary to 27 & 28 Vict. c. 35. It being*

*proved that persons were found upon the app.'s premises under the circumstances charged, and that the person who usually attended the shop was present, though the app. himself was not, the Dublin divisional magistrates convicted the app. Upon a case being stated for the opinion of the court:*

*Held, that the conviction was right, the words of the 6th section of 27 & 28 Vict. c. 35, including the case of harbouring persons tippling beer.*

The following case was stated for the opinion of this court: The app. was summoned to appear before said justices on the 22nd Sept. last, to answer the complaint of John Forde, inspector in the Dublin police, charging that he, the app., being a person licensed to sell beer by retail to be consumed off the premises where sold, at 109, Bride-street, within said district, between the hours of seven and eight o'clock in the afternoon of the 12th Sept. 1864, divers persons, to wit, one man and one woman, were then and there harboured in his, the app.'s, said house and place of sale at 109, Bride-street, who appeared to be, or to have been, recently drinking or tippling beer therein, contrary to the statute 27 & 28 Vict. c. 35. The following evidence was given upon oath before us by John Forde, the resp., namely:

I visited the house of George Graham, spirit grocer and wholesale and retail beer dealer, he then being licensed for the sale of whiskey, and also being duly licensed as a wholesale and retail beer dealer, on the 12th Sept. 1864, between the hours of seven and eight o'clock in the evening I saw a man and a woman, who gave their names as James Bruce and Maria Bruce, sitting down in a room in front of the bar, having a drinking measure and a glass containing porter. The measure was on a bench convenient to where they were sitting and the glass was on the chimney-piece; both contained porter. Both of them drank the porter, and both of them appeared to be under the influence of drink; and the person who usually attended the shop was present. I told him I would make an application for a summons. I will not say positively that both drank the porter in the glass.

Being of opinion that the foregoing evidence disclosed an offence within the meaning of the 27 & 28 Vict. c. 35, s. 6, we duly convicted the app. for said offence, and imposed a fine of 10s. upon him. On the part of the app. it was contended that, upon the facts disclosed in evidence, no offence had been committed against the provisions of said statute; and we were called upon by him to state a case for this court pursuant to the provisions of the statute in that behalf provided.

G. WYSE, } J.P.  
W. ALLEN, }

Sidney, Q. C. (with him Curran) for the app.—Under 8 & 9 Vict. c. 64, if any person licensed to sell to be consumed off the premises sold to be consumed on the premises, he was liable to a penalty of 50L. That statute gave the police authorities for the first time power to prosecute; it recites 6 Geo. 4, and its second section. That Act had a graft added to it by 17 & 18 Vict. c. 89, s. 12. Down to that statute the offences of this character were confined to those committed by spirit dealers in harbouring persons tippling. In consequence of the decision in this court (see *Quin v. Murray*, 8 Ir. Jur. N. S.), the parties have got 27 & 28 Vict. c. 35 passed. Down to this the law stood that a spirit dealer harbouring a person tippling on his premises was liable to a penalty, but that did not extend to beer dealers. The effect of the section is first to say that the law which before only applied to the houses of licensed dealers shall now extend to licensed beer dealers; and it goes on to say the penalties shall extend to persons licensed to sell beer. And if it stopped there, a beer dealer would be liable under that Act no more than a spirit dealer. He would be liable under the statute of Geo. 4. These offences are, the selling of spirits, the tippling of spirits, and the harbouring of persons tippling, or who have been tippling. All the

(a) From the *Irish Jurist*, by permission.

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old offences in relation to spirits have been transferred over to another subject; but the Act does not say this shall also extend to harbouring a person tipping beer. A new class of individuals were affected by the earlier statute. [MONAHAN, C.J.—And therefore to create an offence under this Act there must be either selling beer or harbouring a person who has drunk whiskey?] Yes. The summons states that divers persons were then and there harboured in the house, without saying by whom. Whereas, if the statute did apply, it would only apply to the person harbouring. Harbouring in the criminal code imports an actual interference almost amounting to personal interference (sect. 2). There must be evidence to show a harbouring by the app. in the house. The evidence does not go beyond the summons. The policeman only saw a man who appeared to attend. He told him he would apply for a summons. [CHRISTIAN, J.—Is not that a question of fact for the justices? Your objection is two-fold: first, that it ought to be said the man harboured; and secondly, that there was no evidence of being harboured. Was not the latter a matter of fact for the justices?] If there was any evidence at all it would be, but there is none. [CHRISTIAN, J.—They were found in his house.] Harbouring must be more than a person being found in the house, for any member of his family could not in that case be there from the morning till 11½ p.m. In Archbold's Criminal Pleading, 827-828, instances are given of what would and what would not be harbouring. It must be proved the party has done some act to assist the felon personally. [MONAHAN, C. J.—Harbouring a felon means assisting him to escape from justice: it would be hard to give it this meaning here]: (*Reg. v. Chapple*, 9 C. & P. 355.) This is a criminal offence, because there is imprisonment if the penalty be not paid. Therefore the question of agency arises—if a person allows another to sell to those who have a right to do everything but sit down and tittle, is he responsible for their doing this? (*Cooper v. Slade*, 6 H. of L. 748.) Lord Wensleydale, in his judgment, p. 793, says: "Then comes the more important question, if this can be carried to Slade or his agent, as it is illegal to offer money to another for voting. I take it he cannot be held responsible unless he has given authority." &c. Here is a man licensed to sell beer to be consumed off the premises, who may have a servant to do this for him. If a man is employed to do a lawful act and he acts unlawfully, much more is required to show an intention on his part. The deft. was not present. It may be contended that the Act may be paralysed if a man of straw be put forward to do this; but if so, let the Beer Act be amended. But in this very statute the Legislature have shown, by sect. 5, that they have classified the offences and distinguished the owners. In a certain class of offences against the revenue laws, where the agent acted, the principal was convicted; but in all these cases the offence was committed by the goods being found on the premises of the trader. That was an act, and the agent might be fairly held the agent for the unlawful act.

*J. E. Walsh*, Q.C. and *Beytagh* contra.—The argument that it is not stated by whom the persons were harboured is not open. If it is, this is a summons and not an information: (*Levinge's Justice of the Peace*.) The magistrates state that preliminaries were performed, and that question is not open; if it be the summons may be amended. A parol information would suffice:

*R. v. Miller*, 1 Cr. Cas. R., 116;

8 & 9 Vict. c. 64.

These things are all *ejusdem generis*, all which may happen in the house of a licensed retailer. The

other side put in beer in every other place in the statute except where it presses. They say it does not apply in the concluding clause. They admit that if a man licensed to sell beer has people tipping spirits he would be liable. No doubt, it would be more correct if it were added in the section, "or harbouring persons tipping beer;" but there is no difficulty in concluding the fact of a person tipping beer at an unreasonable hour. [CHRISTIAN, J.—You say that the Act creates a new offence. The app. says the Act only applies to the old offence of persons tipping spirits. It would appear a strange thing if it was enacted that persons should not harbour persons tipping spirits who were already prevented from selling spirits. MONAHAN, C. J.—As I understand, the harbouring was introduced to get over the difficulty of proving an actual sale. No one can doubt that the person who prepared the Act intended to include this case.] The 8th section makes it penal in the persons found there. The word "tipping" is not capable of legal definition, neither is the word "harbouring;" it is for the justices to say what it is. It is too much to say that we are to prove legal harbouring, and that a person may stay away and leave a waiter, and then that we are to prove an authority in the waiter. The point of agency was not made in the court below. This is not the case of principal and agent, it is the case of master and servant. The law could never be carried out against housekeepers if it were held otherwise. The intention was to incorporate everything, and apply to the sale of beer what was law as to the sale of spirits. [CHRISTIAN, J.—The difficulty is to find any words applying to harbouring persons tipping beer. There was only before the offence of harbouring persons tipping spirits.] The Act refers not merely to the sale but to the person selling. [MONAHAN, C. J.—It is admitted on the other side that if a person was found selling beer it would be within the Act.] The words of this Act are, "As if this were repeated and specially enacted;" *i. e. reddendo singula singulis*. The Act must have a reasonable construction. The 8th section would make the person tipping liable to a penalty, and could it be that, notwithstanding this, the party harbouring is not liable? [CHRISTIAN, J.—It is beyond doubt that they intended to include this case. MONAHAN, C. J.—No doubt our decision gave rise to this new Act, and, no doubt, it has provided for the thing we then decided; but we still we have here to decide if relating to the sale includes harbouring.]

*Curran* in reply.—It is contrary to the principles of law that an offence is to be created and punishment attached by intentment. The Act should expressly set forth the offence. It is not to be spelt out from its terms, or from the intention of the Legislature. Three sorts of offences are here. 1. With respect to the hours to which persons licensed to sell for consumption elsewhere shall keep open; and in that there is the omission of the word "not," which nullifies that portion of the section. 2. With respect to 8 & 9 Vict. c. 64, and all the authorities, &c., what were these? To enter a house and punish the parties, &c. In reference to the offences, therein, *i. e.*, in the sections respectively set forth, *i. e.*, transferring to the houses of beersellers the same offences therein set forth; but this does not set forth any new offence. It is not repeating; spirits to call it beer. [KEOGH, J.—What are "such persons?"] The persons licensed to sell to be drunk not on the premises. As to harbouring, the word is not to get an extensive meaning the first time it appears in an Act. It may mean concealing the party from the police, and in that sense it ought to be taken and not against the subject. Unless the servant act within the scope of his authority the

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master is not liable: (Smith's Master and Servant.) There is nothing here to warrant the conclusion that the waiter had any authority to harbour persons tipping beer. The app. ought to succeed, 1st, on the construction of the 6th section; 2nd, on the construction of the word "harbouring."

MONAHAN, C. J.—We are of opinion that this conviction is quite right; that having regard to the 6th and 8th sections persons found recently tipping are certainly within the Act. Therefore there is no doubt it was in the contemplation of the Legislature to render the tipping, or being found recently tipping, an act for which the party would incur the penalty. The only question then is if the words of the 6th section are sufficient. Are there words creating the offence? The words are, that all the provisions in the former Act shall apply to the sale of beer by persons licensed. We think the intention to be found in that section was to extend to the sellers of beer all the penalties, and that every act done in relation and in connection with the sale is equally an offence. We think that the actual sale is one; that the harbouring of a person supposed to be after the sale is another; that the harbouring persons recently tipping beer is an act provided for by the 6th section. The only other question is as to the meaning of "harbouring." It is not the same as in the case of a felon; it is permitting persons to remain in the house who are tipping, or who have the appearance of having been tipping. It would be impossible to say the master would not be responsible for the act of the servant.

CHRISTIAN, J.—I felt some doubt if there were sufficient words in the 6th section to carry out what the 8th section rendered perfectly plain. I think the words are afforded by the concluding words of the 6th section, in which the sale is spoken of. "And in respect of the sale of beer," i.e., what was previously the law as to the sale of spirits shall be of the sale of beer, including the harbouring.

*Conviction affirmed. No costs were given.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,  
Barristers-at-Law.

June 12 and 13.

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*Re AN APPEAL BETWEEN THE BOARD OF GUARDIANS OF THE KETTERING UNION (apps.) v. THE COMMITTEE AND DIRECTORS OF THE NORTHAMPTON GENERAL LUNATIC ASYLUM (resps.)*

*Pauper lunatic—Order for maintenance—Appeal—16 & 17 Vict. c. 97, ss. 96, 108, 128.*

*There is no appeal against an order of justices made under 16 & 17 Vict. c. 97, s. 96, upon the guardians of the union or parish, or overseers of the parish, from which a lunatic has been sent to an asylum for the maintenance, &c., expenses:*

*So held per Cockburn, C.J., Mellor and Shee, JJ. (Blackburn, J. dissentiente).*

This was a rule nisi calling upon the Recorder of Northampton to show cause why a writ of *certiorari* should not issue, to remove into this court an order of the Borough Sessions of Northampton made in an appeal between the above-named parties, quashing an original order of justices for the lodging, maintenance, medicine, clothing, and care of one William Voss, a pauper lunatic, on the ground that the sessions had no jurisdiction.

It appeared from the facts that in Jan. 1861 one William Voss, an idiot from his birth, was brought into the Northampton General Lunatic Hospital from the parish of Middleton, in the Kettering Union, as a private patient, at the instance and charge of his father, where he remained at his charge until Aug. 1862, when the clerk to the Kettering board of guardians, in which union the father was settled, wrote to the secretary of the hospital, telling him that the board of guardians had come to an opinion that the father could no longer maintain his son as a private patient, and that the board would pay the maintenance moneys from the 18th Aug. The lunatic was therefore removed from the private to the pauper class, and his maintenance was therefore included in the general quarterly bills of the whole body of the Kettering paupers confined in the asylum. On the 7th Feb. 1863 the clerk to the board of guardians wrote to say that the board would not pay for the pauper after the 25th March then next, and as the father was unwilling to take charge of him, he continued to remain in the asylum without being paid for by anyone. On the 23rd Sept. 1864 the magistrates for the town of Northampton, upon the application of the committee of management, made an order upon the guardians of the Kettering Union to pay the sum of 40l. 12s. 6d. for the lodging, maintenance, medicine, clothing, and care of the said William Voss, being at the rate of 12s. 6d. per week from the 2nd April 1863, to the 1st July 1864. Against this order there was an appeal to the Borough Quarter Sessions at Northampton. The appeal was entered on the 30th Dec. 1864, and recognisances were entered into by the apps. on the 2nd Jan. following, the sessions being holden on the 6th of the same month. Upon the hearing of the appeal it was objected by the resps., first, that the app. had no right of appeal, as the statutes gave none; secondly, that as the recognisances had not been entered into until after the entry of the appeal, the right of appeal, if any, had been lost; thirdly, that the recognisances had not been entered into forthwith after notice of the appeal had been given to the resps.; fourthly, that as the recognisances were not entered into before a justice of the peace for the town and borough of Northampton, the right of appeal was lost. The Recorder overruled all the objections, whereupon the counsel for the resps. stated that they should defend the appeal under protest, and ultimately the Recorder quashed the order of justices with costs.

*Merewether showed cause.*—This was an order of justices under the 16 & 17 Vict. c. 97, s. 96 (the Lunatic Asylums Act), against which the guardians of the union upon whom it is made had a right of appeal, and if so the order of the sessions is valid. Sect. 128 gives a right of appeal against any order or determination of any justices under the Act, other than orders adjudicating as to the settlement of any lunatic pauper and providing for his maintenance. The order appealed against was not an order adjudicating as to the settlement of the pauper, and therefore is not excepted from the operation of sect. 128.

*Poland and Sills* in support of the rule.—There is no appeal given by the 16 & 17 Vict. c. 97, against an order of this description. The object of the 96th section was to give the proprietor of the Lunatic Asylum a remedy in the first instance against the union or parish from which the pauper was sent. Sect. 95 makes the lunatic pauper chargeable to the parish from which he is sent to the asylum, until his settlement is adjudicated to be in some other parish. An order under sect. 96 in no way affects the pauper's settlement, and

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the parish from which the pauper is sent, and which has in the first instance to pay the proprietor of the asylum, may reimburse itself from the settlement parish of the lunatic or from the county. The appeal given by sect. 128 is not extended to this case. And an order under sect. 98 cannot be appealed against: (*Wilson v. Liverpool (Overseers)*, 17 Q. B. 303.) The order is a mere interim order.

June 13. — COCKBURN, C. J. — I am of opinion that this rule should be made absolute. The clauses of the Act of Parliament upon which the question turns are certainly open to considerable doubt and difficulty; but, upon the whole, I have come to the conclusion that there was no appeal in this case from the order of the justices to the quarter sessions. The order in question was an order upon the guardians of the union which comprised the parish from which the lunatic had been sent to the asylum for his maintenance. The parish might immediately get rid of its liability in one of two alternative ways, either by showing that the pauper was settled in some other parish, a matter upon which the justices had power to adjudicate, and upon adjudicating which they would be bound to make an order for the maintenance of the pauper lunatic upon the parish in which they adjudicate his settlement to be; or, if the parish appealing against this order was unable to ascertain and to show in what parish the lunatic was settled, then by Act of Parliament they are authorised, and the justices are bound, to make an order upon the county for the maintenance of the lunatic out of the county funds. In either case, therefore, the order is only a provisional or interim order. I can quite understand why the Legislature, in making provision for the case of an appeal against an order of maintenance founded on an adjudication of settlement, may have thought that the temporary and transient inconvenience to which the parish, from which the lunatic is sent, may be subjected, should not have thought it necessary in consideration of so small an inconvenience to give them any right of appeal. Besides this, when one comes to look at the sections of the Act of Parliament which relate to the power of appeal, it seems that the machinery prescribed by the Act in case of appeals by parish officers in the case of adjudication of settlement and the machinery provided for appeal in other cases, is so entirely dissimilar, that the machinery to which it would be necessary, if this appeal lay, to resort, namely, the machinery prescribed by the 128th section, is wholly inapplicable to the case of appeal by parish officers. Parish officers are authorised to appeal where there has been an adjudication of settlement and an order for maintenance founded on such adjudication; but then no particular terms are imposed upon them. We come to the 128th section, from which the terms "overseers" and "parish officers" are omitted, and we are dealing with the term "person," and we find an entirely different machinery provided as to recognisances, and so on, and as to the time during which the appeal must be brought, and altogether the machinery is of a different character. It seems to me, looking to the fact alone, that in the one case where the appeal is given, by the 108th section, the terms used are, "the guardians of any union, or parish, or the overseers of any parish;" and that in the 128th section it speaks of "persons," not "person" only; upon the whole, what the Legislature must have intended to mean is this: "If, upon an adjudication of settlement, the guardians of the union, or the overseers of the parish, are aggrieved by an order of maintenance founded on the adjudication, which they believe to be an unjust one, they have a right of appeal. In all other cases 'the person aggrieved' must receive a different signification. There are

many instances that might be mentioned where persons might be aggrieved as distinguished from parish officers, or the guardians of a union, by an order made by the justices under the Act of Parliament; and I cannot help thinking that the term "person" is not intended to be applied to the case of a parish officer. And it is a significant fact in this case, that the county may be in the position of being aggrieved by an order; as for instance, if a county, in order to get rid of a liability cast upon it in the event of a settlement not being found, come forward and suggest, or endeavour to maintain or prove, that a given parish is the parish of the pauper lunatic's settlement, they might be aggrieved by an adjudication of magistrates refusing to affirm that fact, and to act upon it, yet the county has no appeal; and that the county has no appeal has been decided in the case of *Wilson v. The Guardians of Liverpool*. But, independent of that case, it would be impossible to say that the county should be included under the term "person." There is no more reason that I can see why the county should not have an appeal in such a case quite as much as a parish like the present, which, as I have said, only suffers the temporary inconvenience of having a provisional order made upon it. I cannot think the term "person" is to include everybody and every class of persons who may be aggrieved by an order made under the present section. I think we must consider that the term "person," used in the 128th section, does not include the guardians of the union, or the overseers of the particular parish. The reason for introducing the exceptions which are found appears to me tolerably manifest. The term "person aggrieved by any order" might include ratepayer of the parish, or ratepayer of the county, and might certainly include ratepayer of a parish; and it may have been that the exception was introduced into the section of the Act of Parliament for the purpose of excluding any person who, as a ratepayer, should be aggrieved in a case where the Legislature intended that the appeal, if preferred at all, should be preferred by the guardians, or proper officers of the parish; therefore, it says: "If any person feel himself aggrieved by any order of the justices other than an order made under the 96th section; in that case the appeal is to be regulated and limited by the provisions of the 108th section. It excepts, therefore, any case that falls within the 108th section, but it leaves the term "person" as applicable to any of those numerous cases in which persons may be aggrieved by orders made under this Act. I think, therefore, readily admitting the matter is involved in considerable difficulty and obscurity, that upon the whole the language of the Act warrants us in saying that no appeal is given in such a case as the present. I think, therefore, that the rule for quashing the order should be made absolute.

BLACKBURN, J. — As at present advised I take a different view from what my Lord and my learned brothers do; for it seems to me the appeal in this case does lie, and consequently, that the rule ought not to be made absolute. But that depends entirely on the construction of the terms of the Act of Parliament. I do not mean to express my opinion very strongly or decidedly, because the words of the Act are very obscure; though I think the natural sense of them is such as to give the appeal. I do not see that there is anything pointed out to prevent our construing the Act in what, I think, is its natural sense. I admit there is a great deal to be said in favour of the other view of the matter, and, therefore, I do not mean to express a strong opinion of dissent from that which my Lord and my learned brethren entertain, but merely to point out



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that I do not take quite the same view that they do. The 128th section gives an appeal to any person who thinks himself aggrieved by any order other than an order adjudicating as to the settlement of any lunatic pauper and providing for his maintenance. Now, first of all, I must say it seems to me, in construing the Act, we must take the words "any person" as including every sort or kind of person that does not come within the exception. I think, if the order aggrieves the guardians of the union, or the treasurer of the county, or any person is aggrieved, by any order not coming within the exception, that those so aggrieved, whether body corporate or not, would come within the meaning of "any person;" but then I think that, if the order against which they seek to appeal comes within the exception, they then certainly cannot appeal. What appears to me to be the difficulty in the case is, to see what are the orders coming within the exception—those are orders adjudicating as to settlement of any lunatic pauper and providing for his maintenance; if they can be so construed—and it is not any great straining of the words to read them as an order adjudicating as to the settlement of any lunatic pauper and also an order providing for his maintenance, and if that is so, this case falls within that exception and no appeal lies. But it seems to me that the natural construction of the words is, that they mean an order adjudicating both as to the settlement and providing for the maintenance; so that the only case within the exception would be orders that do both those things. If that be the exact meaning of the words, then this order, which only provides for the maintenance and does not touch the settlement, would not be within the exception, and consequently the appeal would lie. We are referred back to the Act, and we find that under the 94th section the justices might make an order upon the next friend of the lunatic to provide for the maintenance of the lunatic. That is certainly an order providing for his maintenance. At the first glance I thought it would be a monstrous thing that a person alleged to be the next friend of the lunatic should not have the power of appeal; but, when I come to look at the section, I find there is no personal enforcing of the order against him; and therefore the only effect is, if he does not obey the order, the next order that has to be made is to sell the property. The subsequent section gives the power to sell the property of the lunatic, but against that order there is an appeal. Therefore, it is nothing to say that the order against the next friend would be in itself binding. Next comes another section, the 96th, where the justices may make an order upon the parish from which the lunatic pauper is sent, ordering them to pay maintenance; that is the order against which in the present case the guardians appeal. Now, the first thing that struck me was, that in the case which is alleged to be the case here, of the justices having adjudicated that the person had been sent from the parish when they never sent him at all, and that he was a pauper when he was not a pauper at all, or that he was a lunatic when he was not a lunatic at all, it seems a very hard thing there should not be an appeal from that; but when we look again at it, it does appear that this is a preliminary or interim order, and from which the parish can get its relief by showing where the person was settled. Therefore, there can be no great absurdity in the scheme of legislation if they were to say that should be final also. And then comes the 97th section, and by that the order of adjudication or settlement is also to be an order for maintenance; so that an order under the 97th section falls completely within the terms of the exception in sect. 128, the order adjudicating the settlement and providing for maintenance. Then

from that we go on through several sections till we come to the 108th, and there it is enacted, if the guardians of any union or parish, or overseers of any parish, feel aggrieved by any such order adjudging the settlement of any lunatic, they may appeal, subject to different terms and in different ways to the general appeal afterwards given in the 128th section. Now, it certainly struck me upon the whole as being the true construction of the Act that, when it is said any person may appeal against any order, except orders adjudging the settlement and providing for the maintenance, that referred back to sect. 108, where there is an appeal given against the particular class of orders which fulfilled every word, and which were orders adjudging the settlement and providing for the maintenance, against which they have provided one appeal, which they have confined to the officers of the union and the overseers of the parish, who are the natural persons to appeal. Against other orders they have provided no appeal, and these come within the general rule of the 128th section, the exception being confined to that for which the appeal is already provided; but against that there is this to be said, and which weighs a good deal in my mind in making me doubt whether it is the true construction of the words when they give the appeal in the 108th section against the order adjudging the settlement. In the 128th section the appeal is against orders other than orders adjudicating the settlement and providing for maintenance, yet the Legislature have, in that view of the case, put in sect. 128 superfluous and idle words. I know it is no uncommon thing in Acts of Parliament to put in superfluous and idle words, without considering what they mean; still, upon the general rule of construction, when they put in additional words, one must suppose they *prima facie* mean to convey some additional meaning, and it may be that here the additional meaning may be to say that an order as to the maintenance of the pauper lunatic, though not as to his settlement, should not be the subject of appeal. I do not say it is absurd; it is, however, a straining of the words, but it is not a great one. I think myself, taking it altogether, that the natural construction of the Act is to confine the exception from the appeal in sect. 128 to the particular class of cases embraced in sect. 108, for which another appeal is given, and against every other order every other person who is aggrieved may appeal. The other view may be better than that view, but that, I think, is the true construction of the Legislature, and I by no means mean to express a stronger opinion than to say I think the appeal did lie.

MELLOR, J.—I am of opinion that the rule ought to be made absolute. There is no doubt very considerable difficulty in coming to a satisfactory conclusion as to the meaning of the various provisions, but I cannot help thinking that the scheme of the Act leads us to the true solution. It seems that, if the lunatic being in an asylum has property, then his property is to be made liable by the mode my brother Blackburn has suggested, provided for by the 94th section. If the lunatic have no property, he is to be considered to be chargeable to the parish from which, at the instance of some officer, or officiating clergyman, he is sent, that is, the parish in which he has an establishment and settlement, and it is to be ascertained in what parish he has a settlement. In that case, *prima facie* the parish from which he is sent is to be deemed the place of his settlement for the purpose of chargeability. Then the 96th section provides that, in that case, orders for the expense of bringing him to the asylum, and his lodging and maintenance, and medicine, clothing, and care, may either be retrospective or prospective, or partially retrospec-

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tive and partially prospective. That order is to be made on the guardians or overseers of the parish, if the parish be not in any union; therefore the order is to be on the guardians or on the overseers of the parish. Now, what is the way in which the settlement is to be ascertained by the 97th section? "Two justices, at the instigation of the parish from which the pauper has been removed, may inquire, and, if they can ascertain the place of settlement, they may make an order adjudicating on the settlement, and ordering that the parish on which he is settled may reimburse the parish from which he is sent all those expenses; that if it turns out on the inquiry they cannot ascertain that he has any place of settlement, then the charge is to be thrown on the county, and the parish to which he has been sent is to be relieved, and the county is to become chargeable with these expenses. Now, there are provisions in respect of which the county may be relieved from these expenses if they can ascertain the settlement, because at the end of the 98th section, which throws this charge upon the county, it says: "That the magistrate may delay adjudging such pauper lunatic to be chargeable to any county until such further inquiry has been made. Provided also, that every county to which any pauper lunatic is adjudged to be chargeable as aforesaid, may, at any time thereafter, inquire as to the parish in which such lunatic is settled, and may procure such lunatic to be adjudged to be settled in any parish." Then there is a provision for the reimbursement of the county, for the moneys paid on account of the lunatic so adjudged to belong to the parish by the 99th section. And by the 100th section it is provided: "That it shall be lawful for any justice hereinbefore authorised, to make any such order as aforesaid upon the guardians of any union or parish, or upon the overseers of any parish, to make such order upon such guardians or overseers, although such union or parish be not within the jurisdiction of such justices." Now, whenever the determination of the justices finally settles the question of the settlement of the pauper, so as to make the charge perpetual, there the appeal is given, and it is given in the very words to the guardians of or to the overseers of the parish. Now by referring to the 108th section, the words are: "If the guardians of any union or parish, or the overseers of any parish, feel aggrieved by any such order as aforesaid." Therefore they are the persons on whom the justices make the order for the expenses of the removal of the lunatic to the asylum, and his provisional maintenance. They are the persons who are authorised to appeal under the 108th section against any order adjudging the settlement of any lunatic; and I ought to say, upon that 108th section, that the only machinery with reference to costs, or anything else, is, they are to be at liberty to appeal without any condition as to recognisance, without anything being said as to costs, certainly nothing as to recognisance, nor are they tied up as the 128th section ties up the parties to whom the appeal is there given. Therefore, I come to the conclusion that the special machinery which provides for the guardians and overseers of the poor, is the appeal which the Legislature intended to give to them; for, by the 128th section, the words, instead of being "any guardian of any union, or overseer of any union, or overseers of the parish," are, "any person who thinks himself aggrieved by any order or determination of any justices under this Act, other than orders adjudicating as to the settlement of any lunatic pauper and providing for his maintenance, may within four months, and on giving recognisance, appeal." And then there is the provision which I do not rely on, as confining it to those things that the justices may have power to mitigate penalties and reduce the

sum which, by way of penalty, may be ordered to be paid by any person who may appeal against the order. But it does occur to me, when an appeal is given in the manner provided by the 108th section, and in the words of the 108th section without providing for recognisances, or the liability to those provisions, assuming the overseers and the guardians of the union are capable of paying without any recognisance as to costs, it does seem singular they should be considered as included under the words "any person," or under the provisions provided by that section. Therefore, although I have some difficulty, which I am bound to admit on this construction, still, it appears to me that these orders which are made on the guardians or overseers of the parish, which are only interim in their intention, may be got rid of the moment it appears there is a settlement that can be ascertained. It was unnecessary, as it seems to me, to give an appeal, and I do not see any impropriety in allowing the decision of the justices in that case to be to that extent final so far as regards the amount of expenses that the settlement parish will have to pay so soon as the settlement is ascertained. I think also, I might rest in some degree on the words my brother Blackburn has referred to in the 128th section; but I have a little doubt on that, because there are other orders providing for the maintenance of the pauper than the orders which are part of the adjudication of settlement. Therefore, I do not feel I can rely quite so positively upon it, though I do not think there is a great strain upon the words by reading "and" as "or." If we found provisions for the maintenance of the pauper by the parish, I think that would make the matter clear. However, as I cannot rely on that reading, I rather prefer to put it on the other ground, which is the ground relied upon by the Lord Chief Justice, and with whose observations upon it I entirely agree.

SHEP, J.—I entirely agree with what has fallen from my Lord Chief Justice and my brother Mellor, and therefore I will not attempt to repeat what has been much better stated by them than I can hope to do; but I will briefly add to what they have said, that it appears to me that the order that is provided under the 96th section is final, in the sense of being without appeal, because it is in its nature provisional. It is to be only provisional and temporary. And secondly, because in the very next section the mode of correcting it, should it be made under a mistake, is expressly provided. The object of the section is, as appears to me, to provide certainly and at once for the maintenance of a person who cannot possibly maintain himself, and to throw the charge of his maintenance immediately upon the parish from which he has been brought to the asylum, or upon the parish, the officer or officiating clergyman of which has caused him to be sent to the asylum; clearly indicating an intention not to decide at once who, or what parish, or what union, shall be liable to support the lunatic, but to provide certainly and at once for his support, leaving to those who may dispute the propriety of their being charged with his support a ready remedy under the 97th section, by calling upon two justices to inquire into the last legal settlement of such lunatic pauper, and to adjudicate upon his settlement, and in the order adjudicating the settlement to order that he shall be provided for by the parish in which they adjudicated him to be settled. From that adjudication, there is a clear appeal given by the 108th section, "that the guardians of any union or parish, or the overseers of any parish being aggrieved by any such order as aforesaid adjudging the settlement of any lunatic, they or he may appeal against the same to the next general quarter sessions." Now, the only

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difficulty that arises upon this construction is on the words of the 128th section, which are, "That any person who thinks himself aggrieved by any order or determination of any justice under this Act other than orders adjudicating as to the settlement of any lunatic pauper, and providing for his maintenance, may, within four calendar months after such order or determination made or given, appeal to the general or quarter sessions." In my opinion these orders adjudicating as to the settlement of any lunatic pauper and providing for his maintenance, are only a little more detailed description of the order mentioned in the 108th section ordering and adjudicating the settlement of any lunatic pauper, because, on referring to the 97th section, it appears that the order adjudging the settlement of any lunatic pauper shall also be an order for the maintenance of such lunatic. Therefore it seems to me that these words, "orders other than orders adjudicating as to the settlement of any lunatic pauper, and providing for his maintenance," mean the same description of orders as are mentioned in the 108th section. Then, as to the word "person." It appears to me, for the reasons that have already been given, that the word "person" cannot be taken to mean the "guardians of any union or the overseers of the poor, or the inhabitants of the county," and the meaning of them must be ascertained by reference to other sections of the statute, amongst them the 94th, by which justices are empowered, if it appears to them that the lunatic has any estate applicable to his maintenance, to order the relieving officer or the overseer of the poor to seize so much of his money or property, and sell it, for the purpose of maintaining the lunatic, as may be necessary. And further, that if the lunatic pauper has any property in the hands of any trustees for him, who have the possession and custody or charge of any property of the lunatic, or, if he has any property in the hands of the Governor and Company of the Bank of England, or any other body or person having in their or his hands any stock, interest, dividends, and so forth, they are empowered to make an order upon such person to pay what may be the charges necessary for the maintenance of the lunatic. And even after such order made, and after they have satisfied themselves that he has no means applicable to his maintenance beyond what may be necessary to maintain his family, the justices are empowered, until such charges as aforesaid shall be paid, in pursuance of such application or order as aforesaid, to make an order on the guardians of the union or parish, or the overseers of the parish from which such lunatic shall be sent for confinement, for payment of the charges of his removal, lodging, maintenance, clothing, medicine, and care of such lunatic." It appears to me, that this section clearly shows that there are persons to whom the word "person" in the 128th section can properly be applicable, without including in that word either guardians of unions, or the inhabitants of counties, and that the whole scheme of these clauses is, to provide absolutely and certainly, and yet provisionally and only temporarily, for the support of the lunatic, pointing out and giving afterwards in the section that immediately follows a speedy remedy by application to two justices to adjudicate upon his settlement, if it be thought by the parish to whom the order to support has been made temporarily, that a mistake has been made as to their liability to support him.

*Rule absolute.*

Wednesday, Nov. 8, 1865.

THE LOCAL BOARD OF HEALTH OF CHATHAM EXTRA (apps.) v. THE ROCHESTER PAVEMENT AND ROAD COMMISSIONERS (resps.)

*Turnpike tolls—Security of—Sinking fund—Contribution by parish to make good deficiency of repairs of turnpike-road—4 § 5 Vict. c. 67—12 § 13 Vict. c. 87, s. 3—13 § 14 Vict. c. 79, s. 4.*

By a local Act (9 Geo. 3, relating to the town of Rochester) certain commissioners were appointed who were empowered to light, watch, &c., the streets, and to open and keep in repair a certain road, and they were to make an annual assessment upon the parishioners, and to erect two turnpike-gates at the termini of the said road. They were also empowered to raise money upon the credit of the rates and tolls, and to assign the same to any persons who should advance the sum. The commissioners from time to time borrowed money under these provisions at 5 per cent., and in the year 1853 the amount so borrowed and secured amounted to 9800*l*. The commissioners then believing that they could get the amount at a lower rate of interest, advertised for the purpose, and succeeded in getting the whole amount at 4 per cent., and the old assignments were given up and cancelled, and new assignments were granted in the year 1855. By the 12 § 13 Vict. c. 87, s. 3 (passed in 1849), it is enacted that in every case in which commissioners of any turnpike-road shall thereafter borrow, charge, or secure any sums of money on the credit of the tolls arising on such road, they shall out of the tolls of such road, and in priority of all other payments thereout, except the interest on any such moneys as aforesaid, set apart a sum of 5 per cent. per annum on the amount of the money so borrowed, in reduction of the money borrowed. But by the 13 § 14 Vict. c. 79, s. 4, after reciting the above provision of the 12 § 13 Vict. c. 87, s. 3, it is enacted that where the commissioners of any turnpike-road had before the passing of the 12 § 13 Vict. c. 87, borrowed any sums of money on the credit of such tolls, and any such money should remain unpaid and unsatisfied at the time of the passing of that Act (13 § 14 Vict. c. 79), such commissioners are, out of the tolls, after payment thereof of the interest of any money owing on the security of such tolls, &c., "and the necessary expenses of the repairs of such road," &c., set apart the like sum of 5 per cent. as a sinking fund. The commissioners had annually, in addition to the amount due to the several creditors, set aside the sum of 5 per cent. as a sinking fund, and in the current year the sum of 400*l*. was so set aside for the latter purpose. It was found, however, that the amount remaining in their hands was not sufficient for the proper repair of the road, though it was admitted that if such sum of 400*l*. had not been so set aside the amount would have been sufficient. Their treasurer, therefore, exhibited an information, under the 4 § 5 Vict. c. 67, before justices, alleging that the funds of the turnpike trust were insufficient for the repair of the road, and praying for an order for contribution from the parish towards the repairs. At the hearing the justices made such order for contribution to the extent of 100*l*.

*Held*, that the order was bad, for that the transfer of the debts in the year 1855 was not a borrowing within the meaning of the 12 § 13 Vict. c. 87, s. 3, and so the commissioners had no authority to set aside the 5 per cent. for a sinking fund, in priority of the sum required for repairs of the road:

*Held*, also (per Cockburn, C.J., Mellor and Shee, J.J., Blackburn, J. dubitante), that, as the rates as well as the tolls were a security under the local Act, neither the 12 § 13 Vict. c. 87, nor the 13 § 14 Vict. c. 79 (each of which speaks of the security of the tolls only), applies to the case.

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This was a case stated under the 20 & 21 Vict. c. 43, upon the following facts :

At a special sessions for the highways, holden at the precinct of Rochester Cathedral, in and for the north or Rochester division of the lath of Aylesford, in the county of Kent, on the 10th and 24th Feb. 1865, the commissioners of the turnpike trust, under an Act of the 9 Geo. 3, intituled "An Act for paving, cleansing, &c., the high streets and lanes in the parish of St. Nicholas, within the city of Rochester and parish of Strood, in the county of Kent, and for making a road through Star-lane, across certain fields adjoining thereto, to Chatham-hill, in the said county" (hereinafter called the resps.), by John S. Bullard, their treasurer, exhibited an information pursuant to the statute 4 & 5 Vict. c. 59, which has since been periodically re-enacted, and was last renewed in the 23 & 24 Vict. c. 67, before us, alleging that the funds of the said turnpike trust are insufficient for the repair of the said turnpike-road lying within the district called Chatham extra, and praying us to make an order that such portion of the highway rates of the said parish of Chatham, or other the rates or assessments levied and applicable to the repair of the highways within the said parish and district as we should judge necessary, should be paid by the said local board of health, being the surveyors of the highways of the said parish and district, to the said commissioners or their treasurer, towards the repairs of such part of the said road as is within the said parish or district. Upon the hearing of the said information, and after due examination of the state of the revenues and debts of the said turnpike trust, and inquiry into the state and condition of the repairs of the roads within the same, and the length of the road within such parish and district, an order was made by us, the said justices, that the sum of 100*l*., part of the rate or assessment levied or to be levied for the repair of the highways in and for the said district of Chatham extra, in the said parish of Chatham, should on the 1st Aug. 1865, by the said local board of health of the said district (hereinafter called the apps.), be paid to the said resps., commissioners of the said trust, or their treasurer, to be wholly laid out in the actual repair of such part of the said turnpike-road as lies within the said parish of Chatham and district of Chatham extra.

The apps., being dissatisfied with our determination, &c., required a case to be stated, as follows :

Upon the hearing of the information it was proved, on the part of the resps., and admitted and found as facts, that the commissioners appointed under the said Act of the 9 Geo. 3, were empowered from time to time to cause the streets and lanes in the parishes of St. Nicholas, Rochester, and Strood to be paved, cleansed, lighted and watched as they should think fit. Also to open, make, and keep in repair a road through and from Star-lane, in the city of Rochester, across the fields and grounds leading to Chatham-hill, to a road then existing on Chatham-hill aforesaid, being the old road from London through Rochester and Chatham to Dover. The same local Act empowered the commissioners to make every year one rate or assessment of and upon all and every person and persons who inhabit, hold, or occupy any houses or tenements whatsoever within the said parishes of St. Nicholas and Strood respectively, so as such rate or assessment in respect of the tenements within the said parish of St. Nicholas shall not exceed 1*s*. in the pound according to the rate made for the relief of the poor of the same parish, nor more than 9*d*. in the pound on houses and buildings in the same parish of Strood, and to erect one turnpike-gate at the end of the new road next Chatham-hill, and another gate at or near the Angel Inn in Strood, and to take at

such gates the tolls specified by the said Act. The commissioners are also empowered at any meeting to borrow and take up at interest any sum or sums of money upon the credit of the rates, assessments, and tolls, and to assign over the same, or any part thereof, to any person or persons that shall advance or lend their moneys thereon, as a security for the several sums borrowed, and the interest, &c. That the said new road was made and maintained to the present time by the said commissioners, and the turnpike-gates set up and maintained as directed, and tolls continued to be taken, and rates were annually made and collected in the parishes of St. Nicholas and Strood, at the maximum rate of 1*s*. in the former and 9*d*. in the latter parish, and the streets and lanes of the two parishes are kept, paved, &c., pursuant to the local Act. The whole of such income is treated as a common fund, and has been applied to all the payments to which the trust is liable. That the commissioners from time to time borrowed money for the purposes of the Act, amounting to upwards of 10,000*l*., which has been reduced by occasional payments of principal to its present amount of 8000*l*. That the great bulk of this loan was borrowed in 1769 and 1770 (except 200*l*. borrowed in 1823), at 5 per cent. interest, and sums were paid off from time to time, so that in 1853 the principal secured by the assignment of tolls, &c., was 9800*l*., and the commissioners believing that the money could be had at a lower rate, accordingly advertised for a loan of that amount at 4 per cent. interest, to be secured on the tolls and rates of the trust. Among the holders of the original assignments of 1770, creditors to the amount of 2000*l*. offered to continue such at the reduced rate of interest, and new capitalists came forward whose tenders were accepted for 7500*l*. more, making together 9700*l*.; the remaining 100*l*. was paid off absolutely from funds in hand. All the original assignments were in April 1855 delivered up and cancelled, as well those of creditors who lowered the rate of their interest and continued otherwise creditors as before as those of the creditors who received their principal money and relinquished all claim, and new assignments to the amount of 9700*l*. were executed to all the creditors, whether new or continuing. Since 1853 assignments to the amount of 1700*l*. have been paid off without any preference, reducing the total secured debt to the present sum of 8000*l*. at interest of 4 per cent. That upon the passing of the Municipal Reform Act, 5 & 6 Will. 4, c. 76, the assessments made pursuant to the local Act in St. Nicholas and Strood were, under the 81st section of the Municipal Reform Act, reduced in proportion to the amount ascertained to have been the previous annual expense of watching, and were therefore, for a time, assessed at only a portion of the respective rates of 1*s*. in the pound in St. Nicholas, and 9*d*. in the pound for Strood, but shortly afterwards, on reference to the 85th section of the same Act, the rates of assessment were, on account of the debt, again raised to the original maximum, and have so continued. There are in the two parishes of St. Nicholas and Strood portions of highways not under the care of the commissioners, or included in this turnpike trust, and highway rates are made by the ordinary surveyor of highways within each of those parishes for the maintenance of such outlying portions. That the total length of road under the charge of the commissioners, from near the Angel Inn, is 4650 yards, of which length 2050 yards are in the streets of Strood and St. Nicholas, and the remaining 2600 yards consist of the new road, namely, 1000 yards in the parish of St. Margaret, Rochester, and the remaining 1600 yards in the parish of Chatham, and entirely within the district of Chatham extra, and the road in Chatham extra

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is the only part of the 4650 yards within our jurisdiction, St. Margaret and the other two parishes being in that of the city of Rochester. The new road has for several years been falling into inferior condition in consequence of the lowness of the funds of the trust arising from the falling off of the tolls caused by diversion of traffic and the discontinuance of stage coach and post travelling, and it is estimated by the surveyor of the resps. to require about 120*l.* in the current year to keep in a proper state of repair that portion which lies within the district of Chatham extra. That the estimated revenue and expenditure for the year 1865, founded principally on the actual receipts and payments of 1864, are as follows. [Here followed a statement of figures showing a deficit of 376*l.* 12*s.*, two of the items of expenditure being 320*l.* interest on the present debt of 8000*l.*, and 400*l.* for sinking fund of 5 per cent. on principal of 8000*l.*] It was contended by the apps., that the respondent commissioners cannot lawfully set aside 5 per cent. per annum on the 8000*l.* principal remaining unpaid on the assignments until after payment out of the revenues of the trust of not only the interest on that principal, and other liabilities and annual expenses of the trust, but also the necessary expenses of the repairs of such road, inasmuch as the debt, if any, being an old debt created before the passing of the 12 & 13 Vict. c. 87 (1st Aug. 1849), the powers of that Act are not available, and the commissioners are left to apply those of the 13 & 14 Vict. c. 79. They would then find sufficient funds from their tolls and rates to pay the interest and all other liabilities, and also to repair the roads, their sole deficit being then in the sinking fund, for which (being postponed to all other payments) there would remain to be set apart only about 25*l.* instead of 400*l.*, and that such a deficiency in means for raising a sinking fund cannot be made good by contributions from highway rates; and further the apps. say, that unless the debt of 8000*l.* is an old debt created long before 1849, the existing assignments are void as being for money raised for other purposes than those of the local Act of 1769, so that in either case the 5 per cent. on capital cannot be set apart for sinking fund until after providing for repair of road out of the income of rates and tolls. The apps. further contend that, supposing the new assignments to be good, and it be held that the money raised comes within the operation of the 12 & 13 Vict. c. 87, yet after deducting the interest (320*l.*) and the 5 per cent. for sinking fund (400*l.*), from the tolls and rates revenues (1492*l.*), there would still remain 772*l.* 7*s.* 2*d.*, which, with the estimated increase of rates, will give about 785*l.*; while the labour and materials for repair of the road and pavements throughout, and the salaries and incidental expenses, would amount to about 895*l.*, thereby reducing the deficit to about 110*l.*, to be made good by such parishes as are liable to the same. [The case proceeded to state other facts, which have become immaterial, and then continued:] The resps. contended that they, the commissioners of this turnpike trust, are authorised, under the Acts 12 & 13 Vict. c. 87, and 13 & 14 Vict. c. 79, to set apart 5 per cent. of the principal of their secured debt, after payment of interest only, and that thereupon if the income of the trust should be insufficient to defray the cost of repairs of the road, the deficiency is to be provided for by contributions from the moneys applicable to the repairs of the highways of parishes through which the turnpike-road passes. They allege that the present debt is, both in form and substance, a new debt created since the 1st Aug. 1849, after the old assignments to the amount of 7600*l.* had been actually paid off in cash, and the remaining twenty-two securities (2200*l.*) satisfied by being exchanged for new assign-

ments (made the same as to the new lenders) in April 1853; that the new loan was for the purposes of the Act, and highly beneficial to the trust in reducing the amount annually required for interest. [The case then proceeded to state other matters, now immaterial, and then continued:] Being of opinion that the resps. will, under the circumstances above stated, be unable during the current year 1865 to keep and maintain the road within their said trust in a good state of repair by means of the revenues of their said trust, and that, after paying interest and setting apart 5 per cent., part of the principal 8000*l.*, as a sinking fund under the Act of the 12 & 13 Vict. c. 87, as aforesaid, they are entitled, under the provisions of the said Act of the 4 & 5 Vict. c. 59, to call upon parishes and districts within the trust to contribute and make up the deficiency; and having considered the circumstances of the parishes of Strood and St. Nicholas, Rochester, and the parish of St. Margaret, Rochester, all which are out of the jurisdiction of our special session, we accordingly made such order as aforesaid.

The questions for the opinion of the court are, whether our judgment was in point of law correct, and whether the estimated deficiency of the resps.' revenues, as shown in this case, arise lawfully under the provisions of the 12 & 13 Vict. c. 87, so as to authorise an order for contribution from parochial or district highway funds towards the maintenance and keeping in repair of the road within this turnpike trust? or whether the resps. are bound to provide for the maintenance and repair of such road, and other payments prior to setting apart the sinking fund of 5 per cent. per annum on the principal debt, and prior to defraying the charge of lighting the parishes of Strood and St. Nicholas, Rochester? whether the deficiency should be made good from time to time as well by the parishes of Strood and St. Nicholas as by the other two parishes of Chatham and St. Margaret (which are not liable to the rates made under the Rochester Local Act), and if so, in what proportions and upon what principle? and whether 100*l.*, the amount ordered by us is excessive?

By the 4 & 5 Vict. c. 1, power is given to justices upon information that the funds of a turnpike trust are insufficient for the repairs of the turnpike-roads within any parish, to examine the state of the revenues and debts of such trusts, and to inquire into the state and condition of the repairs of the roads, &c.; and if after such examination it shall appear necessary or expedient for the purposes of any turnpike trust so to do, then to adjudge and order what portion, if any, of the rate or assessment levied by virtue of the 5 & 6 Will. 4. c. 50, shall be paid by the said parish surveyor, and at what time or times to the said commissioners or trustees, or to their treasurer, to be wholly laid out in the actual repairs of such part of such turnpike-road as lies within the parish from which it was received.

By the 12 & 13 Vict. c. 87, s. 3 (passed 1st Aug. 1849), it is enacted,

That in every case in which the trustees or commissioners of any turnpike-road shall hereafter borrow, charge, or secure any sum or sums of money on the credit of the tolls arising on such road, they shall, out of the tolls of such road, and in priority of all other payments thereout, except the interest on any such moneys as aforesaid, and on any other moneys remaining owing on the security of the said tolls set apart a sum of 5 per cent. per annum on the amount of the money so borrowed, &c., in reduction of the moneys borrowed, &c.

By the 13 & 14 Vict. c. 79, s. 4, after reciting the above enactment of the 12 & 13 Vict. c. 87, s. 3, and that it is expedient to extend such enactment to debts contracted before the passing of the said Act, it is enacted,

That where the trustees or commissioners of any turnpike-road had, before the passing of the 12 & 13 Vict. c. 87, borrowed, &c., any sum or sums of money on the credit of the tolls arising on such roads, and any such money shall

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remain unpaid and unsatisfied at the time of the passing of this Act, such trustees or commissioners shall, out of the tolls of such road, after payment thereof of the interest on any moneys owing on the security of the said tolls, and such sums of money as may be required to be set apart under the said recited enactment, and all other annual liabilities (if any) of their trust, "and the necessary expenses of the repairs of such road, and of the salaries of their officers, and all other necessary expenses of their trust, set apart a sum of five pounds per centum per annum on the amount of principal money so borrowed, charged, or secured before the passing of the said Act and remaining unpaid and unsatisfied as aforesaid," to form a fund towards discharging the moneys borrowed &c., after the passing of the Act.

*Mellish, Q. C. (F. J. Smith with him)* now appeared in support of the order of justices, and contended that they were right in their decision, for that the case was governed by the 12 & 13 Vict. c. 87, s. 3, and that the 5 per cent. for the sinking fund was properly deducted before applying the tolls to the repairs.

*Bovill, Q. C. (Prentice with him)* contended that the justices were wrong in giving priority to the amount for the sinking fund, for that they should have given priority to the amount required for the repairs, and that, if they had done so, there would have been sufficient (as the case stated) to have effected the repairs without calling upon his clients for contribution; that the 12 & 13 Vict. c. 87, s. 3, does not apply, inasmuch as the money was not borrowed after it passed, the paying off of the old creditors in 1853 being merely a transfer of debts; and that the case came, therefore, within the operation of the 13 & 14 Vict. c. 79, s. 4, which, with reference to money borrowed before the passing of the 12 & 13 Vict. c. 87, requires that the tolls should be applied to the repairs of the road before any part is applied to a sinking fund.

*Mellish, Q. C.* was heard in reply.

COCKBURN, C. J.—I am of opinion that the app. is right, and that this order must be quashed. The first question for us to consider is, whether the 12 & 13 Vict. c. 87, applies to the present case? If it does, then it would be the duty of the commissioners, out of the fund which comes to their hands, to assign five cent. of the amount for the formation of the sinking fund before they proceed to pay the interest of the money borrowed, or to expend the necessary amount for the repairs of the road. I think that Act does not apply. In this case the trustees were appointed under an Act of Parliament, to which our attention has been called, and they were empowered to borrow money upon the credit of the rates and tolls levied under the powers of that Act; and they did borrow a sum of money at interest of 5 per cent. They were ultimately advised that they could obtain the amount which they required, or some portion of the money, at a lower rate of interest, namely, at 4 per cent., and they advertised for persons to advance money on the same security, on the assignment of the tolls and rates under the Act of Parliament of 1849, and they obtained the money for that purpose. Now this is all after the passing of the Act of 12 & 13 Vict. c. 87, and the question is, whether that Act of Parliament applies to the second borrowing. The terms of the Act are: "In every case in which the trustees or commissioners of an turnpike-road shall hereafter borrow, charge, or secure any sum or sums of money on the credit of the tolls arising on such road, such trustees or commissioners shall, out of the tolls of such road, and in priority to all other payments thereof, except the interest on any other moneys remaining owing on the security of the said tolls, set apart a sum of 5 per cent. per annum on the amount of money so borrowed, charged, or secured." Now, it is

true, if you take those words in their literal signification, they would apply to the present case, because this was money borrowed after the passing of that Act; but, inasmuch as it was a sum of money borrowed, not for any fresh purpose, not by way of making fresh roads, or being expended in any improvements that might come within the scope of the Act of Parliament, but as it was merely a sum borrowed to pay off the previously existing debt, it appears to me that it was merely a substitution of a new debt for an old debt; the Legislature never could have contemplated such a case, or intended that that should come within the enactment of that statute. As I pointed out in the course of the argument, it might be that the fund arising from the tolls here, combined with the rates, might be adequate to pay the interest of the money borrowed and to maintain the repairs of the road, and yet, after those two most essential objects had been complied with, to constitute a sinking fund. Now what I imagine is what the Legislature intended was, not to alter the existing state of things with reference to a case like the present, but to provide after the passing of that Act, should money be borrowed to carry out the objects of that trust in case of such borrowing, a sinking fund for the purpose of paying the debt. As it was truly pointed out in the course of the argument, the state of things is different from that which existed prior to the 12 & 13 Vict. c. 87, about which period the great railways of the country came into operation, and I cannot think that it was intended that that enactment should apply to such a case as the present, in which the money has been borrowed previously, and where no new charge or incumbrance was created, but simply a new one substituted for an old one to the manifest and obvious benefit of all parties concerned, it being very desirable that money should be got at a cheaper rate of interest. I do not think therefore, on the first point, that the Act of Parliament applies. Secondly, it cannot be contended here that the commissioners are bound under that Act to set aside a sum of 5 per cent. on the amount due, which comes to 4000. a-year, and to do that before they pay the interest of the money due with the expenses of the repairs of the road. If they are not bound to do that, then it is admitted on both sides that there is a sufficient fund for the repairs of the road after the payment of the interest, without calling upon the appa. parish to contribute. I own, besides taking that view of the first question, that I cannot see my way to the conclusion that the Act of Parliament in question can be applicable to the present case. It seems to me that the Act of Parliament, which relates to tolls simply and provides for a sinking fund to be created out of those tolls, without anything more, is not applicable to such a case. I think, therefore, that in deciding on the first point it is not necessary to decide the second; but I entertain a strong opinion on the second point, that Mr. Mellish there would be also wrong, and that that Act of Parliament cannot apply. For these reasons I am of opinion that the order of the justices was wrong, and that the appeal must be allowed.

BLACKBURN, J.—I have come to the same conclusion on the first point on which our judgment is based, namely, that under the circumstances the debts were not to come within the meaning of the Act of 1849, so as to make a sinking fund have priority over the repairs of the road. If that be so, then the present case is one in which the order should not have been made. Upon that point, and on that point only, I base my opinion that the order ought to be quashed. The Act of 1849 enacts, that in every case in which the trustees and commissioners shall hereafter borrow or secure any sum or



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sums of money on the credit of the tolls, they shall set apart a sinking fund out of the tolls before they discharge any other charges upon them. The Act of 1850 extends that enactment to a case in which money has been borrowed before the Act of 1849, and makes a sinking fund to be set aside out of the tolls after the repairs of the roads and other charges have been met. The difference of those two cases can only become of practical importance when the turnpike-road, as far as the turnpike trust is concerned, is in a state of insolvency. So long as the turnpike-roads trustees have a sufficient amount to keep the road in repair, and set aside the sinking fund, it is utterly immaterial whether they set it aside before or after. It only becomes material when there is not enough to set aside for that; therefore, it is in such a case as that that the Legislature have made a difference, and we must look at the state of the law at the time the Act was passed in order to see what was meant. Now, turnpike-roads are all public highways, and as such, if the turnpike-trusts are sufficient to keep them in repair, they are bound to do so, and if they are not, the parish is to contribute. The question really comes to this practically, shall the increase of the sinking fund be delayed, or, shall it go on to the expense of the parishes? That is what it practically comes round to. In that view of the matter it would be right and proper for the Legislature to say, whenever there is any fresh thing to be done for the turnpike-road, and money to be borrowed for fresh purposes for the benefit of the parish, that the parish will have to give a first security for the sinking fund, because that will be a new matter. But where the debts have been already incurred without the parish being liable, it is not right and proper to make the parish give security for the sinking fund for parishes which do not meddle with the bygone debts, but leave them as they were before. Now comes the question of, what is the meaning of a borrowing of any sum or sums of money? I think this can only mean, a new charge; and where money is already borrowed and charged, and it is merely a transfer to fresh creditors for the purpose of diminishing the quantity of interest, I do not think that that is a charging the tolls with any fresh charge—it is merely continuing an old charge; consequently I am of opinion that in such a case as I have mentioned it is merely an old charge continued to a new person, and it does not come within the Act of 1849, though I think it is within the Act of 1850. Now in the present case, the form was gone through of the old creditors being paid off and a new assignment made of the debt; and was that new assignment such as to make it a new borrowing? It is quite plain, as the case is stated, that it is the old charge continued on, although in the hands of new persons, to reduce the rate of interest. A good deal was said in the argument that that was beyond their power. I cannot think there is any doubt that if parties are to continue borrowing sums of money, and they having borrowed, and finding that they can get it at a reduced rate of interest, I do not think that they do go beyond their power in getting it, if there is no hardship and they do it fairly. In substance it is merely a continuation of the old debt; therefore I think it does not come within the Act of 1849, but, subject to the other point, it would come within the Act of 1850. Now, as to the other point, to which my Lord has adverted. This is money borrowed on the security, not only of the tolls, but also of the rates. The commissioners of the turnpike-road are not only commissioners of the roads, but they are commissioners for paving and lighting. Upon that point I do not think it necessary to express any opinion. If it were, I should take time to consider, but my

inclination of opinion at present is contrary to that of my Lord. My inclination of opinion is, that these words are within the Act of Parliament, although the borrowing is not only upon the tolls, but upon other matters. But that is merely an intimation of opinion, and, if it were necessary, I should take more time to consider it. If that ever becomes a material question, it will be raised on *mandamus*, when it could be taken to error to be decided. As it is, the present case will be decided without an appeal.

MELLOR, J.—I agree with my Lord and my brother Blackburn as to the first point. Admitting the literal construction of the words of the statute to be what Mr. Mellish says, yet when one comes to look at the whole context of the two statutes, I think we have an interpretation that is reasonable, and satisfactory. It is this, that money which had been borrowed before the Act of 1849, and secured upon the tolls, though it may be reasonable coming to a change of circumstances, that a sinking fund should be provided, yet still, as that would have an effect upon the interest of the parish at large, it is not, as it appears to me, to have in that case any priority to money borrowed after, because there the money is borrowed on the credit of the thing as it stood, and the money is not, therefore, to be raised, and there is no necessity to hold out special inducements to obtain the money. I think, as this was simply money raised for the purpose of paying off the old charge (and that is the real key to the whole construction of this Act of Parliament), the commissioners are not to increase the charge or the incumbrance of the tolls, except upon the terms of the Act of 1849. If there be no increase of the charge, or enlargement of the obligation, but a simple substitution of money borrowed at 4 per cent. to pay off money borrowed at 5 per cent., I can see no reason in justice why the construction contended for by Mr. Mellish should prevail. Without saying more on that point, I entirely concur in the conclusion which has been come to by my Lord and my brother Blackburn. But with regard to the second point I confess I agree with my Lord, and I cannot help thinking that the case does not apply to this Act of Parliament. The great object of this Act of Parliament is, lighting, watching, cleansing, improving, and incidentally making a new road, and for that purpose rates are to be levied on certain parishes, and tolls taken at particular gates; and according to the whole form of the statutes, they become one common fund, and are applicable to the various purposes of the Act, not merely to the repairs of the roads alone, but lighting and watching, and various other things which are the principal objects, as it appears to me to be, contemplated by the Act of Parliament, the road itself being comparatively a subordinate matter. At all events it is not put forward as the important object of the Act itself. That being so, when we come to look at the terms of the 12 & 13 Vict., we find they are “in every case in which the trustees or commissioners of any turnpike-road shall hereafter borrow, charge, or secure any sum or sums of money on the credit of the tolls,” that is to say, in the case in which the charge and the security is upon the credit of the tolls, then priority is assigned. And then it says, “and on any moneys remaining owing on the security of the said tolls, set apart a sum of five per centum per annum on the amount of money so borrowed, charged, or secured.” Then again, when we come lower down, we find a section which says what is to be the application of the moneys. It says they shall pay such sums, “and the payment of a proportionate part of the moneys borrowed, charged, or secured as aforesaid, and then remaining unpaid to the



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creditors on the tolls of such road." Now, here these persons are not creditors on the tolls "of such road" alone, but the first security they have according to the words of the statute, which empowers the commissioners to make the road, which says they may borrow and take up at interest any sum or sums of money upon the credit of the rates, assessments, and tolls. Therefore, it appears to me, these persons are not creditors of the tolls only but creditors of the rates, assessments, and tolls; and it appears to me that the working out of the sinking fund would be attended with great hardship, and would alter very much and very materially the position of the parish. As it appears to me, it is not intended really to apply to a case where the main security, or where the security may, or a considerable portion of it, consist of a right to charge and assess lands and tenements of a permanent character and which are not precarious like tolls. I think for these reasons that the Act of Parliament does not apply, and that it is not necessary to go further. I agree with my Lord and my brother Blackburn on the first point upon which I base my judgment; but I have thought it right to express an opinion in accordance with what my Lord has given, thinking that that is the fair construction to be put upon the Act of Parliament.

SHEE, J.—I agree that the 12 & 13 Vict. c. 87, has reference only to a new charge made after the passing of the Act, or to further charges on tolls after the passing of that Act; and I also entirely agree with what has fallen from my Lord and my brother Mellor on the second ground.

*Order quashed.*

Attorneys for the apps., *Wills and Finch*, Chatham.

Attorney for the resps., *W. Webb Hayward*, Rochester.

#### REG. v. THE INHABITANTS OF ST. LEONARD, SHOREDITCH.

*Poor-law—Irremovability by three years' residence—Houseless wanderer—9 & 10 Vict. c. 66, s. 1.*

*Residence in a parish, to constitute irremovability, need not be a residence in a house, or in any place ordinarily applied to human habitation. Sleeping in the open air will constitute such residence, if for the requisite period.*

*Where, therefore, a destitute woman, who had resided for sixteen years in the parish of A., at the latter part of her residence gave up her lodgings and wandered about the parish by day, sleeping on the steps of houses, and then for three weeks sleeping in a refuge for homeless poor in the adjoining parish of B., but returning each day to the parish of A. until she obtained admission into the workhouse of A.:*

*Held, that she had acquired the status of irremovability in the parish of A.*

This was a case stated by the Quarter Sessions of the county of Middlesex upon an appeal by the parish officers of St. Dionis, Backchurch, in the city of London, against an order of removal from the parish of St. Leonard, Shoreditch, of one Sarah Broad, widow; upon which appeal the said quarter sessions quashed the said order.

The case was as follows:

The grounds of removal accompanying the said warrant alleged a settlement in the appellant parish, and it was proved and admitted on behalf of the appellant parish that the last legal settlement of the pauper was in that parish. The only ground of appeal on which the present case arises was the fol-

lowing: that the pauper resided in the said parish and in the union in which the said parish is included for three years next before the said application for the said order of removal. The application for the said warrant of removal was made on the date thereof, the 26th Feb. 1864. The pauper had resided at various places in the respondent parish of St. Leonard, Shoreditch, for about sixteen years previous, and until the month of Sept. or Oct. 1863; that in such month, in consequence of illness whilst lodging in the last-mentioned parish, she went into St. Bartholomew's Hospital in the city of London, but left at her last-mentioned lodgings such articles of furniture as she then had, intending to return to it. The pauper remained in the said hospital till near Christmas 1863; on the day she left the said hospital she returned to her lodging and then sold her said articles of furniture, in order to pay the rent which had accumulated, and other debts. She then left her said lodgings, and resided in the said parish of St. Leonard, Shoreditch, with the person who bought her furniture, for a week, when, being destitute, she wandered about in the parish of Shoreditch and out of it, and slept on the steps of a house in that parish the night before she obtained shelter in a refuge for the houseless poor, where she slept for twenty-one successive nights, her ticket of admission having been renewed at the end of the first seven, and again at the end of fourteen days, such renewal being necessary according to the rules of the refuge. The refuge is situate out of the parish of Shoreditch, in the adjoining parish of St. Luke. It is supported by voluntary subscriptions, and is opened during the winter for the purpose of receiving houseless persons, who are sheltered therein, and provided with a sleeping-place and a ration of bread.

During the period of her being thus sheltered, she in the day time wandered about chiefly in the parish of Shoreditch until she met a gentleman who knew her, who endeavoured to procure her admission into Shoreditch workhouse, but she was refused admission. She then slept for two nights in the parish of Shoreditch, and on again applying she was admitted into the workhouse of that parish. It was contended, on the part of the apps., that upon these facts the said pauper was irremovable by virtue of having resided in the resps.' parish for more than three years next before the said application for the said warrant of removal. It was contended on behalf of the resps. that the residence was broken. The Court of Quarter Sessions were of opinion that the pauper had no intention of permanently leaving the parish of Shoreditch, but that she was driven to do so in the manner herein stated by being destitute and houseless, and they quashed the order of removal. The respondent parish is an extensive parish under a board of guardians, and under the control of the Poor Law Board, and for the purpose of irremovability by residence and other purposes of the Poor Law Board forms a union of itself.

The question for the opinion of the court is, whether, on the above facts, the pauper was irremovable from the respondent parish by virtue of having resided therein for more than three years next before the application for the said warrant of removal? If such question be answered in the affirmative, then the said order of sessions quashing the said warrant of removal is to stand confirmed. And if such question be answered in the negative, then the said order of sessions is to be quashed, and the said warrant of removal is to stand confirmed.

By the 9 & 10 Vict. c. 66, s. 1, it is enacted that

No person shall be removed, nor shall any warrant be granted for the removal of any person from any parish in which such person shall have resided for five years (after-

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wards limited to three years) next before the application for the warrant.

*Huddleston*, Q. C. appeared in support of the order of sessions, but the Court called upon

*Taylor* in support of the order of removal.—He contended that, to constitute irremovability when a party leaves his home, there must not only be an intention to return, and an actual return, but that he must have a place of residence to which he has a right to return: (*Reg. v. The Justices of Worcestershire*, 12 L. T. Rep. N. S. 542.) [BLACKBURN, J.—In that case the pauper was physically absent, but here she was wandering about in the parish and merely went out of it for certain nights to obtain temporary shelter. COCKBURN, C. J.—She did not go to the house of refuge as a place of permanent residence. She returned each day to her parish.] She had no place in Shoreditch to which she had a right to go. When she left her lodging she had no residence. [COCKBURN, C. J.—She merely sleeps at the refuge, and goes back to the parish each day. My difficulty is in seeing that she ever left the parish. BLACKBURN, J.—To constitute a residence a person need not reside in a house. Sleeping is an important element in residence, but it is not conclusive.] Residence in such a case as this must mean a place to which the party has a right to return. There is no case where it has been held that a residence may be where the party has no place for sleeping. [MELLOR, J.—Suppose the pauper were to sleep in one of the dry arches of a bridge, would not that be sufficient?] Probably so, if for the requisite time, but, as she would have no right to return to the place, it would be a break if she went away for a single day. There can be no continuous residence where there is no right to return; where there is no place to return to there can be no continuation of the residence; whilst, therefore, the pauper was away sleeping in the refuge out of the parish, she had no constructive residence in Shoreditch.

COCKBURN, C. J.—I think that the order of the sessions was right, and that the pauper was irremovable from the parish of St. Leonards, Shoreditch. I start with the proposition, that the requisite residence within the meaning of the statute makes the pauper irremovable if the three years' residence has not been broken. It is not necessary that the residence should be in a house, as he may live anywhere he may think proper. There are many poor persons who have no place of that kind in which to live, but who do the best they can, sleeping in the open air, under the arches of bridges, and in various other places where they seek a temporary shelter; and if a person under such circumstances, without a habitation in the ordinary sense of the term, were to reside three years in a parish sleeping in the open air, and doing the best he or she could to live, that would be a residence equally with that of a person who resided in a house, or "other place," within the ordinary acceptation of the term. That being so, if a person who lives in the open air is, in one respect, on the same footing as a person living in a house, the next proposition is this, that that residence will not be interrupted by a temporary absence for the purpose of pleasure or convenience, or any of those occasional motives which induce people to leave their place of abode for a time and then return. If that be so in the case of a person who lives in a house, it appears that the same rule applies to the case of a person who, having no house, lives in the open air. Then the case of this poor woman was this, that having been in Shoreditch for some sixteen years, she is turned out of her house and obliged to give up possession of a room which she inhabited in

the parish; she wanders about in the parish by day, and at night she has to go to some place in order to obtain a night's shelter and bread to eat; she goes into a house of refuge which is not within the parish, and it is quite clear that she did not cease to be an inhabitant of St. Leonard's, Shoreditch, by simply obtaining a lodging at a refuge. She comes back to the parish day by day, and as soon as she is compelled to leave off sleeping at the refuge, she tries to get into the workhouse in Shoreditch, and she is in Shoreditch parish until the time when, by the order of sessions, she is thought to be irremovable. I am inclined to think that that is no more an interruption of her residence in Shoreditch than there would be an interruption of the residence in the case of a person who had a house, and for a temporary purpose had gone out of the parish, but intended to come back. It was pressed by Mr. Taylor that, in all the cases that have been before the court on questions of this kind, there has been always some place of residence in the parish in the shape of a lodging, which the person temporarily absent has left behind; and he seems to imply from that, that in order to constitute a constructive residence there must be "a place of residence" in the ordinary sense of the term, to which the person has a right to return. That seems to me to be begging the whole question. If there can be such a residence in the air out of a house where the person remains in the parish, not having a habitation in the usual sense of the term, I see no reason why there may not be a constructive residence, just as a person who has no house may be said constructively to reside in the parish, though bodily out of it for some temporary purpose of necessity. There seems to me to be no distinction between these two cases. In the case of this poor woman she did not "leave the parish with the intention of returning," as in the other cases; but I go further, and I say she never left it at all, for although deprived of her home she is remaining constantly about the parish; and that does not appear to me to constitute a leaving the parish at all, any more than it would be in the case of a person who may leave a place of residence for a temporary purpose, intending to come back. I think that there is no difficulty in this case upon the facts as they are presented to us; but without taking the same ground as the sessions appear to have taken, upon the simple ground that she never did leave the parish in the true sense of the term, the residence continued and the pauper was irremovable.

BLACKBURN, J.—I am entirely of the same opinion. The pauper had, as is admitted, resided sixteen years in Shoreditch. At the end of sixteen years the unfortunate woman falling into destitution was forced out of her house and wandered about the streets, then she slept in a refuge for several weeks, and it is contended that she having no house in Shoreditch, but being a houseless wanderer, that was a ceasing to reside. Now sleeping is an important element to determine whether a person is residing or not. Where there is a dwelling-place existing it is of extreme importance to ascertain that in order to draw the right conclusion. The case then seems perfectly clear. But looking at the facts here, the sleeping in an adjoining parish under the circumstances under which she did sleep there, having no house, but merely taking a refuge for the night, for a night's lodging and a ration of bread, did not, in my opinion, amount to a ceasing to reside, and therefore the pauper was irremovable.

MELLOR, J.—It appears to me that Mr. Taylor's argument would lead to the conclusion that many of the persons for whom the poor-laws were framed would be deprived of the benefit resulting from

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them, and that the most destitute according to him could not be relieved. For the reasons assigned by my Lord and my brother Blackburn I think the sessions were right.

SHEE, J. concurred.

*Order of sessions confirmed.*

Friday, Nov. 10, 1865.

RUSSELL (Clerk to the Local Board of Health) v. TRICKETT.

*Local board—Contract by deed—Surety for contractor—Liability of.*

*By an indenture made between a local board (the plts.) of the first part, certain contractors of the second part, and the deft. of the third part, the contractors covenanted to do certain work upon the basis of a certain specification; and the deft. covenanted to pay any losses that might be sustained from the non-performance of the work. The indenture recited that the specification had been signed by five members of the local board as was required by the local Act. In point of fact the specification had never been signed, although it had been acted upon. In an action against the sureties:*

*Held, that the mere fact of the specification not having been signed did not release the sureties from their liability.*

This was a demurrer to pleas.

The declaration stated that, by an indenture between the Local Board of Health of Merthyr Tydfil of the first part, Thomas Evans and Joseph Evans of the second part, and deft. and G. Kielman of the third part, T. and J. Evans covenanted with the local board to do certain works according to the conditions and schedule of prices set forth in a certain specification. The deft. and G. Kielman covenanted that if Messrs. Evans should not fulfil their contract and keep the conditions of the said specification, they would pay to the board such sums as they should spend, not exceeding 2500*l.* The local board covenanted with Messrs. Evans to pay them 10,773*l.* and to keep the conditions to be performed on their part. It then averred that the Messrs. Evans did not fulfil their contract, whereby the local board were obliged to expend sums of money exceeding 2500*l.* It then assigned a breach of deft.'s covenant that neither he nor G. Kielman had paid the said sum of 2500*l.*

The deft. pleaded three pleas on equitable grounds.

The first said that it was stated in the indenture that the specification was signed by five members of the local board, and that on the faith thereof the deft. executed the indenture, whereas it was not so signed.

The second said that deft. executed the indenture on the faith of the representation made to him by the board that the specification had been signed.

The third said that the deft. executed the indenture on the faith of the representation that the specification should be signed.

These pleas were demurred to, and there was also a replication which was also demurred to, but as this raised the same question, no further notice of it is required.

The points set down for argument on the part of the plt. were, that the pleas were bad, because no ground for equitable relief was disclosed in either of them; because the statements relied upon in the first plea, and the representations relied upon in the second and third pleas were not shown to be either fraudulent or material, nor that the deft., as surety, had been in any way prejudiced, all

the terms of the specification on the part of the local board having been complied with.

The points set down for argument on behalf of the deft. were, that the defts.' liability as surety for the Messrs. Evans was discharged by reason of their not having had the benefit and protection under the contracts for which the deft. had stipulated, and on the faith whereof he became surety; also by reason of the non-execution by the plts. of the specification, and also by reason of the misrepresentation made that the specification had been signed.

*Beresford* (with him *Manisty*, Q. C.), for the plts., in support of the demurrer.—The question is, whether the fact that the specification had not been signed does away with the deft.'s liability. [COCKBURN, C. J.—Suppose it had been signed, how would the surety have been benefited? The object of signing the specification, I take to be to bind the board to the specification, to show that it was the basis of the contract.] As to the ground of misrepresentation, *Smith's Prin. of Eq.* 165, shows that for equity to interfere, the representation must be material, fraudulent, and that the party must be damnified.

*Mellish*, Q. C. (with him *Macnamara*).—One question is, whether signing the specification was not a condition precedent. By the local Act, the indenture must be in writing. Now the indenture recites that specification had been signed. That specification governs the contract. As long as not signed it might be altered. [COCKBURN, C. J.—No, no.] A recital in a deed may often be a condition. [COCKBURN, C. J.—The specification was fully agreed to. Work was actually done under it. How was deft. damnified?] All the damage that I can speak to was, that if obliged to prove specification he would be put to expenses to make plts. sign it.

By the COURT. (a)

*Judgment for the plts.*

Attorneys for deft., *Harrison and Lewis.*

### COURT OF COMMON PLEAS.

Reported by W. MAYD and LUNLEY SMITH, Esqrs.  
Barristers-at-Law.

April 28 and May 10, 1865.

OVERSEERS OF THE POOR OF SUNDERLAND-NEAR-  
THE-SEA (apps.) v. THE GUARDIANS OF THE  
SUNDERLAND POOR LAW UNION (resps.)

*Poor-rate—Rateable value—Valuation list under Union  
Assessment Committee Act—Tied public-houses—  
Small Tenements Act.*

*The union assessment committee amended the valuation list of a parish which had adopted the Small Tenements Rating Act (13 & 14 Vict. c. 99), by inserting in the column for rateable value the full rateable value of the small tenements:*

*Held, that the full rateable value of the small tenements should be inserted, and that the assessment committee therefore were right: also,*

*Held* (*Byles*, J. dissentiente), *that where the occupiers of public-houses were bound to take their beer from a brewery, in consideration of which they paid a smaller rent, the "rateable value" of the public-houses was not to be lowered, nor that of the brewery raised, on account of the benefit of such contract.*

*Allison v. Monkwearmouth* commented on.

This was a special case, stated by order of *Byles*, J., under 12 & 13 Vict. c. 45, s. 11.

(a) Cockburn, C. J., Mellor, Shee, and Lush, JJ.

The parish of Sunderland-near-the-Sea is one of the parishes included in the Sunderland Poor Law Union, the board of guardians of which union have, in accordance with the Union Assessment Committee Act 1862, appointed an assessment committee for the purposes of the Act.

The overseers of the said parish, in pursuance of the said Act, made a list of all the rateable hereditaments in the parish in so much of the form shown in the schedule of the Act 6 & 7 Will. 4, c. 96, as set out in the schedule of the Act now reciting, which list was duly deposited for inspection, published, and afterwards transmitted to the committee as required by the Act. This valuation list, as so transmitted, and as afterwards confirmed and approved by the committee, is to be referred to as forming part of this case.

The committee, after receiving the valuation list, made alterations in the value of certain hereditaments, and then caused the list to be deposited for inspection, as required by the Act, and appointed a day for hearing any objections thereto. The overseers of the poor of the parish of Sunderland gave notice of objection, and appeared before the committee and stated their objections to the alterations; but the committee adhered to their original views, and approved and confirmed the list.

The overseers having reason to think that the parish was aggrieved by the decision of the committee, and having duly obtained the consent of the vestry, gave the notice of appeal.

Previous to the quarter sessions the resp. gave notice to respite, which was done, and immediately an arrangement was entered into that the questions of law should be settled by a special case for the opinion of this court.

The grounds of appeal were, "That the rateable hereditaments comprised in the valuation list were valued at sums beyond the rateable value thereof." This ground of appeal had reference to the valuation of certain breweries in the parish, and the facts are as follows:

In the parish there are five breweries, three of which are occupied by the owners, and the remaining two by lessees.

The occupiers of those five breweries are respec-

tively possessed of, as owners or as lessees, or entitled to a great number of public-houses known as "tied houses," some of which are situate in the parish of Sunderland-near-the-Sea, and some in other different parishes. All these public-houses are let to tenants at smaller rents than they would be let at if they were free public-houses, the tenants being bound to purchase from the brewers all malt and other liquors which they sell in their public-houses, the brewers thus securing to themselves a certain large trade, and being enabled to charge higher prices for their liquors than they would charge the occupier of a free public-house.

In valuing these breweries and public-houses for the purpose of making the valuation list, the overseers applied the same principles to the breweries and public-houses as to the other rateable hereditaments in the parish, pursuant to the Parochial Assessment Act (5 & 6 Will. 4, c. 96), and in the case of the breweries without any regard or reference to the advantages derived by the occupiers from the before-mentioned contracts with the occupiers of the several "tied public-houses," and in the case of the said "tied public-houses," without any regard or reference to the "smaller" rents paid by the occupiers to the brewers, and as if such occupiers were at liberty to purchase the liquors in the open market.

The assessment committee having ascertained that the overseers, in arriving at the "gross estimated rental," and the rateable value of the breweries, had not taken into consideration the advantages which the occupiers of such breweries derived from the before-mentioned contracts with their tenants the publicans, and having obtained the number of such "tied public-houses" attached to each brewery, increased the "gross estimated rental" and "rateable value" of such breweries respectively by such an increased sum as the committee in their opinion considered the breweries might reasonably be expected to let for with the advantages attending the contract with the "tied public-houses."

The following extract from the valuation list will show the nature of the alteration made by the union assessment committee in the case of one brewery:

No. of Assessment.	Name of Occupier.	Name of Owner.	Description of Property.	Name or Situation of Property.	Estimated Extent			Gross estimated Rental.			Rateable Value.		
					A.	B.	C.	£	s.	d.	£	s.	d.
	Robt Fenwick & Co.	Robt Fenwick & Co.	Brewery, Malt-ing Vaults, Warehouses, and Offices.	Low St.				426	0	0	355	0	0
								327	0	0	254	0	0

The figures 327 and 254 were crossed out to show the amounts at which the brewery was returned by the overseers. The figures entered above show the increased amounts charged by the Union Assessment Committee.

The committee, however, made no reduction in the valuation list in respect of the value of the several tied public-houses.

The overseers, in objecting to the increase made in the value of breweries, insisted that if the valuation of the breweries was to be increased by reason of the advantages derived by the tied public-houses, the occupiers of the tied public-houses should be valued only in respect of the smaller rents actually paid by them and at the reduced value of the premises resulting from their obligations to purchase their malt liquors of their landlords, and not at the full annual value of the premises without reference to such obligation.

The committee, however, being of opinion that they were bound by the case of *Allison v. Monkwear-*

*mouth*, 28 L. J. 117, M. C., and the cases therein referred to, refused to alter their decision.

As to the second and third grounds of appeal, the following are the facts:

In the parish of Sunderland-near-the-Sea the Small Tenements Rating Act (13 & 14 Vict. c. 99) was duly adopted in the year 1850, and is still in force.

By this Act, sect. 4, it is enacted that whilst such order as firstly hereinbefore mentioned is in force,

The owner of every tenement in every parish, the yearly rateable value whereof shall not exceed 6*l.*, shall be assessed to the rates for the relief of the poor and to the rates for the repairs of the highways, in respect of such tenements, at three-fourths of the amount at which such tenements would be liable to be rated in case the Act had not passed.

It is further enacted by the same section, that while such order as firstly hereinbefore mentioned is in force, if any owner of any one or more of such tenements shall be desirous of paying a rate in respect of all such tenements in any parish, whether such tenements be occupied or unoccupied, and

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shall give notice in writing of such his desire to the overseer of the poor and to the surveyors of the highways as therein mentioned, then and in such case such owner shall be assessed to the rates for the relief of the poor, and to the rates for the repair of the highways in respect of such tenements respectively, whether the same be occupied or unoccupied, at a sum not being less than one-half of the amount at which such tenements respectively would be liable to be rated if occupied in case this Act had not passed.

In the parish there are upwards of four thousand tenements the yearly value of each of which does not exceed 6*l.*, and in making out the valuation list, the overseers entered the rent of these tenements respectively in the column of the valuation list headed "Gross estimated Rental," at the rent at which the said tenements might reasonably be expected to let from year to year free from all usual tenant's rates and taxes, and to the tithe commutation rentcharge, as required by the 5 & 6 Will 4, c. 96, s. 1, and the Union Assessment Committee Act 1862, s. 15. From this gross estimated rental the overseers made the usual deductions for the average annual cost of repairs and insurance, thus arriving at the sum at which the said tenements would have been liable to be rated if the Small Tenements Rating Act had not been adopted; then, in order to arrive at the reduced amount at which the owners should be assessed instead of the occupiers, the overseers, in those cases where the owners had not compounded, deducted from such last-mentioned amount (that is the amount at which the property would have been liable to be rated if the Small Tenements Rating Act had not passed) one-fourth part thereof and entered the remainder in the column of the valuation list headed "Rateable Value." In those cases where the owners had compounded, the overseers deducted one-half instead of one-fourth from the amount at which the property would have been liable to be rated if the Small Tenements Rating Act had not been adopted, and entered the remainder in the column headed "Rateable Value."

The following case shows the mode adopted by the overseers:

In the case of a tenement in which the owner did not compound, from the "gross estimated rental" of 6*l.* one-sixth was deducted as the annual average cost of repairs and insurance, leaving the sum of 5*l.* as the "rateable value" under the Parochial Assessment Act; from this sum of 5*l.* was then deducted one-fourth, that is 1*l.* 6*s.*, leaving the sum of 3*l.* 15*s.* as the reduced amount or "rateable value" on which the owner was rateable under the Small Tenements Rating Act, and on which sum the rate was to be computed.

In cases where the owner had compounded, from the gross estimated rental of 6*l.* one-sixth was deducted as the average annual cost for repairs and insurance, leaving the sum of 5*l.* as the rateable value under the Parochial Assessment Act; from this sum of 5*l.* was deducted half, that is 2*l.* 10*s.*, leaving the sum of 2*l.* 10*s.* as the reduced amount or "rateable value" on which the owner was rateable under the Small Tenements Rating Act, and on which the rate was to be computed.

Upon these principles the rates for the relief of the poor of the parish have been made ever since the adoption of the Small Tenements Rating Act in 1850, and by which means the overseers have assessed the owners of the small tenements at the same uniform pound-rate in common with the rest of the ratepayers.

The overseers contended that, by the increased valuation made by the committee in respect of the last-mentioned rateable hereditaments, the aggregate "rateable value" of the hereditaments within the parish was improperly increased to the extent

of 3875*l.*, and that such increase was contrary to the provisions of sect. 2 of the 5 & 6 Will. 4, c. 96, and to the provisions of sects. 35 and 36 of the Union Assessment Committee Act 1862.

The committee being of opinion that the 14th section of the Union Assessment Committee Act 1862 required the overseers, in making out the valuation list, to return the full "annual rateable value" of all the rateable hereditaments within the parish, and that the reduction to be made in favour of the owners rated, instead of occupiers, should be made from the rate in the pound, and not from the rateable value, confirmed and approved the valuation list accordingly.

The questions of law arising out of the above statement for the opinion of the court are:

First, whether, under the special circumstances stated in this case, the breweries in question should be rated on any additional sum beyond their annual rateable value as breweries for the advantages derived from the custom of those tied public-houses, the occupiers of which are compelled to purchase their liquors at such breweries; and, if so, whether the public-houses connected with the breweries, but situate in other parishes, should be taken into account in calculating the gross estimated rental and rateable value, as well as those within the parish where the brewery is situate?

Secondly, if the said breweries are, in the opinion of the court, liable to be assessed in respect of the advantages derived from the said tied public-houses, whether the said tied public-houses are liable to be assessed at a reduced "gross estimated rental" and "rateable value" in consideration of being so tied to such breweries?

Thirdly, whether the reduction to be made under the statute 13 & 14 Vict. c. 99, s. 4, and the 14 & 15 Vict. c. 39, s. 3, to the owners of small tenements who are rated instead of the occupiers, should be made from the rateable value of the hereditaments assessed or from the rate in the pound to be levied and collected?

First, as to the rateability of the breweries and "tied-up" public-houses:

*Lush, Q. C. (Prideaux and Heath with him)* contended, for the apps., that the committee were wrong in rating the breweries higher on account of the contracts made with the occupiers, as by sect. 1 of 6 & 7 Will. 4, c. 96, the property alone should be looked at, and not the contracts which the occupier might have with the owner. That in this case the brewery was in no way annexed to the public-house except that they both happened to belong to one person. Secondly, as to the Small Tenements Rating Act, they contended that, under 13 & 14 Vict. c. 99, s. 4, the reduction should be made from the rateable value, and that is not interfered with by the Union Assessment Committee Act. They referred to

*Allison v. Monkwearmouth*, 4 Ell. & Bl. 13;  
*R. v. Bradford*, 4 M. & S. 817; and  
*Easton v. Alce*, 7 H. & N. 452.

*Liddell, Q. C. (Tomlinson with him)*, for the resps., firstly contended that the cases of *Allison v. Monkwearmouth* and *R. v. Bradford* were directly in point; and that the rate was to be made on what might be reasonably expected from a tenant who took the property from year to year *rebus sic stantibus*, the test being, not what might be, but what was, really done with the property; that this principle applied to public-houses, Lord Campbell, in *Allison's* case, stating, that "the obligation to grind at a particular mill would no doubt to a certain extent diminish the yearly value of a farm subject to the servitude; but it is allowed on all hands that this deterioration would be no argument against making the mill assessable in respect of the

multure involuntarily rendered therein." Secondly, as to the Small Tenements Act, that the object of the Union Assessment Committee Act was to get an uniform and correct valuation of the parishes, but that nothing was said about the Small Tenements Act; and as that Act had not been repealed, the parish, in calculating the amount of the rate on each person, ought to take into account that the Act was simply adopted for the convenience of the parish, to save trouble and insure certainty in the collection of rates, and that therefore there was no hardship in the fact that the lump sum of contribution was larger, as it would not be fair on the other parishes that in one parish the rate should be less because it adopted a statute for its own convenience.

ERLE, C. J.—Upon this latter question, my judgment is for the resp., according to the argument of Mr. Liddell. On the first reading of the statute, my judgment was inclined to be the other way, thinking there was a hardship in the conclusion he contended for. I do not, however, think the argument of hardship really can be sustained; but more than that, we are bound to give effect to the enactment of the Legislature as we understand it; and the Legislature has required valuation lists to be made out for every parish, and those valuation lists are to be made out for the purpose of having a uniform and correct valuation of the rateable property in the different parishes. The question is, whether the list set out in the schedule of this Act, containing seven columns (the seventh column being headed "Rateable Value") is, in the column of rateable value, to show the annual rateable value truly, or, in a parish which has adopted the Small Tenements Act, the small tenements are to be set down at the sum which the owner of those tenements has to pay under the statute. In other words, the question is, whether the column of rateable value in the valuation list is to show the true rateable value, or, where it relates to a small tenement in a parish that has adopted the Small Tenements Act, it is to show the proportion of the rateable value which the owner has to pay. I am of opinion that it is to show the rateable value. That gives effect to the words according to the plain meaning of the words "rateable value." If the contention of the overseers was true with respect to small tenements, it would mean three-fourths or one-half, according to the arrangement made with the owner; and as to the rest of the property, true rateable value. I think that means "rateable value" *simpliciter*. I observe all the way through the Act, in the sections as pointed out by Mr. Liddell, until we come to sect. 35, the enactment carefully points out that there shall be one uniform valuation of the rateable hereditaments in the different parishes, and that the result of the survey and valuation shall appear in the valuation list. I was greatly struck with the argument, that it is to be such a uniform correct valuation as a surveyor surveying the corporeal hereditaments that are to be the subject of the rate would perceive from the locality, and the circumstances under which the rateable subject is placed; and that if the rateable value was to be ascertained with respect to these small tenements upon the principle contended for by the overseers, the rateable value would not be what the surveyor would perceive by a survey of the property as it stands, but it would be what the surveyor would perceive from a survey of the property together with an inquiry as to whether the owner had made an arrangement, and if so, whether he made an arrangement to pay the sum at which it should be rated (in which case it would be three-fourths), or an arrangement to pay whether the property is occupied or not (in which case it would be one-

half); and so the column showing the rateable value would be subject to two accidental ephemeral circumstances, and be subject to the further accidental circumstance that the parish which had adopted the Small Tenements Acts at one period might, by giving notice, reject the adoption; and then the column "rateable value," showing the sum to be paid by the owner during the time the parish had adopted it, would not show the rateable value. According to the construction which I have adopted, the words of the statute are to be construed according to their literal meaning, and the whole tenor of the statute directing these valuation lists to be made is clearly to command, without any limitation or exception of any sort that I can see, that the rateable value shall be ascertained according to the Parochial Assessment Act, on the well-known principle of that Act, entirely independent of the Small Tenements Act. The contention on the part of the overseers is, that under sect. 35 of the Union Assessment Act, the owners of small tenements have a right to compound as heretofore; and under sect. 36 the payments are to be made as heretofore. Mr. Lush says these sections would be inoperative if the owners could not compound and pay the smaller sums. But I say I give to these sections their full operation, and hold that the owner has the full right to compound as heretofore, and that where he does compound he is to pay the smaller sum; and although the contributions of the parish would depend on the amount that is put down in the first column of rateable value, yet the sum collected in the parish would not be the same in proportion to the rateable value where the Small Tenements Act had been adopted. The case put by Mr. Liddell has convinced me that there is no real hardship. Supposing two parishes side by side, with exactly the same quantity of rateable property, without small tenements, and exactly the same ratio of small tenements, and one adopts the Small Tenements Act and the other does not adopt the Small Tenements Act, in that case it is agreed on all hands that the parish which has not adopted the Small Tenements Act should have the small tenements put down at their true value in the rateable value. Then, according to my experience as counsel for one parish, where there were a vast number of poor, the sum collected in those two parishes, in my opinion, would be exactly the same. If I am at liberty to import the experience I had in respect of the parish that I was acquainted with, it satisfied me that the collector had an impossibility of getting the true real amount from the small tenements. The operation of this section and the operation of the Small Tenements Act altogether has an operation relating to the collectability of the poor-rate. The whole operation is a convenient mode by which the parties can collect the poor-rate. But the property in the parish which is subject to the rate, the gross estimated rental, the rateable value of all the premises in short before you come to the end of the column as the sum to be paid, all these remain the same. But, in respect of the collectability of the rate, if the parish has adopted the Small Tenements Act, and the owner insures to the parish either three-fourths or one-half of the rate, that is collected. And a comparison of the Union and the Parochial Assessment Act confirms me very much in this view, for the schedule of the Union Assessment Act contains all the same first seven columns that are in the schedule of the Parochial Assessment Act, but does not contain the eighth column. Each of them have got "Name of occupier," "Name of owner," "Description of property," "Situation of property," "Estimated extent," "Gross estimated rental," "Rateable value." But "Rate at sixpence in the pound" is in the Parochial Assessment Act, and is

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not in the Union Assessment Committee Act. I say that the application of the privilege given by the Small Tenements Act should be confined entirely to the sum put down in the eighth column, which eighth column is called "The rate at so much in the pound." And as to an owner who has compounded, it would be exactly one-half of that which was put down for every one else as resulting from premises of the same value. Thus: to use the schedule of the Parochial Assessment Act as an example, put down "rate at 17.7s. 6d.," add against name, "Owner having compounded," instead of being the total of the rate, it would be three-fourths or one-half of it. Upon an examination of the Union Assessment Act, and referring to the Small Tenements Act, and reading them together with the Parochial Assessment Act, I think the Legislature intended that the rateable value in the valuation list should be the true rateable value ascertained from the essential permanent quality of the rateable subject, capable of being ascertained by a surveyor, who would know the real permanent value of the property, not depending on any accident, such as the arrangement made from time to time between the owners and the overseers in respect of the collection of the sum which would be due and be paid by them.

BYLES, J.—I am of the same opinion. I must confess that until I heard the argument of Mr. Liddell I thought otherwise. I now entirely agree with my Lord. It must not be forgotten in all these cases that the statute imposes the tax, not upon the land, but on the person; for the statute says, "by the taxation of every inhabitant, parson, vicar, and others, and every occupier," &c.; and it was decided in *Theed v. Starkey*, 8 Mod. 314, that poor-rates were personal charges and not charges on the land. Now, that being so, it seems to me that the words in the 13 & 14 Vict. c. 99, s. 4, may very well be read as referring to the person, and not to the property. I admit that some slight violence must be done to the Act, and that instead of the exact words we must read "according to," or "in proportion to." Indeed that must be so; because, if you made a rate on any other principle, it would appear that the rateable property is one-half in value of what it really is. At the end of every rate there is this declaration of the overseers and churchwardens: "We do declare the several particulars specified in the respective columns of the above rate to be true and correct, so far as we have been able to ascertain them." The constructions contended for by Mr. Lush would have this effect, that the churchwardens and overseers at the bottom of the rate must make a false declaration, whereas, if you read the word "rate" here to mean what it really means, namely, a charge on the person in respect of the land, then there is nothing but what is strictly correct. The rateable value, the gross value, and the rate on the person are put down. Therefore, I now incline very much to think that the proper mode of proceeding even before the Union Assessment Act was to put down the correct rateable and the correct gross value, and the amount of the rate upon the person. However that may be, it seems to me, when we come to the Union Assessment Act, it must be so. This statute is imperative with respect to that which is now under appeal, namely, the valuation lists, that they shall be correct valuation lists. They are to be made, and as pointed out by my Lord they may be made by persons who have no knowledge of these arrangements. The statute says they shall be correct valuation lists. This is not an appeal against the rate, but it is an appeal against the valuation lists. It seems to me, if it had not been in this form it would have been inapt. Perhaps there was no occasion for the 35th

section of the Union Assessment Act; but if there was, it applies to this case, for it says "nothing shall be construed to prevent the owners of tenements from compounding for the rates to be assessed on the same." That is not quite correct. It ought to have been "assessed in respect of the same," in such manner as they were by any statute or statutes enabled to do before the passing of this Act." Upon these grounds, therefore, I conceive that what has been done has been rightly done; and if it were otherwise, we should be adopting a construction which would make the declarations of the overseers and churchwardens incorrect on the face of it. With respect to the hardship, that has been clearly answered by Mr. Liddell; that objection has been entirely disposed of, and I can add nothing to what has been said.

MONTAGUE SMITH, J. concurred.

Judgment on the third question for the resps.

The following judgments were subsequently delivered on the other two points:

May 10.—ERLE, C. J.—The question relating to the rateable value of the small tenements was answered at the time of the argument. The questions relating to the rateable value, first, of the breweries, and, secondly, of the tied public-houses, are now to be disposed of. The case relates to five breweries, and a number of public-houses tied to each brewery; some being in the same parish with the brewery to which they are tied, and some in a different parish. It seems, from the case, that all the breweries are rated on some principle known to the assessment committee. Without referring to the title-deeds and leases for the purpose of this judgment, I will take the case as if it related to one brewery in one parish, and one public-house tied thereto, by a contract for beer, in another parish; and then the facts relevant to the question are, that the occupier of the public-house holds it under a lease from the occupier of the brewery; that in the lease he contracts to take beer from his landlord's brewery; and that the rent to be paid for the public-house is adjusted by reference to this contract. Thus this causes a loss to the tenant in respect of the beer he buys; that is, he pays more for it than he would have to pay if he traded free from such contract. It also causes a gain to the landlord's brewery, from the same cause. The case does not state that the gain to the brewery is greater or less, or equal to the loss of the public-house; but, as nothing is stated to the contrary, I assume it to be equal. Thus, the rent in money to be paid and received respectively is less than it would be if the house were free, by the amount of such respective loss and gain; but the value that passes between the landlord-brewer, selling beer on the one side, and the tenant-publican buying beer on the other side, is the same as it would be if the house were free. The overseers making out the valuation lists for these parishes, and setting down the rateable value of this brewery and of this public-house, among the others, have obeyed literally the commands of the Union Assessment Act and the Parochial Assessment Act; that is, they have estimated the gross rent which each of those tenements would be worth to a free occupier; and in making that estimate they have excluded from their attention, as they were bound to do, any reference to special profits of trade by reason of special contracts in leases or otherwise. The assessment committee, in revising these valuation lists, have made an alteration by increasing the estimate of the gross rent which the brewery could command. They do not state on what principle they have made this increase, or on what evidence they have acted; but



they have raised the rateable value from 254*l.* to 355*l.* in the example set out in the case, being nearly the rate of increase which was approved of in the case of *Allison v. Monkwearmouth*. It is further stated that, although they have followed that case in raising the rateable value of the brewery on account of the brewery, they have not lowered the rateable value of the public-house by the amount of the loss caused by the tie; probably because the judgment in *Allison's* case does not refer thereto. We are thus called upon to decide between the overseers and the assessment committee; and, in my opinion, the overseers are right. In support of that opinion I would premise some observations before examining the application of the case of *Allison v. Monkwearmouth*, on which the assessment committee rely; I would premise that the Union Assessment Act now under consideration, has a purpose ulterior to the Parochial Assessment Act, which alone was under consideration in *Allison v. Monkwearmouth*. The purpose of the Parochial Assessment Act is to provide for equality in the rating of each of the rateable subjects in one parish. The purpose of the Union Assessment Act is to provide for equality in the rating of each aggregate of rateable value in each of the parishes of the union. This latter purpose is to be effected by applying, with correct uniformity, throughout every parish of the union, the principles for estimating value as required by the Parochial Assessment Act. The valuation lists are made a permanent standard of value whereby to assess all the rateable subjects within the union, both to the Parochial and to the Union Assessment Acts, until an alteration shall have been made; and, although a mode of alteration is provided, yet, considering the expense and difficulty of a survey of the rateable property in a union, an alteration will not be easily made. It is therefore commanded by those statutes, as I understand them, that the estimate of the rental should be confined to corporeal hereditaments, and should be founded on the more permanent elements of value found therein, excluding the effect of temporary contracts and other such contracts. I would further premise that, as the case is stated, there is no ground for assuming that the aggregate value of the two tenements does not continue the same whether they are held separately or jointly, there being no statement of any increase of value by reason of any combination. Then, if the brewery gains by the tie what the public-house loses thereby, and no more, the aggregate amount of the rateable value of the two tenements ought to be the same, whether they are rated together or separately, whether they are held under the same or different landlords. Under these circumstances the notion that the rateable value of the brewery could be increased by the gain from the tie, without lowering the rateable value of the public-house to the same extent by reason of the loss from the tie, was so untenable that the counsel for the resp. did not offer to maintain it. By that admission the question to be answered is narrowed to the point whether the whole rateable value of the public-house shall be set down in the list for the parish where it is situate, or partly therein and partly in the parish where the brewery is situate to which it is tied. That question may be raised in respect of four changes of the relation between the respective occupiers of the brewery, and of the public-house: first, I would take the case when the owner of both is the occupier of both, the brewer carrying on the public-house by a servant. There is no lease and no tie, and each rateable subject would be rated in the parish where situated, upon the ordinary principle, and the contingent possibility of a tie, in case there should be a lease of each, would be immaterial. The value thus ascertained is the true

rateable value for the list. Secondly, I would take the case where the owner of both tenements occupies the brewhouse, worth say 200*l.* per annum, and lets the public-house to a publican, say at 20*l.* per annum, without any contract relating to beer, the house would be free, and the rateable value would be the same as in the last case, unaffected by a tie. Thirdly, I would take the case where the owner of both tenements occupies the brewery and lets the public-house with the tie, that is, with the contract for taking beer, the money-rent being lowered, say to 10*l.*, and the beer overcharged, say to the same amount. In this case also it seems to me that the rateable value of each remains the same, and would be rated in the parish where situate. Fourthly, I take the case where the owner of both tenements makes a lease of each, first letting the public-house, assumed to be worth 20*l.*, for 10*l.*, monied rent, with a contract for taking beer which is worth 10*l.*, given to the brewer, and then letting the brewery with the benefit of that contract, the brewery by itself being worth 200*l.* per annum, the benefit of the tie being worth 10*l.* per annum. Thus the rent for the brewery with the contract is 210*l.* per annum. Under these circumstances, also, it seems to me that each tenement should be rated in the place where it is situate, at the rent which it would command if let by itself without the tie; and that a decision that the rateable value in the fourth case is different from that of the former cases, would in effect hold that the rateable value depends on the actual occupation, not on the estimated rental, which is contrary to the Assessment Acts, as I understand them. Moreover, if the rateable value is altered by the tie, the overseers making the rate ought to know whether it exists. Its existence depends on the title-deeds and leases of the brewer and publican. If the overseers are to rate for the tie, it seems to follow that they ought to inspect and understand those documents of title, and this consequence seems to me absurd. The assessment committee do not refer to any such source of knowledge: perhaps they have increased the rate on every brewery to a large amount, assuming that the tie exists, and they expect the brewer to produce his deeds to relieve himself if that assumption be wrong. But such a principle of rating cannot be sanctioned by any court at Westminster. I now proceed to the case of *Allison v. Monkwearmouth*. The facts of that case seem to me to be materially different from those here stated, and the statute here to be construed is different from the statute then in question, and therefore it is not necessary to decide whether an opinion given by a court by way of advice, from which there is no appeal, is as binding on co-ordinate courts as a judgment would be where the same question is sent up to a second court for its opinion. I should think not. It seems to me that each court is in such case original, and bound to give its own judgment, just as on a motion for a writ of *habeas corpus* each tribunal must give its own decision without being swayed by other tribunals. But, as already observed, it may be that we are not called on here to say that any former case should be overruled. In *Allison v. Monkwearmouth* the title-deeds and leases were produced by the brewer, and the facts relevant to the rating of the brewery for the supposed profit from the tie were taken therefrom. Those facts were that Sir Marmaduke Williamson was owner of a brewery, of which the rateable value by itself was 350*l.*, and thirty-three public-houses of which the rateable value is not given. The public-houses he had let with the contract to take beer at monied rents amount in the aggregate to 15*l.* He then leased to Allison for seventeen years the brewery, with the goodwill of these public-houses as it is called, subject to the payment of the rent

theretofore received by Williamson, that is, yielding in respect of the brewery and fixtures 350*l.*, and in respect of the public-houses 150*l.* This sum of 150*l.* thus described is found to have been in substance the rents of the public-houses collected by Allison for Williamson during the existing leases. When the tenancies changed, Allison let to the new tenants, and continued to receive during the term the same monied rent from those public-houses amounting to about the sum of 140*l.* per annum, which he paid to Williamson under the above-mentioned covenant. The lease of the goodwill of the public-houses is thus shown by the case to have been, in effect, a lease of the public-houses. The court held that Allison was liable to be rated for this sum of 150*l.*, being the amount of rent so received. The case also finds that all the tenants were assessed for their public-houses, but the value is not stated. These being the facts, the judgment affirming the rate on the brewer for the amount of rent collected by him and paid over to the superior landlord, has the singular effect of holding that a rent-collector may be rateable for the amount of rents which he collects where the given relation of brewer and publican is found to exist. Although, as a general rule, the province of the court here is confined to deciding on rateability, and does not extend to deciding on amount, yet the court, in thus holding the brewer liable to be rated for the rents collected, refused to give permission to go into the question of the cost of the production of the supposed rateable value of 150*l.*, and assumed that the covenant to pay that sum as rent of the brewhouse was inclusive of rateable value, although the deed showed it was rent collected. The case also found that Mr. Allison rented other public-houses, not of a brewery landlord, which he sub-let to publicans with the contract for beer. The notion of rating him for the rent he received from those publicans seems not to have been attempted; but, if he was liable for those he rented of Williamson, it is difficult to say why he was not liable for those rented of others. If the attempt had been made to rate him for every public-house under contract with him to take beer, it would have been the rating of a profit of trade, and yet the profit from beer to Williamson's public-houses was the same profit of trade as that from other public-houses. Furthermore there is sound distinction between that case and the present, on the ground that the assessment lists relate to the whole union, and all the tenements are at once to be assessed. Under the former Acts, before the Union Assessment Act, there was a defect in deciding appeals on rates, because only one tenement was the subject of the judgment at a time, and in apportioning the rateable value of two or more portions of the same rateable subject in two or more parishes, the injustice of doubly rating the same rateable subject might be inflicted in the apportioning process, unless all the portions were disposed of at once. Accordingly, in *Allison's case*, although it appeared that the tenants of the public-houses were rated as well as the tenant of the brewery, yet the court had no power of inquiring, and did not inquire, whether the public-houses were rated at their full value, and whether the rating Allison for the rents which they paid to him was not in reality a double rating of the rent of these public-houses; that is, once on the tenant, and again on Allison. Here the overseers have rated all the public-houses, as well as the brewery, according to the principle of the Assessment Acts, and according to those principles the publican would have to pay a rate both on the lower money payment and higher beer charges which he pays to the brewer, his landlord, under the contract. There is no suggestion that any further value is created by this relation of landlord and tenant. If the suggestion was made,

it certainly could not be ascertained without taking an account of the profits of the beer trade, involving an account of all losses by insolvency, and otherwise, and so it would be made apparent that it was an attempt to rate a profit of trade. If the doctrine is established that the supposed profit from a publican-tenant taking beer by contract is rateable upon the brewer, the question would arise why the same profit arising by reason of a publican-debtor contracting to take beer from the brewer-creditor should not be also assessed. The tie is created as well by a loan secured by bill of sale as by a covenant in a lease; that is, unless the publican can pay off the loan he may be broken up, as it is called, at any time, and yet the attempt to make such a profit of trade rateable has not been made. It is also clear that a brewer differs not in respect of this liability from a butcher, a baker, or the like. If the brewer-landlord is to be rated as Allison was, other tradesmen landlords influencing custom by letting retail tenements, with contracts for custom, ought to be raised, but such an item of rateable value has never been recognised. For these reasons the case of *Allison v. Monkwearmouth* seems to me distinguishable from the present. In the judgment delivered by us in that case I endeavoured to distinguish the right of the occupier of a soke-mill, derived from immemorial custom, to the servitude of all within the soke, and the right of the occupier of a canteen placed in a populous locality from a right derived under such a contract as that in *Allison's case*. I refer to the reasons there given, which appear to me to have more force when applied to an assessment list fixing the rateable value of each rateable subject in the union, on the principles above explained, and I will not increase the length of this judgment by repeating what I am reported there to have said. I will only add, as to the soke-mill, that the prescriptive right of the miller of that mill to the mulcture from the inhabitants of the soke is a reality affecting the fee-simple of the whole locality, and the immediate profit fixed by the custom subject to no risk of trade, if the miller may take his toll in kind; whereas the right of the landlord to sue on the contract for taking beer is a personalty affecting only the persons of the contracting parties, and the profit therefrom varies in proportion to the skill of the contracting parties, and is subject to all the risks of trade from insolvency, dishonesty, and the like. If this be correct, the profit to the mill from the prescription is rateable, and the profit to the brewer from the contract for beer is not. Upon this review I come to the conclusion that the judgment should be for the apps.

BYLES, J.—In this case no question arises as to the aggregate rateable value of the whole brewing concern, including in that expression both the brewery, properly so called, and the restricted public-houses. The question is, how that rateable value should be distributed between the brewery itself and those restricted houses. It has been decided by the Court of Q. B., in *Allison v. Monkwearmouth*, 4 El. & B. 13, by which conclusion I think we are bound, that the monopoly which a brewery enjoys over its tributary public-houses enhances the rateable value of the brewery. It is a necessary consequence that it diminishes the rateable value of the public-houses. It doubly affects, or may affect, their annual value to the occupiers, who not only pay more for their beer, but being shut out from the benefit of buying in the open market, may be obliged to purchase an inferior article and to suffer a diminution of the extent of their trade as well as of their rate of profit. These public-houses do in consequence actually let at a lower rent than they would otherwise command. It is objected that a mere personal contract cannot diminish the rate-

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able value of land or houses. But the stat. 6 & 7 Will. 4, c. 96, establishes as the criterion of rateable value the rent (subject to the deductions there enumerated) which a tenant not for a long term of years, but from year to year, would give. The statute does not make the actual rent reserved the criterion of rateable value, but the true theoretical rent; that is to say, the sum at which, making the statutable deductions and having regard to all the surrounding circumstances, the tenement ought to command. Again, the statute, by adopting a supposed tenancy from year to year, seems to exclude a valuation of distant future advantages or disadvantages of the property demised, and to regard its actual condition at the time of the rate, or in the immediate future. Now, if the natural or ordinary advantages of a tenement are permanently taken away from it, and annexed to another tenement, that should seem to be a diminution of the value of the first tenement, and an augmentation of the value of the second. It seems to me that it makes no difference whether the severance arises from modern contract, or from prescription, which presupposes an ancient contract. In this case the ordinary advantages of the tenement are, by a permanent contract between landlord and tenant, taken away from the tenant's tenement, and annexed to the landlord's tenements. If it be said that the surrender of these ordinary advantages by the tenant to the landlord is in effect rent paid by the tenant to the landlord, I should respectfully answer that it is straining the word "rent," as used in the statute, to give it this extensive signification. Moreover, there are cases, much nearer to a reservation of rent service to the landlord than the case now under consideration, in which cases, nevertheless, the reservation of valuable privileges to the landlord on the one hand, or the enjoyment of them by the tenant on the other, have been held respectively to diminish or augment the rateable value of the tenant's occupation. Thus it has been decided, that if the landlord allows to the tenant the right of shooting, the tenant will be rated at more; but if the landlord reserves it to himself the tenant will be rated at less: (*Reg. v. Thurlstone*, 28 L. J. 106.) Some ornamental squares in the metropolis must, by mere private contracts for a long term of years, be used as squares, and no one would live there subject to those contracts. Their rateable value, though in itself very great for many purposes, is destroyed by contract, and by contract it is transferred to the adjoining property, for it is included and rated in the increased value which the ornamental square confers on the mansions that surround it. A house in Cheapside, let as a shop, for which it is adapted by situation and construction, would command a large rent, but if it be subjected by the ground landlord to a stipulation that it shall be used as a dwelling-house only, and not as a shop, its rateable value in the occupation of a tenant is reduced by the effect of the contract. It is no objection that a portion of the value of the land may thus escape the rate altogether, for the statute of Elizabeth imposes the rate, not on the land, but on the person of the occupying tenant in respect of his ability, as tested by the annual value of the land he occupies; for, originally, an inhabitant and occupier was rated for personal property as well as real property; and it has been repeatedly held that the poor-rate is no charge upon the land: (*Theed v. Starkie*, 8 Mod. 314.) Nor is there much danger of abuse, for in ordinary cases that method of letting which will produce most rent will be preferred by the landlord. It is true that pecuniary charges on the land created by contract, as ground rentcharges, annuities, interest of mortgage, and the like, are not to be deducted from the rateable value of a tenement, but that it

is because the legal criterion of rateable value is, by the provision of the statute, the rent which a tenant from year to year would give for the land in its actual condition, subject to certain deductions, among which are tithes, rates, taxes, insurance, repairs, &c., but among which deductions pecuniary charges created by contract are not to be found. But in truth the statute of 6 & 7 Will. 4, though not in form declaratory, made very little alteration in the principles of rating before accepted by courts of law. For these reasons, differing, with respect and reluctance, from the judgment of the Lord Chief Justice, I think the magistrates were right in their decision.

MONTAGUE SMITH, J.—I agree with my Lord that the judgment on the first and second questions of this special case should be for the apps. These questions in substance are, whether the rateable value of a brewery, to be inserted in a valuation list under the Union Assessment Act 1862, is to be increased beyond the ordinary rateable value of the like property, and the rateable value of certain public-houses is to be reduced, because the owner of both has made a contract with his tenants of the public-houses that they shall buy all their beer of him as brewer, at a price beyond the fair market price of the beer. It is contended by the counsel for the resps. that the rateable value of the brewery should be increased, and, as a consequence (which he admits), that the rateable value of the public-houses should be reduced by reason of these contracts, and this although the properties may happen to be in different parishes. It appears to me that this contention is not well founded, and that the contracts between the brewer and the publicans do not form a basis for either raising or diminishing the gross or net rateable value, as defined by the statutes, for the purpose of the valuation list under the recent Act. In estimating the rateable value, or the "rent at which these properties might reasonably be expected to let from year to year," the value of the tenements as they stand and are fitted up, the use to which they may be applied, their local position, and other like circumstances are to be considered. In the case of a brewery the capacity of the building and premises for carrying on trade, and also the fact that a trade corresponding to its capacity would *prima facie* be carried on in it, would be proper elements to include in the estimate, subject, however, in the case of the latter element, to modification if it were shown, as in the case of the idle cotton-mill, *Staley v. The Overseers of Castleton*, 33 L. J. 178, M. C., that the trade was not in fact carried on. But these contracts, if considered, would introduce personal and collateral matters into the estimate, not directly bearing on the occupation of the property and the uses to which it is applied. The contracts here are really modes by which the owner of the two properties chooses for the time not to alter the nature or uses of the occupation of the properties, but to apportion and regulate his own rents and profits. Assume that the owner and occupier of the brewery derives increased profit as a brewer from the contract, there is on the other hand a corresponding loss to him as owner of the public-houses; and if this profit so purchased is held to add to the rateable value of the brewery, it would follow that that value must be reduced below the ordinary rateable value of the like property, in case the brewer chooses to foster his public-houses at the expense of his trade as brewer, by contracts to sell beer to his tenants at a loss. It seems to me that such grounds of raising and depressing rateable value are not warranted by the statutes. The difficulty of importing such contracts into the estimate of rateable value is still more apparent when we are called on to reduce the

rateable value of the public-houses below that of other like houses; I am unable to find a sound principle for such a reduction. The public-houses are occupied, their capacity for trade exists, and a trade is actually carried on in them. These things afford the ordinary elements for estimating rateable value, but neither the particular rent a tenant pays, nor the particular profits or losses of his individual trade depending on provident or improvident contracts in relation thereto, can, I apprehend, be imported. It may be assumed here, that the profits of the publican's trade are cut down by the contract, with the consequence, as found in the case, that the publican pays less rent; but rateable value is not altered by the actual rent being more or less than the rent the premises would reasonably command from a yearly tenant. Rent is no more than presumptive evidence of value, and this being so, I think the rateable value of the public-house remains unaffected, although the actual rent may be below what, without the contract in question, the house would let for. If it were to be held otherwise, and the contract of the publican happened to be so onerous in its terms that no new tenant would give more than a nominal rent for the public-house burdened with a like contract, it would follow from the argument of the resps. that the houses must be rated at a nominal value only. But in truth, in the case of these public-houses, the publicans are really paying a part of their rent in the extra price they are charged for the beer, and clearly the shape in which they pay cannot alter the rateable value of the house. The facts of the case of *Allison v. Monkwearmouth Shore* differ in some respects from the present, and the question of reducing the rateable value of the public-houses was not in that case before the court for decision. Here we have to decide that question, and to decide it upon the provisions of the recent statute. Notwithstanding the respect which I feel for the opinion of the two learned judges who formed the majority of the court, their decision, which could not be appealed from, ought not, I think, to be conclusive in this case. On the first and second questions of this special case, I think the apps. are entitled to judgment.

*Judgment on the first and second questions for the apps.*

Nov. 7 and 9, 1865.

WILLIAMS v. GOLDING.

*Metropolitan Building Act 1855 (18 & 19 Vict. c. 122) s. 108.—Building owner—Notice of action—"Other person."*

*By sect. 108 of the Metropolitan Building Act 1855 it is enacted that no "writ or process shall be sued out against any district surveyor or other person for anything done or intended to be done under the provisions of the Act" till one month after notice of action:*

*Held, that the words "or other person" were restricted to a class, and were intended to protect persons of the same class, as a district surveyor or persons who had official duties cast upon them by the Act, and that they did not include a builder, who while building a house adjoining the plt.'s had negligently underpinned the party wall and thereby caused damage to the plt.'s house.*

This was an action to recover damages for injuries to the plt.'s house by reason of the deft.'s negligence in building a house on the adjoining land. There was also a count in trespass. The deft. pleaded not guilty by statute 18 & 19 Vict. c. 122, s. 108.

At the trial before Willes, J., at the sittings in Middlesex after Easter Term, it appeared that the

plt. was the owner of a freehold house, No. 23, Merchant-street, Bow, on the north side of which was a vacant space, on which the deft., who is a builder, was building two houses for a Mr. Hogg, the owner of the land. There were no rooms in the basement of the plt.'s house, and the foundations only went about two feet into the ground. The houses built by the deft. had rooms in the basement, and it was, therefore, necessary to underpin the party-wall of the plt.'s house. The proper way to do this was by digging under the plt.'s foundations in very short lengths at a time, and building up a fourteen-inch wall. The deft., however, though cautioned by the plt, did it in long lengths, and only built a nine-inch wall, the consequence of which was, that the plt.'s house cracked, and was otherwise damaged. No notice of action was given.

On these facts the counsel for the deft. submitted that the deft. was entitled to notice of action under sect. 108 of the Metropolitan Building Act 1855 (18 & 19 Vict. c. 122).

Willes, J. overruled the objection, but reserved leave to the deft. to move.

The 18 & 19 Vict. c. 122, s. 108, enacts that,

No writ or process shall be sued out against any district surveyor or other person for anything done or intended to be done under the provisions of this Act, until the expiration of one month next after notice in writing has been delivered to him or left at his office, or usual place of abode, stating, &c., and every such action shall be brought or commenced within six months next after the accrual of the cause of action, and not afterwards.

The jury having found a verdict for the plt. for 20*l.*,

*Philbrick*, in Trinity Term, obtained a rule to set aside the verdict, and enter it for the deft. pursuant to the leave reserved.

*Macnamara* now showed cause.—The question is, if a builder under these circumstances comes within the words, "any district surveyor or other person." It is submitted that "other person" means other person *ejusdem generis* as a person acting for or under the district surveyor. The surveyor has duties imposed upon him by the Act which he is bound to perform, and which expose him to certain risks, and therefore it is reasonable that he should have this protection; but a builder acts voluntarily under a contract for his own benefit. The statute requires the action for anything done under the provisions of the Act to be brought within six months: (sect. 108.) So that the effect of holding that it applied to such a case as this would be, that a builder guilty of negligence within the metropolis must be sued within six months, while any other builder may be sued at any time within six years. The interpretation clause (sect. 3) defines the meaning of "builder," "district surveyor," and "person." Sect. 31 points out the duties of the district surveyor. By sect. 32 the Metropolitan Board of Works are empowered to dismiss and appoint district surveyors, and I should say that the Metropolitan Board of Works and the persons so appointed by them would come within the words "other person" in sect. 108. By sect. 36, the Metropolitan Board of Works may direct any person to assist the district surveyor. By sect. 37, they may appoint a surveyor to act when the district surveyor is engaged professionally. By sect. 62, they may appoint a superintending architect and clerks. By sect. 63, he may appoint a deputy. Sect. 69 and the following sections throw on the commissioners of sewers and commissioners of police certain duties with regard to dangerous structures. All these persons would come within the words "other person," and therefore it is not necessary, in order to give a meaning to those words, to extend them to a builder. The

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old Building Acts, 7 & 8 Vict. c. 24, s. 8, and 14 Geo. 3, c. 78, s. 100, simply used the words "any person;" in this Act "any district surveyor" is inserted. That must have been for some reason, especially as in the case of *Collins v. Pomey*, 9 East, 322, the Court thought themselves bound to hold a building owner within those words, though not within the intention of the Legislature. Analogous cases have arisen under the old Bankruptcy Acts, 6 Geo. 4, c. 16, s. 44, re-enacted by the 12 & 18 Vict. c. 106, s. 159, where it has been held that the words "any person" apply only to officers acting under the provisions of the Acts, and not to assignees for acts done in consequence of the property being vested in them. So here, it does not apply to a builder acting under a contract, but only to persons acting officially:

*Corruthers v. Payne*, 5 Bing. 270;

*Edge v. Parker*, 5 B. & O. 697;

*Knight v. Turquand*, 2 M. & W. 101.

Lord Tenterden lays down the rule in *Sandiman v. Breach*, 7 B. & C. 96, that where particular words precede general words, the general words are to be construed as including persons *ejusdem generis*, and that rule has been acted on in many similar cases:

*Reg. v. Silvester*, 33 L. J. 79, M. C.;

*Peatt v. Dicken*, 1 C. M. & R. 422;

*Branswell v. Pennock*, 7 B. & C. 586;

*Kitchen v. Shaw*, 6 Ad. & E. 729.

When this rule was moved the case of *Wheeler v. Gray*, 4 C. B., N. S., 584, affirmed in the Ex. Ch., 6 C. B., N. S., 606, was relied on, but there is no decision on this point there. The Ex. Ch. affirmed the decision of this court on the ground that the building owner had a complete justification under the Act. The cases which will be cited against me come under three heads: they are either decided on the words "any person," as in

*Hughes v. Buckland*, 15 M. & W. 346;

*Pratt v. Hillman*, 4 B. & O. 269;

*Wells v. Ody*, 2 C. M. & R. 128; and

*Collins v. Pomey*, already cited;

or they fall under the head that the persons come within the express words of the statute, as in *Newton v. Ellis*, 5 E. & B. 115; or they come under the head of persons filling an official character, as in

*Davis v. Curling*, 8 Q. B. 286;

*Smith v. Shaw*, 10 B. & C. 277; and

*Wallace v. Smith*, 6 East, 115.

But there is no case going so far as where a particular description of person is named, followed by the words "or other person;" any one has been held to come within those words who is so different from the particular person as a builder is from a district surveyor.

*Philbrick* in support of the rule.—The whole argument turns on the construction of sect. 108, and the only difficulty is occasioned by the words district surveyor being inserted. The deft. gave the notices required by the Act, and he was in fact acting under the powers of the Act, as he was doing that which but for the Act he would have no power to do. The third part of the Act relates to party structures, and gives power to pull down and rebuild, or to make good or repair any party structure, acts which would be trespasses were it not for the Act. Sect. 83 gives power to interfere with party structures on condition of making good any damage. Therefore to hold that a builder is not within this section, and that the action may be brought immediately, entirely does away with the *locus penitentis* given by the Act. The question is, if the deft. *bona fide* believed in a state of law which would protect him. [WILLES, J.—No; he must believe in a state of facts which, if they existed, would protect him.] I

submit that, if he believes that he is acting in pursuance of the Act, and that belief is *bona fide*, he would be protected. The case of *Pratt v. Hillman*, already cited, is in point as to the quality of the act. The words here were large enough to include the deft., and if on the whole statute there appears to be an intention that the words should apply, the rule *noscitur a sociis* does not apply. It has been said that the words would apply to the Commissioners of Sewers and Commissioners of Police, but they were protected before. Here he was doing improperly an act which would have been lawful if he had done it properly. [WILLES, J.—There is nothing in the Act which deals with the manner in which the thing may be done; but if he acts in an unreasonable manner, I do not see how he is acting in pursuance of the Act. He took out the foundations and put in something, which might have been a straw.] But he could not touch the foundations without the powers of the Act. In *Wheeler v. Gray* there was not a decision on this point, but there was a strong expression of opinion by Cockburn, C. J. As to the cases under the Bankruptcy Acts, assignees could not be said to be within the section, as the Act only gives them a title, and does not give them power to enter and seize; but here certain specified powers are given, and it also gives specific remedies. Sect. 8 requires notices to be given to the district surveyor; sect. 41 imposes a penalty on builders neglecting to do so; sect. 42 gives the district surveyor power to inspect the buildings; and sect. 55 to give notice to the builder requiring him to make good defects, and if he do not comply with the notice he may, under sect. 46, be summoned before a magistrate, who may, by sect. 47, impose a penalty. Then sect. 83 imposes the conditions on which he may exercise the right; and sect. 94 imposes a penalty if he fails to make good any damage done, and this is to be recovered before a justice of the peace. Therefore, I submit that he is entitled to notice in order that he may make good the damage before action.

ERLE, C. J.—I think that this rule should be discharged. This was an action against a tradesman employed by a building owner to do some work in respect of a party-wall. The building owner desired to deepen his premises, and to do so it was necessary to undermine the plt.'s wall, and it was the clear duty of the deft. to underpin it, so that no damage should come to the plt.'s house. He built up only a nine-inch wall, by reason of which the plt.'s house was damaged, and for that damage he brought this action, and the deft. says that he is entitled to judgment, because he received no notice of action, and the requirements of sect. 108 of the Metropolitan Building Act were not complied with. That section says [his Lordship read the section, and then proceeded as follows:] Now it is clear that the deft. was not the district surveyor, nor authorised by the district surveyor to do an insufficient work, but he says that the words of the statute are wide enough to include him, as it gives protection to the district surveyor "or other person." I think that some limitation must be put on the words "other person," and I think that the statute did not intend to protect every person who did a wrong while doing something under the Act. In the former statutes protection was given to "any person," now to the "district surveyor or other person;" and I am of opinion that the Legislature intended to restrict "other person" to a class, and meant "other person" *ejusdem generis* as a district surveyor. The builder acts for his own convenience in altering his own premises, and I think that he is not within the same class as a district surveyor. I think that the class intended to be protected was persons who had an official duty

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or some duty cast upon them by the statute, so that they were performing a statutable duty, or intending to do so. Comparing this statute with the former ones, it seems that the Legislature intended to change the class to which the protecting clause was to be applicable, and the words in the old Bankruptcy Act, though different, lead me to the construction which I put upon this case, as do also the authorities which Mr. Macnamara went through very learnedly and fully. In *Newton v. Ellis*, which at first sight seemed strong the other way, it was pointed out that the statute included any person acting under the orders of the local board of health, and the deft. had been ordered by the board of health to sink a well, which was to be done to the satisfaction of the surveyor, and under his direction, and he had negligently left a hole unguarded in the highway, into which the plt. fell and was injured, and as he did it under a contract, it was contended that he did it for his own benefit. But that case is not in point. In *Wheeler v. Gray* the question was raised, but was not disposed of, and it now comes before us for our decision. I think that I may give judgment for the plt., in accordance with the argument of Mr. Macnamara. I place some reliance on the fact that the rights which the defts. exercised was a right to private parties to interfere with their neighbours' property for their own benefit; sect. 80 gives that right, but it is given on condition of making good all damage, and the building owner (and the builder stands in the same position) had a right to enter upon the property and undermine the wall, but only on condition that he made good the damage. He did not make good the damage, and I don't see why I should not hold that having done what was clearly an actual wrong, he is not within the protection of the statute. I think that the section which imposes a 20l. penalty is cumulative, and that is one ground of my decision; but I rely chiefly on the ground contended for by Mr. Macnamara, which satisfies me that this rule should be discharged.

WILLES, J.—I am of the same opinion, and I concur with the Lord Chief Justice on the first and main ground of our decision. But, assuming that Mr. Philbrick had succeeded in bringing the deft. within the words "other person" as exercising statutable powers, he would still have great difficulty in satisfying the court that it is right to enter the verdict for him on the other part of Mr. Macnamara's objection, as it seems that he not only put in an insufficient wall, but he was warned that it was insufficient, and as a builder he must have known that a nine-inch wall was insufficient. Mr. Philbrick is right in saying that that is a question for the jury, but I think that he exercised a wise discretion in not putting it to them.

BYLES and KEATING, JJ. concurred.

*Rule discharged.*

Attorneys for the plt., *Lovell and Co.*

Attorney for the deft., *Proudfoot.*

Friday, Nov. 8, 1865.

HADLEY v. TAYLOR AND OTHERS.

*Public nuisance—Liability of occupier of premises for having an unfenced hole near a highway.*

*The defts. being in want of warehouse room for a short time, hired the ground-floor of the plt.'s warehouse and stored their goods in it. At the back of the warehouse, and within fourteen inches of the highway, was a hoist-hole which had been made by the landlord,*

*but which was unfenced. The plt., in going along the highway after dark, slipped into the hole and was injured:*

*Held, that the hole was near enough to the highway to be a public nuisance, and that the defts.' occupation was such as to make them liable to the plt. for the injuries he had sustained.*

The declaration stated that the defts. were the occupiers and possessed of a certain warehouse and hoist-hole, vault, or cellar immediately adjoining a public highway, and wrongfully suffered the said hoist-hole, vault, or cellar to be open to the said highway, without any light, railing, fence, or protection, and so as to be dangerous to persons lawfully passing along the said highway during the hours of darkness; and the plt., while lawfully passing along the said highway during the hours of darkness, fell into the said hoist-hole, vault, or cellar. whereby, &c.

Plea, not guilty.

The action was tried before Byles, J., at Worcester, when a verdict was found for the plt. for 250l. It appeared from the evidence that the defts., who were merchants in Manchester, had occasion, last February, to have their own warehouse pulled down, and whilst this was being done they agreed with a Mr. Jeffries to allow them for a certain rent to put some of their goods in a part of his warehouse which was in course of erection. The defts.' goods were accordingly placed in the ground-floor of this warehouse, at the back of which was a hoist-hole fourteen inches from a public footpath, not at the time fenced in, but intended to be protected when the warehouse was completed. A short time after the defts. had taken possession, and whilst the warehouse was in the hands of the workmen, the plt., as he was walking along the footpath after dark, slipped into the hole and sustained the injuries for which the present action was brought.

The learned Judge at the trial directed the jury to find for the plt. if they were of opinion that the defts. were in occupation, and that the place was dangerous to persons passing along the highway and they having so found, *Powell, Q.C.* now moved to set aside the verdict, and enter a nonsuit, and contended that the defts. were not liable: first on the ground that they had no control over the premises, except, so far as their own goods were concerned; that they were not bound to fence, and that they had no power to interfere, either with the architect, builder, or those employed by them; secondly, that there was no public nuisance, and that the case was distinguishable from *Barnes v. Ward*, 9 C. B. 392, as there the hole came flush up to the footpath, whereas here it was fourteen inches from it.

ERLE, C. J.—I am of opinion that there should be no rule. The action was brought by the plt. for injuries sustained by him by reason of his falling through a hole which, though not on the highway, was within fourteen inches of it. I think the occupier is liable for that hole, if a passenger passing along the highway is liable by an ordinary accident to be injured by it. The plt. was using the highway when he slipped into this unfenced hole, and I think, according to the case of *Barnes v. Ward*, that the defts. are liable for the nuisance. It is contended on behalf of the defts. that the building was uncompleted, that the landlord put the hole there, and that they (the defts.) had only a temporary occupation during the time that their own warehouse was being built. This, in my opinion, is no defence. As a general rule the party in occupation of the premises is the person to

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whom the public must look in the case of a nuisance, although they may have a right to look to some one else.

WILLES, BYLES, and KEATING, JJ. concurred.

*Rule refused.*

Friday, Nov. 17, 1865.

WIGAN v. STRANGE.

*Stage play—6 & 7 Vict. c. 68—Ballet—Music-hall.*

*The resp. was charged before a police magistrate under the 6 & 7 Vict. c. 68, with unlawfully having and keeping a house and place of public resort for the public performance of stage plays without authority by letters patent, and without a licence from the Lord Chamberlain.*

*It was proved that the resp. was the occupier of the Alhambra, which is a place of public resort, and is not licensed by the Lord Chamberlain, but is licensed for music and dancing by the county justices, under the 25 Geo. 2, c. 36. What would be a pit in ordinary theatres was there a large space fitted up with tables, at which refreshments are served. There are also balconies and stalls, an orchestra with a full band, a stage and proscenium lighted by foot and side lights, a curtain, wings, and grooves for scenes, with drops and flies, &c. The resp. caused to be represented for the amusement of the public, for which they paid, a ballet, sustained by from sixty to seventy females, who came down through a large opening at the top of a platform painted like rocks, and danced down to the stage; when on the stage they formed into two parties and, each lady being armed with two daggers, charged through each other's ranks, striking right and left in mimic warfare. Several of them then stood over the others in triumph. The première danseuse then performed a pas seul, and the other dancers formed themselves into groups, placing palm leaves so as to represent a flower. All then went through some other evolutions, and the performance concluded. This dagger dance, which was brought out at Drury-lane Theatre, was described as a ballet divertissement, and it was capable of being described so as to enable a copy of the directions to be sent to the Lord Chamberlain. The magistrate dismissed the summons, but stated this case, and the question for the opinion of the court was, whether this performance was legal without the licence of the Lord Chamberlain:*

*Held, by the Court, that the question for the opinion of the court was a question of degree, and more a question of fact than of law, and that they could not say, as a matter of law, that this performance was a stage play.*

*Erle, C. J. was inclined to think, as a matter of fact, that the performance, as described in the case, did not fall within the statute.*

*Willes, Byles, and Keating, JJ. thought otherwise.*

*Case stated by a justice under the 20 & 21 Vict. c. 43.*

This was a summons under the statute 6 & 7 Vict. c. 68, ss. 2 and 3 (Theatre Act), on a complaint by Horace Wigan against Frederick Strange, that he the said Frederick Strange, on the 20th May 1865, at a certain house and place of public resort called the Royal Alhambra Palace, Leicester-square, in the parish of St. Martin-in-the-Fields, in the county of Middlesex, did unlawfully have and keep the said house and place of public resort for the public performance of stage plays without authority by virtue of letters patent from Her Majesty or any of her predecessors, and without licence from the Lord Chamberlain of Her Majesty's household for the time being.

On the hearing before me, at the Police-court, Great Marlborough-street, on the 22nd June 1865, the following facts were proved:

The Alhambra has an extensive and lofty interior to which, in evenings, the public is admitted on payment at the doors. It is a place of public resort not licensed by the Lord Chamberlain, but is licensed for music and dancing by the county justices under 25 Geo. 2, c. 36. What would be the pit in an acknowledged theatre is there a large space occupied by tables at which refreshments are served. In the place where boxes are in an acknowledged theatre are places resembling private boxes, and balconies with a reserved part like stalls, all which are for the use of spectators. There is an orchestra with a full band of musical performers, a stage and proscenium lighted by foot and side lights, a curtain called a tableau curtain, wings and grooves for scenes composed of many pieces, with drops and flies. There are various platforms so supported and inclined as to enable persons to come down from a considerable height at the back of the building to the stage, and are painted to represent rocks. A cascade of water falls among them from a place thirty feet high on the wings, and the scenes at the back are painted palm trees; the whole representing an oriental landscape with a waterfall among rocks. Sixty to seventy females dressed in the ordinary costume of theatrical ballet dancers came down through a large opening at the top of the platform painted as rocks, and danced down them to the stage. They were not dressed alike, some had gold tissue skirts over white. Those who first descended danced on the stage in a serpentine figure, so as to occupy the whole front of the stage till all had come down. When all were down they defiled to the right and left, four were placed on each side in front of the proscenium with property, namely, sham musical instruments, in their hands supposed to be played by them to the dancers. The dancers began to dance the *Pas des Poignards*, each lady armed with two daggers, charging through each other's ranks, striking right and left in mimic warfare, then in front as far as the footlights. This performance of the dagger dance ended in several of the females standing over others as if in triumph and retiring when others came forward holding property, namely, sham palm leaves, in their hands, and danced waving them, and formed an avenue as expecting an arrival. Then a lady dancer, who at regular theatres would be called *la première danseuse*, passed down the avenue formed by the other dancers, who retired while she performed a *pas seul* with gestures. The other dancers then formed groups, placing the palm leaves so as to represent the opening of a flower. Others had property called a *pallisade* and danced with it so as to represent a basket of flowers. Several more *pas seuls* having been executed by the *première*, the rest went through other evolutions and the performance concluded. That performance is in the theatrical profession called a *ballet divertissement*, and could not be presented as such without the stage accessories above described; without them it would be mere rehearsal.

A witness from the Lord Chamberlain's office, called a reader of plays, styled it an entertainment of the stage. A ballet of action has a plot, a ballet *divertissement* has none, but cannot be performed without pantomimic action and gestures. It is not confined to the steps of the dancers; dancing quadrilles on the stage would be without such gestures. This dagger dance was brought out originally at Drury-lane Theatre, being then danced by Almas in an Egyptian scene as at the Alhambra in an Oriental. A ballet *divertissement* can be described so as to enable a copy of the directions for it to be sent to the Lord Chamberlain



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according to 6 & 7 Vict. c. 68, s. 12. The ballet of "Ondine," with all its details, has been so described. The Lord Chamberlain has not required copies of the directions of such ballets to be sent in till recently; he has interfered at the Italian Opera, where complaints have been made of the costumes of the female ballet dancers.

On the 11th Jan. 1865, I convicted the deft. on nearly similar evidence, after considering 10 Geo. 2, c. 28, s. 2; 25 Geo. 2, c. 36, s. 2; *Rex v. Handy*, 6 Term Rep. 286; *Gallini v. Laborie*, 5 Term Rep. 242. That conviction was quashed by the Middlesex Quarter Sessions in April 1865. The complainant being dissatisfied with that result, applied for the present summons, on evidence of another performance at the Alhambra, at a later date, which I did not feel competent to refuse, and granted the summons above set forth. After hearing counsel for the deft., I thought it my duty to act in conformity with the decision of the Superior Court, viz., the Quarter Sessions for Middlesex, though entertaining a different opinion from them, and dismissed the summons, but, on request by the complainant, granted him a special case under 20 & 21 Vict. c. 43, for the opinion of this honourable court.

The question for the opinion of this honourable court is, whether the performance above described was legal without the licence of the Lord Chamberlain. If this honourable court shall be of opinion that I ought to have convicted the deft., the parties seek that the summons shall stand, and that this case be remitted to me to make such order as under the guidance of this honourable court shall seem fit. (Signed) R. P. TYRWHITT.

By the 6 & 7 Vict. c. 58, s. 2, it is enacted,

That it shall not be lawful for any person to have or keep any house or other place of public resort for the public performance of stage plays, without authority by letters patent from Her Majesty, her heirs, &c., or without licence from the Lord Chamberlain of Her Majesty's household for the time being, or from the justices of the peace as hereinafter provided; and every person who shall offend against this enactment shall be liable to forfeit such sum as shall be awarded by the court in which, or the justices by whom, he shall be convicted, not exceeding 20*l.* for every day on which such house or place shall have been kept open by him for the purpose aforesaid without legal authority.

By sect. 23 the words "stage play" shall be taken to include any tragedy, comedy, farce, opera, burletta, interlude, melodrama, pantomime, or other entertainment of the stage, or any part thereof.

Serjt. Tindal Atkinson (*Bosanquet* with him) for the app.—The question is, if this performance was legal without the consent of the Lord Chamberlain; and I submit that it was an entertainment of the stage within the meaning of the 6 & 7 Vict. c. 68, s. 2. The note to *Rex v. Neville*, 1 B. & Ad. 489, at p. 497, gives the history of the legislation on this subject. It will be contended on the other side that the resp. was protected by his licence from the magistrates, under the 25 Geo. 2, c. 36; but I say this is not within the purview of that statute, but is strictly a stage representation under the 6 & 7 Vict. c. 68; and I submit that it ranges itself under the head of "pantomime or other stage play." This case is on all fours with *Gallini v. Laborie*, 5 T. R. 242, which was decided in 1793, after the 10 Geo. 2, c. 28, and 25 Geo. 2, c. 36, were passed. That was an action against a foreign dancer who had undertaken to dance at the Italian Opera, or such other place as the plt. should appoint, and the deft. never came; but it appeared that during the time there was no licence from the Chamberlain to the Italian Opera, and Lord Kenyon says: "I think the statute 10 Geo. 2, c. 28, does extend to this and every other species of stage entertainment. The words are general; and the intent of the Legislature manifestly was to put all places of public diversion under the control of the magistracy." This is found by

the magistrate to be a ballet, and one which cannot be performed with effect without stage representations. The case on which my friend will rely is *Rex v. Handy*, 6 T. R. 286. There it was held that tumbling was not an entertainment of the stage within the 10 Geo. 2, c. 28; and *Gallini v. Laborie* is referred to in the arguments, but that case is not in point, as tumbling alone might be exhibited out of doors or in a room as well as on the stage. In *De Begnis v. Armistead*, 10 Bing. 107, *Gallini v. Laborie* was acted on. *Day v. Simpson*, 18 C. B. N.S. 680, differs from the present case in this respect, that there there was a dialogue, but Erle, C. J. says, "it has a curtain, foot lights, drop scene, and wings, living actors on the stage at the commencement, a dialogue, dancing, music and singing, and all seen and heard by the audience." Here we have all those but singing and dialogue, here there were characters on the stage, and their performance was calculated to excite emotions. There is also a case of *Russell v. Smith*, 12 Q. B. 217. I do not lay much stress on those cases, but I use them as illustrations. I say this is a ballet and a dramatic performance, on the authority of *Gallini v. Laborie*. [ERLE, C.J. —There the contract was to perform in a ballet at the Italian Opera; that is assumed all through; and Lord Kenyon seems to have had judicial cognisance that the ballet was a part of the opera.] Then I should ask your Lordships to take judicial cognisance that ballets are now performed at the operas which are no part of the opera itself. (He referred to the definition of ballet in Webster's Dictionary.) This ballet was originally brought out at the Drury-lane Theatre, and I submit that it is essentially a dramatic performance, and comes within the words, "pantomime or other stage play," in the statute.

*Poland* (*Hawkins*, Q. C. with him) for the resp.—The resp. has a licence from the magistrates, under the 25 Geo. 2, c. 36, and the performance under that statute may be dancing, or music, or the two combined, so long as it is not a stage play. It is clear that that statute applies to places where people resort for the purpose of being entertained, and it contemplates that the entertainment shall be provided by the proprietor. In *Clarke v. Searle*, 1 Esp. 25, it was held that the statute applied to houses kept for private dancing, as well as to public places, thereby assuming that it applied to places where hired dancers were kept. It is clear that Lord Kenyon thought that in 1793 it applied to Sadlers Wells, and a place called the Circus, and I find that at that time those places had licences from the magistrates, and people paid to go there to see dancing. In *Guaglieni v. Matthews*, 34 L. J. 116, M. C., it was held that the dancing need not be by the public. In *Gallini v. Laborie*, it was held illegal, because there was neither a licence from the Lord Chamberlain, nor under the 25 Geo. 2. In the 6 & 7 Vict. c. 68, the word "ballet" is omitted, and apparently purposely, as the words "burletta" and "pantomime" are added to the list contained in the old Act. Therefore, we may assume that the Legislature intended the magistrates to have supervision in such a case as this: (*Lee v. Simpson*, 8 C. B. 871.) The word "copy" is used all through the Act, which shows that it was not intended to apply to "ballets," as the word applicable to them would be description. In *Thorne v. Colson*, 3 L. T. Rep. N. S. 697, two persons acted fourteen different parts, and it was attempted to evade the statute by calling it a "dialogue;" but it was clearly a stage play. It is a question of fact in each case whether the performance is a dance or a stage play, and should have been decided by the magistrates; and if the court hold against me, the case ought to be sent back to be decided on appeal to the quarter sessions.

Atkinson in reply.

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ERLE, C. J.—This was a proceeding against the resp. for representing a stage play without a Chamberlain's licence, and the magistrate refused to convict, but has stated the facts that were in evidence before him, and has asked my opinion whether, upon those facts, he ought to have convicted, and, if he ought to have convicted, to send the case back to him. Now, after having given to this case the best attention that I can, it appears to me that the question propounded for me is a question of degree; that it is more a question of fact than a question of law; and, as far as I can understand the case, I incline to the opinion—subject to very great doubt whether I can appreciate the scene that was before the audience at the Alhambra—upon the best understanding that I can have from the description by the magistrate, that the decision that he has come to, not to convict, is the right one. But I say it is entirely a question of degree, and where dancing ceases to be lawful and becomes a stage play is a definition that I am not at all prepared to offer. The earlier statutes required a licence for the representation of a stage play, and there were several specifications of what should be a stage play within the meaning of the statute—tragedy, comedy, farce, opera, burletta, melodrama, and so forth, and entertainment of the stage; and they must have a Chamberlain's licence. That is the 10 Geo. 2, c. 28. It appears, in the case before Lord Kenyon, that a doubt arose as to what came within the description that is there mentioned, and the Legislature appears to me to have provided that there should be an agreeable entertainment, for persons who, perhaps, could not afford to attend at the London theatres, at houses of public resort—agreeable entertainments in the shape of music and dancing, provided that the houses of public resort had a magistrates' licence. Now the resp. has, in literal terms, confined his representation to music and dancing, and the great matter contended for on the part of those who applied for a conviction is, whether he added to music and dancing such an approximation to a dramatic performance as made it come within the description of a stage play. I have heard arguments addressed by those who press for the conviction about the great interest of morality in the matter, but as far as I can see there is no interest of morality at stake. It is a question whether the amusements such as the resp. offers at a place of public entertainment upon cheap terms should be allowed to continue, or whether they should be put a stop to, so that the very same species of public entertainment should be permitted at the licensed theatres, where, in point of fact, those who have a licence would have something in the nature of a monopoly. Dancing and music are clearly lawful without the Chamberlain's licence. A stage play is clearly not lawful without the Chamberlain's licence. Then a very minute detail has been given here of women in numbers coming down from rocks and dancing opposite to each other, forming two ranks; and then another woman coming down of a superior order of dancing and dancing alone, and as far as I can see, if there had been nothing more in the matter than that, I could not have said that this dancing had risen out of the sphere of music and dancing, and had gone into the sphere of a stage play. But the magistrate adds to that, that a number of women came down at once with daggers in their hands, and that a number of women came down afterwards with palm leaves in their hands, and that in the course of their dancing movements the one stood over the other and represented a species of triumph. And that comes very nearly to a dramatic performance; very nearly to it. But there is a place where the line must be drawn, and the magistrate has used terms of art which incline

me very much to take the line between what requires a Chamberlain's licence and what is lawful under the magistrates' licence; to what lies between the two terms of art that he has used here. Because he says this is a ballet divertissement in which there is no consecutive train of ideas, but a number of persons, no doubt elegant in shape and agreeable in their action, so that it would be an agreeable entertainment to be performed; that it is a ballet divertissement without any consecutive train of ideas between one part of the performance and another part of the performance, like a number of agreeable scenes unconnected dramatically, but something passes in succession which those who are at the place of entertainment are supposed to be amused by. That is a ballet divertissement. On the other hand, there is a ballet of action in which there is intended to be represented a regular dramatic story beginning at the beginning and performed to the end, and that may give rise to all manner of emotions that are incidental to tragedy, comedy, farce, or the like, accompanied at the same time by elegance of form and elegant movements, and other matters that are incidental to ballet. I am inclined to say that I could not in the least pretend to have a decided opinion from the description of this representation given by the learned magistrate, for whom I entertain the highest respect, and whom I wish to speak of with the highest possible respect; but if I am called on to say as a matter of law that this which you describe as a ballet divertissement, and not coming up to the degree of a ballet of action, is a stage play, I am unable to affirm that as a matter of law. That is the point at which I stop—I cannot say that I certainly consider that this performance at the Alhambra was a stage play—I could not pretend to have a confident opinion upon it. If I had gone and seen it, or if I had had a graphic description given me by the witnesses, it is very possible that I might have come to the conclusion that the party ought to have been convicted on the facts; but stated as they are stated here, I cannot say from this description that the point of degree at which music and dancing become a stage play has been passed by the resp. against whom this application has been made.

WILLES, J.—I am of the same opinion in the result of our judgment. Certainly, when the difficulty is put of deciding whether any representation, which is not actually a play or a pantomime, such as one has seen upon the stage and recognises at once, is of a dramatic character, and falls within the Act, it is impossible to tell whether it be or not without seeing it; I own I am unable to get over that difficulty to this extent, that I am unable to say judicially, upon any description short of a natural definition of something which I know must be an entertainment of the stage, that the thing so described is an entertainment of the stage. But I own that, reading the facts stated in this case, my first impression was that those facts did state a representation of the stage. But upon hearing the reasons which have been advanced by my Lord, I am disposed to think that the conclusion at which I had arrived was rather a conclusion of fact than a conclusion of law. I own my impression of the facts was, that the first judgment of the magistrate was a correct judgment, that this is an entertainment of the stage; but not now holding that opinion, for the reasons I have heard, as an opinion in point of law, I cannot say that the case ought to go back to the magistrate to convict. On reading these sections one quite perceives the justice of the remark made by Mr. Russell during the argument of the case in the 6 Term Rep., that we are dealing with

an entertainment on the stage and of the stage. The force of that remark is quite obvious, because we know that some of the representations on the stage are of the highest order of genius, whilst others are appertaining rather to what may be represented in a booth at a fair. If so, you must at once see that you cannot construe the section by looking at what is ordinarily represented on the stage. In our time there have been seen upon the stage of a theatre of the highest character the performance of Paganini, and Van Amburgh and his lions. It is impossible, therefore, to construe this section by ascertaining whether the ballet divertissement, the sort of thing described in this case, was as a matter of fact represented ordinarily or occasionally upon the stage at the time when the 6 & 7 Vict. passed, and then come to the conclusion that the words "other entertainment of the stage" must necessarily include that, because it was represented on the stage. I think those words, "other entertainment of the stage," must be construed with reference to the previous words as including only entertainments of the same kind as those which are specified expressly before those words—"tragedy, comedy, farce, opera, play, interlude, melodrama, pantomime"—as extending only to entertainments of a dramatic character. No doubt a ballet represented by dancing and other action, a connected story, would properly be called an entertainment of the stage: that is, a ballet which represents a story, and which is of a dramatic character, although there was no speaking. On the other hand, a mere dance on the stage might not do so. You might instance the case, in dealing with this subject, in which a statue may be represented by the human figure, such as one has seen represented for the amusement of the public in recent times. That might be put as a case in which there was nothing dramatic—something statuesque, not dramatic, no story; a representation put on the stage, but no story. On the other hand, you might put the case of the Tarantula, where a story was actually represented on the stage, an incident suggested, and various emotions which flowed from it, and the result of that exhibited by action. As at present advised, I should have thought that was an entertainment of the stage, because there was a connected story; whether that be a conclusion of law or of fact, I do not pause to inquire. Dealing with this case by the light of these illustrations, which are the nearest that I can bring to bear upon it, I think the reasons which would induce me to come to the conclusion that this was in fact an entertainment of the stage would be these—that there are not merely the accessories of the stage, but that there are persons who represent, or may be taken to represent, a combat, followed by a triumph, and then a reconciliation under some supposed superior influence, represented by the great performer who is introduced while the previous representation is being gone through. On the other hand, it may be that a person looking at this entertainment as actually represented on the stage would treat what passed before the *première danseuse* came on and performed hers, which was the principal part, as mere fringe—only an accessory to her coming on and dancing, so that the principal character of the entertainment was not dramatic. I should conceive that this is so—that therefore it may well be treated as a question of degree whether the representation is of a dramatic kind so as to come within the description of an entertainment of the stage. For these reasons, though speaking, as it is hardly necessary for me to say, with profound deference to the impression of my Lord on the question of fact, I own I should rather have adopted the impression of the magistrate upon the question of fact; but on the question of law as to how this case ought to be

now disposed of, I concur in the judgment of my Lord.

BYLES, J.—I agree with my Lord that this must be a question of degree. It is extremely difficult to draw the line; nevertheless, I cannot but give my opinion, unless I state where it seems to me the line ought to be drawn. I conceive that any of the ordinary dances represented in public would not be within the statute, that is, dancing as regarded under the music licence, not the licence of the Lord Chamberlain. But whenever there is a representation on the stage by dumb show the statute uses the word "pantomime;" whenever there is represented on the stage the events or actions of human life, that, I apprehend, does fall within the statute, and not the less within the statute because the actors perform while they are dancing. Now, in this case there is represented a descent from rocks; there is a cascade; there are persons who file or form on the stage; there is a success, as my brother has pointed out, a triumph, and if anything else was necessary, there are all the theatrical accessories. I own as a question of fact if I had to draw an inference I should have thought that this did fall within a stage play. But the court are of opinion that it is not a matter of law, and I do not say that I can dissent from them on that matter; but the conclusion which the magistrate drew in the first instance, I am bound to say if I had been sitting in his place I should myself have drawn.

KEATINGE, J.—I agree with the rest of the court in the conclusion at which we have arrived, that this is in truth a question of degree, and resolves itself ultimately into a question of fact. I entirely agree with my Lord in his statement of the difficulty that exists in drawing the line between public music and dancing and a dramatic representation. It is not necessary to the conclusion at which we arrive that we should draw the line; but, inasmuch as the other members of the court have given their opinion on which side of the line the present case would range itself, I am obliged to say that, if I were bound to form an opinion and pronounce a judgment as to which side of the line the facts so clearly stated by the magistrate bring the present case, I should have thought that it did come within the statute, and that it was a dramatic representation. The reasons for that have been already pointed out by my brothers Willes and Byles very clearly, and in those reasons, with the greatest possible deference, even on a question of fact, to the opinion expressed by my Lord, I entirely concur. It seems to me that here was a representation by pantomimic gesture of events upon the stage—short, it is true, and few in number, but still amounting to what I should have called a dramatic representation, namely, the triumph of peace over war. For these reasons I should, if obliged to give an opinion, have taken the same view of the question of fact as taken by my learned brethren; but I quite agree with my Lord that this is a question of degree, and thereby resolves itself into a question of fact, and prevents our sending it back to the magistrate for his decision.

*Judgment for the resp.*

Attorney for the app., H. T. Roberts.

Attorney for the resp., G. Lawrence.

[Ex.]

LOWE v. HORWARTH.

[Ex.]

## COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Monday, Nov. 13, 1865.

LOWE v. HORWARTH.

*Conviction for assault—Imprisonment with fine under sect. 74 of 24 & 25 Vict. c. 100—Subsequent action for damages for the same assault—Conviction, imprisonment, and fine pleaded in answer—Demurrer.*

*The conviction of deft. on an indictment for unlawfully wounding, and his being sentenced therefor to a term of imprisonment, and to pay a sum of money to plt., the prosecutor of the indictment, for his necessary costs of the prosecution, and a moderate allowance for his loss of time, pursuant to sect. 74 of 24 & 25 Vict. c. 100, form no bar to the plt.'s subsequently suing the deft. in a civil action for the same assault, and recovering damages for his bodily suffering and medical expenses occasioned thereby; and a plea setting up such conviction, imprisonment, and payment of a fine is bad on demurrer, and no answer to such action:*

*So held by the Ex. in the above case.*

This was a demurrer to a plea.

At the Manchester Summer Assizes 1864, deft. was indicted for, and convicted of, unlawfully wounding the plt., the prosecutor of the said indictment, and was thereupon sentenced by the learned commissioner (Aspinall, Q. C.), before whom he was tried, to four months' imprisonment with hard labour, and he was also ordered and adjudged, under the provisions of sect. 74 of the 24 & 25 Vict. c. 100, to pay to plt., the prosecutor, 26*l.* 17*s.* 4*d.*, plt.'s actual and necessary costs of the said prosecution, together with the further sum of 15*l.*, being "such a moderate allowance for plt.'s loss of time as the court had, upon inquiry, ascertained to be reasonable," with the further sentence of three months' additional imprisonment in case the same several sums should not be sooner paid. The deft. underwent his term of four months' imprisonment, and, failing at the end thereof to pay the above-mentioned sums, he remained in prison for the additional term of three months also; and the said sums were levied upon his goods by virtue of a warrant under the hand and seal of the said commissioner, in pursuance of sect. 75 of the above-mentioned Act, and the amount thereof was paid over to the plt., as the prosecutor of the indictment.

Under these circumstances the prosecutor, the now plt., brought the present action against the deft., to recover damages for the above-mentioned assault and battery, alleging in his declaration as special damage that he was, by means of such assault, &c., prevented following his usual occupation and gaining his livelihood, and was permanently injured and disabled from so doing, and had been forced to, and did necessarily, incur and pay a large sum of money in and about being cured of the wounds, &c.; and he claimed 500*l.* damages.

Plea 2:

That after the committing, &c., and after the 24 & 25 Vict. c. 100, deft. was in due form of law indicted and tried, together with one J. H., for the trespasses in the declaration mentioned at the general sessions, &c. (the summer assizes at Manchester in 1864 before Cockburn, C. J., and others assigned, &c.), and was at the same session, together with the said J. H., duly convicted of the trespasses, &c., and deft. was sentenced by the court there for his said offence to be imprisoned and kept to hard labour, &c., for the term of four calendar months; and it was ordered, &c., that, in addition to the said sentence, the deft. should pay to plt. (the plt. being the prosecutor of the said indictment) 26*l.* 17*s.* 4*d.*, being his actual and necessary costs and expenses of the said prosecution, together with the further sum of 15*l.*, being (with a certain sum of 10*l.* ordered to be paid to plt. by the said J. H.) such a moderate allowance for the loss of time of plt., as the said court there had, upon inquiry and examination, ascertained to be reasonable. And it was further ordered, &c., that unless the

said several sums of 26*l.* 17*s.* 4*d.* and 15*l.*, so awarded, &c., should be sooner paid, deft. should be imprisoned in, &c., for three months, in addition to the said term of imprisonment to which he has been so sentenced, as aforesaid, for his said offence. And deft. says that afterwards H. M. Richardson and Brandwood, being the attorneys of and for plt. duly authorised by plt. in that behalf, signed and served the deft. with a notice in the words and figures following (the plea here set out *verbatim* a demand for immediate payment of the said 26*l.* 17*s.* 4*d.* and 15*l.*, so adjudged to be paid by deft. to plt. as aforesaid, and a notice that in default of payment the same would be levied upon deft.'s goods under sect. 75 of 24 & 25 Vict. c. 100). And deft. says that the said sum of 26*l.* 17*s.* 4*d.* and 15*l.* were not paid according to the requisition of the said order, and therefore the said J. B. Aspinall, Esq., barrister-at-law, one of the said commissioners, &c., and before whom as such commissioner deft. was so convicted, made his warrant, under his hand and seal in these words (the plea here set out *verbatim* the warrant, whereby after reciting the conviction of deft. under the above-named indictment, and his being sentenced to imprisonment and adjudged to pay to plt. the prosecutor, &c., 26*l.* 17*s.* 4*d.*, for costs and the further sum of 15*l.* for his loss of time, &c., with three months' further imprisonment in case of default in such payment, the said commissioner did order the sheriff of the said County Palatine of Lancaster to levy the said several sums of 26*l.* 17*s.* 4*d.* and 15*l.* by distress and sale of the goods, &c., of the deft.)

## Averments:

That the said commissioner then set his hand and seal to the said warrant and delivered the same to the said sheriff. That afterwards and before suit the sheriff, pursuant thereto, levied the said sums, and deft. paid the same to plt. together with the costs of execution; that after the said sentence deft. was, in pursuance and execution of the said sentence, imprisoned and kept to hard labour in the said house of correction, &c., for the said period of four calendar months and three calendar months respectively.

Demurrer, and joinder in demurrer to the said plea.

Plt.'s points:—1. That the conviction and imprisonment of deft., and the costs and fine paid by him, only expiated his offence against the public peace. 2. That the fine inflicted and paid was, as required by the statute 24 & 25 Vict. c. 100, ss. 74, 75, only "a moderate allowance for the loss of time" by the plt., and not for his suffering, permanent disability, and expenses. 3. That it was not the intention of the said statute to deprive a prosecutor, under similar circumstances, of his civil remedy.

Deft.'s points: 1.—That the offences described in the declaration are not remediable by action. 2. That, assuming them to be remediable, nevertheless the causes of action in respect of them have been extinguished by the facts set forth in the plea.

The 24 & 25 Vict. c. 100, s. 74, enacts that

Where any person shall be convicted on any indictment of any assault, whether with or without any battery and wounding, or either of them, such person may, if the court think fit, in addition to any sentence which the court may deem proper for the offence, be adjudged to pay to the prosecutor his actual and necessary costs and expenses of the prosecution, and such moderate allowance for the loss of time as the court shall by affidavit, or other inquiry or examination, ascertain to be reasonable; and, unless the sum so awarded shall be sooner paid, the offender shall be imprisoned for any term the court shall award, not exceeding three months, in addition to the term of imprisonment (if any) to which the offender may be sentenced for the offence.

## Sect. 75:

The court may, by warrant under hand and seal, order such sum as shall be so awarded to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor; and that the surplus, if any, arising from such sale shall be paid to the owner; and in case such sum shall be so levied, the imprisonment awarded until payment of such sum shall thereupon cease.

C. H. Hopwood, for plt., supported the demurrer, contending that the matters disclosed in the plea constituted no bar to the action, and were no satisfaction of plt.'s claim. No doubt the jury, in estimating damages, might take plt.'s receipt of the 15*l.* into account, but, inasmuch as by the express terms of the statute it was paid for his loss of time, as prosecutor of the indictment, it was still open to him to sue deft. civilly in respect of his bodily suffering and permanent injury, and his medical expenses. [BRAMWELL, B.—Surely this plea is a novelty? Is a man to be assaulted and suffer great

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bodily injury, and then, because the party committing the assault is prosecuted criminally, is the injured man not to bring an action for damages? POLLOCK, C. B.—Is there any authority to show that this plea is an answer to the action? (He was here stopped.)

Gray, Q. C., for deft., in support of the plea.—If the “loss of time,” for which the 15*l.* was paid to plt., meant his loss of time in consequence of the assault, and not his loss of time in prosecuting, then it might be said that he was estopped in his present action. But having regard to the terms of the statute and the sentence, he was bound to confess that he could not support the plea.

The Court (Pollock, C. B., Bramwell, Channell, and Pigott, BB.) held the plea to be bad, and gave judgment for plt. in favour of the demurter.

*Judgment for plt.*

Attorneys for plt., Chester and Urquhart, Staple-inn, agents for H. M. Richardson and Brandwood, Bolton.

Attorneys for deft., Clarke, Woodcock, and Ryland, Lincoln's-inn-fields.

### COURT OF ARCHES.

(CANTERBURY.)

Reported by Dr. SWABEY, of Doctors'-commons.

Friday, June 16, 1865.

(Before the Right Hon. STEPHEN LUSHINGTON, D.C.L., Dean.)

EDWARDS AND MANN v. HATTON.

Church-rate—Mode of taking evidence—17 & 18 Vict. c. 47.

*An application made by either party under the above Act to take evidence vivâ voce will be granted unless the party opposing such application can show sufficient reason why it should not.*

This was a point of practice arising in a suit for subtraction of church-rate. For an earlier stage of the case see *ante*, p. 289.

The chief question raised on the pleadings was the equality of the assessment; the deft.'s allegation specified 146 properties said to be unfairly assessed.

Dr. Swabey, for the plts., now moved the court to order the evidence to be taken *vivâ voce*.—The 17 & 18 Vict. c. 47 enacts, “That in any suit or proceeding depending in any Ecclesiastical Court in England or Wales, the court, if it shall think fit, may summon before it and examine, or cause to be examined, witnesses by word of mouth, and either before or after examination by deposition or affidavit, &c.” It is submitted that both the court and the parties will be gainers by adopting this method. The court will more readily judge of the value of conflicting evidence, and will have the opportunity of questioning witnesses itself. The parties will have the benefit of the cross-examination of the witnesses, and will probably avoid the great expense caused by taking and reducing the depositions into writing in the country.

Dr. Deane, Q.C., for the deft., opposed the motion.—These cases, turning on valuation, are really questions of accounts. If such a case came on at Nisi Prius, it would be referred. A number of witnesses must be brought to and kept in town if the case is to be heard *vivâ voce*, and it is difficult to see how expense can be saved by that.

Dr. LUSHINGTON.—The question is properly this, whether the party whom Dr. Deane represents has shown sufficient reason why the evidence should not be taken *vivâ voce*. I am of opinion he has not. I think the court will be much better able to deal with such a case on *vivâ voce* evidence. In the *Tamworth* case a few questions put to some of the witnesses might have guided me to a conclusion in much shorter time than I was forced to take to arrive at it. As to expense, as long as the law on the point remains what it is, I am afraid a large expense is unavoidable.

Moore and Currey, proctors for plts.

Crosse for deft.

### V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Monday, Nov. 6, 1865.

EDWARDS v. MARTIN.

*Bankruptcy—Reputed ownership—Order and disposition—Notice of assignment of policies of insurance.*

From the evidence of a secretary of an insurance company, it appeared that the assurer, prior to his bankruptcy, happening to call at the office of the company respecting the payment of a premium, told the secretary casually, in the course of conversation, that the policy was deposited with his bankers, as in fact it was, though no notice was ever sent to the company; and the secretary made no memorandum of the statement, as he said he should have done if he had regarded it as notice of a dealing with the policy:

*Held, that this was not sufficient evidence of notice to the company to give validity to the deposit as an equitable assignment by way of mortgage as against the assignees in bankruptcy.*

The question in this case was as to the right of the plts., the assignees in bankruptcy of the late Mr. John Glenn, as against the defts., Messrs. Martin and Co., bankers, of Lombard-street, to the proceeds of two policies of insurance which had been effected by Mr. Glenn on his own life.

The facts of the case were as follows:

In 1853 Glenn deposited with the defts. the policies in question for the purpose of securing a debt then due to them. No memorandum in writing accompanied the deposit, and no formal notice was given to the insurance companies of such deposit. In Nov. 1855 Glenn was adjudicated a bankrupt, and in Nov. 1862 he died.

Mr. Francis, the secretary of one of the companies, a witness on the part of the plts., deposed that the prospectuses issued by the company contained an announcement that notices of the assignment of policies would be registered, and, when required, duly acknowledged; and that although generally written notices of any assignment or dealing with the policy were given, yet if verbal notice only were given, the particulars of such verbal notice would be entered in the book, but information acquired casually, respecting any dealing with a policy, in the course of conversation would not be so entered. Previously to Mr. Glenn's bankruptcy no notice of any assignment of the policy appeared in the book, and to deponent's knowledge and belief no written notice had been given. Deponent, however, recollected, that on Mr. Glenn calling in the year 1853 to take up a dishonoured cheque which had been given in payment of a premium, Mr. Glenn in reply to a remark of deponent's, that to preserve the policy the premium must be paid at once, said that “the policy was in fact held by

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Messrs. Martin." This statement was merely a casual one made in the course of general conversation, and deponent made no memorandum of it, nor did he enter any particulars of it in the books of the company, as he should have done, and as it would have been his duty to have done, if he had regarded it as notice of a dealing with the policy.

Mr. Stevens, defts.' solicitor, deposed that, in Jan. 1861, Mr. Glenn stated in his (Stevens's) presence, that he (Glenn) had before his bankruptcy given the insurance companies notice of the deposit of the policies with the defts.

Since the bankruptcy of Glenn the defts. had paid the premiums on the policies; and since his death the policy moneys had been recovered, and were now standing in the joint names of one of the plts. and one of the defts. as stakeholders.

Bacon, Q. C. and Swanston, for the plts., argued that no sufficient notices had been given to the companies, and consequently that the policies were still in the order and disposition of the bankrupt. They cited

*Ex parte Hennessy*, 1 Con. & L. 559; and 2 Drew. & War. 551;

*Ex parte Arkwright*, 8 M. D. & D. 129;

*Ex parte Ellis*, 1 Atk. 101;

*Ex parte Carbis*, 4 Dea. & C. 354.

The evidence as to notice merely went to alleged conversations, and that was not enough to take the policies out of the bankrupt's order and disposition. It was essential that the notices should be shown to have been given to the insurance offices, and this had not been done. They also cited *Smith v. Smith*, 2 Cro. & M. 231; and see further the cases collected at Shelford on Bankruptcy, 279-281.

Greene, Q. C. and T. Stevens for the defts.—The notices which had been given to the secretaries of the companies were sufficient. The onus of the proving that notice was given to the office before the bankruptcy lies on the plt.: (*Ex parte Re Stevens*, 4 Dea. & C. 117.) Even without notice it has been held that a deposit of a policy with bankers before the bankruptcy for moneys already advanced is sufficient to disentitle the assignees to recover in trover, on the ground that it is not in the order and disposition of the bankrupt, with the consent of the true owner: (*Gibson v. Overbury*, 7 M. & W. 555.) But here actual knowledge of the assignment of the policies had been conveyed to officers of the companies, and the object with which that information had been given was immaterial. They cited

*Ex parte Bignold*, 8 M. & A. 477;

*Ex parte Stright*, M. 502; 2 Dea. & C. 314;

*Gale v. Lewis*, 16 L. J. 119, Q. B.;

*Ex parte Barnett*, 1 De G. 194.

The VICE-CHANCELLOR.—The only question is, whether sufficient notice has been given to the insurance companies of the deposit, and I am of opinion that there is no evidence of any sufficient notice. It is quite plain upon the authorities cited that the title to the policies, under the circumstances of this case, is in the assignees in bankruptcy of Glenn. The defts. will be entitled to be repaid the premiums paid by them, with interest at 5 per cent., and subject to that deduction and the payment of the costs of the suit, as agreed upon between the parties, out of the proceeds of the policies, the residue of these proceeds will be payable to the plts.

Solicitors for the plts., *Chilton and Co.*; for the defts., *Charles Stevens*.

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON and T. W. SAUNDERS, Esqrs.,  
Barristers-at-Law.

Nov. 8 and 20, 1865.

## REG. v. THE GUARDIANS OF THE HASTINGS POOR-LAW UNION.

*Order of removal—Settlement by renting a tenement—Hiring for a year under the 6 Geo. 4, c. 57.*

*Though a tenancy is terminable by a notice to quit within a year, yet if the terms of the hiring are such as to show that the parties contemplated that the tenancy would, unless the notice was given, endure for a year or more, and it does endure for a year, it will be sufficient (so far as the length of tenancy is concerned) to confer a settlement under the 6 Geo. 4, c. 57.*

*W. W., by written agreement, agreed to let to J. H. a certain house "quarterly, at a yearly rent of 25l., to be paid on the 29th Sept., 25th Dec., 25th March, and 24th June; taxes to be paid by tenant; to be left in tenantable repair. A quarter's notice to be given by either party." The tenant occupied under this agreement for six years:*

*Held, that he gained a settlement under the 6 Geo. 4, c. 57.*

This was a case stated under the 12 & 13 Vict. c. 43, for the opinion of the court as to whether the pauper lunatic, John Hagel, had acquired a settlement by renting a tenement. It appeared he had rented a house for the period of six years under the following agreement:

An agreement between William Wellerd and John Hazel. William Wellerd agrees to let, and John Hazel agrees to hire, the house No. 62, George-street, quarterly, at a yearly rent of 25l., to be paid on the 29th Sept., 25th December, 25th March, and 24th June; taxes to be paid by tenant; to be left in tenantable repair. A quarter's notice to be given by either party.  
Hastings, 26th July 1866.

By the 6 Geo. 4, c. 57, s. 2 (which is the statute applicable to this point), it is enacted, that

No person shall acquire a settlement in any parish or township maintaining its own poor, by or by reason of settling upon, renting, or paying parochial rates for any tenement not being his or her own property, unless such tenement shall consist of a separate and distinct dwelling-house, or building, or of land, *bona fide* rented by such person in such parish or township at and for the sum of 10l. a-year at the least for the term of one whole year; nor unless such house, or building, or land shall be occupied under such yearly living; and the rent for the same to the amount of 10l. actually paid for the term of one whole year at the least.

*Poland* now appeared in support of the order of removal, and contended that the renting was for the term of one year, and that the term "quarterly," as used in the agreement, must be taken with reference to the whole agreement, for that the mentioning of the four quarterly days of payment shows that it was contemplated that the tenancy should endure for a year at least; that the parties clearly contemplated a hiring for a year defeasible by a quarter's notice:

*R. v. St. Giles's, Cripplegate*, 4 Best & Sm. 509.

*Hurst*, for the apps., argued that the use of the word "quarterly" clearly indicated that it was not a yearly hiring; that the mention of the four quarterly days throughout the year only indicated when the rent was payable if the tenancy continued, but did not make the hiring a yearly one. If this had been a yearly hiring the notice to quit should expire at the end of the year; but here a quarter's notice may be given at any time, and he may have gone out in fact before the end of the first year. BLACKBURN, J.—The case of *Rex v. Horstmonceaux*, 7 B. & C. 551, where the rent was to be paid weekly and either party to be at liberty to determine the tenancy by a quarter's notice from any quarter-day,

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is against you, for there it was held that a settlement was gained by renting a tenement for a year.] In that case no precise time of holding was stated, and therefore it was considered to be a holding for a year; but in the present case the holding is expressly stated to be a quarterly holding:

*Wilson v. Abbott*, 3 B. & C. 88;

*R. v. Warminster*, 6 B. & C. 77.

*Poland*, in reply, referred to

*The Overseers of Willesdon v. The Overseers of Paddington*, 3 Best & Sm. 593.

*Cur. adv. vult.*

Nov. 20.—COCKBURN, C. J.—In this case the question is, whether John Hazel, a pauper, had acquired a settlement in St. Clement's, Hastings, by renting a tenement for the term of one whole year within the meaning of the statute 6 Geo. 4, c. 57. The pauper actually occupied the premises for six years, under an agreement in the following terms: "Wm. Wellerd agrees to let, and John Hazel agrees to hire, the house, No. 62, George-street, quarterly, at a yearly rent of 25*l.*, to paid on the 29th Sept., 25th Dec., 25th March, and the 24th June. Taxes to be paid by tenant, to be left in tenantable repair. A quarter's notice to be given by either party." The language of the agreement, speaking as it does of a yearly rent, and mentioning the four quarter-days, shows that the parties contemplated that the tenancy would probably continue for a year, but it was in the power of either party to put an end to the tenancy by a quarter's notice, and we think that the use of the word "quarterly" shows that it was intended that the notice might terminate at the end of any quarter, so that it was at the option of either party, by giving a proper notice; to terminate the tenancy before the end of the year. If we were now for the first time construing the statute 6 Geo. 4, c. 57, we should not be disposed to hold that this was a hiring for a whole year, as there is great force in the argument that the true construction of the statute is, that the tenancy must be such as must endure for a whole year; but in *Rex v. Herstmonceux*, 7 B. & C. 551, though it was justly contended in the argument that such was the true construction, Littledale, J. decided, after taking time to consider, that "a taking at twenty guineas a-year, the rent to be paid weekly, and either party to be at liberty to give three months' notice from any quarter-day, and at the expiration thereof to determine the tenancy, was a taking for a year, unless within the year notice should be given, and that notice not having been given, the occupation was under a letting for a whole year within the meaning of stat. 6 Geo. 4, c. 57." This case was followed by the court in *The Overseers of Willesdon v. The Overseers of Paddington*, 3 B. & S. 593. In that case there was an obscurely worded agreement: Wightman, J., in his judgment, states its effect to be "a demise for three months certain from the 25th Dec. 1859, but that, if the parties should go on as landlord and tenant after that time, it should be a yearly tenancy at the rate of 18*l.* a-year, payable monthly, and determinable by giving three months' notice, which" Wightman, J. thought "might be given at any time, and need not be a notice expiring at any particular time." "Then," said he, "the pauper having occupied for more than a year, has rented a tenement for the term of one whole year within the meaning of stat. 6 Geo. 4, c. 57." Crompton, J. seems to have inclined to think that the construction of the agreement was that the notice to quit must expire at the end of the year (on which reading of the agreement the present question could not arise.) But he expresses no dissent from the view of Wightman, J., and no disapprobation of *Rex v.*

*Herstmonceux*. In *Rex v. St. Giles's, Cripplegate*, 4 B. & S. 509, the case of *Rex v. Herstmonceux* was again followed. There the letting was of a house from the 25th March 1858, at the monthly rent of 1*l.* 1*s.* 8*d.* . . . "one month's notice to expire either on the 25th March, 25th June, 25th Sept., or 25th Dec., shall be a good and sufficient notice on either side" for the tenant to deliver up possession. Though the rent was expressed to be monthly, it was clear from the agreement as to the notice to quit that the tenancy was intended to be more than a monthly one. The Court say: "To what other conclusion can we come than that it was a hiring of the tenant indefinite as to duration, but terminable at a month's notice on either side on any of the specified quarterly days, and the house having been actually occupied under that hiring for upwards of two years, it appears to us to have been an occupation under a hiring for a whole year." No case was cited, nor are we aware of any, in which the authority of *Rex v. Herstmonceux* has been questioned, and on this state of the authorities we feel ourselves bound to hold, that though a tenancy is terminable by a notice to quit within a year, yet, if the terms of the hiring are such as to show that the parties contemplated that the tenancy would, unless the notice was given, endure for a year or more, and it does endure for a year, it will be sufficient to confer a settlement. We do not intend to decide that a weekly tenant at a weekly rent, who, by payment of rent, becomes a tenant from week to week so long as both landlord and tenant please, gains a settlement at the end of fifty-two weeks, as having held under a letting for a whole year. We think that the decisions only apply to cases where it appears, from the terms of the letting, that the parties contemplated originally that the holding would endure for a year, though it might be put an end to before the expiration of the year. In the present case, indeed, the parties say that the house is to be let "quarterly," and if the agreement stopped there, the inference would be, that they did not contemplate that the holding would continue for a whole year; but they proceeded to say, that it shall be at a yearly rent, payable on the four usual quarter-days. This seems to us to show quite as strongly as anything in the agreements in *Rex v. Herstmonceux*; *Willesdon v. Paddington*, and *R. v. St. Giles's, Cripplegate*, that it was contemplated by the parties that the holding would continue for a year or more, though it might be put an end to before the expiration of a year, and the word "quarterly" will, we think, have sufficient effect given to it by using it to show that it was intended that the quarter's notice might terminate at the end of any quarter without giving it the effect of nullifying these expressions. Had the word "quarterly" been omitted, and the words "ending on any quarter-day" been inserted at the end of the agreement, the effect of the agreement would have been precisely the same, both as to the continuance of the holding, and the mode in which it was to be determined. The case would have then been identical with *Rex v. Herstmonceux*, and we think that we ought not to make a nice distinction between the effect of agreements according to their words, when the intention of the parties, as expressed by the words used, and the legal effect of the agreements, are identical. It is important that points arising upon settlement law, when once determined, should not be again disturbed, except on most cogent grounds, and we should therefore not feel justified in overruling the three cases already decided on this subject, although we may doubt the correctness of the original decision. The order should therefore be affirmed.

— Order affirmed.



Q. B.]

REG. on the the prosecution of HUGHES v. THE OVERSEERS OF BILSTON.

[Q. B.]

Saturday, Nov. 11, 1865.

SAUNDERS (app.) v. BALDY (resp.)

*Game—Using an instrument for the purpose of taking game without a certificate—Close time—Penalty—1 & 2 Will. 4, c. 32, s. 23.*

*Upon an information under sect. 23 of the 1 & 2 Will. 4, c. 32 (Game Act), for using an instrument for the purpose of taking game (pheasants) without a game certificate, it is no answer to the information that the act was committed in "close time" (13th March), when, if the deft. had possessed a game certificate, it would not have availed him to have taken game.*

*The penalty imposed by sect. 23 has no reference to any particular time of the year, but applies to the offence described if committed at any time of the year.*

This was a case stated by certain justices acting for the division of Hailsham, Sussex (under the 20 & 21 Vict. c. 43), upon a dismissal by them of an information against the resp. under sect. 23 of the 1 & 2 Will. 4, c. 32 (the Game Act.) That section enacts that,

If any person shall take or kill any game, or use any dog, gun, net, or other engine or instrument for the purpose of searching for, or killing, or taking game, such person not being authorised so to do for want of a game certificate, he shall, on conviction thereof before two justices of the peace, forfeit and pay for every such offence such sum of money, not exceeding five pounds, as to the said justices shall seem meet, &c.

The 3rd section also provides a penalty for killing game out of season, which period, in case of pheasants, extends from the 1st Feb. to the 1st Oct.

At the hearing it was proved that on the 13th March last the resp., who had no certificate, set a trap with barley scattered around it in a plantation belonging to Sir Charles William Blunt, Bart., where there were pheasants, with the purpose of catching some of them. The justices, however, were of opinion that as at such season no game certificate would have been a protection, so it was no offence under the statute to use an engine at such a time for the purpose of taking game without a certificate, and therefore they dismissed the information.

Hannen now appeared for the app. (the informant), and contended that the justices were wrong, for that, irrespective of the season, no one had a right at any time to search for game without a certificate; that the 3rd section would not apply to the case, inasmuch as no game was actually killed, and that the object of the 23rd section was the protection of the revenue, and had no reference to any particular time of the year; that the two sections refer to two distinct offences, the 3rd to killing game during the "close time," and the 23rd to taking or searching for game at any time without a certificate. He was stopped by

COCKBURN, C. J.—That is clearly so. The object of the one section is the protection of the game, and that of the other the protection of the revenue. To constitute an offence under the first section the game must be actually killed; but under the other section it was committed if the instrument was merely used for the purpose by an uncertificated person, whether any game were killed or not.

LUSH, J.—I am of the same opinion. The two enactments are quite distinct and for different objects, and the penalties are cumulative. Both offences may be committed, and both penalties may be incurred.

*The case to be remitted to the justices with the opinion of the court.*

Wednesday, Nov. 15, 1865.

REG. on the prosecution of HUGHES (app.) v. THE OVERSEERS OF BILSTON (resps.)

*Parochial assessment—Poor-rate—Deduction for water supply—Net annual value.*

*Water was supplied to houses by town commissioners at certain rates, and it was matter of arrangement whether the water was supplied to the landlords or tenants; but it was entirely optional with the owners or occupiers to refuse to be supplied by the commissioners:*

*Held, that the sum paid for water, even though by the landlord, was not an item for deduction in estimating the net annual value under the Parochial Assessment Act.*

This was an appeal against a poor-rate of the parish of Bilston of the 24th May 1864.

The following is an extract from the rate-book of the assessment which was the subject of this appeal:

No.	Name of Occupier	Name of Owner.	Description of Property rated.	Name and Situation of Property.	Gross estimated Rental.	Rateable Value.
2781	Isaac Hughes.	Richard Dodd and John Southam.	House.	New Village.	£ s. d. 11 5 0	£ s. d. 9 0 0

The appeal was heard at the Staffordshire Epiphany Quarter Sessions 1865, and the court found that the gross estimated rental was 9l. 2s., and that to arrive at the net rateable value the app. was entitled to a deduction of the following sums as yearly outgoings which the overseers ought to allow under sect. 1 of the Parochial Assessment Act, 6 & 7 Will. 4, c. 96, viz.:

Repairs and insurance at one-sixth of rental	£1 16 4
Poor rates	1 8 8
Sewers rates	0 4 5
Highway rate	0 3 4
Town improvement rate	0 8 10
Water rate	0 11 4

£4 12 11

In accordance with such finding the Court reduced the gross estimated rental to 9l. 2s., and the net rateable value to 4l. 9s. 1d., subject, as to the last of the above deductions of 11s. 4d. for water rate, to the opinion of the Court of Q. B. upon the following case:

The township of Bilston is supplied with water partly from pumps and partly from works by the Dudley Waterworks Company, under an Act 4 Will. 4, c. 42, and it was entirely in the option of owners or occupiers to accept or refuse the water supplied under that Act.

By the Bilston Improvement Act 1850 (13 & 14 Vict. c. 96), the Bilston Commissioners have power to purchase the works of the Dudley Waterworks Company within Bilston, and to hold the works so purchased in the same manner and with the same powers in all respects as if the same had been made, constructed, or purchased by the commissioners under the powers and for the purposes of the Bilston Improvement Act, and they were compellable, at the request of the owner or occupier of any house, or part of a house, in any street in which any water-pipe of the commissioners should be laid, or of any persons who, under the provisions of any Act incorporated with the Bilston Improvement Act, should be entitled to demand the supply of water for domestic purposes, to furnish to such owner or occupier, or other person, a sufficient supply of water for their domestic uses, at certain rates therein specified.

Q. B.]

REG. v. SPURRELL AND WALKER.

[Q. B.]

Under sect. 76, the commissioners have power to levy a waterworks rate for the purpose of purchasing, making, and maintaining waterworks, but no such rate has, in fact, ever been made or levied.

In the year 1853 the commissioners purchased from the Dudley Waterworks Company all the plant and main of the company within the township of Bilston, and since that time have supplied water to all persons desirous of accepting it at a regular scale of prices, of which the following is a copy of the one at present in force.

#### THE BILSTON IMPROVEMENT ACT 1850.

##### WATER RENTS.

##### Revision of the Scale of Charges

Notice is hereby given, that the Bilston Township Commissioners and Local Board of Health have found it necessary to revise the scale of charges, and that the following will be the quarterly payments for water consumers after the 25th Sept. 1863:

##### Charges for Domestic Consumption.

Owners' composition payable whether occupied or not.												
Tenements rated under ...	...	...	...	...	...	...	...	...	...	...	...	...
To pay quarterly ...	...	...	...	...	...	...	...	...	...	...	...	...
Occupiers' charges.												
Premises rated at ...	£11	12	13	14	15	16	17	18	19	20		
To pay quarterly ...	3/10	4/2	4/6	4/10	4/10	5/2	5/6	5/10	6/	6/2		
&c., &c.												

Charges for trade purposes by special arrangement.—By order of the board, B. H. HARPER, Clerk.  
Commissioners' Office, Church-street, Bilston,  
Nov. 18th, 1863.

The water is supplied by pipes from the mains to the houses, and when the water rent is in arrear or unpaid after notice, the supply is cut off and withdrawn. About one-half of the inhabited houses are supplied with water from these waterworks, and pay rent for the same to the commissioners, and as to these it is a matter of arrangement between the landlord and tenant to which of the two the water is supplied, and which of the two pays the water rent. The inhabitants of those houses to whom there is no supply from the waterworks procure their water from their own wells or other sources. In the present instance the water is supplied from the waterworks; the landlord pays the water rent, and the occupier has nothing to do with it.

The app. contends that the payment for water is a deduction to which he is entitled under the Parochial Assessment Act, as being an expense necessary to maintain the premises in a state to command such rent.

The resps. contend that, inasmuch as it is optional with the owner and occupier of the house whether they will take their supply of water from the commissioners, or obtain it from other sources, it is not a necessary expense or outgoing which they ought to allow as a deduction from the rateable value.

If the Court shall be of opinion that the deduction ought to be allowed, the rate is to stand as reduced, viz., at 4l. 9s. 1d.; if on the contrary, an addition of 11s. 4d. is to be made to the sum to which the rateable value was reduced by the Court of Quarter Sessions.

*M'Mahon (D. D. Keane, Q. C. with him)* argued for the app.—This deduction for the water rate ought to be allowed. The words of the Parochial Assessment Act (6 & 7 Will. 4 c. 96), s. 1, are: "No rate for the relief of the poor shall be allowed by justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." The quarter sessions have found as a fact that the app. is entitled to a deduction in respect of water rent of 11s. 4d.; that is, they have found that the

payment of the water rent which was by the landlord here was a necessary expense to maintain the premises in a state to command the rent obtained. [MELLOR, J.—Suppose the water rent is not paid, and the water is cut off, could the deduction be claimed then? Or, suppose the tenant obtained his water from a pump on the premises, ought the expenses of the pump to be deducted?] The expense of keeping the pump in repair ought to be deducted. In *Reg. v. Hall Dare*, 34 L. J. 17, M. C., it was held that the sewers rate and expenses of sewerage works ought to be allowed as deductions in estimating the net annual value. [MELLOR, J.—Though it is called a water rate, it is in reality money paid for so much water. The parties need not take it unless they like. LUSH, J.—Suppose it was for gas instead of water, and by arrangement the landlord paid the charge, could it be claimed as a deduction?] It is submitted on the facts and finding of the quarter sessions in this case the water rent should be allowed as a deduction.

*Staveley Hill*, for the resps., was not called upon.

COCKBURN, C. J.—This case is quite clear. The question is, whether the water rent is to be deducted in estimating the net annual value of the app's premises for the purposes of the poor-rate. I am of opinion that it ought not. The expenses to be deducted are such as are necessary to keep the premises in such a position as to command the rent obtained for them. The deductions have nothing to do with what the landlord agrees to find, and what the tenant would have to find for himself but for such agreement on the landlord's part.

MELLOR and SHEK, JJ. concurred.

LUSH, J.—I am of the same opinion. The payment for water has no more to do with the necessary expense of keeping the premises in such a state as to command the rent than the payment for gas.

*Judgment for the resps.*

Wednesday, Nov. 15, 1865.

REG. v. SPURRELL AND WALKER.

*Overseers of poor—Substantial householders—Master and servant—43 Eliz. c. 2. s. 1.*

*A farm bailiff was engaged as weekly servant at 11s. per week, and the occupation of a cottage, rent free:*

*Held, necessary to ascertain whether the occupation of the cottage was subservient to the service, or simply part of the remuneration for the service, in order to determine whether the occupation was that of servant, and so the servant's occupation was the master's occupation, or quid tenant, so that the servant could be considered as a substantial householder capable of being appointed an overseer of the poor within 43 Eliz. c. 2, s. 1.*

Appeal against an order of two justices of the county of Norfolk, nominating and appointing "John Spurrell and Wm. Walker, substantial householders, within the parish of Pudding Norton, in the county, to be overseers of the poor of the said parish, together with the churchwardens thereof, until 25th day of March 1865, and fourteen days afterwards, unless other overseers shall be previously appointed in their stead."

The app., John Spurrell, is tenant under Wm. Boycott and others, trustees, under the will of John Moore, deceased, of a farm of 812 acres, together with a farm-house and premises, and a cottage adjoining, and forming part of the said premises, but

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fifty yards or more from the farm-house, at one entire rent; such cottage being a separate and distinct tenement. The farm is co-extensive with the parish of Pudding Norton, and the said John Spurrell resides with his family and servants in the farm-house, which, excepting the cottage above mentioned, is the only human habitation in the parish. The app., Wm. Walker, is his farm-bailiff, and looks after the men. He is a weekly servant, and receives 14s. a-week, and occupies the above cottage (which is furnished with his own furniture) rent free, in part payment for his services. But for the cottage his wages would be higher.

No poor-rates are paid for the parish of Pudding Norton, but the said J. Spurrell pays to the treasurer of the Walsingham Union, which comprises the said parish, the county rate in respect of the farm and cottage.

The parish of Pudding Norton is an immemorial parish and rectory. The church is in ruins. The present rector was appointed in 1854, and receives the tithes.

On behalf of the apps., it was contended that W. Walker was not a substantial householder within the 43 Eliz. c. 2, s. 1.

The Court of Quarter Sessions gave the following judgment: We find that under the circumstances of this case, both apps. were substantial householders within the statute, and we confirm the order, subject to a case for the opinion of the Court of Q. B.

*D. Brown* having obtained a rule *nisi* to quash the order of sessions,

*Denman, Q.C. and Staveley Hill* showed cause.—The app. Walker was a substantial householder within the meaning of the 43 Eliz. c. 2, s. 1. The object in setting aside the appointment is, to avoid the payment of the union rating altogether, as the appointment of one overseer only would be bad: (*Reg. v. Cousins*, 33 L. J. 87, M. C.) The 43 Eliz. only requires the churchwardens of every parish, and four, three, or two substantial householders there as should be thought meet to be appointed yearly as overseers. When a rule was applied for in the Bail Court for a *certiorari* to bring up this order, Crompton, J. said he was inclined to think that Walker was a householder. In *Re Overseers of Pudding Norton*, 33 L. J. 136, M. C., the Court of Quarter Sessions found that he was a substantial householder. The occupation here was that of tenant. Walker received less weekly than he otherwise would but for the occupation of the cottage. [Mellor, J.—In *Rex v. Stubbs*, 2 T. R. 395, one of the overseers was a servant.] The test for determining whether the occupation was as tenant was put by Tindal, C. J., in *Hughes, app. v. Chatham*, resp., 7 Sc. N. R. 606, viz., whether the servant was required to occupy in the performance of his contract to serve his master.

*Mellish, Q. C. and Bulmer, Q. C.*, in support of the rule. Walker's occupation was that of a servant merely, in the same way as a gardener or gamekeeper sometimes occupies—a tenant of his employer's in addition to weekly wages. There is no separate agreement for the cottage, and he would have no right to go and live anywhere else. A servant occupying a cottage with less wages, on that account does not occupy as tenant: (*Birtie v. Beaumont*, 16 East 38.) In law the servant's occupation is that of the master:

*Rex v. Kelstern*, 5 M. & S. 186;  
*Reg. v. Chesnut*, 1 B. & Ad. 478;  
*G. Brown's case*, 2 East, P. O. 601.

*Cockburn, C. J.*—With reference to the last point, it is clear that a servant cannot be a householder

who has not an occupation independent of his master. The real question is, whether on the finding by the sessions we can say that there was not the relation of landlord and tenant between these parties. The facts are not sufficiently found to enable us to determine that question. One essential element to be considered is omitted, viz., whether the occupation of the house was necessary to the service or not? For if it was, then it was the occupation of the master, although the servant's remuneration was less on account of his having the house to live in. On the other hand, if the occupation was not necessary to the service, then the fact that the occupation forms part of the remuneration for the service will not render the occupation less an occupation *quod* tenant than if the servant had paid rent for it. It may be convenient to both master and servant that an arrangement should exist, that instead of receiving so much wages the servant should inhabit some tenement of his master's as part of the wages. It does not follow that because the relation of master and servant may happen to exist, there may not be an occupation of the master's premises by the servant *quod* tenant. One essential element in the inquiry is, whether the occupation is simply part of the remuneration for the service or simply subservient to the service. That element should have been before us. If that is ascertained by the sessions, there will probably be no difficulty in dealing with the case after what has fallen from the Court.

The rest of the Court concurring,

*Case remitted to the Sessions.*

Wednesday, Nov. 22, 1865.

REG. v. THE PATENT EURIKA AND SANITARY MANURE COMPANY (LIMITED).

*Indictment—Change of venue—For what cause alone permitted.*

*The court will not permit the venue in an indictment to be changed for any other cause than the inability to obtain a fair trial in the original jurisdiction.*

*Where, therefore, an indictment for a nuisance was found against the defts. at the last assizes for Cheshire, and an action for the same nuisance was brought against the defts. in the Court of C. P., and an application was then made to such Court of C. P. for an injunction under sect. 82 of the C. L. P. A. 1854, which was discharged upon the undertaking of the defts. to consent to the indictment being tried at the ensuing winter assizes for the city of Manchester, the Court of Q. B. refused to permit the trial to be had at such assizes.*

This was an indictment found against the defts. at the last assizes for the county of Chester for a nuisance, and which, therefore, stands for trial at the next spring assizes for that county. An action had also been brought, and is now pending against the said defts., for a nuisance arising out of the same facts, and in that action the plt. applied to the Court of C. P., in which it was brought, under the 82nd section of the C. L. P. A. 1854, for an injunction against the defts. Upon the argument of that rule it was suggested that the indictment might be tried, and so the question be settled at an earlier period than the ensuing spring assizes—namely, by the venue being altered to Manchester, for which place an assize will be held early in the coming month of December. To this the defts. assented, and the rule for an injunction was accordingly discharged upon the undertaking of the defts. not to offer any opposition to the trial of the indictment at Manchester. At the Crown-office, however, it was stated

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that upon an indictment no such change of venue had ever been known or permitted; the only ground of change being inability to obtain a fair trial.

*McIntyre* thereupon obtained a rule to enter a suggestion on record that the indictment can be more conveniently tried at Manchester than at Chester, and he now moved to make that rule absolute, and contended that, as the matter was a pressing one, involving the health of the neighbourhood, and as the manufactory, though in Cheshire, was, in fact, within seven miles of Manchester the court should permit the change. [COCKBURN, C. J.—The master of the Crown-office informs the court that there is no instance of a change of venue in a criminal case except upon the ground of the probability of not obtaining a fair trial in the original jurisdiction.] In the case of *Clark v. The Queen*, 29 L. J. 232, Q. B., a change was permitted upon similar grounds as the present. [COCKBURN, C. J.—That was a *quo warranto* information, which in reality is to try a civil right.] The principle is the same. It may be suggested then that a fair trial cannot be had in Cheshire. [Quain said he was ready to assent to that if it could be done. COCKBURN, C. J.—We cannot sanction such a suggestion unless there is an affidavit of the fact.]

Quain appeared for the defts., and stated that, in accordance with the undertaking he gave in the C. P., he was ready to agree to any arrangement by which the indictment might be speedily tried.

COCKBURN, C. J.—This court cannot interfere upon the subject. There is no precedent whatever for changing the venue upon a suggestion of the convenience of the parties. If the court could be satisfied that by retaining the venue a fair trial could not be insured, it might be otherwise. We should, moreover, be exceedingly averse to allowing the indictment to be tried at the ensuing Manchester assizes, which are about to be held for the convenience of the inhabitants of that city alone, and the holding of which, as it is, seriously interferes with the progress of business in London.

*Rule discharged.*

Tuesday, Nov. 28, 1865.

THE MIDLAND RAILWAY COMPANY v. THE COUNCIL OF THE BOROUGH OF BIRMINGHAM.

*Borough improvement rate—Rateable value of railway goods—Station.*

*By a borough improvement Act authorising a rate to be levied, it was enacted, that the occupiers of any land used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament, should be rated at one-fourth part only of the net annual value.*

*Certain sidings and turn-tables, occupying about ten acres of land, were used for loading trucks and carriages with goods, and also as a standing place for laden and unladen carriages, and were found in the special case to be necessary for conducting the traffic of the railway:*

*Held, rateable at one-fourth only of their net annual value.*

This was an appeal by the Midland Railway Company against a borough improvement rate, to the Birmingham Borough Sessions, and a case was stated by consent under the 12 & 18 Vict. c. 45.

The apps. are the Midland Railway Company, who are the owners and occupiers of a railway constructed under the powers of several Acts of Parliament for public conveyance, part of which railway,

and of the lands, buildings, and works occupied therewith, is situate and lies within the borough of Birmingham.

The resps. are the council of the borough of Birmingham, who, by the Birmingham Improvement Act 1851, s. 127, are authorised and empowered to levy upon the occupiers or owners of all buildings and lands within the borough, as in the said Act provided, a borough improvement rate, subject to a proviso that such rate should not exceed in any one year the sum of 2s. in the pound on the annual value of such buildings and lands, and to a further proviso in sect. 129 of the said Act contained:

That the occupiers of any land covered with water, or used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, should be rated in respect of the same to the rates authorised to be levied by the said Act at one-fourth part only of the net annual value.

On the 18th Feb. 1862, the resps. for the purposes of the said Act made a borough improvement rate of 2s. in the pound, and thereby assessed the apps. as owners and occupiers of certain property, in the said rate described as "passengers and goods stations, offices, warehouses, stables, workshops, locomotive engine-house, cattle stalls, sheds, platforms, weighing machines, turn-tables, machines, wharves, houses, lands, and premises, in various wards within the borough," on the annual value thereof.

The total rateable value of the property so described and assessed in the said rate is 2905*l.* 10*s.*, and it is agreed for the purposes of this case that the sum of 1588*l.* 10*s.* part thereof shall be taken as the rateable value of the property so assessed, which consists of the lands and buildings occupied by the apps. with their said railway, and the sum of 1317*l.* residue thereof at the rateable value (supposing the contention of the resps. to prevail) of the property so assessed, which consists of the lands occupied by the sidings and turn-tables necessary for the use and working of the said railway, and used therewith, which last-mentioned property the apps. contend is rateable on one-fourth only of the net annual value thereof.

The land so occupied by the sidings and turn-tables of the station covers ten acres or thereabouts.

The main lines of railway and sidings, and the buildings shown upon the plans, constitute the Lawley-street and Camphill stations where goods are laden into trucks and carriages when about to be conveyed on the apps.' railway, and are unladen from them after such conveyance.

The sidings are also used for the standing of loaded and unloaded trucks and carriages belonging to the apps., when at rest; two of such sidings, marked A. and B. on the plan of the Lawley-street station, are used for standing and unloading of such trucks and carriages as belong to coal owners or coal traders using the line of railway.

There are usually a considerable number of trucks and carriages at rest on the sidings when not wanted to travel. The apps. have required traders who use their own trucks, and leave them on the sidings and turn-tables without unloading for forty-eight hours after notice of arrival, to pay, and such traders have in some cases paid, 1*s.* a-day per waggon for every day's delay, but the apps. have no power to enforce this charge by their Acts of Parliament, and they make no profit by it.

The sidings, switches, and turn-tables are used for the purpose of passing trucks or carriages from one part of the station to another, and they are also used in connection with the main lines of railway. They terminate at the end next Lawley-street on the plan, and do not run into any railway at that end, but are all connected with the main lines, and with each other by switches and turn-tables. The sidings run into the buildings marked pink on the plan, which consist of goods sheds and an engine

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house, except those sidings which are shown with dead ends.

The sidings and turn-tables are all necessary for conducting the traffic of the railway, and have been necessarily enlarged as the traffic increased.

The land so occupied by the sidings and turn-tables of the goods station is coloured yellow on the plans annexed to this case.

The apps. contend that the said sidings and turn-tables are rateable upon one-fourth part only of the net annual value thereof.

The question for the decision of the Court is:

Whether, under sect. 129 of the Birmingham Improvement Act 1851, the apps. are rateable in respect of the lands occupied by the said sidings and turn-tables on the annual value thereof, or at one-fourth part only of the net annual value thereof.

*J. Brown, Q. C. (Field, Q. C. and J. O. Griffiths with him)* for the resps.—The land in question is the Lawley-street goods station, which, it is submitted, is liable to be rated at the full annual value. The 129th section comes by way of proviso on the 127th section. This station is similar to an inn-yard where the stage-coaches and waggons stand, and that could not be considered as part of the "road" on which the stage-coaches travel; so neither can this station be considered as part of the railway proper, as it was termed in *The South Wales Railway Company v. The Swansea Local Board of Health*, 4 E. & B. 189. This station is also analogous to a wharf alongside a canal which would not be within the reduced rating, although the canal is:

*Newport Dock Company v. Newport Board of Health*, 2 B. & S. 708;

*Reg. v. Eastern Counties Railway*, 4 B. & S.

*Wills (J. C. Carter with him)*, for the apps., was not called upon to argue.

*MELLOR, J.*—I am of opinion that our judgment should be for the apps., who, upon the 129th section of the Improvement Act, are entitled to be rated in respect of these sidings and turn-tables at one-fourth part only of their net annual value, and at no higher rate. The term "railway" in the Act is not confined to the two lines of rails necessary for carrying goods and passengers from one place to another. By the *Swansea* case it was determined, on the construction of a similar section in the Public Health Act, that the word "railway" means not only the actual lines of railway, but also the turn-tables and sidings necessary for conducting the traffic of the railway. If the sidings are not necessary for conducting the traffic, but are made mainly for warehousing accommodation, they are rateable at their full annual value. There is no other limitation than what is necessary for the conduct of the business of the railway. We are relieved by the case from any difficulty, because these turn-tables and sidings are found to be necessary for the traffic of the railway. I can well understand why a distinction should be made between watching and lighting and improvement rates and the poor-rate; and that as to the poor-rate the rating should be upon the full productive value, whereas in regard to improvement and sanitary rates, which are for works necessary for the health and comfort of the inhabitants, a limitation should be upon the rating in the case of railway companies. With reference to such objects as those, there seems to be no difference between the sidings and turn-tables and the main line. I agree with the *Swansea* case, confirmed as it is by the subsequent case. If there is any excess of land occupied for the sidings and turn-tables, that is a matter for the sessions, not for this court. Our judgment will be for the apps.

*SHEE, J.*—I am of the same opinion. The question is, whether the sidings and turn-tables come within the meaning of the proviso as "land used only as a railway." Does the proviso mean land occupied by the rails only on which goods and passengers are carried from place to place; or does it include land used for the purpose of turning carriages from one line to another, by sidings and turn-tables? I think that it includes both descriptions of land. The *Swansea* case is an authority for the decision of this case. Mr. Brown pressed on us the consideration that there might be lines of railway in connection with the running lines for passengers, used only for the purpose of warehousing the carriages. If such a case came before us, probably it might be right not to include such in the reduced rating. That is not the case before us, because it is found in the case that these sidings and turn-tables were necessary for the working of the railway proper.

*LUSH, J.*—I am of the same opinion.

*Judgment for the apps.*

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 11, 1865.

(Before POLLOCK, C. B., WILLES and SHEE, JJ., FIGOTT, B., and SMITH, J.)

REG. v. WM. FISHER.

*Malicious injury to property—Damaging a machine with intent to render useless—24 & 25 Vict. c. 97, s. 15.*

*The working parts of a steam threshing machine were designedly screwed too tight, which prevented it from working; and the plug of the pump was designedly taken out, and replaced with the wrong side up, so that no water could pass from the pump to the boiler; and the pipe leading from the plug to the boiler was stopped up by a piece of stick, and the machine was thus rendered temporarily useless, and exposed to danger. But when the working parts of the engine were loosened, the plug properly replaced, and the stick taken from the pipe, the engine was as good as before these acts were done:*

*Held, that these acts constituted damage to the machine within the 24 & 25 Vict. c. 97, s. 15.*

Case reserved for the opinion of this court by the Chairman of the Suffolk Quarter Sessions.

At the General Quarter Sessions of the peace for the county of Suffolk, held by adjournment at Bury St. Edmunds on the 4th July 1865, William Fisher was arraigned upon an indictment framed on the 15th section of the statute 24 & 25 Vict. c. 97, which charged that he unlawfully, maliciously, and feloniously damaged with intent to destroy or render useless a certain threshing machine, the property of Edward Kersey Green.

At the trial it was shown that the engine in question had been under the prisoner's care as engine driver and servant to the prosecutor, and that on Saturday the 16th May last, in consequence of a difference between him and the prosecutor, the prisoner left prosecutor's service. On Monday the 8th May last the prisoner did not come to work, but in the course of the day he told the prosecutor that he had not a man who could drive the engine, and that he would be glad to take him back. When prosecutor and his other men went to work the engine they got up the steam and tried to start it, but found they could not get it to move; they then unscrewed the engine to ascertain the cause, when they discovered that the working parts of the engine

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had been so tightly screwed up that the steam power of the engine was not sufficient to set them in motion, and it was proved that this must have been the result of design, and not of accident. They also discovered that the plug of the pump which supplies the engine boiler with cold water had been taken out, and replaced with the wrong side up, so that no water could pass from the pump into the boiler, and this also it was deposed must have been done designedly, and could not have been accidental. They further found that the pipe leading from the plug of the pump to the boiler had been stopped up by a piece of stick being thrust up it, so that, even supposing that water could have passed through the plug, it could not have got through the pipe into the boiler.

The engine was thus rendered temporarily useless, and it took the prosecutor and his men two hours to get it to work, and it was, moreover, shown that if the fire had been kept up the plunger of the pump would have forced the pump off the boiler, and also that the water in the boiler would have become exhausted, and the boiler would have burst, and serious consequences would have ensued; but it was admitted by the prosecutor that when the working parts of the engine had been loosened, the plug taken out and properly replaced, and the obstruction from the pipe had been removed, the engine was just as good as before. Various circumstances tended to show that these acts had been done by the prisoner.

Upon these facts it was objected by the counsel for the prisoner that there had been no offence committed within the meaning of the statute, inasmuch as there had been no permanent damage done to the engine.

The Court left the case to the jury, and directed them that the preventing the machine from working was "doing damage," and the jury found the prisoner guilty.

Upon the application of counsel for the prisoner, the Court decided to reserve the question of law for the consideration of the Court for Crown Cases Reserved.

"Whether, upon the facts stated, the temporary injury to the engine was such a malicious damage as to bring the prisoner under the penalties of the statute, and whether the prisoner was properly convicted."

The prisoner was discharged upon recognisances of bail to appear and receive judgment when called upon.

*Hillam Mills* for the prisoner.—The conviction cannot be sustained. The indictment is for damaging, with intent to render useless, a certain threshing machine. To support such an indictment some actual injury or damage must be shown to have

been done to the machine. Here there was no injury or damage to the machine itself. There was an obstruction, which could be removed, and when removed the machine was in as good working condition as ever. If any damage had been caused by the obstruction, the case would have come within the section, but the discovery was made before any damage ensued. In all the decided cases that bear on the construction of sect. 15 of the 24 & 25 Vict. c. 97, there was a removal of some part of the machine and positive injury to it. [PICKOT, B.—There was some damage here; it required time and labour to put the machine in proper working order again.] That is not the kind of damage contemplated by this section. In *Reg. v. Gray*, 26 L. J. 203, M. C., to support a conviction for exposing a child on a common, under 7 Will. 4 & 1 Vict. c. 85, s. 2, it was held that there must be some *lesion* of the organs of the child. The principle of that decision applies in the present case. [WILLES, J.—There was *lesion* here in the sense of a dislocation of the parts of the engine.] The 29th section of the 24 & 25 Vict. c. 97, provides for this very offence, viz., obstructing the parts of a machine so as to render it useless. And the prisoner might have been indicted under that, but he was not. Or the prisoner might, upon the present indictment, have been convicted of an attempt to damage, but that view was not left to the jury.

*Orridge*, for the prosecution, was not called upon to argue.

POLLOCK, C. B.—We are all of opinion that the conviction in this case should be supported. My brother Willes has suggested the case of spiking a gun. In such a case there is no actual damage done to the gun which has been spiked, as the spike can be taken out; but though the gun is not damaged, it is rendered useless by being spiked. It is damaged for the purpose of rendering it useless. It has been argued that the word damage in the statute does not include such an act as was done to the machine in this case; but it is impossible to say that a steam engine is not damaged when something is put in it which, if the water is allowed to go on boiling, will cause it to burst. The word "damage" is added to the other words "cut," "break," or "destroy," in the section. And can it be said that a machine is not damaged when its parts are so misplaced that if the machine goes on working it will break itself? Until the parts of this threshing machine were replaced it was perfectly useless. For these reasons we are of opinion that the conviction ought to be affirmed.

The rest of the Court concurred.

*Conviction affirmed.*













